IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 131

Suit No 804 of 2016

Between

Patsystems Pte Ltd

… *Plaintiff*

And

PT Bursa Komoditi Dan Derivatif Indonesia

… *Defendant*

GROUNDS OF DECISION

[Contracts] — [Breach]
[Contracts] — [Contractual terms] — [Variation]
[Contracts] — [Consideration] — [Promissory estoppel]
[Contracts] — [Contractual terms] — [Implied terms]
[Contracts] — [Remedies] — [Damages] — [Claim for wasted expenditure]

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v
PT Bursa Komoditi Dan Derivatif Indonesia

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High Court — Suit No 804 of 2016
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4, 5, 6 September 2018; 31 October 2018; 21 January 2019

22 May 2019

Mavis Chionh JC:

Introduction

1 The Plaintiff in this case is a company incorporated in Singapore which engages in the business *inter alia* of developing and marketing computerised financial trading systems for use in trading on the global derivatives markets. The Defendant is a company incorporated in the Republic of Indonesia which carries on business as a commodities- and derivatives-based exchange in Indonesia. The two parties entered into a written Software Licence & Support Agreement dated 9 September 2009 ("the Licence Agreement") and a written Addendum to the said Licence Agreement dated 1 May 2010 ("the Addendum"). The Plaintiff sued the Defendant in the present proceedings for the total sum of US$604,340.68 in respect of 17 invoices issued by the Plaintiff to the Defendant between 28 March 2012 and 19 August 2014. The Defendant denied any liability to pay the sum claimed. The Defendant also filed a counter-claim

against the Plaintiff alleging breaches by the Plaintiff of "the terms, whether express or implied, of the [Licence] Agreement and Addendum",[1] in respect of which it sought the refund of the entire licence fee or, alternatively, damages.

2 On 31 October 2018, following a 3-day trial and the filing of written submissions, I allowed the Plaintiff's claim and dismissed the Defendant's counter-claim. The Defendant later applied for leave to file a notice of appeal out of time. I granted the Defendant's application on 21 January 2019, and it filed the notice of appeal on 23 January 2019. I now set out below the reasons for my decision. I will start by setting out the more pertinent provisions of the Licence Agreement and the Addendum before summarising each party's case and the evidence led in support of its case, and then setting out my factual findings and reasoning.

Background: The Licence Agreement and the Addendum

3 A copy of the Licence Agreement of 9 September 2009 is found at pp 28 to 73 of the affidavit of evidence-in-chief of the Plaintiff's Chief Executive Officer ("CEO") Mr Silvio Oliviero ("Mr Oliviero"). Pursuant to the Licence Agreement, the Defendant paid a one-time licence fee of US$1.5 million for a perpetual, non-exclusive, irrevocable and limited licence to use the Plaintiff's software on the commodities and derivatives exchange operated by the Defendant (referred to as "ICDX" in the Licence Agreement). The software in question comprised, broadly, the Broker Software used for electronic execution and order management, and the Clearing and Matching Engine Software used for the clearing and matching of exchange-traded products.[2]

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1 [37] and [38] of the Defence and Counter-claim.

2 See pp 29-30, 49-50 of Mr Oliviero's AEIC.

4 The Licence Agreement also provided for the payment of annual fees for System Support and Maintenance ("S&M fees"), at US$150,000 per year in respect of support and maintenance for the Matching Engine System and US$75,000 per year in respect of support and maintenance for the E-Broker Core System and Front-End.[3]

5 Finally, the Licence Agreement also provided for the Plaintiff to charge a usage fee (referred to as "Retail Lot Charges" in the invoices) for every lot traded by API[4] retail users of certain front-end applications.[5]

6 For ease of reference, I reproduce below the more pertinent clauses in the Licence Agreement:

> **7. THE CHARGES**
>
> 7.1 Customer agrees to pay to Patsystems the Charges as set out or calculated in accordance with the Purchase Order. Patsystems will invoice such Charges upon signature by both Parties of the relevant Purchase Order and Customer shall pay such Charges within 30 days such signature, unless otherwise stated in the Purchase Order or invoice.
>
> 7.2 If Customer does not pay the Charges on the due date for payment, Patsystems may notify Customer of the amount overdue and require its payment within the next fourteen (14) days. If Customer does not pay the outstanding amount notified within the fourteen (14)-day period, Patsystems may by 14 days' notice to Customer forthwith suspend the Service or any part of it, or terminate this Agreement.
>
> 7.3 In the event that Customer in good faith disputes any portion of the Charges contained in an Invoice, the Customer will pay the undisputed portion of the invoice (provided such portion is independent and not co-dependent on the part of the Invoice disputed) on the due date in full and the Customer shall

3 See p 51 of Mr Oliviero's AEIC.

4 Briefly, the term "API" refers to "Application Programme Interface", a type of software protocol that allows computers to exchange messages in a manner that can be processed automatically.

5 See pp 52-53 of Mr Oliviero's AEIC.

within 14 days' from the date of receipt of the Invoice, send a notice of dispute to Patsystems setting out the reasons for the disputed amount shall set out the amount in dispute, the reason for such dispute and supporting evidence ("**Notice of Dispute**"). Pending the resolution of the disputed amount, there is suspension of payment for the Invoice in respect of the bona fide disputed amount. The Parties shall negotiate in good faith in an attempt to resolve the dispute, provided that if the dispute cannot be resolved within sixty (60) days of the date of the Invoice, matter shall be referred to for dispute resolution in accordance with the dispute resolution procedure set forth at Clause 18. If Customer does not submit Notice of Dispute within the stipulated period of 14 days' from the date of receipt of the Invoice, Customer waives all rights to dispute the Invoice., nothing in this clause shall prevent or restrict Patsystems from instituting legal proceedings provided that Patsystems shall have complied with the mode of dispute resolution at set out in **Clauses 18** and **19**.

7.4 Customer shall pay to Patsystems interest on any overdue sum at the rate of four (4) per cent per annum over the base rate SIBOR in respect of the period between the due date for payment any undisputed portion and the date on which Patsystems receives the overdue amount. The Charges are exclusive of value added tax or any other sales or local tax duty or similar charge which shall be payable by Customer additionally. Provided always that no interest is payable on any overdue sum in the case of suspension of payment for disputed amounts and undisputed amounts (that are not independent from the disputed amounts) in accordance with Clause 7.3, if the delay in payment was caused by an error or omission from Patsystems.

…

10. WARRANTIES

10.1 Patsystems warrants that the Software will comply with the Specifications set out in the Project Plan at the date of Acceptance and operate on the media on which they are supplied immediately on installation subject to their having been installed on the Equipment. Customer's sole remedy in the event of the Software not so operating satisfactorily will be (at the option of Customer) either the supply and installation on the Equipment of replacement versions of the Software or the refund of any unused sums already paid by Customer to Patsystems on a pro rata basis.

10.2 Patsystems warrants that either it is the legal and beneficial owner of the Software or an Authorised Licensee thereof with full right to licence such Software to Customer as provided in this Agreement. Patsystems further warrants that to the best of its knowledge and belief the Software does not infringe the intellectual property infringement rights of any third party. As far as Patsystems is aware, there are no third party intellectual property infringement claims brought against Patsystems in respect of the software.

10.3 The limited express warranties set forth in this clause 10 are made to Customer exclusively and are in lieu of all other warranties and all conditions, warranties or other terms concerning the Software and System which might otherwise be implied into this Agreement or any collateral contract (whether by statute or otherwise) are hereby expressly excluded

10.3 Patsystems warrants that it has used its reasonable effort to scan the Software using up to date anti-virus software to check that the Software does not, upon delivery to Customer, contain any commonly known virus, worm or other code designed to disable, damage the Software.

10.4 PATSYSTEMS AND PATSYSTEMS PARTIES MAKE NO OTHER WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, WITH REGARD TO ANY PRODUCTS AND SERVICES PROVIDED UNDER THIS AGREEMENT, AND/OR THE SOFTWARE, IN WHOLE OR IN PART.

10.4.1 WITHOUT LIMITING THE FOREGOING, PATSYSTEMS AND PATSYSTEMS PARTIES EXPLICITLY DISCLAIMS:

10.4.2 ALL WARRANTIES OF SUITABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE;

10.4.3 THAT THE SOFTWARE OR SYSTEM, IN WHOLE OR IN PART, WILL BE ERROR FREE OR WILL OPERATE WITHOUT INTERRUPTION;

10.4.4 THAT THE SOFTWARE WILL BE COMPATIBLE WITH ANY HARDWARE OR SOFTWARE OTHER THAN THE EQUIPMENT.

…

16. ENTIRE AGREEMENT

16.1 This Agreement supersedes all prior agreements arrangements and understandings (whether express or implied, written or oral) between the Parties in relation to the subject matter of this Agreement and constitutes the entire agreement between the Parties to the exclusion of all other terms conditions and warranties express or implied, written or oral.

…

22. GENERAL PROVISIONS

22.1 Variation Proposed modifications or amendments to this Agreement shall be enforceable only if they are in writing in accordance with the change order and are signed by Authorised representatives of both Parties.

22.2 No Waiver No term or provision of this Agreement shall be deemed waived and no breach excused unless such waiver or consent is in writing and signed by the Party claimed to have so waived or consented. No omission or delay on the part of any Party in exercising any right, power or privilege under this Agreement shall operate as a waiver by it of any right to exercise it in future or of any other of its rights under this Agreement.

…

Schedule 3: Project Plan

Acceptance Criteria – on a component by component basis

(a) The Customer agree to commence the Acceptance Testing (which shall be no later than 3 days from the date of completion of the installation of Software by Supplier) ("Ready for Acceptance Testing Date"); The Acceptance Criteria and data shall be as such as is reasonably required to show that the System complies with the Documentation. The Supplier shall provide the Customer with reasonable assistance to prepare such user acceptance criteria and test data at the Customer's request. The Customer shall have 45 Business Days to test the Software for compliance with the Documentation.

(b) The Customer shall confirm acceptance by issuing written notice of acceptance. If there is non-compliance, the Customer shall issue notice of non-compliance setting out the non compliance with the Documentation. If no written notice of acceptance or notice of non-compliance is issued by Customer within 45 Business Days after Software's installation, or if the Software is used in a live environment then the Software shall be deemed to have been accepted or upon 30th November 2009 (which ever the earlier).("Deemed Acceptance")

(c) In the event that, within 45 Business Days after the Software's installation, Customer sends a written notice of non-compliance to Supplier, identifying particular Defects in the Software, Supplier will use reasonable efforts to correct the Detects properly specified in the rejection notice without any charges. When it believes that it has made the necessary corrections, Supplier will resubmit the Software to the Customer and the provisions above shall be reapplied for acceptance in accordance with the above.

> (d) If Supplier fails to secure acceptance in accordance with the above within 3 months following Customer's first receipt of the Software, Customer shall have the option to (i) allow Supplier to continue to attempt to resolve the problem related to the Defect, or (ii) at any time accept the Software 'as is' or (iii) reject Software with at least 14 days' written notice in which the Customer shall be entitled to a pro-rated refund of all payments made to Supplier, If the Customer does not elect any of the above or puts the Software into use then the Software shall be deemed to be accepted.
>
> …
>
> **Schedule 5: Support and Maintenance Services**
>
> **2.1 Purpose**
>
> The purpose of this document is to define the support and maintenance services ("Services") to be provided by Patsystems to the Customer pursuant to the Agreement and in accordance with the terms set out below. To the extent that there is any inconsistency between this schedule and the Agreement, the terms of the Agreement shall prevail.
>
> …
>
> **2.2 Overview**
>
> Patsystems aim is to provide systems that meet business needs, are reliable, available and well supported. Central to the achievement of this aim is effective service management by Patsystems in conjunction with our Customer.
>
> The information contained in this documentation is for guidance. The Customer is ultimately responsible for providing the appropriate level of service to its own end users.
>
> [emphasis in original in bold]

7 A copy of the Addendum of 1 May 2010 is found at pp 74 to 77 of Mr Oliviero's AEIC. The Addendum was stated to be incorporated into and to form part of the Licence Agreement; and in the event of any conflict between its terms and those of the Licence Agreement, the former were to prevail.[6] In gist, the Addendum made a number of additional provisions in relation to the payment of S&M fees by the Defendant. In particular, it put in place a process whereby

[6] See p 74 of Mr Oliviero's AEIC.

the two parties would conduct six-monthly reviews of the software system provided by the Plaintiff to the Defendant to ensure that the system was meeting "business needs, … reliable and well-supported". The process put in place by the Addendum prescribed *inter alia* the manner in which the Defendant would give the Plaintiff notice of non-compliance and how it would be entitled to seek a refund of the S&M charges payable under the Addendum subsequent to such notification of non-compliance.

8 I reproduce below the more pertinent clauses in the Addendum:

> **5. The Charges**
>
> All charges are exclusive of GST (to be paid by the Customer). The following charges shall be applied in USD to the installations at all locations.
>
> **<u>II. System Support and Maintenance Annual Fee's</u>**
>
> Matching Engine System support yearly fee **USD $ 150,000 per year**
>
> E-Broker Core System and Front-End fee **USD $75,000 per year**
>
> **For the period, 1st January 2010 through to 31st December 2010, Customer will be billed:**
>
> $150,000 for Matching Engine System support
>
> $75,000 for E-Broker Core System and Front-End support
>
> This will be payable in two instalments:
>
> 1st June 2010: $112,500
>
> 1st December 2010: $112,500
>
> **For the period, 1st January 2011 through to 31st May 2011, Patsystems has agreed to waiver all support fees and therefore no support fees will be payable by the customer for the above support and maintenance of the Matching Engine and E-Broker systems**

For the period, 1st June 2011 through to 31st December 2011, Customer will be billed:

$75,000 for Matching Engine System support

$37,500 for E-Broker Core System and Front-End support

This will be payable in one instalment:

1st June 2011: $112,500

From 1st January 2012:

All system Support and Maintenance costs shall be chargeable annually in advance from the 1st January 2012 and payable each year thereafter on the same date for as long as this agreement remains in place.

SCHEDULE 5 – SUPPORT AND MAINTENANCE SERVICES

Clause 2.2

First paragraph, third line, the word "annually" shall be replaced with "every (6) six months" and shall read as follows:-

This document will remain in effect until replaced with an undated version which must be agreed by both Parties in writing. It will be reviewed regularly for accuracy and completeness. It is intended that the first review will take place 6 months after issue, with subsequent reviews taking place every six (6) months after this date. The review shall be conducted in accordance to Review Criteria in this Addendum.

REVIEW CRITERIA

(1) Both BKDI and PPL agree to conduct a review every six (6) months starting 1st January 2011, 1st July 2011, 1st January 2012 and 1st July 2012, review shall be conducted no later than 30 days from the stipulated dates. The review shall be such as is reasonably required to show that the System complies with PPL objectives of providing a system that meet business needs, are reliable and well supported.

(2) BKDI shall confirm acceptance of BKDI's review by issuing written notice of acceptance. If there is non-compliance, BKDI shall issue notice of non-compliance. If no written notice of acceptance or notice of non-compliance is issued

by BKDI within 30 business days after the stipulated review dates above then the System shall be deemed to have been accepted.

(3) In the event that, within 30 Business Days after the review, BKDI sends a written notice of non-compliance to PPL, identifying particular Defects in the System, PPL will use reasonable efforts to correct the Defects properly specified in the rejection notice without any charges. When it believes that it has made the necessary corrections, BKDI shall review again and the provisions above shall be reapplied for acceptance in accordance with the above.

(4) If PPL fails to secure acceptance in accordance with the above within one (1) month following BKD's review, BKDI shall have the option to (i) allow PPL to continue to attempt to resolve the problem related to the Defect, or (ii) at any time accept the review 'as is' or (iii) with at least 14 days' written notice, BKDI shall be entitled to a refund and/or discount of the Charges payable under this Addendum.

The review shall be conducted in accordance with the guidelines of Schedule 5 – Support and Maintenance Services

Summary of the parties' cases

9 Following the signing of the Licence Agreement, the Defendant signed off on the User Acceptance Testing ("UAT")[7] on 29 November 2009. It is not disputed that the soft launch of the Defendant's trading platform took place in December 2009 and its official launch in March 2010.[8] It is also not disputed that after paying the first instalment of US$112,500 of the first S&M payment on 9 July 2010, the Defendant began withholding payment of the subsequent S&M amounts, claiming that it was experiencing multiple problems with the software system provided by the Plaintiff.

10 In the ensuing dispute over Plaintiff's claim for the allegedly outstanding

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[7] See pp 150-151 of Volume 1 of the Agreed Bundle of Documents ("ABD") for a copy of the UAT Acceptance.

[8] The Defendant's Director and witness Megain Widjaja ("Mr Widjaja") confirmed these dates in cross-examination: see the transcript for 5 September 2018 at 28:20 to 29:7.

S&M, the chief bone of contention concerned whether the parties' contractual rights and obligations were to be found solely in the express provisions of the Licence Agreement and the Addendum, or whether the terms of these two written agreements had been varied via subsequent email correspondence. The Plaintiff's case was that the parties' rights and obligations were wholly encapsulated in the express terms of the Licence Agreement and the Addendum; that subsequent email correspondence represented ongoing discussions between the parties in their attempt to find a solution to the issues which the Defendant raised in relation to the software system provided by the Plaintiff; that these discussions did not result in a legally binding final agreement; and that any "agreement" or "compromise" alluded to in the emails represented goodwill gestures on the part of the Plaintiff which were not legally binding.

11 The Defendant's case, on the other hand, was that subsequent to the signing of the Licence Agreement and the Addendum, the parties had agreed in their email correspondence on legally binding contractual variations. The Defendant claimed that the basis for the first such contractual variation – which the Defendant termed "the Arrangement" – was set out in an email sent by the Plaintiff's then Regional Director of Asia-Pacific, one Barry White ("Mr White") on 30 May 2011.[9] According to the Defence and Counter-claim filed by the Defendant, the terms of the Arrangement were as follows:[10]

> (a) that the Plaintiff would replace the Defendant's existing software system with a new system called the Global Trading Administration ("GTA"), "subject to [the Defendant's] comfort and confidence that the GTA would indeed resolve the issues faced by the Defendant", and that

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9 [33] of the Defendant's Closing Submissions. See 2 ABD 768-769 for a copy of Mr White's email of 30 May 2011.

10 [16] of the Defence and Counter-claim.

the GTA would be offered to the Defendant "for test purposes over the course of the next three months, i.e. until the end of August 2011";

(b) that "[i]n exchange", the Defendant would pay the S&M fees of US$112,500 then outstanding for the S&M period of 30 June 2010 to 31 December 2010; and

(c) that the Defendant "would withhold the payments for the S&M fees until the point that the GTA was implemented, and/or the Defendant signed off on the documents accepting the GTA".

12 The Defendant claimed[11] that the parties subsequently renegotiated the terms of the Arrangement and that a second contractual variation followed, the terms of which were to be found in Mr White's email of 28 March 2012.[12] These, according to the Defence and Counter-claim, were as follows:

(a) that the Defendant would pay the Plaintiff the annual S&M fee of US$75,000 for the E-Broker Core System and Front-End; and

(b) that the Defendant "was entitled to withhold" the annual S&M fee of US$150,000 for the Matching Engine Support "until the GTA was implemented".

13 For ease of reference, I reproduce below the contents of Mr White's emails of 30 May 2011 and 28 March 2012.

Email from Barry White sent on 30 May 2011 at 11.19am

Hi Arwadi,

[11] [19] of the Defence and Counter-claim.

[12] 5 ABD 2417.

Thank you for your time the other day to discuss the S&M payments etc.. As mentioned its slightly hard for me to have part of this payment held back, mainly because the due date for payment was Dec 1st 2010 and after six months of non payment becomes a problem on the bad debtor books for the auditors to balance.. as beyond 6 months tends to be the cut of date for aged debt before moving into this stage on the books. I do however have a better idea based on your comments below and refers to the next installment which is due on the 1st June 2011 which is part of the Addendum 1 agreement attached.

In respect of the attached addendum I would propose the following:

1. ICDX to pay the full $112,500 for the S&M period of June 30th 2010 till December 31st 2010 I [sic] *which case would close off the 2010 books for Patsystems etc..*

2. Patsystems to offer ICDX the offering of holding the $112,500 S&M payment which is due June 1st 2011 and caters for the S&M until the 31st December 2011

3. Patsystems to only request the payment for the $112,500 at the point where ICDX signoff on the GT PME system. Which shall be offered in the coming weeks

4. Patsystems to offer their New installed in-house GT system to ICDX for test purposes over the course of the next 3 months until the end of August 2011

5. Patsystems to work to a plan with ICDX to have a GT system installed on ICDX hardware, to at least have a system in house for low impact testing, due to hardware restrictions

Can you please let me know if this would work for ICDX, as I think it's a reasonable plan moving forward and will endeavor that we all work to making the GT system a reality plan for ICDX given the enhancements and offering that will solve many features ICDX requires for their business moving forward.

I have answered the individual questions below to help on answering all questions

We are very thankful for your offer and we look forward to move on. However, our shareholders have a few points to consider as well. Some of the points are:

1. GT is a new platform and we don't have a chance to have a feel of it.

A: We shall offer access to the GT system as soon as the Australian service is running which shall be in 2 weeks time, in the meantime access to the Singapore GT system will be given to *start some training on this platform. Please note that the systems will be shared environments using segregation*

2. What if GT doesn't solve our current problem.

A: The GT has been built to solve the current issues of the Circuit Breakers being able to change mid session etc.. The GT system shares a database with the PME, so there is no chance that information in the PME and GT Core can be different, I think any issues that you do have will be resolved here. I shall have someone run over the current list of issues rasied [sic] *to make sure these are covered.*

3. What if we would go through the same experience with the current platform.

A: I hope none of this will be the case and if any of it is, you will not sign off on the UAT and hold back the money. I cant guarantee that nothing will ever go wrong here, as we are in the age of technology and therefore things can go wrong either it be hardware or software, I do think our system has a good stability around it and has been built with a dual core aspect for durability. The greatest of Exchanges as you would have seen in the past 12 months have crashed a great deal, So I think it's hard to say it's full proof but do feel this will solve many problems that have been experienced due to separate OMS and Matching databases.

We have had many internal meetings and tried to come with resolution for Pats and ICDX. We came out with some proposal as follows:

1. We agree to accept your offer to upgrade to GT

A: We shall offer the Singapore/Sydney systems until we find a comfortable level for the ICDX test system to be upgraded for low impact testing

2. Until we are comfortable and have confident with GT, we would temporarily hold $75,000 yearly from the annual S&M fee.

A: As per my offering above from points 1 to 5 this shall supersede from the withholding in this point 2

3. The accumulated $75,000 would be fully paid to Pats, after we sign acceptance for GT.

A: this shall now become $112,500 which shall be paid to Pats after ICDX sign acceptance for GT

I hope these points are acceptable and I look forward to working with ICDX to build further trust and functionality on the system *to give you customers the greatest offering. Just as an FYI your new GT system will have a great deal of enhanced Risk functionality along with a true 24hr platform which runs over 6 days a week, which shall be the first for South East Asia.. give that GL, TT or CQG do not offer true 24hr/6 trading on their systems for the Overseas markets.*

Please let me know your thoughts on this. I have also received your email on the Phillip Market Maker and shall address this for ICDX.

[emphasis in original in grey]

Email from Barry White sent on 28 March 2012 at 2.23pm

Hi Arwadi,

Thank you for your time yesterday to talk over the system and how we can move forward with everything. As mentioned we are now at a stage where we need to work through an agreement with the outstanding Support & Maintenance mainly because the build up of this value with be 225,000 USD as of June 30th .. which is quite a large amount running into the remainder of the year. And will be something of a value which will concern our parent company as we look to work closely with ICDX for further growth at discount installations etc..

So in light of this, Could you please discuss internally on my compromise of ICDX paying the outstanding amounts of the OMS (E-Broker Core System) which is 75,000 USD from the 1st July 2011 to the 30th June 2012.. there will still be a 150,000 USD payment for the S&M on the Matching Engine Support that ICDX will hold (which is for the same period) .. until we move the platforms onto the GT system, but this will allow for me to continue with other initiative like the X-link PALN projects etc..

As also mentioned the GT system has been tested for the Back Office JV2 and also the physical delivery and is at a point where we are ready to introduce the system to ICDX as a short term test, before looking at this being the replacement of the existing VMS system you have and the move from your existing Data Centre which is planned for July 2012.

please let me know how you go with your discussions, but I think this is a very fair play from Patsystems with these outstanding amounts and feel it will allow for goodwill to be passed between our businesses as we look to grow together in Indonesia.

14 As to the Defendant’s counter-claim, as noted at the start of these written

grounds, the Defendant pleaded breaches by the Plaintiff of "the terms, whether express or implied, of the [Licence] Agreement and Addendum",[13] in respect of which it sought the refund of the entire licence fee or, alternatively, damages. The Defendant did not plead any specific implied terms in the Defence and Counter-claim. Instead, it referred to clause 10.1 of the Licence Agreement, clause 2.2 of Schedule 5 of the Licence Agreement, and the Review Criteria set out in the Addendum.[14]

15 It is not disputed that a substantial portion of the relevant communications in this case – including the relevant email correspondence – took place between Mr White and Mr Setiabudi. By the time of the trial, however, both Mr White and Mr Setiabudi had left the employment of the Plaintiff and the Defendant respectively, and they were not summoned as witnesses by either party. I will next set out the evidence given by the witnesses who were summoned. Mr Oliviero was the Plaintiff's sole witness. The Defendant called as its witnesses its Director Mr Megain Widjaja ("Mr Widjaja") and its former Manager of Market Operations Mr Teddy Sangeroki ("Mr Sangeroki").

PW1 Mr Oliviero's evidence

16 Mr Oliviero acknowledged from the outset that he came on the scene only after the ION group of companies (in which he served as CEO of the Agency Trading and Processing Division) acquired Patsystems plc, a public-listed company in the United Kingdom, in February 2012.[15] The Plaintiff was one of Patsystems plc's subsidiaries.

13 [37] and [38] of the Defence and Counter-claim.

14 [34]-[36] of the Defence and Counter-claim.

15 [6] of Mr Oliviero's AEIC.

17 Mr Oliviero was appointed as the Plaintiff's CEO with effect from June 2012 but started having oversight of its commercial matters in the few months before then. Sometime in April or May 2012, he was briefed by Mr White on the matters relating to the Defendant's account. *Inter alia*, he was told[16] that the Defendants had "raised issues regarding the reliability of the Plaintiff's software, as well as alleged gaps in functionality between the Plaintiff's system and the Defendant's purported business requirements"; further, that "[w]hile the Plaintiff's support team had resolved many of the reported issues along the way, the Defendant had continued to complain that it was encountering problems" and had withheld payment of the S&M fees on the basis of these complaints. Mr Oliviero understood the email communications of 30 May 2011 and 28 March 2012 to be gestures of goodwill.[17]

18 In respect of the 30 May 2011 email, Mr Oliviero's understanding was that Mr White had – "as a gesture of goodwill only" – "offered to provide the Defendant" with the new GTA system, "although the exact terms of such an offering had not been crystallised"; and that on the basis that "GTA might be available to it in future, the Defendant agreed to make payment of US$112,500 being the fees for the S&M service for the period 30 June 2010 to 31 December 2010". In return, Mr White had offered to let the Defendant "hold off paying the US$112,500 for S&M services which was due on 1 June 2011," which payment the Plaintiff would ask for "after the Defendant had signed off on the GTA system".[18] As to the 28 March 2012 email, Mr Oliviero's understanding was that this was a "further gesture of goodwill" from Mr White – following some delay in the Plaintiff providing the GTA system to the Defendant for

[16] [10(a) and (b)] of Mr Oliviero's AEIC.

[17] [10(c) and (e)] of Mr Oliviero's AEIC.

[18] [10(c)] of Mr Oliviero's AEIC.

testing – to allow the Defendant "to pay the fees for the S&M services relating to the OMS [the "Order Management System" – essentially, the Broker Software] first (i.e. US$ 75,000) whilst holding back the remaining fees for the S&M services relating to the PME [the Matching Engine] (i.e. US$ 150,000) which was then due, until they were provided with the GTA system".[19]

19 In cross-examination, Mr Oliviero said he had been "surprised"[20] by Mr White's email to him on 22 May 2012.[21] In that email, Mr White had alluded to "many issues" being encountered by the Defendant in using the Plaintiff's software system, ranging "from software reliability issues to functionality gaps", and had proposed that as a "goodwill gesture", the Defendant be offered "a S&M reduction of 50% of 225,000 USD S&M which they are contracted to at present, which would mean they would be paying $112,500 until we get them to move onto GT PME and get to a live state". In his email reply to Mr White,[22] Mr Oliviero asked the latter to "clarify what is contractual and what has been agreed as gesture of goodwill", and requested that a full legal review be done. Mr Oliviero clarified that he had formed the understanding that Mr White's communications with the Defendant had hitherto been "a number of goodwill offers that had not been finalised in actual documented paperwork"[23] because after he asked Mr White to "clarify what is contractual, what is goodwill", the latter had by "end of May / June 2012" "yet to produce a piece of contractual document that reflected the agreement between the parties".[24]

19 [10 (e)] of Mr Oliviero's AEIC.

20 See the transcript for 4 September at 45:6 to 45:24.

21 pp 79 to 80 of Mr Oliviero's AEIC.

22 p 79 of Mr Oliviero's AEIC.

23 See the transcript for 4 September at 53:10 to 53:13.

24 See the transcript for 4 September at 52:15 to 52:24.

20 Mr Oliviero also testified that from what he could see, the "offers" made by Mr White to the Defendant – such as the "offer" of the GTA system – were "commercial concessions" which the Plaintiff was not contractually obliged to make, and which Mr White made because he "was trying to have a positive experience" for "a new client".[25] It was pointed out to Mr Oliviero that the bulk of the contested invoices were issued from June 2013 onwards and that following Mr White's email of 30 May 2011, the Plaintiff had not in fact issued invoices to the Defendant for S&M payments in 2011 and 2012 (leaving aside the invoice of 28 March 2012[26] which formed one of the contested invoices). In response to defence counsel suggesting that this showed the Plaintiff to be "abiding by the agreement that [Mr White] had struck with the Defendant in May 2011" to let the Defendant withhold "annualised S&M fees", Mr Oliviero initially stated that he thought it suggested the Plaintiff "was effectively working to implement that agreement".[27] However, in re-examination, he clarified that in using the term "agreement", what he had been referring to was "the discussion between [Mr White] and [the Defendant]":[28]

> I was referring to the discussion between Barry [Mr White] and ICDX [the Defendant] on the revised payment structure and so I think my expectation would be that, until the discussion are ongoing, the company would have not issued specific invoices but, as we've already discussed, I don't believe a final agreement was ever reached … [T]here was continuous emails going back and forth around what would be the payment structure that ICDX wanted, Barry going back with alternative or with revised pricing and effectively Barry and ICDX trying to reach or having a discussion around what agreement they wanted to reach and how they wanted to change the contract, yeah.

21 Mr Oliviero also testified that following Mr White's briefing to him in

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25 See the transcript for 4 September at 76:21 to 77:25.

26 [6] of the Statement of Claim.

27 See the transcript for 4 September at 121:4 to 121:19.

28 See the transcript for 4 September at 138:6 to 139:16.

May 2012 regarding the Defendant's account, he did not hear from Mr White again until 28 August 2012, when the latter forwarded to him an email of the same date from the Defendant's Mr Setiabudi.[29] The key contents of Mr Setiabudi's email to Mr White were as follows:

> **Email from Mr Setiabudi to Mr White on 28 August 2012 at 6.23pm**
>
> *Dear Barry,*
>
> *Following up our meeting in Singapore, we would like to establish a common ground so that both of us would see the same picture as our contract is coming to conclusion in September.*
>
> *We apologize for the late reply because we have to wait for the shareholders' periodical meeting, and Patsystems was among the agenda to be discussed.*
>
> *As the results of the meeting, the followings are our points of views with the explanation behind them:*
>
> *1. We bought the systems as a whole from front up to clearing modules.*
>
> *2. However, since the very beginning, we can only utilize the OMS (front end) up to its potential. Thus, we have agreed that ICDX should pay only the Support and Maintenance (S & M) of the OMS only, which is USD 75,000 annually.*
>
> *3. In addition, we also were promised to get upgraded to GT systems which should fix a lot of the shortfalls of the current version.*
>
> *4. Looking at the Schedule of the Addendum No. 1 to The License Agreement, the S & M periods are implied as follows:*
>
> *Period Year 1: 1st January 2010 through to 31st December 2010*
>
> *Period Year 2: 1st June 2011 through to 31st May 2012*
>
> *Period Year 3: 1st June 2012 through to 31st May 2013*
>
> *5. Thus, each Period, we have to pay USD 75,000, and that comes to a total of USD 225,000.*
>
> *6. We made two S & M payments on 9th July 2010 of USD 112,500 and on 4th July 2011 of USD 112,500. The total payment was USD 225,000.*

29 5 ABD 2426-2427.

> *7. As you can see, we have paid off the S & M charges up to the end of Period Year 3, which is through to 31st May 2013.*
>
> *8. Since the GT systems launch has been delayed, the above agreement should stand.*
>
> *In summary, those points are the basis ground that we believe is fair and mutual. We present our views truly based on good faith and good relationship that we have so far. We would love to continue our relationship with Patsystems to support ICDX trading platform for now and the future. As a result, benefits for both parties can be manifested.*

22 According to Mr Oliviero, he understood Mr Setiabudi to be proposing in this email "that: (1) only US$ 75,000 was payable annually for the S&M fees for the OMS; (2) the previous amounts of US$112,500 paid on 9 July 2010 and US $112,500 paid on 4 July 2011 would be recognised as payment for these S&M fees up to 31 May 2013; and (3) no other amount would be payable for S&M fees since the GTA system launch was delayed". In forwarding Mr Setiabudi's email to Mr Oliviero (as well as Mr Oliviero's colleague David Groggin), Mr White stated that it was for their information and to let them "have visibility on this".[30] Mr White also added:

> *I have been trying to see how we can reach an agreement for part payment on the system, since the GT debacle. I think this is unacceptable … I shall be addressing this over the next couple of days, as there's quite a lot for me to discuss with them on the matter especially the fact they are using the waive periods as non part of their costs period.*

23 On 30 August 2012, Mr White wrote to Mr Oliviero about Mr Setiabudi's email of 28 August 2012, making inter alia the following comments:[31]

> *… I think to start with, the details below on the payment are correct in the aspect they have paid a total of $225,000. We had the original agreement based on an S&M of $225,000 per annum*

[30] p 83 of Mr Oliviero's AEIC.

[31] p 87 of Mr Oliviero's AEIC.

> *which was 150,000 USD for the matching/clearing PME and 75,000 USD for the OMS part of the system.*
>
> *They exchange went live in November 2009 as a soft launch with a official launch in March 2010, due to first launch being what I would call a UAT period given there was no real directional trading happening it was deemed that the system was still running through the processes with Patsystems not charging for the S&M over this period. when the exchange did finally launch we agreed that the S&M would be starting from July 2010 with all previous support being waived as part of the process.. when we got to the end of 2010, due to making the books look better in Pats for the YE 2010 we had a switch round where ICDX paid for two period within 2010 and had a free period over Jan to July 2011 .. at which stage the normal fees would be charged.. (addendum 1) we had a number of issues in-between which resulted in a letter from their legal on Non-Compliance. which at that stage now placed us into another issue of them holding the Jul to Dec 2010 payment back, yet we had were to recognize this in the 2010 YE..*
>
> *We got to a point where through further negotiations in early July 2011 we agreed on the payment for the $112,500 to be paid and there would be no further payments for S&M until they were provided a working GT system.. which was agreed with the Exec Management at Pats.. **please note this meant Payment would only be HELD back not waived***
>
> *We got to a point in March 2012 where we thought we were able to now deliver the GT at which point we all agreed with ICDX on this matter and asked for a "good will" payment of 75K which was part payment for the outstanding amounts.. as you know a couple of weeks later the whole GT was pulled back leaving me and the team very embarrassed first off.. and left with the issue below of June 11 to June 12 and now into this next half year.. of the H2 2012*
>
> [emphasis in original in bold underline]

24 When asked by Mr Oliviero to clarify what the next steps were and what he required, Mr White replied that it would be best to find out "whether the GT PME will be available for" the Defendant "sometime in the future"; that there had been "a number of ups and downs with the offering"; and that he would be able to make a suggestion once he knew what they could "achieve on the GT PME".[32]

25 Vis-à-vis Mr Setiabudi, Mr White also responded to his 28 August 2012 email on 30 August 2012, stating that he would "discuss with [his] management on the matter and come back".[33] It is not disputed that he did not revert to Mr Setiabudi with any substantive reply before leaving the Plaintiff's employment in late October / early November 2012. According to Mr Oliviero, the likely reason for the absence of any substantive reply to Mr Setiabudi was the fact that at the time of Mr White's departure, no decision had yet been made by the Plaintiff as to whether the GTA system would be made available as a solution to its customers.

26 The Plaintiff eventually made the decision to abandon the GTA system as a project in end-2013 / early 2014.[34] Before then, however, Mr Oliviero met with Mr Widjaja and his team in Jakarta in mid-January 2013 as he wanted to discuss the issue of their outstanding S&M payments and also to get their direct feedback on the issues they claimed to be facing with the Plaintiff's software.[35] According to Mr Oliviero, he communicated to Mr Widjaja and his team at this meeting that "whatever [Mr White] had agreed with [them] was not legally and contractually binding"; and they then had a discussion to try "to find an amicable resolution in what was a long outstanding dispute in terms of non-payment and open support issues".[36] As far as he was concerned, the Plaintiff's take-away from this meeting was that it would have to "go away and document" what it believed "was a contractual position" and how it believed it could "solve the open support issues".[37]

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32 p 86 of Mr Oliviero's AEIC.

33 5 ABD 2426.

34 See the transcript for 4 September at 129:25 to 130:2.

35 [23] of Mr Oliviero's AEIC.

36 See the transcript for 4 September at 92:13 to 93:14.

37 See the transcript for 4 September at 93:24 to 94:4.

27 In the course of conducting this review, a number of points became clear to Mr Oliviero.[38] In particular, he noted that the software system which was the subject of the perpetual licence purchased by the Defendant was an "out of the box" software system. This was crucial because it meant that the onus would be "on the customer to ensure that the software was appropriate for its business needs": "the Plaintiff did not warrant that its software was fit for any particular purpose (such disclaimer being part of the [Licence] Agreement)"; and the UAT period provided for in the Licence Agreement was "the customer's opportunity to ensure that the software it [was] purchasing [was] suitable for its business requirements". This, according to Mr Oliviero, was:

> … an important term to software companies such as the Plaintiff because no "out of the box" software system will necessarily meet all of the functionality that a customer might expect. This is especially the case for complex financial software such as that provided by the Plaintiff which would be expected to work not only with the customer's own internal systems (which are themselves complex) but also with third party systems such as those of customers and markets.

28 In this case, Mr Oliviero noted that the Defendant had signed off on the UAT Acceptance on 29 November 2009 expressly confirming acceptance of the software. In addition, whilst the Defendant had served one notice of non-compliance under the Addendum on 21 January 2011, it had not followed up with any further notices as provided for under the review criteria set out in the Addendum to request a refund of the S&M charges payable. In the circumstances, there was no contractual basis for the Defendant to withhold the payment of S&M fees, especially when it was continuing to request support and maintenance for the issues it had raised.[39]

29 In line with the above understanding, the Plaintiff sent the Defendant a

[38] [25] of Mr Oliviero's AEIC.

[39] [25(f)] of Mr Oliviero's AEIC.

set of Powerpoint slides on 10 June 2013,[40] setting out the "contractual parameters insofar as the acceptance of the Plaintiff's software and the payment of S&M fees [were] concerned", how it would address the issues raised by the Defendant regarding the software, and – crucially – the "amounts and invoices due to be paid by the Defendant … which would include new invoices which would be issued concurrently with the slides". *Inter alia*, the slides made reference to invoices which were being issued concurrently and stated the total amount due from the Defendant to be US$657,332.90.[41] The Defendant was also informed that "as a gesture of good will due to the issues experienced with the J-Vision and J-Clear components [of the Plaintiff's software]", the amount due would be discounted to US$507,332.90 if it paid the issued invoices within 30 days of receipt. There was no mention in these slides of "the May 2011 arrangement that was struck with [Mr White]" or of the GTA system.[42]

30 Despite an email from Mr Widjaja on 10 June 2013 stating that the Defendant would "come back" to the Plaintiff "shortly",[43] nothing further was heard from the Defendant for some weeks, nor did it make any payment of the invoices. When the Plaintiff sent a reminder on 4 July 2013 regarding payment of the invoices, Mr Widjaja responded by inviting Mr Oliviero to travel to Jakarta again "to discuss this matter", saying there were "outstanding issues that needs [*sic*] to be cleared up".[44] Mr Oliviero did not take up this invitation to visit Jakarta yet again. In his view, things had come to a point where it would be commercially difficult for the Plaintiff to continue providing support and maintenance services to the Defendant while outstanding invoices totalling

[40] [26]-[27] and pp 99-112 of Mr Oliviero's AEIC.

[41] p 111 of Mr Oliviero's AEIC.

[42] See the transcript for 4 September at 88:21 to 89:9.

[43] p 117 of Mr Oliviero's AEIC.

[44] p 115 of Mr Oliviero's AEIC.

US$657,332.90 remained unpaid. In his response to Mr Widjaja, he pointed out that the Plaintiff had already summarised in the slide presentation its "detailed internal due diligence" of the software issues raised by the Defendant; and that while he remained available to discuss any specific issues, "this should not be linked to the issue of the overdue invoices" – which, he added, he expected the Defendant to clear "by the 10th of July 2013 in line with [its] contractual obligations".[45]

31 The Defendant did not respond to Mr Oliviero's email, nor did it make any payment by 10 July 2013. On 11 July 2013, Mr Oliviero wrote to the Defendant stating that as the overdue invoices totalling US$657,332.90 remained unpaid, the Plaintiff "may suspend" its services to the Defendant if payment was not made within 14 days.[46] On 22 July 2013, he received the following letter in response from Mr Widjaja:[47]

> Referring to the Letter dated July 11, 2013 in respect of 'Suspension of Service' sent by [the Plaintiff] to us, we hereby inform you that in regard to the matter conveyed in the letter which principally stated the existence of outstanding bill in the amount of USD 657,332.90… ("Invoice") over the transaction as set forth in the Software Licence and Support Agreement dated September 9, 2009 ("Agreement"), the reason of the unpaid Invoice is the constant damages to the software referred to the Agreement, which until recently have not been repaired and well maintained.
>
> Furthermore, we hereby show our good will to settle the Invoice provided that [the Plaintiff] shall fulfill all the obligations as referred in the Agreement and make the improvements and periodic maintenance on the software referred to in the Agreement.

32 Mr Oliviero did not understand Mr Widjaja's allegation about "constant

[45] p 114 of Mr Oliviero's AEIC.

[46] p 121 of Mr Oliviero's AEIC.

[47] p 124 of Mr Oliviero's AEIC.

damages to the software": as far as he was concerned, at the January 2013 meeting the Defendant had raised 10 issues with the software; and in its June 2013 slides, the Plaintiff had explained in detail how each issue could be resolved – but no steps had been taken by the Defendant.[48] On 11 September 2013, some weeks after a tele-conversation with Mr Widjaja, Mr Oliviero received from the Defendant's Mr Sangeroki a list of issues which the latter said had "not [been] captured yet in [their] previous discussion".[49] Mr Sangeroki ended the email by stating:

> *The underlying issue here is actually the GT system. We were promised a replacement system called GT, and all issue would not be problem anymore on GT. That was why ICDX kept go on even there is some bugs on our current system, because we put a lot of hope on GT. And it is not coming.*

33 On reviewing Mr Sangeroki's list of issues, Mr Oliviero realised that it was "almost a completely new list of issues". He became concerned that the Defendant "was just putting forth a never-ending list of issues ... as justification for withholding payment"; and that the Plaintiff would find itself in a "lose-lose situation" if it continued trying to resolve these alleged issues while receiving no payment for its support and maintenance services. Accordingly, on 4 October 2013, the Plaintiff notified the Defendant that it would be suspending its services with effect from 19 October 2013 pursuant to clause 7.2 of the Licence Agreement, in view of the latter's failure to pay its overdue charges (by then totalling US$657,441).[50]

34 Following the Plaintiff's letter of 4 October 2013, the parties had a series of discussions. On 17 October 2013, the Defendant asserted during a tele-

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48 [32] of Mr Oliviero's AEIC.

49 pp 126-127 of Mr Oliviero's AEIC.

50 p 130 of Mr Oliviero's AEIC.

conversation that "there was an agreement that the Plaintiff would only charge the Defendant US$75,000 for S&M fees until the Plaintiff offers the GTA system to the Defendant, and that by paying US$225,000 so far, the Defendant had paid their S&M fees up to May 2013". On that basis, the Defendant asserted that "there was only US$75,000 due for the period from June 2013 to June 2014, which they would be willing to pay".[51] It will be noted that these assertions corresponded with the claims made in Mr Setiabudi's email to Mr White on 28 August 2012 (see [21] above). When Mr Oliviero objected that their understanding was wrong and that the Licence Agreement provided for S&M fees of US$225,000 a year, the Defendant claimed that the Plaintiff's software "was not working", that they did not use the J-Clear component of the software "as a result of issues encountered", and that it was "not feasible" for them to pay yearly S&M fees of US$225,000.

35 The Defendant also proceeded on 18 October 2013 to send the Plaintiff copies of emails which it claimed constituted "written proof" of the agreement for it to pay only US$75,000 per year for S&M fees: namely, Mr White's email of 28 March 2012 to Mr Setiabudi and Mr Setiabudi's email of 28 August 2012 to Mr White[52] (see [13] and [21] above). On the same day, the Plaintiff emailed the Defendant to say that it would "take no action on its notice of suspension without further notice" in light of the ongoing dialogue between the parties. The Plaintiff also requested that "without prejudice to [its] right to payment of all outstanding invoices", the Defendant should remit payment of US$225,000 "representing the $75,000 per annum support and maintenance fees that [the Defendant] does not dispute is due".[53] Mr Oliviero explained that the Plaintiff

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51 [38] of Mr Oliviero's AEIC.

52 pp 132-141 of Mr Oliviero's AEIC.

53 p 151 of Mr Oliviero's AEIC.

made this request because "based on the Defendant's own position that US$75,000 of S&M fees [was] due for each period, and given that the full S&M fees for the periods 1 July 2011 to 30 June 2012, 1 July 2012 to 30 June 2013, and 1 July 2013 to 30 June 2014 [remained] unpaid, a total amount of at least US$ 225,000 (i.e. US$75,000 per period) should be payable by the Defendant without dispute".[54]

36 Over the next few months, the Plaintiff heard nothing further from the Defendant, although on 6 January 2014, the latter made a single payment of US$75,000. Mr Oliviero understood this single payment to be in line with the Defendant's suggestion that it should pay only US$75,000 in S&M fees for the period June 2013 to June 2014. On 15 January 2014, the parties had another tele-conversation in which the Defendant again claimed to have difficulties agreeing to pay the outstanding S&M fees because of "unresolved issues with the Plaintiff's software".[55] This led to another email from the Defendant on 24 January 2014 enclosing yet another – much longer – list of alleged issues with the software system.[56]

37 Seeing that there appeared to have been no progress in the several months since the Plaintiff had been engaging the Defendant and that the Defendant continued to be non-committal about paying its S&M fees, Mr Oliviero decided that a Notice of Termination would have to be issued to the Defendant in order to minimise further exposure by the Plaintiff. This was done on 30 January 2014. It should be noted that the notice period was stated to be 6 months (i.e. effective 7 August 2014), and that the Plaintiff continued to provide support services to the Defendant during the notice period.[57] Cross-examined

[54] [40] of Mr Oliviero's AEIC.

[55] [43] of Mr Oliviero's AEIC.

[56] pp 165-169 of Mr Oliviero's AEIC.

as to why the Plaintiff had not effected immediate termination, Mr Oliviero explained that the Plaintiff felt it had an obligation to the financial markets, and immediate termination would have put the Defendant's exchange "at a massive operational risk".

38 It should also be noted that it was after the service of the Notice of Termination that the Defendant started issuing formal written letters to the Plaintiff each time it encountered an issue with the Plaintiff's software.[58] The Plaintiff eventually ceased the provision of support services on 8 August 2014; and the Defendant having continued to make no further S&M payments despite the issuance of a formal demand by the Plaintiff, the present suit was filed on 26 July 2016.

DW1 Mr Widjaja's evidence

39 Mr Megain Widjaja is the Director of the Defendant. He testified that the Defendant was incorporated in Indonesia in 2008 to carry on business as a futures commodity and derivatives-based exchange. As a new entity, the Defendant wanted to engage a software service provider "that could provide a full-fledged software system that would enable it to function effectively as a commodity and futures exchange".[59] The Defendant made their needs known to the two potential vendors they were then in discussion with – the Plaintiff and another company called Trayport Limited. The Defendant subsequently took a keener interest in the Plaintiff because it "seemed to understand the Defendant's interests as a new entrant on the exchange market" and because of various assurances by Mr White as to the Plaintiff's ability to provide "a comprehensive

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[57] See the transcript for 4 September at 118:2 to 119:4.

[58] [47] and pp 446-635 of Mr Oliviero's AEIC.

[59] [9] of Mr Widjaja's AEIC.

front to back exchange system".[60] According to Mr Widjaja, these assurances were repeated by the Plaintiff throughout the parties' negotiations between 2008 and 2009.[61] These negotiations culminated in the Licence Agreement of 9 September 2009.

40 Mr Widjaja claimed that the Defendant encountered problems with the Plaintiff's software "almost from the outset … with the first complication arising as early as 8 December 2009" when data relating to daily reports generated by the system was lost.[62] The next incident occurred on 11 January 2010 when users were unable to access their contracts in the system. "Most crucially", according to Mr Widjaja, the J-Clear and J-Vision components of the Back Office system were "simply not functioning", which meant that the Defendant was unable to generate the necessary data reports for its members and for the Indonesian regulatory authorities; and eventually, the Defendant had to switch to software provided by a local third-party vendor called Polamedia.[63] It was with a view to remedying the initial problems that the parties entered into the Addendum of 1 May 2010, which laid down *inter alia* a set of review criteria to "enable the Defendant to choose the option of seeking a refund and/or discount of payable monies to the Plaintiff in the event that the software [was] defective".[64]

41 It is not disputed that following the signing of the Addendum on 1 May 2010, the Defendant issued a Notice of Non-Compliance to the Plaintiff on 21 January 2011[65] listing a number of alleged defects as provided for in the review

60 [10] of Mr Widjaja's AEIC.

61 [11] and pp 35-36 of Mr Widjaja's AEIC.

62 [19] of Mr Widjaja's AEIC.

63 [20] of Mr Widjaja's AEIC.

64 [21] and [22(e)] of Mr Widjaja's AEIC.

criteria in the Addendum. It is also not disputed that this was the only Notice of Compliance issued by the Defendant in the entire history of its dealings with the Plaintiff; and that following the issuance of this notice on 21 January 2011, there was no follow-up action by the Defendant to request either a refund of or a discount on the S&M charges payable.

42 Nevertheless, Mr Widjaja claimed that the Defendant continued to encounter errors in the Plaintiff's software. In the period between January 2010 and July 2010, 15 issues emerged across the Front Office, Back Office Clearing and Exchange Systems which "greatly hampered the Defendant's ability to provide the necessary trading services to its customers as bargained for under the [Licence] Agreement".[66] According to Mr Widjaja, the Defendant expressed its frustration in various emails to the Plaintiff, but found the latter unable to "adequately remedy existing issues or prevent new issues from arising".[67] In his opinion:

> [T]he Plaintiff had given a software system to the Defendant which was simply not workable. To put it simply, the Defendant was not getting what it had paid for.
>
> In particular, in respect of the J-Clear Installation and Licensing, J-Vision Report Configuration to Banking Systems, and the J-Clear Report Development for government regulated reports (collectively referred to as the "Back Office Systems"), as well as the Matching Engine System, the Plaintiff had failed, refused and/or neglected to provide systems which were in a serviceable and/or usable condition.

43 The Defendant was aware that under clause 7.3 of the Licence Agreement, it "was to provide a Notice of Dispute in respect of any invoice it wished to dispute".[68] Mr Widjaja said that the Defendant had not issued any

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65 1 ABD 543.

66 [23]-[24] of Mr Widjaja's AEIC.

67 [26]-[34] and also exhibits MW-7 and MW-8 of Mr Widjaja's AEIC.

such Notice of Dispute because it "desired to preserve the goodwill between the two parties, and trusted the Plaintiff to make good on its promises in the [Licence] Agreement and the Addendum". He claimed, however, that it was in light of the Defendant's "ongoing problems with the software" that the Plaintiff made an offer in February 2011 "to replace the entire software with a new one" known as the Global Trading Administration ("GTA") which was intended to resolve the issues troubling the Defendant in respect of the current software".[69] At this juncture, however, the Defendant was apparently uncertain as to whether the GTA system would "be the answer for all [its] platform problems". This concern was expressed by Mr Setiabudi in an email he sent to Mr White on 23 May 2011.[70] In this email Mr Setiabudi set out the following proposals:

> *We have had many internal meetings and tried to come with resolution for Pats [the Plaintiff] and ICDX [the Defendant]. We came out with some proposal as follows:*
>
> *1. We agree to accept your offer to upgrade to GT.*
>
> *2. Until we are comfortable and have confident with GT, we would temporarily hold $75,000 yearly from the annual S&M fee.*
>
> *3. The accumulated $75,000 would be fully paid to Pats, after we sign the acceptance for GT.*

44 Mr Widjaja claimed that Mr White's email of 30 May 2011 (see [13] above) was a "counter-proposal" to the Defendant which the latter accepted. To recap, the five points of Mr White's "proposal" of 30 May 2011 were as follows:

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68 [37] of Mr Widjaja's AEIC.

69 [38] of Mr Widjaja's AEIC refers to an offer allegedly made "on or around 17 February 2011" but does not exhibit any email of this date containing the said offer.

70 pp 184-185 of Mr Widjaja's AEIC.

> *1. ICDX to pay the full $112,500 for the S&M period of June 30th 2010 till December 31st 2010 I which case would close off the 2010 books for Patsystems etc..*
>
> *2. Patsystems to offer ICDX the offering of holding the $112,500 S&M payment which is due June 1st 2011 and caters for the S&M until the 31st December 2011*
>
> *3. Patsystems to only request the payment for the $112,500 at the point where ICDX signoff on the GT PME system. Which shall be offered in the coming weeks*
>
> *4. Patsystems to offer their New installed in-house GT system to ICDX for test purposes over the course of the next 3 months until the end of August 2011*
>
> *5. Patsystems to work to a plan with ICDX to have a GT system installed on ICDX hardware, to at least have a system in house for low impact testing, due to hardware restrictions*
>
> [emphasis in original in grey]

45 In Mr Widjaja's words, the Defendant's agreement to Mr White's email of 30 May 2011 "had the effect of modifying, in writing, the respective obligations of both parties".[71] His evidence was that this contractual modification – which the Defendant referred to as "the Arrangement" – contained the following terms:[72]

[71] [46] of Mr Widjaja's AEIC.

[72] [45] of Mr Widjaja's AEIC.

(a) The present software would be replaced by the GTA, subject to the Defendant's comfort and confidence that the GTA would indeed resolve the issues it faced.

(b) The GTA was to be offered to the Defendant for testing purposes between May 2011 and August 2011.

(c) The Defendant agreed to pay the hitherto outstanding S&M fees, i.e. the sum of US$ 112,500 for the &M period of 30 June 2010 to 31 December 2010; and

(d) The Defendant would withhold the payment for future S&M fees until the GTA was implemented, and/or the Defendant signed off on the documents accepting the GTA.

46 Indeed, Mr Widjaja's evidence was that "[t]hrough the Arrangement, the Plaintiff had essentially invited the Defendant to hold off on the legal rights it might otherwise have had as a result of the defective software system, in exchange for the Plaintiff's promise that it would similarly compromise on its entitlement to S&M fees".[73] In particular, he testified that the Plaintiff's "proposal" to provide the GTA system was "an absolutely critical aspect of the Arrangement" because the Defendant "placed great weight on the Plaintiff's promise that the GTA system would resolve" the problems it had encountered in the existing software.[74]

47 By end-2011, however, the Defendant had not yet received the GTA system in replacement of its existing software.[75] In the meantime, it continued to experience "instability" in using existing software.[76] In addition, Mr Widjaja claimed that he observed that following the ION group's acquisition of the Plaintiff in February 2012, the Plaintiff "was experiencing difficulty with keeping to the Arrangement". Specifically, concern was expressed about the

[73] [46(c)] of Mr Widjaja's AEIC.

[74] [48] of Mr Widjaja's AEIC.

[75] Exhibit MW-11 of Mr Widjaja's AEIC.

[76] Exhibit MW-12 of Mr Widjaja's AEIC.

S&M fees due from – and not paid – by the Defendant, which by then had accumulated to US$225,000. This concern apparently led Mr White to seek to renegotiate the Arrangement with the Defendant and resulted in "a new compromise" (referred to by the Defendant as "the Revised Arrangement"). The Defendant's case was that the basis for this "new compromise" was to be found in the following passages in Mr White's email to Mr Setiabudi on 28 March 2012:

> *So in light of this, Could you please discuss internally on my compromise of ICDX paying the outstanding amounts of the OMS (E-Broker Core System) which is 75,000 USD from the 1st July 2011 to the 30th June 2012.. there will still be a 150,000 USD payment for the S&M on the Matching Engine Support that ICDX will hold (which is for the same period) .. until we move the platforms onto the GT system, but this will allow for me to continue with other initiative like the X-link PALN projects etc..*
>
> *As also mentioned the GT system has been tested for the Back Office JV2 and also the physical delivery and is at a point where we are ready to introduce the system to ICDX as a short term test, before looking at this being the replacement of the existing VMS system you have and the move from your existing Data Centre which is planned for July 2012.*
>
> *please let me know how you go with your discussions, but I think this is a very fair play from Patsystems with these outstanding amounts and feel it will allow for goodwill to be passed between our businesses as we look to grow together in Indonesia.*

48 It should be noted that although the Defendant's case was that it accepted the "fresh" proposals in Mr White's email, the only email response on record from the Defendant – following a reminder by Mr White – was a brief email from Mr Setiabudi on 17 April 2012 stating as follows:[77]

[77] 2 ABD 926.

> *Hi Barry*
>
> *I managed to talk to the BOD. In principle, we would like to work in a mutual relationship. It as to be win win relationship. However, we also would like to have you come to Jakarta to talk about detail plan for the future. Please let us know your schedule.*

49 In its closing submissions, the Defendant has acknowledged that "the documentary record of any acceptance [of Mr White's email of 28 March 2012] seems scarce".[78] Nevertheless, in his AEIC, Mr Widjaja asserted that this email of 28 March 2012 again modified the parties' contractual rights and obligations by putting in place the following "fresh" contractual arrangement:[79]

> (a) The Defendant would pay the Plaintiff the amounts of S&M on the E-Broker Core System and Front End for the period from 1 July 2011 to 30 June 2012, i.e. the annual fee of US$ 75,000; and
>
> (b) The Defendant was entitled to withhold the amounts of S&M on the Matching Engine Support for the period of 1 July 2011 to 30 June 2012 until the GTA was implemented, i.e. the annual fee of US$ 150,000.
>
> (c) The Plaintiff would roll out the GTA gradually, beginning first as a short term test, with a view to overhauling the existing system by July 2012.

50 In early May 2012, there was some email correspondence between the Plaintiff and the Defendant about UAT of the GTA system.[80] On 5 June 2012, however, Brian Ko (the Plaintiff's technical relationship manager) requested the Defendant to "suspend [its] UAT testing in [the] GT Test environment for the time being", as he understood from his "management team" that "the GT roll out project [was] presently on hold".[81] There was apparently no immediate reply

78 [41] of the Defendant's Closing Submissions ("DCS").

79 [54] of Mr Widjaja's AEIC.

80 pp 200-203 of Mr Widjaja's AEIC.

81 p 200 of Mr Widjaja's AEIC.

from the Defendant to this update from Brian Ko, but on 28 August 2012, Mr Setiabudi sent an email to Mr White (see [21] above). To recap, Mr Setiabudi listed 8 points which he said formed the basis of what the Defendant believed to be "fair and mutual":

> *… the followings are our points of views with the explanation behind them:*
>
> *1. We bought the systems as a whole from front up to clearing modules.*
>
> *2. However, since the very beginning, we can only utilize the OMS (front end) up to its potential. Thus, we have agreed that ICDX should pay only the Support and Maintenance (S & M) of the OMS only, which is USD 75,000 annually.*
>
> *3. In addition, we also were promised to get upgraded to GT systems which should fix a lot of the shortfalls of the current version.*
>
> *4. Looking at the Schedule of the Addendum No. 1 to the License Agreement, the S & M periods are implied as follows:*
>
> *Period Year 1: 1st January 2010 through to 31st December 2010*
>
> *Period Year 2: 1st June 2011 through to 31st May 2012*
>
> *Period Year 3: 1st June 2012 through to 31st May 2013*
>
> *5. Thus, each Period, we have to pay USD 75,000, and that comes to a total of USD 225,000.*
>
> *6. We made two S & M payments on 9th July 2010 of USD 112,500 and on 4th July 2011 of USD 112,500. The total payment was USD 225,000.*
>
> *7. As you can see, we have paid off the S & M charges up to the end of Period Year 3, which is through to 31st May 2013.*
>
> *8. Since the GT systems launch has been delayed, the above agreement should stand.*

51 As seen earlier, Mr White's reply to Mr Setiabudi on 30 August 2012 was that he would come back after discussing the matter with his management. In his AEIC, Mr Widjaja claimed that this email reply showed that Mr White was still "committed to the Revised Arrangement". In cross-examination, however, he conceded that he was not sure what Mr White was "trying to say"

and described the reply as "in limbo".[82] Mr Widjaja further testified that after Mr White's departure from the Plaintiff in November 2012, it became apparent to him that the Plaintiff "intended to abandon both" the Arrangement and the Revised Arrangement.[83]

52 On 10 June 2013, Mr Widjaja received the Plaintiff's email enclosing its slide presentation. He noted that the slides did not mention the GTA system at all, which he found "very unfair".[84] As to the invoices which were issued to the Defendant concurrently with the slides, he said the Defendant was "surprised and confused"[85] to receive these invoices. As to the Plaintiff's analysis in the slides of the 10 issues which the Defendant had raised in relation to its software in January 2013, Mr Widjaja said he believed his team would have looked at the solutions proposed by the Plaintiff and "tried to do something" – but he also said he did not think the proposed solutions solved the issues. He admitted that he did not know if anyone from the Defendant had implemented the Plaintiff's proposed solutions, as there was "a clear segregation of duties" within the Defendant's organisation, and it was Mr Setiabudi who was "fully in charge of the technical aspects of the system implementation, or even the fixing of the Patsystems … the issues".[86] Nevertheless, he believed Mr Setiabudi and his team "would have done something to talk about this".[87]

53 It is not disputed that the Defendant did not send the Plaintiff any substantive comments on the 10 June 2013 slides. On 22 July 2013, after

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82 See the transcript for 5 September at 86:21 to 87:2.

83 [66] of Mr Widjaja's AEIC.

84 See the transcript for 5 September at 96:20 to 97:9.

85 See the transcript for 5 September at 97:16 to 97:17.

86 See the transcript for 5 September at 106:19 to 107:11.

87 See the transcript for 5 September at 107:9 to 107:13.

receiving the Plaintiff's letter of 11 July 2013 threatening suspension of services in the event of the invoices remaining unpaid, Mr Widjaja wrote to the Plaintiff stating that "payment was withheld because of the defects in the software" but offering "to settle the invoices provided the Plaintiff made good on its promises under the Agreement".

54 In cross-examination, Mr Widjaja conceded that his letter of 22 July 2013 made no mention of the Arrangement and/or the Revised Arrangement and/or the Plaintiff's failure to supply the GTA system, but insisted that the contractual variations allegedly represented by the Arrangement and the Revised Arrangement still stood.[88] In re-examination, Mr Widjaja was referred by the Defendant's counsel to his email of 5 July 2013,[89] in which he had responded to the Plaintiff's chaser for payment by inviting Mr Oliviero to visit Jakarta to "discuss this matter" (see [30] above). Mr Widjaja claimed that by alluding to "outstanding issues" in this email, he was really referring to the GTA system, and that his invitation to Mr Oliviero to visit Jakartaa was really both to make the latter "responsible for the GTA" and to "discuss" the Plaintiff's slide presentation.[90]

55 Mr Widjaja also claimed that although his letter of 22 July 2013 made no mention of the Arrangement and/or the Revised Arrangement and/or the Plaintiff's failure to supply the GTA system, these were actually referenced in his letter of 24 January 2014.[91] Whilst he conceded that this letter of 24 January 2014 also did not explicitly mention the Arrangement and/or the Revised Arrangement and/or the GTA System, he asserted that there were "implicit"

88 See the transcript for 5 September at 98:8 to 98:19.

89 4 ABD 2271-2272.

90 See the transcript for 5 September at 127:1 to 128:8.

91 5 ABD 2516-2517.

references". He claimed that the sentence "*we have, in good faith, agreed to have Patsystems fixing the issues*" was really a reference to the GTA system because the GTA system was supposed to be the solution to the defects in the Plaintiff's existing software.[92] He also claimed that the sentence "*Patsystems agrees to restructure the payment of the support system*" was really a reference to the Arrangement of 31 May 2011.[93]

56 As to the Defendant's counter-claim, Mr Widjaja asserted that the Defendant had made known to the Plaintiff from the beginning its "desire for a comprehensive and functioning software system that would enable it to achieve its commercial goal of being a reliable and successful commodity and futures exchange in Indonesia".[94] In his AEIC, Mr Widjaja referred to clause 10.1 of the Licence Agreement, clause 2.2. of Schedule 5 of the Licence Agreement, and the Review Criteria stated in the Addendum.[95] He expressed the opinion that "the software provided for by the Plaintiff to the Defendant was … not up to the standards required under the Agreement" as it was – according to him – "not serviceable, operable, or functional", "did not 'comply with' the necessary specifications", and did not "operate … immediately on installation". He did not specify in his AEIC which contractual specifications the Plaintiff had failed to comply with but made the general statement that the Defendant had "experienced inexplicable, and often unresolved, defects in the Plaintiff's software on an unacceptably frequent basis".[96] He further asserted that these "defects" had "undermined the core benefit which the Defendant had contracted for when signing the Agreements in the first place, that is, a stable and

92 See the transcript for 5 September at 120:3 to 121:23; 132:19 to 133:20.

93 See the transcript for 5 September at 134:9 to 134:16.

94 [74] of Mr Widjaja's AEIC.

95 [75]-[77] of Mr Widjaja's AEIC.

96 [78] of Mr Widjaja's AEIC.

functioning software system that would facilitate the Defendant's commercial interests as a new player in the market".[97]

57 In cross-examination, Mr Widjaja admitted that he had not provided any evidence of any monetary loss on the Defendant's part.[98] On being shown materials extracted by the Plaintiff's counsel from the websites of the Association of Futures Markets and MarketsWiki,[99] Mr Widjaja also admitted that the Defendant's exchange had experienced a steady growth in the volume of contracts traded on it between 2010 and 2013 (from 61,000 contracts in 2010 to 934,000 contracts in 2013).[100] He agreed that the more contracts that were traded on the exchange, the more revenue the Defendant would make,[101] although he asserted that the volume of contracts traded on its exchange had been falling by double digits since 2014.[102]

DW2 Mr Sangeroki's evidence

58 Mr Teddy Sangeroki began working for the Defendant in June 2010 and left the company in March 2015. He is currently working as a corporate secretary in another company related to Mr Megain Widjaja.[103] Whilst working for the Defendant, he was put in charge of its Market Control Centre ("MCC") Division, where he was responsible for "monitoring and overseeing the backend operations of the Plaintiff's software", and "coordinating with the Plaintiff to rectify issues with the system as and when those might have arisen".[104] In cross-

97 [79] of Mr Widjaja's AEIC.

98 See the transcript for 5 September at 123:5 to 123:14.

99 Exhibits P1 and P2 respectively.

100 See the transcript for 5 September at 47:10 to 50:21.

101 See the transcript for 5 September at 49:1 to 49:7.

102 See the transcript for 5 September at 50:21 to 50:24.

103 See the transcript for 6 September at 8:10 to 8:14.

examination, he agreed that he had no training in computer engineering: his last job prior to joining the Defendant had been that of assistant director at a flour factory. He also agreed that in liaising with the Plaintiff on technical problems, whilst he would be able to "see the technical problem because it affected the trading transaction", he would not be capable of understanding in technical terms the root cause of the problem.[105]

59 Notwithstanding his admitted lack of technical expertise, Mr Sangeroki gave a detailed description in his AEIC of what he said were the various systems which made up the Plaintiff's software.[106] In cross-examination, it was put to him that his understanding of the plaintiff's software system contained multiple errors: for example, that he had wrongly classified a number of systems as being part of the Matching Engine when they were actually Front End Broker products.[107] He denied that his understanding of the software system contained any errors, claiming that he had derived such understanding from what "[he] had learnt from the user guide", from explanations given by the Plaintiff's staff,[108] and from the Defendant's own summary of documents provided by the Plaintiff.[109]

60 Mr Sangeroki also gave evidence of what he claimed were "widespread and incessant issues and problems with the [plaintiff's] Matching Engine System"[110] and the "issues and non-delivery of the Back Office System".[111] In

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104 [3] of Mr Sangeroki's AEIC.

105 See the transcript for 6 September at 4:20 to 4:25 and 7:13 to 8:8.

106 [5]-[20] of Mr Sangeroki's AEIC.

107 See the transcript for 6 September at 8:22 to 44:24.

108 See the transcript for 6 September at 9:5 to 9:10.

109 See the transcript for 6 September at 14:1 to 14:23.

110 [22]-[25] of Mr Sangeroki's AEIC.

respect of the Matching Engine System, he gave several examples of alleged "problems". For example, he said that the Matching Engine System was unable to run automatically when started up by the Defendant at the start of each day, and would instead need to be manually "bounced" "a minimum of two times every day" – with various attendant risks (such as possible loss of data) – just to ensure that all the applications on this system would run. Aside from this example of the need for manual "bouncing" of the system, Mr Sangeroki cited six other examples of "problems" with the Matching Engine System. It should be noted that of these six other alleged "problems", Mr Sangeroki conceded that three had been solved, although he claimed that one was only "temporarily" solved", while the solutions provided for the other two allegedly did not explain the cause of the error and did not guarantee non-recurrence.[112] As for the Back Office System, he said that the "most critical issue" was the inability of the J-Clear System to produce any reliable financial reports, including reports needed "for purposes of the relevant regulatory requirements".[113] He also referred to several other issues such as the inability of the J-Clear system to allow members of the Defendant's exchange to view their trade history and financial statements. According to Mr Sangeroki, the issues with the Back Office System "made the Defendant's platform … appear unreliable and an unprofessional platform, making members or traders wary of using the Defendant to trade commodity and futures contracts".[114]

61 According to Mr Sangeroki, throughout the history of the Defendant's usage of the Plaintiff's software, 171 incident reports had been logged with the

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111 [26]-[33] of Mr Sangeroki's AEIC.

112 See the table at [24] of Mr Sangeroki's AEIC.

113 [27]-[28] of Mr Sangeroki's AEIC.

114 [32] of Mr Sangeroki's AEIC.

Plaintiff on the problems encountered with the software.[115] These 171 incident reports included incident reports logged after the issuance of the Plaintiff's Notice of Suspension of Service on 4 October 2013. Mr Sangeroki contended that these 171 incident reports were "not exhaustive" because the Defendant did not log an incident report each time an issue arose. He also referred to various emails exchanged with the Plaintiff which he said illustrated the issues that the Defendant had with the software.[116] In his opinion:[117]

> [T]he Front Office System had the occasional issues but we were willing to resolve them as and when they arose. However, the Matching Engine System … was so wrought with problems practically on a daily basis that I do not think what was promised was delivered. The Back Office System was the worst of all, as it could not even fulfil the functions it was meant to perform. I felt as if the Plaintiff had used the Defendant as guinea pigs insofar as the PME and Back Office System was concerned … [N]o other exchange had been using this system when the Plaintiff offered it to us.

62 Mr Sangeroki said that eventually the Defendant resolved some of their more major issues by "using third-party vendors to step in and fulfil the functions that the Plaintiff's software simply could not".[118]

63 In cross-examination, Mr Sangeroki was asked to reconsider his claim that "no other exchange" besides the Defendant had used the Plaintiff's software system.[119] He was shown documentation appearing to show that other exchanges such as Thailand's Agricultural Futures Exchange ("AFET") had in fact installed the Plaintiff's software system with all the modules present. He

115 Exhibit TS-3 of Mr Sangeroki's AEIC.

116 [37]-[48] of Mr Sangeroki's AEIC.

117 [51] of Mr Sangeroki's AEIC.

118 [50] of Mr Sangeroki's AEIC.

119 See the transcript for 6 September at 18:17 to 25:6.

insisted, however, that he was correct in asserting that the Defendant was the only exchange to use the Plaintiff's software system.[120]

The key issues in contention

64 I will next deal with my analysis of the key issues in contention between the parties and explain my reasons for finding in favour of the Plaintiff on these issues.

65 In respect of the Plaintiff's claim for the total sum of US$604,340.68 in respect of the 17 invoices listed in the Statement of Claim, it was not disputed that the key issues were as follows: firstly, whether the Arrangement and the Revised Arrangement constituted valid contractual variations which modified the parties' rights and obligations to the extent that the Defendant would not be liable to pay the said invoices; and secondly, in the event the Arrangement and the Revised Arrangement were found not to be valid contractual variations, whether the Plaintiff was nevertheless "estopped from relying on the non-issuance of any Notice of Dispute as indication that the Defendant accepted, and/or waived all rights to dispute each of the Invoices".[121]

66 In respect of the Defendant's counter-claim for the refund of the entire licence fee or alternatively damages, the key issues were whether the Plaintiff had breached any term of the contract between the parties; and if yes, which contractual term it had breached.

The Plaintiff's claim on the unpaid invoices

67 In respect of the Plaintiff's claim on the unpaid invoices, I rejected the

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120 See the transcript for 6 September at 24:1 to 24:7.

121 [28] of the Defence and Counter-Claim.

Defendant's argument that "the Arrangement and/or the Revised Arrangement was an effective variation of parties' obligations under the [Licence] Agreement and Addendum".[122] I agreed with the Plaintiff that no binding agreement was reached between the parties in the terms of the Arrangement and the Revised Arrangement as pleaded.[123] My reasons were as follows.

The Arrangement

68 I will deal first with the Arrangement. To recap: the Defendant's case, as explained in Mr Widjaja's AEIC, was that the Arrangement represented a binding agreement which was reached by the defendant's acceptance of the following terms offered in Mr White's email of 30 May 2011:[124]

> *1. ICDX to pay the full $112,500 for the S&M period of June 30th 2010 till December 31st 2010 I* [sic] *which case would close off the 2010 books for Patsystems etc..*
>
> *2. Patsystems to offer ICDX the offering of holding the $112,500 S&M payment which is due June 1st 2011 and caters for the S&M until the 31st December 2011*
>
> *3. Patsystems to only request the payment for the $112,500 at the point where ICDX signoff on the GT PME system. Which shall be offered in the coming weeks*
>
> *4. Patsystems to offer their New installed in-house GT system to ICDX for test purposes over the course of the next 3 months until the end of August 2011*
>
> *5. Patsystems to work to a plan with ICDX to have a GT system installed on ICDX hardware, to at least have a system in house for low impact testing, due to hardware restrictions*[emphasis in original in grey]

69 It should be noted that Mr Widjaja described Mr White's email of

122 [79] of the Defendant's Closing Submissions.

123 [35]-[39] of the Plaintiff's Closing Submissions.

124 [44] of Mr Widjaja's AEIC.

30 May 2011 as a "counter-proposal" to Mr Setiabudi's email of 23 May 2011, which had contained the Defendant's own "proposal" with regard to the GTA system and the payment of S&M fees.[125] Mr Widjaja specifically stated in his AEIC that it was Mr White's "counter-proposal" of 30 May 2011 which the Defendant "eventually accepted". In cross-examination, Mr Widjaja confirmed that it was the Defendant's case that the terms of the Arrangement were encapsulated in Mr White's 30 May 2011 email.[126] There was no suggestion at any time that the Arrangement contained terms other than those set out in the 30 May 2011 email, as reproduced above.

70 By way of further recap, it should also be noted that the Defendant pleaded in its Defence and Counter-claim that the binding agreement represented by the Arrangement was as follows:[127]

> (a) The Defendant agreed for its present platform / software to be replaced to the GTA, subject to its comfort and confidence that the GTA would indeed resolve the issues faced by the Defendant. The GTA was to be offered to the Defendant for test purposes over the course of the next three months, i.e. until the end of August 2011;
>
> (b) In exchange, the Defendant agreed to pay the S&M fees which remained hitherto outstanding, i.e. the sum of US$ 112,500 for the S&M period of 30 June 2010 to 31 December 2010;
>
> (c) The Defendant would withhold the payments for the S&M fees until the point that the GTA was implemented, and/or the Defendant signed off on the documents accepting the GTA.

125 [41]-[43] of Mr Widjaja's AEIC.

126 See the transcript for 5 September at 54:2 to 54:11.

127 [16] of the Defence and Counter-claim.

71 According to the Defendant's case, there were two key elements to the contractual variation encapsulated in the Arrangement: that the Defendant's existing software system would be replaced by the GTA system; and that after settling the S&M charge of US$112,500 for the period 30 June 2010 to 31 December 2010, the Defendant would be entitled to withhold all further S&M payments until it accepted the GTA system in replacement of its existing software. Having reviewed Mr White's 30 May 2011 email, however, it was simply not possible in my view to find that it provided the basis for a contractual variation with these terms.

72 Firstly, in respect of the payment of S&M charges, it was clear from what Mr White stated in his 30 May 2011 email that he was concerned only with two specific S&M payments: the S&M payment for the period of US$112,500 for the period 30 June 2010 to 31 December 2010 – which he was anxious for the Defendant to settle, in order to "close off the 2010 books for [the Plaintiff]" (item 1 of his email); and the S&M payment due on 1 June 2011 for the period 1 June 2011 to 31 December 2011[128] – which he was offering to let the Defendant withhold until it signed off on the GTA system (items 2 and 3 of his email). There was no mention at all by Mr White of any other S&M charge for any other periods. Given Mr White's stated concern about non-payment of the S&M charges morphing into bad debts in the Plaintiff's books,[129] and given the potential financial consequences for the Plaintiff of having the Defendant withhold *all S&M payments post-31 December 2010* until it decided to accept the GTA system, it was unbelievable that any such agreement should not have been spelt out in specific and explicit terms.

128 It will be remembered that the S&M charge for the period 1 January 2011 to 31 May 2011 had been waived pursuant to the Addendum signed on 1 May 2010.

129 2 ABD 768.

73 Indeed, the fact that Mr White had no intention of "offering" to let the Defendant withhold any other S&M charge may be seen in his response in the same email to Mr Setiabudi's suggestion in the latter's 23 May 2011 email that the Defendant should "temporarily hold $75,000 yearly from the annual S&M fee" until it felt "comfortable and … confident with GT".[130] In his 30 May 2011 email, Mr White's specific response to this suggestion by Mr Setiabudi – which followed the five items of his own proposal – was emphatically in the negative:[131]

> *I have answered the individual questions below to help on answering all questions*
>
> *…*
>
> *2. Until we are comfortable and have confident with GT, we would temporarily hold $75,000 yearly from the annual S&M fee.*
>
> *A: **As per my offering above from points 1 to 5 this shall supersede from the withholding in this point 2***
>
> [emphasis in original in grey; emphasis added in bold underline]

74 Even assuming for the sake of argument that Mr White's 30 May 2011 email could be construed as having promised to let the Defendant withhold all S&M payments post-31 December 2010 until it accepted the GTA system, the Defendant would need to have provided consideration for such a promise when they accepted it, in order to have a legally binding agreement. On the evidence available, I agreed with the Plaintiff that no valid consideration was provided. In its closing submissions, the Defendant argued that:[132]

> …[W]ith the issuance of the Non-Compliance [Notice of 21 January 2011], it was plausible, and may have well been

130 p 185 of Mr Widjaja's AEIC.

131 2 ABD 769.

132 [106(1) & (2)] of the Defendant's Closing Submissions.

> imminent, that the Defendant would have applied for a refund or discount of the S&M fees under the Addendum … As such, the Plaintiff benefited from the Arrangement in avoiding the Defendant from ever applying for such refund or discount. At the same time, the Defendant benefited from not being required to pay for the S&M fees until and unless the GTA was implemented.
>
> … [T]he consideration may also be seen from the perspective that the Defendant released the Plaintiff from any prospect of it having to refund or discount the S&M fees paid in exchange for the Plaintiff releasing the Defendant from paying future S&M fees, until and unless the GTA system were [*sic*] implemented.

75 I did not find the above argument viable. Even if one were to assume that the Defendant had consciously taken a decision to forbear from following up its Non-Compliance Notice with any request for a refund or discount of S&M charge, there was no evidence of any request – express or implied – by the Plaintiff that it should so forebear. This, in my view, was fatal to the Defendant's assertion of sufficient consideration. In this connection, regard should be had to the decision of the English Court of Appeal in *Combe v Combe* [1951] 2 KB 215 ("*Combe*"). This was a case involving a couple undergoing a divorce. Between the date of decree nisi and decree absolute on the petition for divorce, the husband promised his wife to allow her £100 a year free of tax. The wife forbore to apply to the Divorce Court for maintenance, but not on any request by the husband, express or implied, that she should so forbear. The husband did not pay to his wife the payments he had promised, and she brought an action in the King's Bench Division on his promise to make those payments to her. The English CA allowed the husband's appeal against the decision by the court below to allow the wife's claim, holding that there was no consideration from the wife for the husband's promise. In his judgement, Denning LJ stated (at 221):

> I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance, or, in other words, any request by the husband,

> express or implied, that the wife should so forbear. He left her to apply if she wished to do so. She did not do so … *Her forbearance was not intended by him, nor was it done at his request. It was therefore no consideration.* [emphasis added]

76 *Combe* has been endorsed by our own CA in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*"),[133] where Andrew Phang JA – in delivering the judgement of the CA – held (at [82]):

> [T]he element of request is necessary in order to establish a link between the parties concerned. So, for example, if the promisee chooses, of his or her own volition (and without more), to confer a benefit on the promisor, this will not constitute sufficient consideration in the eyes of the law. Likewise, if the promisee chooses, of his or her own volition, to incur a detriment, then (as the leading English Court of Appeal decision of *Combe v Combe* [1951] 1 KB 214 ("*Combe*") clearly illustrates, that would not constitute sufficient consideration in the eyes of the law. In *Combe*, the plaintiff wife failed in an action against her ex-husband for a promise made by him to pay her maintenance as the court held that the fact that she had voluntarily refrained from claiming maintenance against him in a court of law did not constitute sufficient consideration because it was done entirely at her behest, with no request whatsoever coming from her ex-husband. …

77 In respect of the other alleged element of the Arrangement, namely, that the Defendant's existing software system would be replaced by the GTA system, I also did not find it possible to construe Mr White's email of 30 May 2011 as having made any such promise. Whilst item 3 of the five-point proposal in the said email did refer to the Defendant signing off on the GTA system "[w]hich shall be offered in the coming weeks", item 4 made it clear that the GTA system was to be offered to the Defendant "for test purposes over the course of the next 3 months until the end of August 2011"; and item 5 went on to state that the Plaintiff would "work to a plan with [the Defendant] to have a GT system

133 Tab 9, Vol 1 of the Defendant's Bundle of Authorities ("DBOA") for Closing Submissions.

installed on [the Defendant's] hardware to at least have a system in house for low impact testing, due to hardware restrictions". Mr White also stated that the Plaintiff would "endeavour that [they] all work to making the GT system a reality plan for [the Defendant] given the enhancements and offering that will solve many features [the Defendant] requires for their business moving forward".[134] Having regard to these express statements, it was clear that the 30 May 2011 email could not have provided the basis for a legally binding agreement whereby the Plaintiff undertook the obligation of replacing the Defendant's existing software system with the GTA system.

78 Tellingly, in cross-examination, Mr Widjaja conceded that the Defendant had to test the GTA system first before deciding whether this new system worked for it; that it "could well be that" the Defendant would not like the GTA system after looking at it; and that given the mind-set at the time, "the events that were going to take place in future [were] not certain".[135] These concessions demonstrated, in my view, that the Defendant itself could not have treated Mr White's 30 May 2011 email as the basis for a binding agreement for the Plaintiff to replace the Defendant's existing system with the GTA system.

79 In re-examination, Mr Widjaja sought to backtrack from his concessions in cross-examination: he claimed that Mr White's 30 May 2011 email had given the Defendant a "high dose of assurance" by addressing the concerns expressed in Mr Setiabudi's 23 May 2011 email; and that in the circumstances, the Defendant had been "led to believe" that they were entering into an "agreement" which would provide an amicable solution for moving forward.[136] A review of the responses given by Mr White vis-à-vis Mr Setiabudi's concerns showed,

134 2 ABD 768.

135 See the transcript for 5 September at 73:15 to 75:5.

136 See the transcript for 5 September at 141:11 to 144:9.

however, that Mr White's references to the provision of the GTA system to the Defendant were all in the context of a proposal for the Defendant to test the system; there was no representation at any point that the Plaintiff was binding itself to replace the Defendant's existing system with the GTA system. In particular, in response to Mr Setiabudi's statement (*per* his 23 May 2011 email) that the Defendant "agree[d] to accept [the Plaintiff's] offer to upgrade to GT",[137] Mr White's response – couched in rather circumspect terms – was:

> We shall offer the Singapore / Sydney systems until we find a comfortable level for [the Defendant's] test system to be upgraded for low impact testing.

80 Furthermore, it should be noted that the Defendant did not dispute that whilst negotiating parties might enter into a binding agreement even when a few issues remained to be agreed, there would be no binding obligation unless all the material terms of the contract were agreed on: see for example *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR(R) 202 ("*Grossner Jens*").[138] In *Grossner Jens*, the plaintiff had offered to broker the private sale of Swissotel Holding GA ("Swissotel") to the defendants. The plaintiff sought 1% of the transaction price as broker's commission on successful acquisition of Swissotel by the defendants. The defendants did not accept these proposed terms of remuneration and sought to cap the commission. For this purpose, they requested the plaintiff for information on the scope of his services and on the indicative price for Swissotel – which queries the plaintiff did not reply. Subsequently, after the defendants acquired Swissotel through a competitive bidding exercise in which they appointed Morgan Guarantee to act for them, the plaintiff demanded his commission from the defendants, claiming that he had brokered the deal. His claim was dismissed by the High Court, which held that

137 2 ABD 770.

138 Tab 10, Vol 1 DBOA for Closing Submissions.

the parties had failed to agree on crucial terms such as the plaintiff's remuneration and the scope of his brokerage services; and that accordingly, there was no binding brokerage contract between the parties. In his judgement, Justice Tan Lee Meng held that:

> Depending on circumstances, negotiating parties may enter into a binding contract even though there are a few terms which have yet to be agreed upon. This was recently reiterated by the Court of Appeal in *The Rainbow Spring* [2003] 3 SLR(R) 362. *However, the position is very different where important terms have not been agreed upon* for as Maugham LJ put it in *Foley v Classique Coaches* [1934] 2 KB 1 at 13, "*unless all the material terms of the contract are agreed there is no binding obligation*". In the present case, the parties did not reach agreement on crucial terms such as the remuneration for JG [the plaintiff] if he succeeds in brokering the sale of Swissotel to Raffles and the scope of the services to be rendered by JG. [emphasis added]

81 In *G. Scammell & Nephew, Ltd v HC & JG Ouston* [1941] AC 251 ("*G. Scammell*"), the respondents agreed to purchase from the appellants a new motor van, but stipulated that "this order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years". Before any hire-purchase agreement was entered into, the appellants refused to proceed further, whereupon the respondents sued for damages for breach of contract to "supply" the van. The respondents' claim was upheld by the first-instance judge and by the English CA. On the appellants appealing to the House of Lords, the appeal was allowed. The House of Lords held that the clause as to hire-purchase terms was so vague that no precise meaning could be attributed to it, and that consequently no enforceable contract had been reached between the parties. Viscount Maugham noted (at 256–257) that not only was it unclear what the words "hire-purchase terms" meant in the present case, "nothing [had been] said (except as to the two years period) as to the terms of the hire-purchase agreement, for instance, as to the interest payable, and as to the rights of the letter whoever he may be in the event of default by the respondents in payment

of the instalment at the due dates"; nor was there any evidence to suggest that there were any well-known "usual terms" in such a contract. These, he concluded, were "very serious difficulties", which made it "impossible to conclude that a binding agreement [had] been established by the respondents". Agreeing with him, Lord Wright stated (at 268–269):

> There are in my opinion two grounds on which the court ought to hold that there was never a contract. The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention.
>
> …
>
> [T]he other reason, which is that the parties never in intention nor even in appearance reached an agreement, is a still sounder reason against enforcing the claim. In truth, in my opinion, their agreement was inchoate and never got beyond negotiations. They did, indeed, accept the position that there should be some form of hire-purchase agreement, but they never went on to complete their agreement by settling between them what the terms of the hire-purchase agreement were to be. The furthest point they reached was an understanding or agreement to agree upon hire-purchase terms. But as Lord Dunedin said in *May & Butcher v The King*, reported in a note to *Foley v Classique Coaches Ltd*, "*To be a good contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which has still to be determined but then that determination must be a determination which does not depend upon the agreement between the parties*".
>
> [emphasis added]

82 In *May & Butcher v The King* [1934] 2 KB 17 ("*May & Butcher*"), one of the two cases referenced by Lord Wright above, the appellants were general contractors who claimed that they had entered into a binding agreement with the Disposals and Liquidation Commission for the purchase by the appellants of tentage which might become available in the United Kingdom ("UK"). In respect of payment for the tentage, the alleged agreement provided that the

"price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage becomes available for disposal, and are offered to the purchasers by the Commission". The appellants appealed to the House of Lords after the court at first instance and the CA had rejected their claim. In dismissing the appeal, the House of Lords held that there was no concluded contract between the parties. As Lord Buckmaster put it (at 20):

> It has long been a well recognised principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all.

83 Viscount Dunedin (whose judgment was cited by Lord Wright in *G. Scammell*), further noted (at 21) that:

> As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract.

84 Although in *Foley v Classique Coaches Ltd* [1934] KB 1 ("*Foley*") the English CA distinguished *May & Butcher*, it is important to note the grounds on which they distinguished that case. In *Foley*, the plaintiff had agreed to sell and the defendants to buy a piece of land, adjoining other land belonging to the plaintiff, which the defendants intended to use for their business as motor coach proprietors. The sale of the land was made subject to the defendants entering into another agreement to purchase from the plaintiff all the petrol required for their business ("the second agreement"). The second agreement stipulated that the defendants would purchase petrol from the plaintiff "at a price to be agreed by the parties in writing and from time to time"; further, that the defendants

would purchase no petrol from any other person so long as the plaintiff was able to supply them with quantified sufficient to satisfy their daily requirement". The second agreement also provided that if any dispute or difference should arise on the subject matter of construction of the agreement, "the same shall be submitted to arbitration". The land was duly conveyed to the defendants who – for more than three years thereafter – obtained their petrol from the plaintiffs.

85 Subsequently, disputes arose between the parties; and the defendants purported to repudiate the second agreement. The defendants alleged *inter alia* that the second agreement had no binding force because no agreement in writing as to price had ever been made. An application by the plaintiff for a declaration that the second agreement was valid and binding was granted by the court at first instance, whose decision was upheld by the CA. The CA decided that a term must be implied in the agreement that the petrol supplied by the plaintiff should be of reasonable quality and *sold at a reasonable price*, and that if any dispute arose as to what was a reasonable price, it was to be determined by arbitration. Crucially, the CA held that the facts of the case and the nature of the contract "took it out of the authority of *May & Butcher*" (per Greer LJ at 12). The CA noted that in this case, the second agreement had been duly stamped and bore all the signs of a legal contract, unlike the "mere informal letter" in *May & Butcher*. The CA also noted that the defendants had purchased all its petrol from the plaintiff for three and a half years before purporting to repudiate the second agreement. It was further held that the second agreement formed one of the two considerations agreed for the purchase of the land from the plaintiff. Finally, and critically, the CA found the case to be analogous to case involving tied houses, in which typically a publican would agree not to take beer from anyone except the brewer: noting that it was an "old-established rule" in such cases that the brewer for his part was agreeable to supplying beer of reasonable quality and

at a reasonable price, the CA held that there was "no distinction in principle between a contract for the price of beer to be paid by the tenant of a tied house" and the second agreement in the case before it.

86 Turning back to the facts of the present case, it should be pointed out firstly that the replacement of the Defendant's existing software system with the GTA system would have been a substantial endeavour which would have required extensive efforts to be made in diverse areas such as user acceptance testing, training, and resolution of hardware compatibility issues. Mr Widjaja accepted in cross-examination that the GTA system would have been an entirely new platform, and upgrading to such a new platform would not have been a matter of merely adding some patches to the Defendant's existing software.[139] Secondly, the Defendant did not dispute the Plaintiff's claim that the new GTA system was "estimated to be worth US$6 million".[140] In cross-examination, Mr Widjaja agreed that the Defendant was not going to be given the GTA system for free.[141]

87 At the same time, it was plain that there was never any discussion between the parties as to what one would have thought were the material terms of an agreement for the Defendant to get the GTA system in replacement of its existing software. There was no discussion of the timeline for the replacement to be effected. Whilst the Defendant made much of the sentence "[w]hich shall be offered in the coming weeks" in item 3 of Mr White's 30 May 2011 email ("Patsystems to only request the payment for the $112,500 at the point where ICDX signoff on the GT PME system. Which shall be offered in the coming weeks"), item 4 of the same email made it clear that what was to be offered to

[139] See the transcript for 5 September at 64:8 to 64:20.

[140] [10(c)] of Mr Oliviero's AEIC.

[141] See the transcript for 5 September at 65:15 to 65:18.

the Defendant "in the coming weeks" was purely for test purposes ("Patsystems to offer their New installed in-house GT system to ICDX for test purposes over the course of the next 3 months until the end of August 2011"): there was no promise by the Plaintiff in the 30 May 2011 email or in any other correspondence that they would replace the Defendant's existing software with the GTA system "in the coming weeks" – or indeed, by some definite deadline. Even more critically, there was no discussion between the parties as to the price to be paid for the substitution of the GTA system for the existing software: Mr Widjaja agreed in cross-examination that there was no discussion of the price and/or the cost of upgrading the Defendant to the new GTA system.[142] Bearing in mind the principles articulated in *Grossner Jens*, *G. Scammell* and *May & Butcher*, the above factors led me to conclude that there was never any agreement between the parties for the Plaintiff to replace the Defendant's existing software with the GTA system.

The Revised Arrangement

88 As for the Revised Arrangement, to recap – the Defendant's case was that this was a binding agreement concluded via its acceptance of the "compromise" offered in Mr White's email of 28 March 2012.[143] The terms of the Revised Arrangement, as pleaded, were that:

(a) the Defendant was to pay the Plaintiff the amounts of S&M on the E-Broker Core System and Front End, i.e. the annual fee of US$75,000; and

142 See the transcript for 5 September at 63:18 to 63:24.

143 [19] of the Defence and Counter-claim.

(b) the Defendant was entitled to withhold the amounts of S&M on the Matching Engine Support until the GTA was implemented, i.e. the annual fee of US$150,000.

89 As pleaded, the Revised Arrangement was substantively different from the Arrangement. The Arrangement allegedly provided for the Defendant to withhold all S&M payments post-31 December 2010 until its acceptance of the GTA system. In contrast, the Revised Arrangement allegedly provided for the Defendant to pay annually the S&M charge of US$75,000 applicable to the E-Broker Core System and Front End, while withholding the annual S&M charges of US$150,000 applicable to the Matching Engine Support until the delivery of the GTA system.

90 As with the Arrangement, however, a review of Mr White's email showed that it could not have provided the basis for a legally binding Revised Agreement with the terms as pleaded. The "compromise" that Mr White actually put forward in his email on 28 March 2012 was as follows:

> *Could you please discuss internally on my compromise of* ***<u>ICDX paying the outstanding amounts of the OMS (E-Broker Core System) which is 75,000 USD from the 1st July 2011 to the 30th June 2012.. there will still be a 150,000 USD payment for the S&M on the Matching Engine Support that ICDX will hold (which is for the same period) .. until we move the platforms onto the GT system</u>****, but this will allow for me to continue with other initiative like the X-link PALN projects etc..*
>
> *As also mentioned the GT system has been tested for the Back Office JV2 and also the physical delivery and is at a point where* ***<u>we are ready to introduce the system to ICDX as a short term test, before looking at this being the replacement of the existing VMS system you have and the move from your existing Data Centre</u>*** *which is planned for July 2012.*
>
> [emphasis added in bold underline]

91 From the above, it was evident that insofar as Mr White spoke of the Defendant withholding any S&M payment, he was referring in clear and specific terms to the S&M charge of US$150,000 payable for the Matching Engine Support for the period 1 July 2011 to 30 June 2012. Moreover, as with the Arrangement, given Mr White's stated concern with the "build up" of a "large amount" of unpaid S&M charges and with his parent company's attitude towards such a situation, it was unbelievable that if the parties had indeed varied their contract to let the Defendant withhold all S&M charges payable for the Matching Engine Support until it received the GTA, this should not have been expressly articulated in Mr White's email.

92 As for the Plaintiff's purported obligation to upgrade the Defendant to the GTA system, which the Defendant insisted was the basis on which they accepted the Revised Arrangement,[144] it was also not possible to construe Mr White's 28 March 2012 email as having made or reiterated any such promise. Instead, as with his 30 May 2011 email, it was clear that insofar as the 28 March

[144] [20] of the Defence and Counter-claim.

2012 spoke of the GTA system, it merely spoke of the Plaintiff offering this system to the Defendant "as a short term test before looking at this being the replacement for the existing VMS system". Again, as with the Arrangement, there was no discussion of the exact timeline for the delivery of the GTA system, or of the price of the GTA and/or the cost of upgrading to the GTA.

93 Tellingly, in its Closing Submissions, the Defendant sought to resile from the terms it had pleaded in respect of the Revised Arrangement. It contended in its Closing Submissions that in the Revised Arrangement:

> … not much was changed from the terms of the Arrangement, only that:
>
> (1) The Defendant would pay the Plaintiff, as a compromise, the amounts of S&M on the E-Broker Core System and Front End ***for the period from 1 July 2011 to 30 June 2012, i.e. the annual fee of US$75,000***; and
>
> (2) The Plaintiff would roll out the GTA gradually, beginning first as a short term test, ***with a view to overhauling the existing system by July 2012, i.e. within four (4) months of Mr White's 28 March 2012 email***.
>
> [emphasis added in bold italics]

94 From the Closing Submissions, it appeared that the Defendant was arguing that the Revised Arrangement simply provided for the Defendant to pay the outstanding S&M charge for the E-Broker Core System and Front End for the period 1 July 2011 to 30 June 2012 (i.e. a sum of US$75,000), whilst requiring the Plaintiff to roll out the GTA with a view to overhauling the Defendant's existing system by July 2012. The necessary implication was that the Revised Arrangement left unchanged the terms of the Arrangement which allegedly allowed the Defendant to withhold *all S&M payments* until its acceptance of the GTA.

95 I was unable to accept this submission. The terms of the Revised Arrangement as described in the Defendant's Closing Submissions were not at all the terms pleaded in [19] of the Defence and Counter-claim, which had stated that the Revised Arrangement provided for the Defendant to *pay annually the S&M charge of US$75,000 applicable to the E-Broker Core System and Front End, while withholding the annual S&M charges of US$150,000 applicable to the Matching Engine Support until the delivery of the GTA system*. Nor was it ever pleaded in the Defence and Counter-claim that the GTA system would be rolled out with a view to overhauling the Defendant's existing system by July 2012, i.e. within four months of Mr White's 28 March 2012 email. Indeed, in this respect, nothing in the 28 March 2012 email remotely suggested that the GTA system would be rolled out with a view to overhauling the Defendant's existing system by July 2012; the mention in that email of July 2012 was in reference to the date of the Defendant's intended move from its existing Data Centre, and could not by any stretch of the imagination be read as the promised deadline for the replacement of the Defendant's existing system with the GTA:

> *… the GT system has been tested for the Back Office JV2 and also the physical delivery and is at a point where we are ready to introduce the system to ICDX as a short term test, before looking at this being the replacement of the existing VMS system you have and **the move from your existing Data Centre which is planned for July 2012**.* [emphasis added in bold underline]

96 In any event, as stated earlier, the supposed deadline of July 2012 was not pleaded as a term of the Revised Arrangement, and our courts have consistently held that "parties are strictly bound by their pleadings and the court may not decide on issues not raised therein": *Bumi Geo Engineering Pte Ltd v Civil Tech Pte Ltd* [2015] 5 SLR 1322 ("*Bumi Geo*") at [48].[145]

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145 Tab 1 of the Plaintiff's Bundle of Authorities ("PBOA") for Reply Submissions.

97 More importantly, the fact that the Defendant was so ready to shift its position from its pleaded case demonstrated to me the lack of credibility of its case. For the reasons set out above, I also rejected the contention that parties had concluded a binding contractual variation vis-à-vis the Revised Arrangement.

Mr White's internal emails

98 In contending that the parties had reached a binding agreement in the Arrangement and/or the Revised Arrangement to vary their contractual rights and obligations, the Defendant placed considerable emphasis on two internal emails sent by Mr White to Mr Oliviero. The Defendant argued that the words used by Mr White in these internal emails showed that he viewed the parties as having reached a binding agreement vis-à-vis the Arrangement and/or the Revised Arrangement. It pointed out, for example, that in his email to Mr Oliviero on 30 August 2012, Mr White had stated the following:[146]

> *… We had the original agreement based on an S&M of $225,000 per annum which was 150,000 USD for the matching / clearing PME and 75,000 USD for the OMS part of the system.*
>
> *… [W]hen the exchange did finally launch we agreed that the S&M would be starting from July 2010 with all previous support being waived as part of the process.. when we got to the end of 2010, due to making the books look better in Pats for the YE 2010 we had a switch round where ICDX paid for two period within 2010 and had a free period over Jan to July 2011.. at which stage the normal fees would be charged. (addendum 1) we had a number of issues in-between which resulted in a letter from their legal on Non-Compliance. which at that stage now placed us into another issue of them holding the Jul to Dec 2010 payment back, yet we had were to recognise this in the 2010 YE..*
>
> *We got to a point where through further negotiations in early July 2011 we agreed on the payment for the $112,500 to be paid and there would be no further payments for S&M until they were*

146 p 87 of Mr Oliviero's AEIC.

> *provided a working GT system.. which was agreed with the Exec Management at Pats..* ***please note this meant Payment would only be HELD back not waived.***
>
> *We got to a point in March 2012 when we thought we were able to now deliver the GT at which point we all agreed with ICDX on this matter and asked for a "good will" payment of 75K which was part payment for the outstanding amounts.. as you know a couple of weeks later the whole GT was pulled back leaving me and the team very embarrassed first off.. and left with the issue below of June 11 to June 12 and now into this next half year.. of the H2 2012.*
>
> [emphasis in original in bold underline]

99 I make the following observations in respect of the Defendant's reliance on Mr White's internal emails (or more accurately, on references in his email to "agreement" between the parties). Firstly, it was not disputed that Mr White – and indeed, the other protagonists in this dispute – were not legally trained. Mr White's use of expressions such as "agreement" and "agree" must in my view be treated with some circumspection, instead of it being immediately assumed that by such expressions he was referring to a legally binding contract. As Viscount Maugham cautioned in *G. Scammell* (at pp 254–255), "laymen unassisted by persons with a legal training are not always accustomed to use words or phrases with a precise or definite meaning". That our courts have taken a similarly circumspect approach to the use by laymen of apparent legal terms may be seen in *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 ("*Benzline*").[147] In that case, one of the issues in contention was the legal status of a payment of $300,000 made by the respondents Supercars to the appellant Benzline. At trial, Benzline's key witness Mr Ng had given testimony in which he had apparently conceded that the respondent Supercars' First Purchase Order was "placed on the condition that Supercars would be sub-dealer" and that Supercars' $300,000 deposit was

[147] Tab 28,Vol 2 of DBOA for Closing Submissions.

"a pre-contract deposit on the basis that the parties were going to sign a sub-dealer contract". On appeal, the CA acknowledged that Mr Ng's testimony had been "frankly disastrous" – but held that his testimony "must be interpreted bearing in mind his lack of legal training" (at [66]):

> What a layperson describes as a "condition" or "basis" may not be that in law. In the present case, it is equally plausible that, when read in context, Mr Ng's answers reflect only that the parties *expected* or *assumed* that the Exclusive Sub Dealership Agreement would be entered into, and not necessarily that this expectation / assumption was communicated and formed the legal basis for the transfer.

100 In the same vein, Mr White's use of expressions such as "agreement" and "agree" in his internal emails did not in my view automatically signify that he was affirming the existence of a binding agreement for the Defendant to withhold all S&M payments until its acceptance of the GTA. In fact, a review of other internal email correspondence indicated quite the opposite. Thus, for example, in his email of 22 May 2012[148] to Mr Oliviero (and another colleague), Mr White had started by stating that the Defendant had experienced "many issues with the workings of the old VMS PME" and that:

> *… Due to the many issues encountered it was agreed in 2011 that ICDX would hold back the S&M annualised payments until they received the GT platform, which at that point in time we were expecting to be available in H2 2012. the prerequisite for this agreement was for ICDX to pay their outstanding 6 month S&M, which at the time was refusing to pay due to the build up of issues that had taken place and the Notice of Non-Compliance … to Pats for the issues they had faced without any real solution to the issues.*

101 According to the Defendant, it was revealing that in this email, Mr White again used the expressions "agreed" and "agreement" in referring to the Defendant's withholding of S&M payments, and that he did not use the

[148] pp 79-80 of Mr Oliviero's AEIC.

expression "goodwill gesture" to refer to these arrangements even though he used that expression to refer to his suggestion of a 50% discount on the Defendant's S&M fees. Crucially, however, what the Defendant omitted to point out was that in the same email, in presenting his suggestion of a 50% discount to Mr Oliviero, Mr White described that suggestion and the then existing arrangements as follows:[149]

> ***Goodwill Gesture***
>
> *I would like to offer ICDX a S&M reduction of 50% of* ***the 225,000 USD which they are contracted to at present****, which would mean they would be paying $112,500 until we get them to move onto GT PME and get to a live state.. I'm not sure on how they will react, given the time they have waited and the fact that they have had to adopt a new back office system for the PME after the J-Clear (J-Vision) product wasn't able to handle certain report or contracts with more than 2 decimals.*
>
> *I'm not one for offering such goodwill normally, but given the trouble and time this has been a hanging issue.. I think it's important we try to compromise with ICDX. They also have the licence for PALN Penyaluran Amanat Luar Negeri trading from Indonesia and have Phillips trading via their screens into central Singapore locations… So if anything I wish to keep this relationship going due to the changes which will continue to take place at this account with the company and family of ICDX being such high profile people in Indonesia.*
>
> [emphasis added in bold italics]

102 I found the above passage extremely telling for the following reasons. Firstly, Mr White clearly stated that what the Defendant was "contracted to at present" was the payment of S&M charges of US$225,000 annually. This was precisely the annual S&M amount the Defendant were obliged to pay pursuant to the Licence Agreement and the Addendum. Mr White did not refer to any binding agreement in the interim having varied this obligation such that the Defendant was entitled to withhold all S&M payments post-31 December 2010

[149] p 80 of Mr Oliviero's AEIC.

till its acceptance of the GTA (*per* the Arrangement), or such that the Defendant was obliged to pay only the annual S&M charges for the E-Broker Core System and Front End (US$75,000 annually) whilst withholding the S&M charges for the Matching Engine Support (US$150,000 annually) till the delivery of the GTA (*per* the Revised Agreement).

103 Secondly, if indeed parties had reached a binding agreement *per* the terms of the Arrangement or of the Revised Arrangement, Mr White's proposed "goodwill gesture" made no sense as it would have meant offering the Defendant worse payment terms than those they had supposedly already agreed to: it would have meant the Defendant coughing up the considerably larger amount of US$112,500 in annual S&M payments – as opposed to being entitled to withhold all further S&M payment until acceptance of the GTA, or being entitled to pay only US$75,000 annually until such acceptance. In other words, assuming the Arrangement and/or the Revised Arrangement had achieved contractual variation *per* the terms pleaded by the Defendant, it was difficult if not impossible to see how the 50% reduction in S&M fees proposed by Mr White would have constituted a "goodwill gesture" capable of placating the Defendant. Mr White's proposed "goodwill gesture" only made sense if as at 22 May 2012 (the date of his email), the Defendant was still contractually obliged to pay annual S&M fees of US$225,000.

The absence of invoices issued between 30 May 2011 and 10 June 2013

104 The Defendant also cited the absence of invoices issued by the Plaintiff between 30 May 2011 and 10 June 2013 (save for the invoice dated 28 March 2012 for US$75,000) as being evidence in support of the proposition that a binding agreement had been reached in May 2011 for it to withhold all S&M payments pending delivery of the GTA system.

105 I did not think that this fact in itself was of much assistance to the Defendant. Looking at the relevant email correspondence, it was clear that between May 2011 and August 2012, Mr White was attempting to find a payment solution that would on the one hand appease the Defendant, given its grouses about the Plaintiff's software, and on the other hand, be acceptable to the Plaintiff's parent company. These twin concerns were articulated in his 28 March 2012 email, where he expressly stated:

> *… we are now at a stage where we need to work through an agreement with the outstanding Support & Maintenance mainly because the build up of this value with be 225,000 USD as of June 30th .. which is quite a large amount running into the remainder of the year. And will be something of a value which will concern our parent company as we look to work closely with ICDX for further growth at discount installations etc..*

106 As Mr Oliviero put it, parties were essentially "going back and forth around what would be the payment structure that ICDX [the Defendant] wanted, Barry going back with alternative or with revised pricing and effectively Barry and ICDX trying to reach or having a discussion around what agreement they wanted to reach and how they wanted to change the contract".[150] It should also be remembered that Mr White left the Plaintiff's employment in end-October / early November 2012 without ever giving a substantive reply to Mr Setiabudi's email of 28 August 2012 (in which the latter had made certain proposals for how *past* S&M payments were to be treated); that Mr Oliviero then met with Mr Widjaja in January 2013 in an attempt to "find an amicable resolution in what was a long outstanding dispute in terms of non-payment and open support issues"; and that following the January 2013 meeting, the Plaintiff spent several months reviewing the list of software issues raised by the Defendant and documenting what it understood the contractual position between the parties to be.[151] In these circumstances, the absence of any invoices issued by the Plaintiff

[150] See the transcript for 4 September at 138:6 to 139:16.

was not surprising and did not necessarily suggest that parties had concluded a binding agreement to let the Defendant withhold all S&M payments until delivery of the GTA.

The Defendant's conduct

107 The Defendant's conduct in response to the demands made by the Plaintiff for payment from June 2013 provided additional evidential support for the above conclusion. Despite being threatened with the suspension of the Plaintiff's services,[152] and despite Mr Oliviero having on 6 July 2013 declined his invitation to visit Jakarta to discuss "outstanding issues",[153] Mr Widjaja's letter of 22 July 2013 made no mention of the Arrangement or the Revised Arrangement having varied the Defendant's payment obligations, nor of the Plaintiff's supposed obligation to upgrade the Defendant's system to the GTA system.

108 Furthermore, it should be noted that on 18 October 2013, when the Defendant forwarded the Plaintiff copies of Mr White's email of 28 March 2012 and Mr Setiabudi's email of 28 August 2012,[154] the claim put forth by the Defendant was that these emails constituted "written proof" of the agreement for it to pay only US$75,000 annually in S&M fees.[155] There was no mention at all of a binding agreement allowing the Defendant to withhold all further S&M payment until delivery of the GTA system – despite the Defendant claiming that this was the agreement *per* the Arrangement and despite the

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151 See the transcript for 4 September at 93:24 to 94:4.

152 p 121 of Mr Oliviero's AEIC.

153 p 114 of Mr Oliviero's AEIC.

154 pp 132-141 of Mr Oliviero's AEIC.

155 p 132 of Mr Oliviero's AEIC.

Defendant asserting in its Closing Submissions that "not much" had changed even with the Revised Arrangement.

109 It should be added that although Mr Widjaja claimed in cross-examination that Mr Setiabudi's email of 28 August 2012 was the Defendant's response to Mr White's email of 28 March 2012,[156] an examination of Mr Setiabudi's email showed that he was proposing a number of new terms which had never been mentioned in Mr White's email of 28 March 2012 – namely, that the alleged "agreement" for the Defendant to pay only US$75,000 in S&M charges annually was to be applied *retrospectively* to the previous S&M payments totalling US$225,000 made by the Defendant (US$112,500 on 9 July 2010 and US$112,500 on 4 July 2011), such that it would be treated as having paid off all S&M charges due "through to 31st May 2013".[157] Indeed, elsewhere in cross-examination, Mr Widjaja was compelled to concede that Mr Setiabudi's 28 August 2012 could not be an explicit acceptance of Mr White's 28 March 2012 email;[158] and as noted earlier, in its Closing Submissions, the Defendant admitted that "the documentary record of any acceptance [of Mr White's 28 March 2012 email] seems scarce".[159]

110 Even as late as 24 January 2014,[160] Mr Widjaja's correspondence with the Plaintiff made no mention of the Arrangement and/or the Revised Arrangement and/or the Plaintiff's supposed obligation to upgrade the Defendant's existing system to the GTA. As noted earlier, Mr Widjaja admitted as much in cross-examination. As to his attempt in re-examination to assert that

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156 See the transcript for 5 September at 84:19 to 85:2.

157 p 136 of Mr Oliviero's AEIC.

158 See the transcript for 5 September at 78:6 to 79:1.

159 [41] of the Defendant's Closing Submissions.

160 5 ABD 2516-2517.

various phrases in his letter of 24 January 2014 should be understood as *implied* references to the Arrangement and to the GTA system, I found this belated explanation contrived and wholly lacking in credibility.

Summary of my findings on whether the Arrangement and/or the Revised Arrangement effectively varied the parties' contractual rights and obligations

111 In summary, having regard to the reasoning set out in [68] to [110], I found that the Arrangement and the Revised Arrangement did not amount to legally binding contractual variations which varied the parties' rights and obligations under the Licence Agreement and the Addendum. On the evidence adduced, I found that that the email correspondence – including Mr White's emails of 30 May 2011 and 28 March 2012 – really represented a series of ongoing negotiations between the parties arising from the Defendant's alleged unhappiness with various software issues and its unwillingness to pay S&M charges. I found that any "offers" Mr White made in the said emails to let the Defendant withhold S&M payments were non-binding "goodwill gestures"; further, that he never at any point concluded a binding agreement with the Defendant to let it withhold all S&M payments till its acceptance of the GTA system, or to let it pay only US$75,000 annually pending such acceptance.

112 Given my factual findings on the issue of whether the Arrangement and the Revised Arrangement constituted legally binding agreements, I did not find it necessary to rule on the argument raised by the Defendant as to clause 22.1 of the Licence Agreement (which specified that contractual variations were to be in a particular written form) being void for uncertainty. In other words, I was prepared to assume in the Defendant's favour that clause 22.1 should be disregarded and to approach the evidence on that basis.

The alleged promissory estoppel

113 I next considered the Defendant's argument of promissory estoppel. This was pleaded in [28] of the Defence and Counter-claim as follows:

> [A]s a result of the ongoing correspondence between the Plaintiff and the Defendant between 28 March 2012 and 19 August 2014, the Arrangement and the Revised Arrangement, the Plaintiff is estopped from relying on the non-issuance of any Notice of Dispute as indication that the Defendant accepted and/or waived all rights to dispute, each of the Invoices.

114 The Defendant argued that even if the Arrangement and/or the Revised Arrangement were found not to be binding contractual variations, "[i]n making the Arrangement and later the Revised Arrangement … the Plaintiff clearly unequivocally promised to forbear on insisting upon any legal entitlement it had to future S&M payments, until and unless the Defendant was provided and implemented the GTA system".[161]

115 As to the legal principles applicable, it was not disputed that *per* the CA's judgement in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [57],[162] the Defendant had the burden of proving the following if it wished to establish the alleged promissory estoppel:

(a) the Plaintiff had made an unequivocal representation to the Defendant that it would not insist on its legal rights to all future S&M payments until the provision of the GTA system to the Defendant;

161 [208] of the Defendant's Closing Submissions.

162 Tab 2 of PBOA for Closing Submissions.

(b) the Defendant had relied on the representation by the Plaintiff, resulting in a change of position; and

(c) it would be inequitable for the Plaintiff now to enforce its legal rights to payment of its invoices.

116 In arguing that the Plaintiff had made an unequivocal representation that it would not insist on its legal rights to all future S&M payments until the provision of the GTA system to the Defendant, the Defendant relied primarily on the text of Mr White's emails of 30 May 2011[163] and 28 March 2012.[164] The Defendant contended that "[t]he plain text of Mr White's email [of 30 May 2011] … in particular, the terms encapsulated at items 2 and 3 – [were] sufficient, by itself, to evince a promise on the part of the Plaintiff to allow the Defendant to withhold S&M payments, until the Defendant signed off on the GTA system";[165] further, that the 28 March 2012 email was "in substance, a reiteration of the Arrangement" that "only reinforced the same".[166]

117 For the reasons explained in [118] to [124], I did not find that the 30 May 2011 and the 28 March 2012 emails could be construed as making the unequivocal representation argued for by the Defendant.

118 In respect of the 30 May 2011 email, the Defendant sought to rely on a sentence in Mr White's response to Mr Setiabudi's query (in the latter's 23 May 2011 email) as to what would happen if the Defendant "*would go through the same experience with the current platform*". Mr White, in responding, had stated *inter alia*:

163 [210]-[214] of the Defendant's Closing Submissions.

164 [217]-[220] of the Defendant's Closing Submissions.

165 [211] of the Defendant's Closing Submissions.

166 [217]-[218] of the Defendant's Closing Submissions.

> *I hope none of this will be the case and if any of it is, you will not sign off on the UAT and hold back the money.*

119 The Defendant sought to place great emphasis on the sentence "you will not sign off on the UAT and *hold back the money*" was clearly a reference to the Plaintiff's promise in the same email that the Defendant would be allowed "to withhold S&M payments until [it] signed off on the GTA system". It submitted that items 3 and 4 of the 30 May 2011 email showed parties had "expected that *the GTA system would have been tested and implemented onto the Defendant's system over the next three (3) months*":[167]

> Accordingly, it was fully envisioned that the Defendant would have, by some point, signed off on the acceptance of the GTA system. However, as it turned out, the GTA not only failed to be tested meaningfully or implemented during this time frame, it never was delivered at all. Accordingly, in line with Mr White's representation that the Defendant would not sign off the UAT and '*hold back the money*', it is only logical that all further S&M fees that would have otherwise been due would be, in such circumstances, similarly held back. Were it otherwise, the entire Arrangement would have virtually no meaning, since the very premise of the Arrangement was to enable the Defendant to obtain a replacement for the defective software …

120 In other words, what the Defendant was saying was that this one sentence should be construed as a representation by Mr White that in the event the Defendant's software was not replaced with the GTA within 3 months from 30 May 2011, the Defendant would be entitled to withhold all further S&M payments until the replacement occurred. To put such a construction on Mr White's statement, however, would have required that I put aside basic canons of linguistics and logic, and engage instead in hazy speculation. In the first place, the reference to the timeline of "the next 3 months" was clearly a reference to the time period in which Mr White was expecting to be able to let

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[167] [214(1)] of the Defendant's Closing Submissions.

the Defendant test the GTA system. This was clear from item 4 of his email, in which he expressly stated:[168]

> *4. Patsystems to offer their New installed in-house GT system to ICDX for test purposes over the course of the next 3 months until the end of August 2011*
>
> [emphasis in original in grey]

121 In this connection, I found the approach of the CA in *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd and another appeal* [2014] 2 SLR 156 ("*Cupid Jewels*") to be helpful in elucidating the degree of certainty and clarity required in the representation alleged to form the basis of a promissory estoppel. In *Cupid Jewels*, the appellant Cupid Jewels was a tenant of the respondent Orchard Central. Cupid Jewels fell into rental arrears from August 2009, but it was only in May 2010 that the parties began negotiations for rental review. On 2 June 2010 Orchard Central sent a letter to Cupid Jewels offering a number of rebates on its base rent on an *ex gratia* basis. Cupid Jewels did not accept the offer in this 2 June 2010, and talks between the parties continued without any agreement being reached. On 13 July 2010, Cupid Jewels sent an email requesting that the payment of rental arrears commence in August 2010 in 24 monthly instalments. On 27 July 2010 Orchard Central replied via email stating:

168 2 ABD 768.

> We have reviewed your request comprehensively and regret that we are unable to agree to your request of payment of your outstanding arrears in 24 months. We have reviewed, and request that all the arrears be paid *by 31 December 2010*.
>
> *We look forward to your instalment plans, afterwhich, we can move our discussion forward.*
>
> [emphasis added]

122 Cupid Jewels acknowledged the above email on 29 July 2010 and notified Orchard Central that it would revert after meeting with its owners who were then outstation. Between 29 July 2010 and 5 August 2010, parties continued to correspond about matters such as the provision of audited sales receipts. However, on 6 August 2010, Orchard Central filed an *ex parte* application in the High Court for a Writ of Distress in respect of Cupid Jewel's outstanding rental arrears for the period August 2009 and 2010 (by then a total sum of $891,507.99). The application was granted, and the sheriff proceeded to seize the goods found on the tenanted premises. Cupid Jewel's application for release of the distrained goods was dismissed by the High Court Judge, whose decision was upheld by the CA. The Judge found that Orchard Central had made a clear representation in its 27 July 2010 email that it would not enforce its legal rights under the lease agreement at least before the negotiations on payment of arrears had broken off – although he found that Cupid Jewels had failed to prove the elements of detriment and reliance. On appeal, however, the CA disagreed with the Judge's finding on the element of representation. On an examination of the communications between the parties, the CA held (at [39] and [41]) that:

> … there was in fact *no* clear and unequivocal representation by Orchard Central that it would not enforce its legal rights under the Lease Agreement. While the parties were certainly negotiating over the rental rebates and repayment arrangements, there was nothing in the correspondence between the parties that evinced a representation that was sufficiently of the character necessary to invoke the equitable doctrine of promissory estoppel. On appeal, Cupid Jewels

> sought to characterise the 27 July 2010 Email as an offer for all arrears to be paid by 31 December 2010, and that this offer was still open at the time of Orchard Central's application for the Writ of Distress. We disagreed with such a characterisation. The 27 July 2010 Email was simply too uncertain to be an offer and was, at best, a mere invitation to treat. Even if this email was an offer (which we did not find), the fact remained that there was no clear and unequivocal representation by Orchard Central *that it would not enforce its legal rights*.
>
> … Ultimately, that Cupid Jewels was under a (false) sense of security arising from Orchard Central's initial forbearance and that Cupid Jewels conducted itself according to that self-perceived assurance did not detract from the fact that … *no representation giving rise to a promissory estoppel was ever made*.
>
> [emphasis in original]

123 Applying a similar approach to the communications between the parties in the present case, there was nothing in the 30 May 2011 email which could remotely be construed as a promise to let the Defendant withhold all S&M payments until such time as the replacement of its existing system with the GTA. In fact, in respect of items 2 and 3 of the email (which the Defendant relied on "in particular"), item 2 referred unequivocally to the withholding of "*the $112,500 S&M payment which is due June 1st 2011 and caters for the S&M until the 31st December 2011*"; and item 3 stated clearly that the Plaintiff would "only request *the payment for the $112,500* at the point where [the Defendant] signoff on the GT PME system". It followed as a matter of logical construction that in talking about "the money" to be held back, Mr White was referring to the US$112,000 for the period 1 June 2011 to 31 December 2011 described in item 2 of the email. Given that Mr White had taken pains to spell out in item 2 the precise S&M period for which he was offering to let the Defendant withhold payment, it was unbelievable that if he had been intent on representing that the Defendant could withhold all further S&M payments till delivery of the GTA,

he should have refrained from saying so in equally specific and unambiguous terms.

124 In arguing that the Plaintiff had in the 30 May 2011 email made an unequivocal representation that the Defendant would be allowed to withhold all S&M payments till delivery of the GTA, the Defendant also relied on the absence of invoices issued by the Plaintiff between 30 May 2011 and 10 June 2013 (save for the invoice dated 28 March 2012 for US$75,000). However, as alluded to earlier, I did not think the absence of invoices in the said period was particularly instructive. As mentioned earlier (at [106]), during the period in question, parties were essentially "going back and forth" to discuss and negotiate a payment solution which both could live with, taking into account the Defendant's complaints about software issues and the Plaintiff's concerns about unpaid invoices becoming bad debts in its books. By early November 2012, when Mr White left the Plaintiff's employment, he had not provided a substantive reply to Mr Setiabudi's email of 28 August 2012; and following Mr Oliviero's meeting with Mr Widjaja in January 2013, the Plaintiff had taken a few months to work through the software issues raised by the Defendant and to document what it understood the contractual position to be.[169] Having regard to the prevailing circumstances, I did not find that the absence of any invoices issued by the Plaintiff in this period indicated some prior promise to let the Defendant withhold all S&M payments till delivery of the GTA. If indeed the Defendant had derived some sense of reassurance from the absence of invoices between May 2011 and June 2013 (leaving aside the 28 March 2012 invoice), it was wholly self-induced.

169 See the transcript for 4 September at 93:24 to 94:4.

125 For the reasons set out above, I rejected the contention that the Plaintiff had made an unequivocal representation to the Defendant that it would not insist on its legal rights to all future S&M payments until the provision of the GTA system to the Defendant. Since this was the first of the mandatory elements required for a promissory estoppel to arise, it was not necessary for me to consider the other elements of reliance, change of position and inequity; nor was it necessary for me to consider the arguments made on whether – if promissory estoppel were established – the Plaintiff had given reasonable notice that the conditions for it had come to an end.

The Defendant's counter-claim for refund of the entire licence fee or alternatively damages

126 I will next deal with the Defendant's counter-claim. As noted earlier, the Defendant pleaded breaches by the Plaintiff of "the terms, whether express or implied, of the [Licence] Agreement and Addendum",[170] in respect of which it sought the refund of the entire licence fee or, alternatively, damages. In claiming breach of contract by the Plaintiff, the Defendant cited clause 10.1 of the Licence Agreement, clause 2.2 of Schedule 5 of the Licence Agreement, and the Review Criteria set out in the Addendum.[171] The Defendant did not plead any specific implied terms in the Defence and Counter-claim.

The Defendant's argument that clause 10.1 of the Licence Agreement imposed on the Plaintiff an obligation to provide a "reasonably workable" software system

127 Given the manner in which it had pleaded the alleged contractual breach by the Plaintiff, I was taken aback to see that in its Closing Submissions, the Defendant contended that "[t]he Plaintiff was obliged to provide the Defendant

[170] [37] and [38] of the Defence and Counter-claim.

[171] [34]-[36] of the Defence and Counter-claim.

with a software system that was *reasonably workable,* pursuant to Clause 10.1 of the Agreement"; "[a]lternatively, the Plaintiff was under an *implied obligation* to provide the Defendant with a software system that was reasonable workable".[172] The Defendant argued that the use of "the term 'satisfactorily' in clause 10.1 of the [Licence] Agreement obliged the Plaintiff to provide a software system that would be reasonably workable".[173] Citing *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"),[174] the Defendant also purported to rely on the extrinsic evidence of the parties' pre-contractual communications, claiming that "[t]he surrounding factual circumstances which culminated in the signing of the [Licence] Agreement indicates that parties had entered into a contract for the provision, by the Plaintiff to the Defendant, of a full-fledged and holistic software system that would enable the Defendant to function effectively as a commodity and futures exchange in Indonesia".[175]

128 I was taken aback by the above arguments, firstly, because the Defendant did not at any point plead in its Defendant and Counter-claim that clause 10.1 of the Licence Agreement should be construed as giving rise to a binding obligation on the Plaintiff's part to "provide the Defendant with a software system that was *reasonably workable*". Nor was it pleaded in the alternative that the Plaintiff was subject to an implied contractual term obliging it to "provide the Defendant with a software system that was *reasonably workable*". The Defendants also did not plead any of the extrinsic evidence sought to be relied on in its proposed construction of the parties' contractual rights and

172 [241]-[251] of the Defendant's Closing Submissions.

173 [243] of the Defendant's Closing Submissions.

174 Tab 16, Vol 1 of DBOA for Closing Submissions.

175 [243(1)] of the Defendant's Closing Submissions.

obligations. This omission to plead these matters and the absence of any explanation for such omission were – with respect – baffling, given that they formed a vital part of the Defendant's case – indeed, the very lynchpin of its Counter-claim. Our courts have consistently held that "parties are strictly bound by their pleadings and the court may not decide on issues not raised therein": see [48] of *Bumi Geo*.[176] Moreover, having cited *Sembcorp Marine Ltd v PPL Holdings Pte Ltd & anor* [2013] 4 SLR 193 ("*Sembcorp Marine*")[177] in its Closing Submissions,[178] the Defendant could not be unaware of the principles laid down by the CA in that case In *Sembcorp Marine*, the CA had endorsed the adoption in *Zurich Insurance* of a contextual approach to contractual construction which permitted recourse to extrinsic evidence of the external context of a contract in aid of its construction. At the same time, the CA cautioned that "the broad language associated with the contextual approach [was] susceptible to being misunderstood and misapplied", and that it was "not a licence to admit all manner of extrinsic evidence". The CA then set out what it called "requirements of civil procedure" for parties proposing a contextual approach to the construction of a contract or the implication of contractual terms (at [73]):

> [A]lthough the contextual approach is most frequently engaged in the context of interpretation, this is not to say that the contextual approach is irrelevant when it comes to other aspects of construction such as implication or rectification. Indeed, it is trite that the courts must have regard to the context at the time of contracting when considering the issue of implication. Therefore, to buttress the evidentiary qualifications to the contextual approach to the construction of a contract, the imposition of four requirements of civil procedure are … timely and essential:

176 Tab 1 of PBOA for Reply Submissions.

177 Tab 19, Vol 1 of DBOA for Closing Submissions.

178 [246] of the Defendant's Closing Submissions.

> (a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;
>
> (b) second, the factual circumstances in which the facts in (a) were known to both or all of the relevant parties must also be pleaded with sufficient particularity;
>
> (c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and
>
> (d) fourth, the obligations of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).

129 In *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*"),[179] the CA reiterated the importance of the pleading requirements established in *Sembcorp Marine*, noting that it embodied "'a cards-up approach' towards commercial litigation", and brought about critical benefits including procedural fairness and substantive justice. The CA further held (at [51]) that:

> … it is not enough for a party to allude, in a vague and general manner, to the result which it seeks to reach. Instead, as stated in *Sembcorp Marine* … each fact in the factual matrix, the circumstances under which it was known to both parties and, crucially, the *effect that such facts would have on the intended construction* must all be pleaded with specificity. [emphasis in original]

130 Although the Defendant sought to include in Mr Widjaja's AEIC[180] details of the extrinsic facts relied on for its proposed construction of clause 10.1 of the Licence Agreement, this did not cure its breach of the pleading requirements set out in *Sembcorp Marine*. In *Yap Son On*, the CA firmly rejected the respondent's argument that its failure to observe the pleading

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179 Tab 6 of PBOA for Reply Submissions.

180 [74]-[80] of Mr Widjaja's AEIC.

requirements was remedied by its having set out the necessary details in its witnesses' AEICs (at [52]):

> We also reject the Respondent's argument that it was enough for these details to have been set out in the AEICs. This runs contrary to the settled principle of law that defects in pleadings cannot be cured by averments in affidavits …

131 The Defendant's failure to plead the Plaintiff's alleged contractual obligation to provide "a software system that was *reasonably workable*" was plainly prejudicial to the Plaintiff. I should point out that there was no mention of the Defendant's new "case" even in the Opening Statement filed by the Defendant's counsel. In relation to the Defendant's counter-claim, whilst there was a brief reference in the Opening Statement to "business common sense" requiring "that the software system be, at the very least, sufficiently workable", this was not elaborated upon: the Defendant simply proceeded to cite clause 10.1 of the Licence Agreement read with clause 2.2 to Schedule 5 and the Review Criteria in the Addendum, without revealing its new "case" that clause 10.1 – properly construed – imposed an obligation to provide a "reasonably workable system". The Opening Statement also made no mention at all of the Defendant's reliance – in the alternative – on an *implied* contractual term to the same effect. It was apparent that the Plaintiff was completely thrown off-guard when the Defendant eventually put forward these claims in its Closing Submissions: nothing in the Plaintiff's Closing Submissions dealt with this issue, and the Plaintiff had to then scramble to deal with it in its Reply Closing Submissions.

132 For these reasons, I was of the view that the Defendant's breach of the pleading requirements established in *Sembcorp Marine* was fatal to the case it put forward in closing submissions vis-à-vis its counter-claim for contractual breach.

133 In any event, I would stress that even if I were to disregard the Defendant's breach of the pleading requirements, its proposed construction of clause 10.1 of the Licence Agreement simply could not be sustained. To recap, the text of clause 10.1 read as follows:[181]

> Patsystems warrants that the Software will comply with the Specifications set out in the Project Plan at the date of Acceptance and operate on the media on which they are supplied immediately on installation subject to their having been installed on the Equipment. Customer's sole remedy **in the event of the Software not so operating satisfactorily** will be (at the option of Customer) either the supply and installation on the Equipment of replacement versions of the Software or **the refund of any unused sums already paid by Customer to Patsystems on a pro rata basis**.
>
> [emphasis added by the Defendant in bold underline]

134 The Defendant sought to direct my attention to the highlighted portions of the above text, arguing that although the word "satisfactorily" was not defined in the Licence Agreement, "guidance [could] be taken from the well-established canons of contractual interpretation at law",[182] and that given the "plain meaning" given in the Oxford Dictionary to this word ("in a way that fulfils expectations or needs; acceptably")[183]:

> … the term "satisfactorily" within Clause 10.1 of the Agreement obliged the Plaintiff to provide a software system that would be reasonably workable. The software need not have been flawless, but it would, at minimum, have to be sufficiently defect-free such that the Defendant's customers could conduct their trades with reasonable efficiency.

135 I rejected the above arguments. With respect, it would have required blatantly ignoring all the other words in clause 10.1 which gave context to the

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181 [241] of the Defendant's Closing Submissions.

182 [242] of the Defendant's Closing Submissions.

183 [243] of the Defendant's Closing Submissions.

use of the word "satisfactorily". From the first sentence of clause 10.1, it was clear beyond doubt that what the Plaintiff (referred to as "Patsystems") was warrantying was that its software would, firstly, "comply with the Specifications set out in the Project Plan at the date of Acceptance", and secondly, "operate on the media on which they are supplied immediately on installation subject to their having been installed on the Equipment". The second sentence of clause 10.1 then proceeded to spell out what the Defendant's remedy (as the "Customer") would be "in the event of the software *not so operating satisfactorily*". The specific use of the word "so" was important, as it clearly signalled that the issue of whether the software operated "satisfactorily" – and therefore whether the Defendant was entitled to the remedy provided – must be determined with reference to the warranty stated in the first sentence: that is, the software would not be considered to be operating "satisfactorily" if it failed to "comply with the Specifications set out in the Project Plan at the date of Acceptance" or to "operate on the media on which they are supplied immediately on installation subject to their having been installed on the Equipment". Any construction of the word "satisfactorily" that overlooked the word "so" placed before it – and that ignored the first sentence of clause 10.1 – would do deliberate violence to the clear language of the clause.

136 The Defendant's proposed construction of clause 10.1 also ignored the express exclusions stated in clause 10.4. In particular, it ignored the fact that clause 10.4 expressly stated that the Plaintiff disclaimed any warranties that its software would be suitable and fit for any particular purpose, or that it would be error free or operate without interruption in whole or in part:

> 10.4 PATSYSTEMS AND PATSYSTEMS PARTIES MAKE NO OTHER WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, WITH REGARD TO ANY PRODUCTS AND SERVICES PROVIDED UNDER THIS AGREEMENT, AND/OR THE SOFTWARE, IN WHOLE OR IN PART.
>
> 10.4.1 WITHOUT LIMITING THE FOREGOING, PATSYSTEMS AND PATSYSTEMS PARTIES EXPLICITLY DISCLAIMS:
>
> 10.4.2 ALL WARRANTIES OF SUITABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE;
>
> 10.4.3 THAT THE SOFTWARE OR SYSTEM, IN WHOLE OR IN PART, WILL BE ERROR FREE OR WILL OPERATE WITHOUT INTERRUPTION;
>
> 10.4.4 THAT THE SOFTWARE WILL BE COMPATIBLE WITH ANY HARDWARE OR SOFTWARE OTHER THAN THE EQUIPMENT.

137 The Defendant's additional reliance on clause 2.2 of Schedule 5 to the Licence Agreement and on the Review Criteria stipulated in the Addendum did not assist its argument that clause 10.1 imposed on the Plaintiff an obligation to provide a "reasonably workable" system. In respect of clause 2.2 of Schedule 5, the Defendant attempted to rely on the first sentence under the sub-heading "Overview", which stated that the Plaintiff's "aim" was to "provide systems that meet business needs, are reliable, available and well supported".[184] What the Defendant failed to highlight, however, was that Schedule 5 was concerned specifically with defining the *Support and Maintenance Services* to be provided by the Plaintiff. This was clear from the cover page of Schedule 5,[185] and from the preamble in clause 2.1 of the schedule which stated (under the sub-heading "Purpose"):

> The purpose of this document is to define the support and maintenance services ("Services") to be provided by Patsystems

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184 [76] of Mr Widjaja's AEIC.

185 p 57 of Mr Oliviero's AEIC.

> to the Customer pursuant to the Agreement and in accordance with the terms set out below.

138 In other words, the contents of Schedule 5 were focused on defining the Plaintiff's support and maintenance obligations. Nothing in clause 2.2 or elsewhere in Schedule 5 suggested that clause 2.2 was intended to touch on the Plaintiff's warranties in the main Licence Agreement vis-à-vis its software. Moreover, the statement in clause 2.2 that the Plaintiff aimed to provide systems that met "business needs", were "reliable, available and well supported" did not appear to me to be anything more than a very general statement – the sort one might colloquially characterise as a vague "motherhood statement", incapable in itself of imposing on the Plaintiff any specific binding obligation, and certainly incapable of modifying or redefining the specific warranty provided in the first sentence of clause 10.1 of the Licence Agreement. Indeed, it was expressly stated in clause 2.1 of Schedule 5 that "[t]o the extent that there is any inconsistency between this schedule and the [Licence] Agreement, the terms of the [Licence] Agreement shall prevail".[186]

139 I would make similar observations in respect of the general references in the Review Criteria to the Plaintiff's "objectives of providing a system that meet business needs, are reliable and well supported".[187]

140 As to the Defendant's reliance on pre-contractual email communications between the parties as evidence supportive of its proposed construction of clause 10.1,[188] even assuming its failure to plead this extrinsic evidence did not preclude it from being considered, I would not have found this evidence to be of any assistance. In gist, the Defendant sought to rely on an email from

186 p 61 of Mr Oliviero's AEIC

187 [77] of Mr Widjaja's AEIC.

188 [243(1)] of the Defendant's Closing Submissions.

Mr White dated 4 June 2008 in which he had made several statements about how he felt the Plaintiff's "offering of a full turn key solution creates a very fitting scenario for ICDX to launch and grow at a rapid pace" and how its "clearing and back office system offerings will be able to offer the ICDX the necessary reporting to keep the regulators happy and allow easy flow of tax for profits taken on a daily basis".[189] Such statements, according to the Defendant, proved that the Plaintiff had a "commitment to provide a complete turnkey front to end solution that would meet the Defendant's needs as a new player on the market".[190]

141 I would make three key points in respect of the above argument. Firstly, the email communications relied on emanated from early June 2008 – more than a year before the signing of the Licence Agreement. Indeed, from the other remarks made by Mr White in the same email, it was plain that this email was sent at a point in time when the Plaintiff was conscious of other potential competition for the Defendant's custom: thus, for example, Mr White alluded to a rival "OMX platform" and the "weaknesses on other platforms and offerings". In other words, this email was clearly part of an ongoing effort by the Plaintiff at that early stage to interest the Defendant in its products, and such general statements as were made in the email were clearly made with the expectation that parties would enter into further negotiations – hence Mr White's request at the end of the email for "time over the following weeks to discuss further".[191]

142 Secondly, the parties in this case entered into a written Licence Agreement after more than a year of negotiations; and as Mr Widjaja admitted in cross examination, whatever the overall aims of the parties might have been

189 p 35 of Mr Widjaja's AEIC.

190 [243(1)] of the Defendant's Closing Submissions.

191 p 36 of Mr Widjaja's AEIC.

in 2008, their obligations were set out in the Licence Agreement;[192] and whatever parties' objectives might have been at the point of entering into the said contract, these must necessarily be defined by the express terms of the contract.[193] Mr Widjaja also admitted that the only warranties provided by the Plaintiff as to its software were the warranties found in clauses 10.1 to 10.3 of the Licence Agreement. He acknowledged the various exclusions and disclaimers stipulated in clause 10.4 of the Licence Agreement – including the disclaimer of any warranty that the Plaintiff's software would be error-free – although he claimed that the operation of the software was "very limited" and even "non-functional"[194] (which claim I will address later in dealing with the Defendant's submissions on total failure of consideration).

143 Thirdly, the Licence Agreement included an "entire agreement clause" in clause 16. In *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*"), the CA held (at [25]) that the effect of such clauses "is essentially a matter of contractual interpretation and will necessarily depend upon its precise wording and context". Having regard to the wording of the present clause 16 ("This Agreement supersedes all prior agreements arrangements and understandings (whether express or implied, written or oral) between the Parties in relation to the subject matter of this Agreement and constitutes the entire agreement between the Parties to the exclusion of all other terms conditions and warranties express or implied, written or oral"), I was satisfied that it was so drafted as to preclude any attempt to qualify or supplement the parties' written contract by reference to pre-contractual representations.

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192 See the transcript for 5 September at 16:21 to 16:25.

193 See the transcript for 5 September at 19:18 to 20:1.

194 See the transcript for 5 September at 18:10 to 19:17.

144 For the reasons given above, even assuming the Defendant's failure to plead the extrinsic evidence it relied on did not preclude such evidence from being considered, I found parties' pre-contractual email communications to be entirely unhelpful to the Defendant's proposed construction of clause 10.1.

The Defendant's argument that the Plaintiff was "under an implied obligation" to provide a "reasonably workable" software system

145 While the Defence and Counter-claim alluded to the Plaintiff having breached "the terms, whether express *or implied*, of the [Licence] Agreement and Addendum", the Defendant did not plead any specific implied term. For the reasons stated in [128] to [132] above, I found this omission to be fatal to the Defendant's attempt to establish an implied contractual obligation on the Plaintiff's part to provide a "reasonably workable" software system. By way of comparison, in *The Wellness Group Pte Ltd and another v OSIM International Ltd and others and another suit* [2016] 3 SLR 729 ("*The Wellness Group*"),[195] where the statement of claim pleaded that it was an implied term of the parties' shareholders' agreement that the second plaintiff (one Manoj) would continue his service contract with the company TWG Tea Co Pte Ltd, but failed to plead any particulars as to why it was necessary to imply this term, the High Court held (at [211]) that the failure to plead the facts relied on to support the alleged implied term must lead to the failure of the second plaintiff's claim on this implied term.

146 In any event, even assuming the Defendant could somehow surmount this procedural impediment, I did not find any basis for implying in this case the contractual obligation it was alleging. The CA has held that a contractual term cannot be implied "if it is inconsistent with an express term of the contract

195 Tab 5 of PBOA for Reply Submissions.

concerned": see *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*")[196] at [31]. In this case, the Licence Agreement had expressly set out in clauses 10.1 to 10.3 the warranties provided by the Plaintiff, and had also expressly provided in clause 10.4 for the disclaimer of any other warranties. An implied term that the Plaintiff was additionally subject to an obligation to provide a "reasonably workable" software system would be patently inconsistent with these express terms. I would add that the Defendant's definition of the concept of "reasonably workable" (namely, a system that "need not have been flawless, but … would, at minimum, have to be sufficiently defect-free such that the Defendant's customers could conduct their trades with reasonable efficiency") appeared to me to be so general and fuzzy that it was difficult to see how it could pass either the "business efficacy" test or the "officious bystander" test set out in *Ng Giap Hon* (at [36]–[37]).

147 For the reasons given above, I rejected the Defendant's argument as to implied contractual obligation.

The Defendant's argument as to total failure of consideration

148 As an alternative to its counter-claim in breach of contract, the Defendant claimed in its closing submissions that it was entitled to a refund of the US$1.5 million licence fee on the basis of total failure of consideration. According to the Defendant, the Plaintiff had failed "completely to discharge its part of the bargain" between the parties; and "the Defendant simply did not enjoy the benefit of any part of what is bargained for".[197]

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196 Tab 2 of PBOA for Reply Submissions.

197 [286]-[287] of the Defendant's Closing Submissions.

149 I make two key points in respect of the Defendant's submissions as to total failure of consideration. Firstly, I found it highly regrettable that this alternative claim of total failure of consideration was also not pleaded in the Defence and Counter-claim. That it was clearly an afterthought conceived after the close of the trial could be seen from the absence of any mention of such a claim even in the Defendant's Opening Statement. As with the failure to observe the pleading requirements in relation to the counter-claim for contractual breach, this glaring omission to plead total failure of consideration as an alternative claim was once again plainly prejudicial to the Plaintiff: the Plaintiff's Closing Submissions did not deal with this alternative claim; and once again, the Plaintiff had to scramble to respond in its Reply Submissions.

150 In its Closing Submissions, the Defendant apparently sought to fix this procedural violation by dealing with its arguments on total failure of consideration under the rubric of the "Plaintiff's breach of the [Licence] Agreement and/or the Addendum". It will be recalled that the Defendant had in its Defence and Counter-claim prayed for the recovery of the entire Licence Fee of US$1.5 million as an alternative remedy to that of damages for the Plaintiff's alleged contractual breach.[198] In its Closing Submissions, the Defendant sought to argue – under the sub-heading "The Plaintiff's breach of the Agreement and/or the Addendum entitles the Defendant to a refund of the Perpetual Licence fee" – that quite apart from breach of an express or implied contractual term, refund of the licence fee could also be justified on the ground of total failure of consideration.[199] This was done without acknowledging that a claim of total failure of consideration constituted a separate cause of action. With respect, this appeared to me to be conceptually misconceived.

198 [38] of the Defence and Counter-claim.

199 [284]-[293] of the Defendant's Closing Submissions.

151 The law of contract compensates a plaintiff for damages resulting from the defendant's breach. As Lord Denning MR held in *Anglia Television Ltd v Reed* [1972] 1 QB 60 ("*Anglia Television*") at 63, in claiming compensation for the defendant's breach of contract the plaintiff can claim for loss of profit; but if he has not suffered any loss of profits or if he cannot prove what his profits would have been, he can claim in the alternative the expenditure which has been thrown away – that is, wasted expenditure. In *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 ("*CCC Films*"), Hutchison J – relying *inter alia* on *Anglia Television* – held that such wasted expenditure could include the contract sum paid by a plaintiff. In *CCC Films*, the plaintiffs had paid a licence fee of US$12,000 for a licence from the defendants to exploit, distribute and exhibit three motion pictures, but had failed to receive from the defendants the taped recordings of these pictures and were consequently unable to make effective use of the licence. The plaintiffs sued for breach of contract. Although they had sought damages for the breach, they did not adduce any evidence of the amount of profit lost as a result of the defendants' breach: instead, they asked in the alternative for the recovery of the US$12,000 licence fee. Hutchison J gave judgement for the sum of US$12,000, on the basis that it was wasted expenditure by the plaintiff.

152 That such a claim for the contract sum as "wasted expenditure" following from a defendant's contractual breach may look "superficially similar" to a claim for the same sum on the ground of total failure of consideration was acknowledged by the High Court in *PT Panosonic Gobel Indonesia v Stratech Systems Ltd* [2010] 3 SLR 1017 ("*PT Panosonic*").[200] The High Court also made it clear that despite the "superficial" similarity, there were "material differences" between the two, "such that making the former claim is

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[200] Tab 3 of PBOA for the Plaintiff's Reply Submissions.

not to be considered a backdoor means of getting around not having properly pleaded the latter". The court expressly approbated (at [6]) the following observations by the registrar below:

> The former claim [i.e. the claim for the contractual price as a reliance loss] is premised on the argument that in reliance on the defendant's promise, the plaintiff has made an expenditure (i.e. the payment of the contract price) which has been *wasted*, but the latter claim [i.e. the claim for the same contractual sum based on total failure of consideration] is founded on an entirely separate argument that the defendant has been *unjustly enriched* because of his total non-performance of the contract… [I]t is open to a plaintiff to choose between making one or the other claim. [emphasis in original]

153 The High Court also pointed out that these observations were in accord with the court's decision in the main action between the same parties in Suit No 34 of 2007, *PT Panasonic Gobel Indonesia v Stratech Systems Ltd* [2009] 1 SLR(R) 470. In Suit No 34 of 2007, the plaintiff (PT Panasonic) had pleaded breach by the defendant (Stratech) of the Services Agreement signed between them, and had claimed damages on two alternative bases: firstly, on the basis that it had been induced to enter into the Services Agreement with the defendant by certain misrepresentations made by the defendant before the conclusion of the agreement; secondly, that the defendant had breached its obligations under the agreement (a) in failing to complete the provision, customisation and implementation of the information management system that it was supposed to provide to the plaintiff; (b) in failing to ensure that the said system met the specifications in the Services Agreement; and (c) by breaching clause 3.1 of the Services Agreement. These pleadings notwithstanding, the plaintiff also sought to put forward *in its closing submissions* the alternative argument that the defendant's failure to implement and deliver the said information management system amounted to a total failure of consideration entitling it to seek repayment of all monies paid under the Services Agreement. When the defendant objected

that the plaintiff had not pleaded a claim of total failure of consideration, the plaintiff argued that it had pleaded all the facts necessary to establish such a claim, and that the consequences of establishing they the evidence adduced was a legal consequence that did not need to be pleaded. Judith Prakash J (as she then was) found the defendant's objection to the belated argument of total failure of consideration to be well-founded (at [87]). She noted that the plaintiff had failed to plead a claim for refund of payments on the basis of total failure of consideration; that if it had pleaded this as its main or alternative relief, the defendant would have been able to test the basis for such claim in cross-examination, discovery exercises and submissions; that the defendant had been deprived of these opportunities since no leading to that effect was made; and that it was too late for the plaintiff to raise the argument in closing submissions.

154 For the reasons set out above, I was of the view that the present Defendant's failure to plead the alternative claim of total failure of consideration was fatal to its attempt to establish such a case in its Closing Submissions.

155 In any event, even assuming the Defendant were somehow able to surmount the above procedural impediments, it could not dispute that "if the plaintiff gets something out of the contractual agreement, this remedy [in total failure of consideration] would not be available to him": per the Court of Appeal in *Ooi Ching Ling v Just Gems Inc* [2003] 1 SLR(R) 14 ("*Ooi Ching Ling*") at [44], a case cited by the Defendant itself.[201] In this case, the evidence before me showed clearly that the Defendant had obtained benefit from its contract with the Plaintiff. In its Closing Submissions, the Defendant contended that the benefit it had contracted to receive was "a complete turnkey front to back office Exchange Solution".[202] What the Defendant failed to point out was that this

201 Tab 23, Vol 1 of DBOA for the Defendant's Closing Submissions.

phrase was lifted from a Functionality Proposal sent by Mr White during the parties' ongoing discussions some 3 months prior to the signing of the Licence Agreement[203] – but that when the Licence Agreement was eventually signed, it expressly provided for the specific deliverables to be provided by the Plaintiff to the Defendant in consideration of the licence fee: see in this respect clause 2 of the Licence Agreement and the list of deliverables set out in Schedule 2.[204] Indeed, the Defendant itself acknowledged at one point in its Closing Submissions that the licence fee was paid in consideration of the eleven specific deliverables set out in Schedule 2.[205] There was no evidence to suggest that the Defendant had not received the specific deliverables contracted for.

156 Moreover, whilst complaining of multiple bugs in the software delivered, the Defendant has not shown that it got nothing at all out of its contractual bargain. Instead, it has only spoken vaguely in its Closing Submissions about how its traders "were often unable to conduct their trades with reasonable efficiency, causing them to suffer considerable financial losses" – but it has produced no evidence of the alleged "considerable financial losses" suffered by these traders, nor - apart from a brief and nebulous statement about the erosion of the "trust" between itself and its traders[206] - has it explained how these alleged losses by the traders meant a total failure on its part to derive any benefit from its contractual bargain, Indeed, Mr Widjaja conceded in cross-examination that the Defendant's new trading platform had benefited from the Plaintiff's brand name, and that despite its complaint about the supposed failure

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202 [288] of the Defendant's Closing Submissions.

203 1 ABD 8.

204 pp 32-33. 48-53 of Mr Oliviero's AEIC.

205 [296] of the Defendant's Closing Submissions, where the Defendant alluded to "the eleven (11) deliverables which were covered by the cost of the Perpetual License Fee".

206 [289] of the Defendant's Closing Submissions.

of the Plaintiff's trading software, the exchange had experienced a steady increase in the volume of contracts traded on its exchange between 2010 and 2013, from 61,000 contracts in 2010 to 934,000 contracts in 2013 (though Mr Widjaja asserted that the volume had fallen since 2014).[207]

157 In short, therefore, even assuming it was open to me to consider the Defendant's belated argument on total failure of consideration, the evidence before me simply could not support such an argument.

158 In its Closing Submissions, the Defendant also suggested that even if I disagreed that it had received no benefit under the Licence Agreement and/or the Addendum, it was still open to me to find that there had been "a total failure of consideration for a specific, divisible portion of the Agreement and/or the Addendum". The Defendant suggested that "applying a rough-and-ready approach", I should treat "three (3) of the eleven (11) deliverables which were covered by the cost of the Perpetual Licence Fee" as having been the subject of "a total failure of consideration". These were the J-Clear Installation and Licensing, the J-Vision Report Configuration to Banking systems, and the J-Clear Report Development for government regulated reports: according to the Defendant, on account of these three components, it was entitled to be refunded three-elevenths of the licence fee of US$1.5 million.

159 I rejected the above argument as it was never pleaded by the Defendant. The claim that the Licence Agreement was somehow divisible into eleven portions, that there had been a "total failure of consideration" in respect of three specific portions, and that Defendant should be refunded three-elevenths of the licence fee was never put to any of the witnesses during the trial, nor was such a claim mentioned in the Defendant's Opening Statement – which meant that

[207] See the transcript for 5 September at 47:10 to 50:21.

once again, the Plaintiff were blindsided and prejudiced in having been deprived of the opportunity to address this claim during the trial.

The Defendant's argument that there was no contractual acceptance of the Plaintiff's software

160 Finally, in its Closing Submissions, the Defendant also made the startling submission that it "cannot be said to have contractually accepted the Plaintiff's software"; and that it still retained the "right to reject the software".[208]

161 I rejected the above argument for the following reasons. Firstly, the Acceptance Criteria under the Licence Agreement was clearly spelt out in Schedule 3 to the agreement:[209] in brief, the Defendant had 45 business days to test the software for compliance with the contract specifications ("the Documentation"), following which it could either raise defects in the software to the Plaintiff via a notice of non-compliance or confirm acceptance. It was not disputed that the Defendant issued the written UAT Acceptance on 29 November 2009.[210] It was also not disputed that even if no written UAT Acceptance had been issued, the Acceptance Criteria provided in Schedule 3 of the Licence Agreement expressly stipulated that:

> … [i]f no written notice of acceptance or notice of non-compliance is issued by Customer within 45 Business Days after Software's installation, or if the Software is used in a live environment then the Software shall be deemed to have been accepted or upon 30th November 2009 (which ever the earlier).("Deemed Acceptance")

162 It was not disputed in this case that the Defendant's exchange went live with a soft launch in November 2009 and that it was officially launched in March

208 [277]-[283] of the Defendant's Closing Submissions.

209 p 55 of Mr Oliviero's AEIC.

210 1 ABD 150.

2010.[211] In the circumstances, it could scarcely be doubted that by March 2010 at the very latest, the software was being used "in a live environment".

163 On any view, therefore, the Defendant's argument that it had never accepted the software was wholly unsustainable. Indeed, it was noteworthy that in none of the Defendant's correspondence with the Plaintiff prior to the Plaintiff's Notice of Termination was it ever asserted that there had been no contractual acceptance of the software – not even in Mr Widjaja's letter of 24 January 2014,[212] sent just one week before the Notice of Termination.

164 The Defendant complained that whilst the Acceptance Criteria under the Licence Agreement obliged it to issue any notice of non-compliance within 45 business days after installation of the software, it "would not know within 45 business days that a multitude of errors and issues would plague the software over the next year or so". However, this argument misapprehended entirely the purpose of UAT under the Licence Agreement. It could not be the purpose of UAT to allow the licensee of a software system to predict with assurance the "multitude of errors and issues" which might occur in the system "over the next year or so": this would be commercially impracticable. Rather, the purpose of UAT was to allow the Defendant to verify that the software delivered complied with the contractual specifications: if it did not and if the Plaintiff failed to respond in time to an ensuing Notice of Non-Compliance by correcting the specified defects, the Defendant would be entitled to reject the software and to claim a refund of the licence fee.

165 This did not mean that once the software was accepted, the Defendant would be left with no remedy in the event it found other defects. Under the

211 See Mr White's email of 30 August 2012 to Mr Oliviero: p 87 of Mr Oliviero's AEIC.

212 pp 163-164 of Mr Oliviero's AEIC.

Addendum of 1 May 2010, a process of six-monthly reviews was put in place whereby the Defendant would be entitled to issue notices of non-compliance in respect of any defects it identified in the system; and if the Plaintiff failed to rectify the defects to the Defendant's satisfaction, the latter would be entitled to claim a refund or discount of S&M charges by serving a written notice. The Defendant was well aware of this process, as it issued a Notice of Non-Compliance to the Plaintiff on 21 January 2011.[213] However, it never followed up the said Notice with a written request for a refund or discount of S&M charges, nor did it issue any other Notices of Non-Compliance.

166 In the circumstances, it would appear that despite its grumbles about the bugs in the Plaintiff's software and despite its knowledge of the contractual processes available to address such complaints, the Defendant chose not to avail itself of these processes because of the sense of security it derived from its friendly relationship with Mr White and from the absence of invoices for a period of time. Like the appellant in *Cupid Jewels*, this sense of security was falsely self-induced, and no doubt an unfortunate misstep in terms of business judgement – but it still did not justify the Defendant in denying that it had accepted the Plaintiff's software.

Conclusion

167 In light of the reasoning set out at [126] to [164], I dismissed the Defendant's counter-claim and entered judgement for the Plaintiff in the sum of US$604,340-68, with interest to run at the contractual rate stated in clause 7.4 of the Licence Agreement.

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[213] 1 ABD 543.

168 As to costs, the Defendant conceded that it had failed to beat the terms of an Offer to Settle served by the Plaintiff on 24 August 2018. As such, I awarded costs of the proceedings to the Plaintiff on a standard basis up to 24 August 2018 and on an indemnity basis thereafter.

Mavis Chionh
Judicial Commissioner

Low Chai Chong, Liong Wei Kiat, Alvin and Shaun Tho (Dentons Rodyk & Davidson LLP) for the plaintiff;
Ramesh Selvaraj, Tseng Zhi Cheng, Sean Douglas and Hiew E-wen, Joshua (Allen & Gledhill LLP) for the defendant.