IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 102

Suit No 542 of 2012

Between

PT SANDIPALA ARTHAPUTRA

… Plaintiff

And

(1) STMICROELECTRONICS ASIA PACIFIC PTE LTD

(2) OXEL SYSTEMS PTE LTD

(3) VINCENT PIERRE LUC, COUSIN

… Defendants

And
Between

OXEL SYSTEMS PTE LTD

… Plaintiff (by Counterclaim)

And

(1) PT SANDIPALA ARTHAPUTRA

(2) PAULUS TANNOS

(3) CATHERINE TANNOS

(4) LINA RAWUNG

… Defendants (by Counterclaim)

JUDGMENT

[Commercial Transactions] — [Sale of Goods] — [Damages for Breach of Contract]

[Commercial Transactions] — [Sale of Goods] — [Rights of Unpaid Seller]

[Tort] — [Conspiracy]

[Tort] — [Misrepresentation] — [Fraud and Deceit]

[Tort] — [Negligence] — [Duty of Care]

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v
STMicroelectronics Asia Pacific Pte Ltd and others

[2017] SGHC 102

High Court — Suit No 542 of 2012
George Wei J
14–18, 21–24, 28–31 March; 1, 4–5 April; 5–6, 16–19 May 2016; 15 July 2016

12 May 2017 Judgment reserved.

George Wei J:

1 The present proceedings arose out of a contract between the plaintiff, PT Sandipala Arthaputra ("Sandipala"), and the second defendant, Oxel Systems Pte Ltd ("Oxel"), for the supply of microchips ("chips") from the first defendant, STMicroelectronics Asia Pacific Pte Ltd ("ST-AP"). These chips were needed to fulfil Sandipala's obligations under an Indonesian Government contract to produce electronic identification cards for its citizens.

2 The trial took place over 22 days between March and May 2016. Numerous highly contentious issues arose across the various claims and the counterclaim between the parties. For this reason, it is convenient to begin with a list of the main individuals involved in the suit and an overview of the disputes that have arisen.

Dramatis Personae

3 Sandipala is an Indonesian company that was incorporated in 1987.[1] It carries on the business of, *inter alia*, the production of personalised electronic identification cards.[2] In late 2010 or early 2011, Sandipala was in considerable financial difficulties and was insolvent. On or about 19 January 2011, Paulus Tannos ("Mr Tannos") purchased majority shares in Sandipala, to use it for new businesses. Most of the shares that were purchased were placed under the name of his wife, Lina Rawung ("Mrs Rawung"). Mr Tannos injected considerable capital into Sandipala.

4 As at 4 March 2011, the Board of Management of Sandipala was constituted as follows:[3]

(a) President Director: Mr Tannos

(b) Director: Ms Catherine Tannos ("Ms Tannos")

(c) Director: Ms Pauline Tannos

(d) President Commissioner: Mrs Rawung

5 Apart from Sandipala, Mr Tannos also controlled another company, PT Megalestari Unggul ("MLU") in which he was the majority shareholder and its managing director.[4]

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1 Statement of Claim (Amendment No 4), [1].

2 Statement of Claim (Amendment No 4), [1].

3 Paulus Tannos' ("Mr Tannos'") Affidavit of Evidence in Chief dated 5 February 2016, [9].

4 Mr Tannos' Supplemental Affidavit of Evidence in Chief, [57].

6 ST-AP is a company incorporated in Singapore in 1994. It carries on the business of, *inter alia*, marketing and selling chips and is part of the STMicroelectronics Group of companies ("ST"). The third defendant, Mr Vincent Cousin ("Mr Cousin") was at all material times ST-AP's country manager for Indonesia.[5]

7 ST had a Microcontrollers, Memory and Secure MCU product group ("MMS") which included a Secure Microcontroller Division ("SMD").[6] Ms Marie-France Florentin ("Ms Florentin") was the General Manager of the SMD and also an employee of STMicroelectronics (Rousset) SAS, a French company ("ST-F").[7] Mr Claude Dardanne ("Mr Dardanne") was the head of MMS and Ms Florentin's direct supervisor.[8]

8 The chips marketed by ST-AP are essentially manufactured in France by MMS and ST-F. These are then shipped to ST-AP's customers. It appears that whilst the chips are made in France, finishing work is sometimes done overseas such as in Taiwan.

9 Oxel is a company incorporated in Singapore in 2009.[9] It is in the business of the supply and sale of chips for use in personalised electronic identification cards or "smart cards", and it has the licensing rights to sell a software suite known as PAC, which was one of the operating systems for the chips.[10] Oxel is wholly owned by Execorp Limited, a company incorporated in

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5 Statement of Claim (Amendment No 4), [5A]; Defence (Amendment No 4) of ST-AP, [10].

6 Marie-France Florentin's Affidavit of Evidence in Chief dated 1 February 2016, [1].

7 Marie-France Florentin's Affidavit of Evidence in Chief dated 1 February 2016, [1].

8 Marie-France Florentin's Affidavit of Evidence in Chief dated 1 February 2016, [4].

9 Statement of Claim (Amendment No 4), [5].

the British Virgin Islands.[11] Mr Andi Bharata Winata ("Mr Winata") is Oxel's Sales and Marketing Representative in Indonesia.[12]

The key events

Sandipala's participation in the tender

10 In early 2011, the Ministry of Home Affairs of the Indonesian Government (the "MHA") invited tenders for the production and supply of personalised electronic identification cards which were referred to as "E-KTP Cards" for the Indonesian population (the "Tender").[13] Detailed requirements were set out including those touching on the chips and the operating system. Of especial significance was the obligation for each applicant to submit two chips for evaluation. The specific operating system that was to be masked onto the chips was not prescribed, save that it must be an "open operating system", though this term was initially undefined. This led to questions from a consortium participating in the Tender, and the MHA subsequently clarified that an open operating system was one that could be put into the two types of chips specified.[14]

11 After Mr Tannos purchased majority shares in Sandipala, Sandipala entered into discussions with members of a consortium led by Perusahaan Umum (Perum) Percetakan Negara ("PNRI") (collectively the "PNRI Consortium") to include Sandipala in its bid for the Tender.[15] Thereafter,

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10 Andi Bharata Winata's ("Mr Winata's") Affidavit of Evidence in Chief, [6].

11 Defence and Counterclaim (Amendment No 4) of Oxel, [1.2.4].

12 Mr Winata's Affidavit of Evidence in Chief, [1].

13 Statement of Claim (Amendment No 4), [6].

14 Bruno Louis Vanhoucke's ("Mr Vanhoucke's") Affidavit of Evidence in Chief, [14]–[15]; p 53 (List of Questions in the Meeting of Explanation, question 14).

Sandipala became a member of the PNRI Consortium by way of a Consortium Agreement dated 28 February 2011.

12 The PNRI Consortium comprised the following companies:[16] (a) PNRI; (b) Perusahaan (Persero) Superintending Company of Indonesia ("Sucofindo"); (c) Sandipala; (d) PT Quadra Solutions ("Quadra"); and (e) Perusahaan (Persero) PT Len Industri ("Len Industri"). The roles and responsibilities of the consortium members were divided as follows:[17]

(a) PNRI, the leader of the PNRI Consortium, was responsible for, *inter alia*, dealing with chip manufacturers and to produce a portion of E-KTP Cards.

(b) Sucofindo was responsible for conducting training seminars and classes.

(c) Sandipala was responsible for producing a portion of E-KTP Cards, personalising the same and thereafter distributing the E-KTP Cards, including those produced by PNRI.

(d) Quadra and Len Industri were jointly responsible for procuring and installing the necessary systems, such as the central government database, fingerprint and iris information collection systems and the key management system.

13 Shortly after Sandipala joined the PNRI Consortium, the PNRI Consortium submitted its tender proposal to the MHA. Whilst the evidence

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15 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [13].

16 Statement of Claim (Amendment No 4), [7].

17 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [14].

could have been clearer, it appears that the PNRI Consortium decided to use the following chips (made by different manufacturers) in their tender proposal: (i) NXP P308G0P3 ("NXP P3 chip"); and (ii) ST23YR12 ("ST23YR12 chip").[18] There is dispute and uncertainty as to the identity of the operating system provided with the ST23YR12 chip for the tender submission. I pause to note that the actual tender submission documents were not placed before the Court as Sandipala's position was that these documents were with PNRI.[19]

14 The tender submission process comprised three distinct stages. A brief description of each stage has been set out below:[20]

(a) The Proposal Stage: Various participating consortiums submitted their tender proposals which provided for the technical aspects of the E-KTP Card production process. This included the specifications of the chip to be used in the E-KTP Cards. At this stage, each tender proposal would be assessed and some would progress to the next stage of the tender submission process.

(b) The Proof of Concept ("POC") Stage: At this stage, the processes of population data collection, mass production and personalisation of E-KTP Cards were demonstrated to the MHA. This involved, *inter alia*, the use of a sample set of the proposed chips encoded with the proposed software and operating system. The successful consortiums would then proceed to the next stage.

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18 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [29].

19 See Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, pp 936–945.

20 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [17].

(c) The Costs Stage: At this stage, the remaining consortiums would submit their quotes for costs of population data collection as well as production, personalisation and distribution of the E-KTP Cards to the MHA.

15 As part of the POC Stage of the Tender, the MHA conducted tests and evaluations of the chips provided by the PNRI Consortium at various locations between May and June 2011. This included one session at Sandipala's factory on 20 May 2011 ("the POC test").[21] The evidence as to what chips and operating system were tested by the MHA at Sandipala's factory was decidedly murky. Whilst it is clear that the NXP P3 chip and operating system were tested and evaluated by the MHA, it is entirely unclear whether the ST23YR12 chip was ever tested and evaluated. The simple reason is that the ST23YR12 chip encoded with RUA or RUB operating system was not ready in time for the POC test. Whilst Mr Tannos claims there were other tests, the only test in evidence is that on 20 May 2011.

16 On 21 June 2011, the MHA formally announced that it would award the Tender to the PNRI Consortium for the production and supply of 172,015,400 personalised E-KTP Cards for the Indonesian population which were to be produced and supplied in the years 2011 and 2012 ("the E-KTP Project").[22] The PNRI Consortium entered into a written agreement with the MHA on 1 July 2011 ("the E-KTP Card Production Agreement").[23]

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21 Sandipala's Further and Better Particulars, Bundle of Pleadings ("BOP") 17, para 5.4 and BOP18 para 6.1.2.

22 Statement of Claim (Amendment No 4), [14]; Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [23].

23 Statement of Claim (Amendment No 4), [14]; Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [19].

17 It bears noting that two types of chips used by the PNRI Consortium in their tender proposal (as stated above at [13]) were approved for use in the E-KTP Cards: (a) the NXP P3 chip manufactured by NXP Semiconductors Group ("NXP"); and (b) the ST23YR12 chip manufactured by ST.[24] No operating system was specified.

18 On 9 June 2011, Sandipala entered into a further agreement with the other members of the PNRI Consortium ("the 9 June Consortium Agreement").[25] Under the 9 June Consortium Agreement, Sandipala was supposed to produce 132m blank E-KTP Cards and personalise all E-KTP Cards.[26]

19 The 9 June Consortium Agreement was subsequently amended pursuant to "the First Amendment to Distribution of Agreement Rights and Obligations of the Members of Consortium" dated 26 July 2011 ("the Amended Consortium Agreement"). Under the Amended Consortium Agreement, Sandipala's share of work was reduced to producing, personalising and supplying 60% of the E-KTP Cards (*ie*, from about 132m E-KTP Cards to approximately 103m E-KTP Cards).[27] The remaining 40% of E-KTP Cards were to be produced, personalised and distributed by PNRI.[28]

20 PNRI used the NXP P3 chip and operating system to meet its obligations. Initially, Sandipala also used the NXP P3 chip and system in

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24 ST-AP's and Mr Cousin's Core Bundle 28 (subsequent letter from MHA).

25 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [18].

26 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, p 274.

27 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [24].

28 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [24].

respect of the E-KTP Cards due in 2011. Thereafter Sandipala decided to move away from the NXP P3 chip (as discussed below at [29]). The reason why this decision was made by Sandipala is unclear.

21 I pause here to explain the words "produce", "personalise" and "distribute" in the context of the E-KTP Project. *Production* refers to the process by which a microchip is embedded into the body of a plastic card.[29] This entails an automated process using a card production machine. The plastic card must be laminated and security features printed on the card.

22 *Personalisation* refers to the process of saving the personal information of an individual (such as his photograph, name, address *etc*) onto the chip.[30] Special "personalisation machines" must be used for this purpose. Manufacturers/suppliers of personalisation machines include the Muehlbauer Group of companies ("Muehlbauer")[31] and Datacard Asia Pacific Limited ("Datacard"). Security is an extremely important part of the personalisation process. The personal information of Indonesian citizens are held in Indonesian Government database. The personalisation machine will be connected to that database so that the relevant information can be transferred and stored in the chip embedded into the E-KTP Card. It stands to reason that the software or operating system in the chip, personalisation machine and the database and other components of the system must be compatible. Of especial importance is the need for the software in the chip to be compatible with the Key Management System ("KMS"), which is essentially security software.

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29 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [26].

30 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [27].

31 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [21].

23 Distribution refers to the act of sending the personalised E-KTP Card to the Indonesian Government's E-KTP Card Distribution Centres throughout Indonesia where the cards are checked and activated using card reader machines connected to the Indonesian Government's system.[32]

24 It will be appreciated that there are many steps in the production and personalisation process. Detailed and strict time-lines were imposed by the Government tender contract in respect of production volumes. As will be discussed in more detail later, problems arose when Sandipala was unable to personalise the E-KTP Card using the ST chips ordered and supplied by Oxel.

Sandipala took steps to purchase chips and personalisation machines

25 MLU provided funds to Sandipala to finance the E-KTP Project. The MLU funds were provided by Bank Artha Grahaand secured by personal guarantees signed by Mr Tannos, Ms Tannos and Mrs Rawung.[33]

26 What follows is an overview of the main steps taken by Mr Tannos and Sandipala to secure chips and personalisation machines to meet Sandipala's obligations.

27 By late June 2011, when the Tender was awarded to the PNRI Consortium (and indeed likely much earlier), it would have been obvious that a good deal of assets would have to be acquired to meet the obligations under the tender award. In particular, it was essential that sufficient personalisation machines be obtained for use at the POC test by the MHA and indeed thereafter for the actual tender award. It appears that the personalisation

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32 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [28].

33 Oxel's Bundle of Documents excluded from Agreed Bundle Vol 11, 4171.

machines used for the POC test were from Muehlbauer. Subsequently, around June 2011, Sandipala purchased 14 "MX6000" machines from Datacard which were to be used to personalise electronic identification cards.[34]

28 Under the E-KTP Card Production Agreement with the MHA, 172,015,400 E-KTP had to be produced and personalised for 2011 and 2012. There was an urgent need for Sandipala to source for the chips to produce its 60% share of the E-KTP award for 2011 and 2012.

29 In July 2011, Sandipala purchased NXP P3 chips through AvandIDe and Excelpoint, which were distributors of NXP chips. The precise quantity of chips purchased is disputed. Sandipala places the figure at 3m chips[35] whereas Oxel claims that more than 32m chips were ordered.[36] In relation to these 32m chips, Mr Tannos agreed that Sandipala had ordered 32m of them, but he claimed that he did not proceed with the order because of financing (letter of credit) issues.[37] It is hard to accept Mr Tannos' evidence on this point for the simple reason that in June or July 2011, Sandipala placed an order for 14 Datacard machines configured to work with the NXP chips.[38] In any case, there is no doubt that Sandipala could use NXP chips if it wanted to in order to fulfil its obligations. The decision to move away from NXP chips was Sandipala's alone. There is no evidence at all to support Mr Tannos' claim that PNRI had instructed Sandipala to use ST chips. As members of the same consortium, it is not obvious why the two lead members should choose to use

34 Mr Tannos' Supplemental Affidavit of Evidence in Chief, [11]; Monica Lim's Affidavit of Evidence in Chief, [5]–[7].

35 Mr Tannos' Supplemental Affidavit of Evidence in Chief, [14].

36 Transcript of 15 March 2016, p 4 at line 1 to p 12 at line 12.

37 Transcript of 18 March 2016, p 104 at line 4 to 12.

38 Closing submissions of ST-AP and Mr Cousin, [66].

different chips with different operating systems for the same Indonesian Government project: a project which involved the E-KTP Cards which had to be compatible with the E-KTP system established for Indonesia as a whole.

30 Between August and November 2011, Sandipala received or obtained quotations from a number of other entities for the supply of chips that could be used in producing E-KTP Cards. These entities included Ubivelox International Pte Ltd ("Ubivelox"),[39] ST-AP,[40] Oberthur Technologies ("Oberthur"),[41] Hongda as well as Oxel.

31 On 4 August 2011, Mr Tannos, Mr Cousin and Mr Soung Jin Kim ("Mr Kim") of Ubivelox met regarding the possible sale of ST-AP's chips to Sandipala. On the same day, Mr Tannos received separate quotations from Mr Cousin and Mr Kim for ST23YR12 chips that were encoded with the Ubivelox operating system.

32 In early September 2011, Mr Tannos met Ms Florentin and Mr Dardanne in Jakarta.[42] On 20 September 2011, Mr Cousin sent Mr Tannos another quotation from ST-AP for the supply of ST23YR12 chips encoded with RUB operating system which had been developed by PT Softorb ("Softorb"). This offer was not accepted by Mr Tannos apparently because the letter of credit payment terms was too onerous for Sandipala.[43] It bears repeating that the ST23YR12 chip with the RUB operating system produced

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39 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [37].

40 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [38] and [49].

41 Mr Tannos' Affidavit of Evidence in Chief dated 5 Feb 2016, [83]–[84].

42 Transcript of 21 March 2016, p 40 at line 24 to p 41 at line 14.

43 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [55].

by Softorb did not arrive in time for the POC test held by MHA. Nevertheless, the ST23YR12 chip alongside the NXP P3 chip was approved by MHA in the tender award. The evidence that Sandipala was unable to provide a letter of credit for the full purchase price is confined to a bare assertion from Mr Tannos. After reviewing the evidence, I do not accept that any problems in securing a letter of credit was the reason why Mr Tannos did not want to proceed with an order for ST23YR12 chips encoded with RUB. The decision not to proceed with this order is very surprising given that this was the very type of chip approved by MHA. There is no doubt that if that chip arrived in time for the POC test conducted by MHA on 20 May 2011, it would have been encoded with the RUB system.

33 Whilst Mr Tannos was having discussions with ST-AP in early September 2011, it is evident that he was also engaged in talks with a German company, Oberthur. What this means is that Oberthur would source for suitable chips (for example from ST-AP) and develop a suitable operating system for the chip. The circumstances in which Mr Tannos started talks with Oberthur is uncertain. What is clear is that these discussions occurred shortly after Sandipala started discussions with ST-AP and Ubivelox and culminated in an order on 19 September 2011 for 30m modules using "ST 23 Series – NXP P3/P5 Series". This purchase order was made expressly subject to testing and approval by the authorities. According to Mr Tannos, these chips were produced and delivered to Sandipala in Jakarta, but were not tested and approved. The chips were rejected by Sandipala.[44]

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44 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [124] – [144]; p 977–978.

Sandipala places order for chips with Oxel

34 Between October 2011 and early November 2011, Mr Tannos had several meetings with Mr Winata, the details of which are heavily disputed. I will come to these meetings later on in this judgment. On or around 9 November 2011, Sandipala entered into an agreement with Oxel under which Oxel agreed to supply 100m chips described as "ST-Micro ST23YR12AW0NPACA" at the price of US$0.60 per unit ("the Agreement").[45] These are ST23YR12 chips which are encoded with Oxel's proprietary PAC software for the chip's operating system.[46] The PAC operating system was owned by one of Oxel's suppliers, Logii Inc ("Logii").

35 The key terms of the Agreement were as follows:

(a) Sandipala would purchase and take delivery of a "Committed Quantity" of 100m chips.

(b) The chips would be delivered in batches according to the following timeline.

(i) The first 10m would be delivered in the fourth quarter of 2011 to the first quarter of 2012 ("Q4 2011").

(ii) The second batch of 30m would be delivered in the first quarter of 2012 to the second quarter of 2012 ("Q1 2012").

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45 Agreed Bundle Vol 3 ("3AB"), 987 (purchase order); See also 984 (quotation); Oxel's Opening Statement, [10(a)].

46 Oxel's Opening Statement, [10(a)].

(iii) The third batch of 30m would be delivered in the second quarter of 2012 to the third quarter of 2012 ("Q2 2012").

(iv) The fourth batch of 30m would be delivered in the third quarter of 2012 to the fourth quarter of 2012 ("Q3 2012").

(c) Sandipala would make a 20% down payment based on the committed quantity of chips, such down payment being payable at the beginning of each quarter. A down payment of US$1.2m was made by Sandipala on 14 November 2011.[47]

36 Oxel's supply chain is as follows.[48] Once Oxel receives an order for chips made with ST wafer chips and encoded with PAC operating system, Oxel will submit a purchase order to one PT Danatel Pratama ("Danatel"). Danatel will then arrange for ST to encode the blank wafer chips with the PAC operating system. When this is done, Danatel will send the encoded chips to another production facility specified by Logii, which would usually be the production facility of a company based in Taiwan, Chilitag Technology Ltd ("Chilitag"). Chilitag will use the encoded chips shipped by Danatel to produce the completed chip. Although the contract between Oxel (Singapore) and Sandipala (Jakarta) was on "*ex-works*" terms, it appears that Oxel agreed to assist arrange for a shipping carrier to transport the chips to Jakarta for delivery to Sandipala.

37 In anticipation of an order from Sandipala following discussions between Mr Winata and Mr Tannos,[49] Oxel requested for a quotation for chips

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47 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [37].

48 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [7].

from Danatel. On 1 November 2011, Oxel received a quotation from Danatel for 100m "Unsawn, ungrinded, uncoded & unmasked wafer ST23YR12" for US$34m.[50] It was later agreed that Oxel would pay a 20% down payment to Danatel for each batch of ST23YR12 chips and the remaining 80% on delivery.[51] On 4 November 2011, Oxel sent Danatel a purchase order to Danatel for 100m ST23YR12 chips in wafer form manufactured by ST for US$34m.[52]

38 Separately, Oxel placed an order for completed chips with Logii. On 15 November 2011, Logii sent Oxel a quotation for 100m units of "IC Module ST23YR12" for US$25.8m.[53] The "IC Module ST23YR12" referred to the completed chips that Logii would produce using the ST23YR12 chips manufactured by ST and encoded with the PAC operating system.[54] On 17 November 2011, Oxel sent Logii a purchase order for the purchase of 100m units of "IC Module ST23YR12" for US$25.8m.[55]

Sandipala requests for samples

39 On 11 November 2011, Ms Tannos wrote to Kris Zhang of Oxel ("Mr Zhang") to request for samples of Oxel's chips because Sandipala needed them for testing. On the same day, Mr Zhang replied that "[t]he samples are being taken care now and our rep in Indonesia will contact you".[56] On 22

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49 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [9] and [11].

50 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [12].

51 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [13].

52 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [14].

53 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [39].

54 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [39].

55 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [40].

November 2011, Ms Tannos again requested samples of the chips.[57] It is not disputed that no samples were eventually provided. Oxel's evidence is that they told Ms Tannos that because the first delivery of chips was due in late December 2011, Sandipala was free to do what it wanted with those chips.[58]

40 On 19 December 2011, the PNRI Consortium held a meeting without Sandipala and decided to redistribute the printing and personalisation works as between Sandipala and PNRI. The result of the meeting was that Sandipala had its blank card printing and personalisation works reduced from 103m and 172m respectively to 60m for both.[59] It is significant to note that the decision to reduce Sandipala's work allocation took place about three days before the first batch of Oxel's chips were delivered to Sandipala. The legal basis under which PNRI Consortium reduced Sandipala's share was never made clear in the present proceedings.

Sandipala receives Oxel's chips

41 Oxel's chips were delivered in batches, with the first delivery taking place sometime in December 2011. The initial batches of the chips contained ST23YR18 chips bearing 18kb of memory which was not the same as the ST23YR12 chips that were stated in the Agreement. There is a dispute as to which batches of the chips contained the ST23YR18 chips. Sandipala claims that the first three shipments of the chips sent by Oxel contained 18kb chips[60]

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56 3AB 1011.

57 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [41].

58 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [42].

59 Closing Submissions of ST-AP and Mr Cousin, [234].

60 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [149].

whereas Oxel claims that only the fourth shipment contained 18kb chips which was a result of a shipping error.[61]

42 In any case, the E-KTP Cards that were produced using Oxel's chips could not be personalised as they were encoded with an operating system that was incompatible with the E-KTP infrastructure.

43 Sandipala's case is that it only discovered the problem with Oxel's chips in early January 2012 whereas the defendants' case is that Mr Tannos (and therefore Sandipala) had known at all material times that Oxel's chips would not work unless changes were made to the E-KTP infrastructure. Of particular importance were changes to the KMS. It is undisputed that attempts were made to seek MHA's approval for changes to be made to the E-KTP infrastructure so that Oxel's chips could be used and that such approval was not granted.[62]

44 On 10 January 2012, Ms Tannos sent an email to Mr Winata attaching a letter requesting for a temporary reduction of Sandipala's order of chips.[63] On 13 January 2012, by way of an email sent by Mr Zhang, the request was rejected.[64] On 19 January 2012, Ms Tannos sent Mr Winata an email which attached a letter dated 12 January 2012. In that letter, Sandipala asserted that their order of 100m chips was only an indicative order, save for 10m chips for which down payment was made. On the same day, Oxel replied to assert that

61 Ika Kusuma's Affidavit of Evidence in Chief dated 5 February 2016, [57].

62 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [200], pp 777–783; Closing Submissions of Oxel, [355]; Closing Submissions of ST-AP and Mr Cousin, [1(h)]. See also Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [148]–[150].

63 Mr Winata's Affidavit of Evidence in Chief at p 586–587.

64 Ika Kusuma's Affidavit of Evidence in Chief at para 64, Exhibit IK-77.

the contract was for a "committed quantity" of 100m chips.[65] To date, Sandipala has paid Oxel a total of US$1,712,875 under the Agreement.[66] It has also accepted delivery of about 6m chips, while rejecting the delivery of about another 6m chips. The deliveries and payments are discussed in detail later at [197]–[200].

The meetings between Mr Tannos, Mr Winata and Mr Cousin in 2012

45 There were on-going discussions between Mr Tannos, Ms Tannos, Mr Winata and Mr Cousin in 2012, after the alleged discovery that Oxel's chips did not work. Three of such conversations, which were secretly recorded, are noteworthy.

46 The first took place on 13 January 2012 between Ms Tannos, Mr Jerry Chum of Sandipala and Mr Cousin. The second conversation took place on 22 January 2012 between Mr Tannos and Mr Cousin. It was clear at this point that the MHA had rejected Oxel's chips.[67] The third discussion took place between Mr Winata, Mr Tannos, Ms Tannos and Mr Cousin on 21 April 2012. The first and second conversations were secretly recorded by Mr Cousin and the third was secretly recorded by Mr Winata.[68]

47 On 27 February 2012, Sandipala received a letter from Oxel's lawyers seeking payment of arrears.[69] Shortly after, on 29 February 2012, Oxel's

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65 Ika Kusuma's Affidavit of Evidence in Chief at paras 72–74.

66 Defence and Counterclaim of Oxel (Amendment No 4), dated 2 February 2016.

67 Vincent Cousin's ("Mr Cousin's") Affidavit of Evidence in Chief, pp 168–169 (paras 5.48-5.53).

68 Mr Cousin's Affidavit of Evidence in Chief, pp 123–165; pp 167-212; Mr Winata's Affidavit of Evidence in Chief, pp 727–749.

69 Mr Tannos' Affidavit of Evidence in Chief, [204], pp 809–811.

lawyers filed a police report on behalf of Oxel alleging that Sandipala had cheated and defrauded Oxel.[70] On 28 June 2012, Sandipala commenced the present proceedings.

48 As the rest of the events leading up to the transactions between the parties are hotly disputed, I will set out a brief overview of each party's pleaded case before proceeding to outline the issues that arise for determination in the present case.

The cases put forth by the parties

Sandipala's case

49 The crux of Sandipala's case in these proceedings is that it had been induced into contracting for the supply of chips that could not be used to produce the E-KTP Cards or which could not be used without changes to the E-KTP system as a whole. Mr Tannos' position is that he was led to believe that the 100m chips which he had ordered from Oxel could be used to produce the E-KTP Cards for the Indonesian Government and that these chips were the same as those that had been tested and approved.

50 According to Sandipala, the PNRI Consortium, through Quadra and its sub-contractor, Softorb, contracted with ST-AP to supply 100,000 pieces of electronic chips for use in the tender evaluation ("the Tender Evaluation Chips").[71] There was an agreement between the PNRI Consortium and ST-AP which required the latter to submit on behalf of the PNRI Consortium written technical specifications in relation to the electronic chips that ST-AP

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70 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [146].

71 Statement of Claim (Amendment No 4), [8].

recommended for use in the production of the E-KTP Cards.[72] If the PNRI Consortium was successful in the Tender, it was to source the same type of electronic chips from ST-AP for the mass production of the E-KTP Cards.[73]

51 Sandipala also claims that ST-AP was furnished with the details of the Indonesian Government's requirements, specifications for the E-KTP Cards and the electronic card reading system in use by the Indonesian Government.[74] On the basis of the aforesaid information, ST-AP determined the appropriate type of electronic chip as well as software operating system to be encoded on it and supplied 100,000 pieces of such electronic chips together with the written specifications of such chips for use in the tender evaluation.[75] These chips were ST23YR12 loaded with RUB operating system developed by Softorb.

52 Most critically, Sandipala pleads that the E-KTP Cards made with the Tender Evaluation Chips worked successfully with the card reading system used by the MHA during the POC test.[76] As a result, the Indonesian Government awarded the Tender to the PNRI Consortium. It was in this context, says Sandipala, that it entered into the Agreement with Oxel. Sandipala claims to have been under the false impression that the chips that were to be supplied under the Oxel Agreement were "the same" as the Tender Evaluation Chips. ST-AP on the other hand points out, amongst other matters, that the ST23YR12 chips loaded with RUB software did not in fact arrive in

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72 Statement of Claim (Amendment No 4), [9].

73 Statement of Claim (Amendment No 4), [9].

74 Statement of Claim (Amendment No 4), [10].

75 Statement of Claim (Amendment No 4), [10].

76 Statement of Claim (Amendment No 4), [13].

time for the POC test. Further, the ST23YR12 chip was approved by the MHA without any reference to an operating system.

Sandipala's claims against Oxel

53 Sandipala's primary claim against Oxel is founded on a breach of the Agreement which, according to Sandipala, contained the following terms:

(a) An express or implied term that Oxel would supply 100m units of chips that were identical to the Tender Evaluation Chips and/or chips that would correspond to sample chips that had been provided by ST-AP.

(b) An express or implied term that Oxel would supply chips that were fit for the particular purpose that had been made known to Oxel, *ie*, for the production of E-KTP Cards.

(c) An implied term that Oxel would supply a batch of sample electronic chips to Sandipala for functional testing before mass producing the chips.

54 Sandipala also claims that Oxel has breached its duty of care by:

(a) negligently offering to supply Sandipala with chips that could not be used to produce E-KTP Cards;

(b) failing to inform Sandipala that the chips proposed to be supplied could not or could possibly not be used to produce E-KTP Cards; and

(c) failing to provide any assistance to Sandipala after Sandipala discovered that the chips actually supplied could not be used to produce E-KTP Cards.

Sandipala's claims against ST-AP

55 Sandipala's claim against ST-AP is founded on a breach of a collateral contract, the terms of which have been pleaded as follows:[77]

(a) ST-AP would supply chips that were identical to the Tender Evaluation Chips and ensure such chips be supplied to Sandipala under the Agreement.

(b) All the pleaded terms in the Agreement which relates to the specifications of the chips were incorporated into the collateral contract such that ST-AP was obliged to supply chips that conformed to those specifications and ensured that they be supplied to Sandipala through Oxel.

56 Sandipala also claims against ST-AP for breaching its duty of care by:[78]

(a) fraudulently and negligently misrepresenting to Sandipala that Oxel would supply Sandipala with chips that could be used to produce E-KTP Cards when ST-AP knew otherwise or was not sure of that;

(b) failing to alert Sandipala to the fact that the chips that ST-AP proposed to supply through Oxel could not or could possibly not be used to produce E-KTP Cards; and

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77 Statement of Claim (Amendment No 4), [24A].

78 Statement of Claim (Amendment No 4), [52G].

(c) failing to provide any assistance to Sandipala after Sandipala discovered that the chips actually supplied by Oxel could not be used to produce E-KTP Cards.

Sandipala's claims against Mr Cousin

57 Sandipala claims against Mr Cousin for making the following misrepresentations which he knew to be false or was reckless as to their truth:[79]

(a) Oxel was the exclusive distributor for ST-AP's chips in Indonesia.

(b) The chips offered by Oxel in its quotation were the same type of chips as the Tender Evaluation chips.

(c) Oxel would be able to procure from ST-AP and supply Sandipala the same type of chips as the Tender Evaluation chips.

Sandipala's claims against all the defendants

58 Against all of the defendants, Sandipala claims that they conspired and combined with each other with the intention of causing harm to Sandipala, namely, by offloading on Sandipala, chips that could not, or could possibly not be used to manufacture E-KTP Cards.[80]

59 Significantly, Sandipala has also pleaded that it had entered into the Agreement pursuant to a unilateral mistake of fact, namely, that Oxel was to

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79 Statement of Claim (Amendment No 4), [52T].

80 Statement of Claim (Amendment No 4), [52AA].

provide chips that were the same as the Tender Evaluation Chips, and the Agreement is therefore void.

ST-AP's and Mr Cousin's case

60 At the outset, it bears noting that Mr Cousin's position is generally aligned with that of ST-AP.[81] Their position which has been touched on already has been summarised as follows in their closing submissions:[82]

> (a) The PNRI Consortium did not use any ST23YR12 chips for concept testing and evaluation at the POC Stage even though it was ultimately awarded the Tender on the basis that the NXP P3 chip and ST23YR12 chips were approved for use in the E-KTP Project.
>
> (b) ST-AP played no part in the preparation of the PNRI Consortium's tender proposal or at the POC Stage.
>
> (c) Mr Tannos was at all times aware that the chips that were to be supplied under the Agreement would not work unless certain system modifications were made. He then set out to procure governmental approval for the relevant system modifications with an eye to increasing Sandipala's production allocation and share of the profits within the PNRI Consortium.

Oxel's case

61 Oxel's position in the proceedings is broadly similar to that of ST-AP and Mr Cousin. According to Oxel, it had upheld its end of the bargain and

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81 Defence of Mr Cousin, [1].

82 Closing Submissions of ST-AP and Mr Cousin, [1].

arranged for the supply and delivery of chips pursuant to the Agreement.[83] But after accepting nine shipments of these chips, Sandipala refused to accept further deliveries.[84] Mr Winata, on behalf of Oxel, gave evidence that Mr Tannos had set out to look for 100m chips encoded with an operating system that was different from that approved by the MHA when it awarded the Tender to the PNRI Consortium.[85] Mr Winata's position was that he told Mr Tannos that he could not help because Oxel's chips were encoded with a specific operating system, *ie*, the PAC operating system and would not be compatible with the card system that had been approved for the E-KTP Project[86] without first making extensive technical modifications to the other parts of the smart card system.[87] Even if such modifications were technically possible, those modifications would have to first be approved by the MHA.[88]

62 Mr Tannos was at all material times aware that the chips supplied under the Agreement were incompatible with the systems that were in place, but was confident that he could modify the approved card system to work with the operating system encoded on chips.[89] He claimed that he could do so since there was no operating system specified for the ST23YR12 chip and he was therefore entitled to make use of any type of operating system on those chips.[90] It was also alleged that Mr Tannos claimed that he was close to the Minister of

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83 Oxel's Opening Statement, [2].

84 Oxel's Opening Statement, [2].

85 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [20].

86 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [22].

87 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [27].

88 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [27].

89 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [37].

90 Transcript of 17 May 2016, p 84 at lines 5 to 8.

Home Affairs[91] and that he had set out to change the operating system in order to gain control over the operating system and the entire E-KTP Project.[92] Therefore, Sandipala purchased the chips in the belief that it would be able to persuade the Indonesian Government to accept a card system that was compatible with those chips.[93] But Sandipala subsequently failed to procure such system changes and hence, set out to avoid its obligations to Oxel under the Agreement.[94]

63 Oxel counterclaims against Sandipala for breaching the Agreement. Oxel has also counterclaimed that the people behind Sandipala, namely, Mr Tannos, Ms Tannos and Mrs Rawung, conspired and combined together to cause Sandipala to breach the Agreement and/or extricate Sandipala from its obligations under the Agreement without having to bear the consequences of a breach of contract.

The issues in the trial

64 The key factual disputes in these proceedings are as follows:

(a) Whether ST-AP recommended or determined suitable chip hardware for use in the tender evaluation;

(b) Whether ST-AP supplied chips for use in the tender evaluation; and

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91 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [39].

92 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, [39].

93 Oxel's Opening Statement, [3].

94 Oxel's Opening Statement, [3].

(c) Whether Mr Tannos/Sandipala was aware that Oxel's chips would not work with the existing systems that were in place.

65 On the basis of my findings on the above factual issues, I will proceed to evaluate the claims advanced by Sandipala against the defendants in the main suit as well as the claims advanced by Oxel against the defendants in the counterclaim.

Decision

66 I preface my decision with a brief explanation of some of the fundamentals of a smartcard project. A smartcard system consists of many parts, including the smartcard reader, personalisation systems, databases, card printers, security and access control systems.[95] All of these systems are designed to work together with a common interface/protocol that is used for communication. The requisite components of a smart card system are supplied by various players in the industry. These players include:

(a) Chip manufacturers (such as ST and NXP): These companies manufacture chips that are found in smartcards. Such chips come in a variety of forms such as wafers, dual-in-line ("DIL") packaging and modules.[96]

(b) Card manufacturers (such as Sandipala): These companies are the ultimate recipients of the chips and would use those chips to produce smartcards.

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95 Mr Lam's Expert Report, [13].

96 Mr Vanhoucke's Affidavit of Evidence in Chief, [7].

(c) Suppliers of operating systems or software developers (such as Softorb, Danatel and Oxel): These companies are primarily involved in the buying and selling of chips that are encoded with proprietary operating systems that they either own or have a licence to use.

(d) Distributors (such as AdvanIDe and Excelpoint): These companies focus on sales and marketing.

67 I turn now to assess the evidence in relation to the three key factual disputes that I have outlined above at [64]. These findings will then form the basis on which the merits of Sandipala's claims and Oxel's counterclaims will be determined.

Whether ST-AP recommended or determined chip hardware/software for use in the tender evaluation

68 Sandipala pleaded that Softorb contracted with ST-AP for the latter to: (a) determine the appropriate type of electronic chip and software operating system to be encoded on it for use in the tender evaluation;[97] and (b) submit written technical specifications of such chips for the PNRI Consortium's use during the tender evaluation.[98] Sandipala's case was also that ST-AP acceded to these requests and made the necessary recommendations. I note however, that Sandipala did not call any witness from Quadra and this point was not pursued by Sandipala in its closing submissions.

69 Sandipala's pleadings refer to a data sheet for the ST23YR12 chip (which sets out the technical specifications of the chip hardware) ("the

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97 Statement of Claim (Amendment No 4), [10].

98 Statement of Claim (Amendment No 4), [9].

Datasheet") that attached an addendum (which described generic features of the Softorb OS to be encoded on the ST23YR12 chip) ("the Addendum").[99] It is not disputed that the Datasheet and the Addendum were both signed by Mr Cousin.

70 ST-AP/Mr Cousin's position is as follows. First, there is no evidence that Softorb was a sub-contractor of Quadra or the PNRI Consortium;[100] Softorb was merely one of the software developers that were vying for a stake in the E-KTP Project.[101] Secondly, ST-AP did not recommend any chip hardware or software operating system to Softorb for use in the tender evaluation. In relation to the signed Datasheet and Addendum, their response is that these documents were prepared by Softorb for use in Softorb's pitch to the consortiums that were participating in the Tender and as such, cannot be interpreted as reflecting the chip hardware and software that ST-AP had recommended to be used by the PNRI Consortium.[102]

71 Having considered the evidence and arguments, I reject Sandipala's allegation that ST-AP had recommended the chip hardware and software that were to be used in the tender evaluation. There is no evidence to support Sandipala's assertion that Softorb was the subcontractor of Quadra or the PNRI Consortium or that ST-AP had recommended to Softorb the chip hardware and/or software that could be used in the tender evaluation. In contrast, the evidence placed before the court is consistent with ST-AP/Mr Cousin's case that Softorb was acting as an independent software developer

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99 Mr Cousin's Affidavit of Evidence in Chief, [28] and Exhibit VPC-3.

100 Closing Submissions of ST-AP and Mr Cousin, [39].

101 Closing Submissions of ST-AP and Mr Cousin, [41].

102 Closing Submissions of ST-AP and Mr Cousin, [45(b)].

which intended to make a pitch to various consortiums for the use of its software with ST-AP's ST23YR12 chips in the tender evaluation.

72 First, the evidence shows that ST-AP/Mr Cousin had no hand in determining the suitable software to be encoded on the chips. In January 2011, Softorb placed an order for 100,000 ST23YR12 modules that were to be encoded with an operating system that would be submitted to ST-AP. The said operating system (referenced "RUA") was subsequently submitted to ST-AP sometime in February 2011. Upon discovering that the RUA operating system did not work, Softorb replaced it with another operating system (referenced "RUB") in May 2011. These dealings show that it was in fact Softorb which had developed its own software that was to be encoded on the chips that Softorb purchased from ST-AP. This is inconsistent with Sandipala's claim that ST-AP had determined the *suitable operating system* to be encoded on the chips for use in the tender evaluation. Further, as pointed out by ST-AP and Mr Cousin, it is illogical that ST-AP, a chip hardware manufacturer, would make software recommendations to Softorb which was itself a software developer.[103]

73 Secondly, the Datasheet and the Addendum do not support the allegation that ST-AP recommended the chip hardware and/or software for the PNRI Consortium's use in the tender evaluation. It appears that these documents originated from Softorb, not ST-AP; they were attached to an email that was sent from Softorb to Mr Cousin on 7 April 2011. Although the documents bear Mr Cousin's signature, I accept his explanation that Softorb had requested him to sign on them so that Softorb could submit them to the consortiums it was working with. I also accept Mr Cousin's explanation that

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103 Closing Submissions of ST-AP and Mr Cousin, at [45(a)]

he had signed the documents without knowing which consortium they would be provided to. In particular, I find his explanations to be consistent with the fact that there is no evidence to support the allegation that Softorb had been acting on behalf of Quadra or the PNRI Consortium at the material time.

74 Further, I find the date on which the Datasheet and the Addendum were sent to ST-AP to be rather significant. In Mr Tannos' affidavit of evidence-in-chief ("AEIC"), he deposed that the details of the PNRI Consortium's tender proposal had mostly been decided on by the time Sandipala joined the PNRI Consortium on or around 28 February 2011 and therefore, Sandipala did not have a say in any decision-making aspects of the bidding, tender process or the technical specifications or requirements of the E-KTP Cards.[104] It is thus illogical for the PNRI Consortium to have later sought recommendations from ST-AP in April 2011. This much Mr Tannos conceded during cross-examination.[105]

75 In view of the above, I accept ST-AP/Mr Cousin's case that they did not recommend any chip hardware or software for the PNRI Consortium's use in the tender evaluation. Given the evidence, it is not surprising that Sandipala did not argue in its closing submissions that ST-AP/ Mr Cousin had recommended the chip hardware and/or software to be used by the PNRI Consortium in the tender evaluation. Instead, the focus of its submissions was on its claim that ST-AP/Mr Cousin had known at all material times the specifications of the chip hardware and/or software that was eventually submitted by the PNRI Consortium and approved by the Indonesian Government. I will address this contention later on.

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104 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [16].

105 Transcript of 18 March 2016, p 28 at line 6 to p 29 at line 10.

Whether ST-AP supplied chips for use in the tender evaluation

76 I turn now to Sandipala's claim that ST-AP had supplied chips for use in the tender evaluation. Sandipala pleaded that ST-AP had supplied 100,000 chips (*ie*, the Tender Evaluation Chips as defined above at [50]) to Softorb pursuant to a contract entered into sometime in April or May 2011,[106] and that these Tender Evaluation Chips were delivered to Quadra or Softorb in April or May 2011.[107] Sandipala further pleaded that it had collected for the purpose of the tender evaluation 10,000 of the Tender Evaluation Chips from PNRI's factory in May 2011.[108] Sandipala also pleaded that 1,000 of the Tender Evaluation Chips that were collected from PNRI's factory were used to personalise cards which were then tested and evaluated by Sandipala's employees in May 2011 in the presence of *inter alia*, officials from the MHA.[109]

77 This pleaded position is factually unsustainable upon a closer look at the sequence of dealings between Softorb and ST-AP from January to April 2011.

(a) Sometime in December 2010 or early January 2011, Softorb informed ST-AP that it wished to purchase a small quantity of encoded ST23YR12 chips, both in DIL form and in module form, for initial testing, followed by 100,000 chips in module form.[110]

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106 Bundle of Pleadings, Further and Better Particulars served pursuant to the 1st Defendant's Request dated 23 January 2013, at [2.1.1].

107 Bundle of Pleadings, Further and Better Particulars served pursuant to the 1st Defendant's Request dated 23 January 2013, at [4.2.1].

108 Bundle of Pleadings, Further and Better Particulars served pursuant to the 1st Defendant's Request dated 23 January 2013, at [4.2.4].

109 Bundle of Pleadings, Further and Better Particulars served pursuant to the 1st Defendant's Request dated 23 January 2013, at [5.4].

110 Mr Vanhoucke's Affidavit of Evidence in Chief, [29].

(b) On 28 January 2011, Softorb confirmed that it would be submitting a new ROM Code (*ie*, operating system) to ST-AP to be used in the production of chips ordered by Softorb.[111] Softorb indicated *inter alia* that: it was intending to purchase a total of 100,000 modules from ST-AP; and that the order was to be a "Risk Order", which meant that Softorb authorised ST-AP to commence volume production of the 100,000 modules immediately, without having to wait for the customer to test and validate the DILs or initial batches of modules.

(c) On 11 February 2011, an encrypted file containing Softorb's operating system was submitted to ST-AP.[112] This operating system was given the code reference "RUA".[113]

(d) On 24 February 2011, Softorb issued a purchase order to ST-AP, confirming an order for five units of ST23YR12 chips in DIL form and 8,000 units of ST23YR12 chips in module form.[114]

(e) On 1 March 2011, Softorb agreed to purchase from ST-AP 100,000 ST23YR12 chips in module form that were encoded with the "RUA" operating system.[115] Softorb also confirmed that its order for the 100,000 units of ST23YR12 was a "Risk Order".[116]

(f) On or around 2 April 2011, five units of ST23YR12 chips in DIL form were delivered to Softorb for testing.[117] The batch of

111 1AB 385.

112 Mr Vanhoucke's Affidavit of Evidence in Chief, [31].

113 Mr Vanhoucke's Affidavit of Evidence in Chief, [31].

114 Mr Vanhoucke's Affidavit of Evidence in Chief, [32(a)].

115 Mr Vanhoucke's Affidavit of Evidence in Chief, [32(b)(i)].

116 Mr Vanhoucke's Affidavit of Evidence in Chief, [32(b)(ii)].

ST23YR12 modules encoded with the RUA operating system were also shipped sometime in early April 2011.[118]

(g) On 20 April 2011, Softorb requested ST-AP to halt production of the 100,000 ST23YR12 modules. Softorb had tested the initial batch of ST23YR12 DILs and modules but could not get the RUA operating system to work.[119] Following investigations, Softorb informed ST-AP that there had been an error in the manner in which it had previously generated the RUA code and that it had to submit a new operating system to ST-AP.[120]

(h) On or about 4 May 2011, Softorb submitted a New ROM Code Submission form to ST-AP and indicated that this order would *not* be a "Risk Order", that is to say, that ST-AP should not commence production of the 100,000 ST23YR12 modules until Softorb had tested the initial batch of ST23YR12 DILs and modules and validated the revised operating system encoded therein.[121] On 5 May 2011, Softorb submitted a new operating system which was given the code reference "RUB" by ST-AP.[122]

(i) On or about 27 May 2011, Softorb issued a purchase order to ST-AP confirming an order for five units of ST23YR12 chips in DIL

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117 Mr Vanhoucke's Affidavit of Evidence in Chief, [33].

118 Mr Vanhoucke's Affidavit of Evidence in Chief, [34].

119 Mr Vanhoucke's Affidavit of Evidence in Chief, [35].

120 Mr Vanhoucke's Affidavit of Evidence in Chief, [36]; Oxel's Bundle of Documents which have been Excluded from the Agreed Bundle Vol 8, 2991.

121 Mr Vanhoucke's Affidavit of Evidence in Chief, [37].

122 Mr Vanhoucke's Affidavit of Evidence in Chief, [38].

form and 8,000 units of ST23YR12 chips in module form.[123] All the chips were to be encoded with its RUB operating system.[124]

(j) On 8 June 2011, Softorb issued a purchase order for 100,000 units of ST23YR12 modules encoded with the RUB operating system (the "8 June 2011 Purchase Order").[125]

(k) On or about 6 July 2011, the five ST23YR12 DILs encoded with the RUB operating system were shipped out to Softorb.[126]

(l) On 12 July 2011, Softorb issued a ROM Code Validation Form to ST-AP, confirming that the ST23YR12 DILs delivered to Softorb had been tested and were working fine with the RUB operating system, and that ST should commence production of the additional 100,000 ST23YR12 modules encoded with the RUB operating system.[127]

(m) The 8,000 units of ST23YR12 modules encoded with the RUB operating system were shipped to Softorb in two batches on 21 July 2011 and 11 August 2011.[128]

(n) The 100,000 ST23YR12 modules encoded with the RUB operating system were subsequently shipped out in two batches on 26 September 2011 and 30 September 2011 respectively.[129]

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123 Mr Vanhoucke's Affidavit of Evidence in Chief, [39(a)].

124 Mr Vanhoucke's Affidavit of Evidence in Chief, [39(a)].

125 Mr Vanhoucke's Affidavit of Evidence in Chief, [39(b)].

126 Mr Vanhoucke's Affidavit of Evidence in Chief, [40].

127 Mr Vanhoucke's Affidavit of Evidence in Chief, [41].

128 Mr Vanhoucke's Affidavit of Evidence in Chief, [42].

129 Mr Vanhoucke's Affidavit of Evidence in Chief, [43].

78 In the light of the above events, it is unsurprising that during cross-examination, Mr Tannos conceded that Sandipala's position (contrary to its pleaded position) was the Tender Evaluation Chips had been supplied pursuant to the 8 June 2011 Purchase Order.[130] Mr Tannos also conceded that (a) the 10,000 pieces of chips that Sandipala had allegedly collected from PNRI's factory could not have come from the Tender Evaluation Chips;[131] (b) the 1,000 chips that Sandipala allegedly used to produce and personalise the cards for testing and evaluation in the Tender could not have come from the Tender Evaluation Chips;[132] and (c) the testing and evaluation that was carried out in Sandipala's factory on 20 May 2011 had nothing to do with the Tender Evaluation Chips.[133] His concessions, coupled with the fact that the chips that were the subject of the 8 June 2011 Purchase Order were only delivered in September 2011, effectively means that the tender evaluation could not have involved any ST-AP chips despite the fact that ST-AP's ST23YR12 chips had been approved for use in the E-KTP Project. The disparity between the concessions and what was pleaded is clear.

79 In the light of the above facts and concessions, Sandipala changed tack and claimed that a "chip emulator" (instead of the physical chips) encoded with the RUB operating system could have been tested during the tender evaluation.[134] This assertion or suggestion arose after Mr Tannos read Mr Bruno Louis S Vanhoucke's ("Mr Vanhoucke's") AEIC in which Mr

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130 Transcript 14 March 2016 at p 114 at line 5 to p 115 at line 21.

131 Transcript 14 March 2016, p 78 at line 15 to p 79 at line 6.

132 Transcript 14 March 2016, p 81 at line 7 to p 82 at line 5.

133 Transcript 14 March 2016, p 82 at line 22 to p 83 at line 17.

134 Transcript 14 March 2016, pp 72 – 74 and 110.

Vanhoucke (an employee of ST-AP) stated that Softorb had asked ST-AP to provide a chip emulator and that he had attended to Softorb's request.[135]

80 I note first that the alleged use of a chip emulator has not been pleaded; Sandipala's pleaded case was that actual physical chips had been used. Secondly, the alleged use of a chip emulator is inconsistent with the evidence before the court.

(a) Oxel's expert, John Lam ("Mr Lam"), gave evidence that he had never heard of any government tender for smartcards where the government permitted the use of a chip emulator during the POC Stage. According to him, testing had to be done on a physical smartcard because the government would need to satisfy itself of the tenderer's capability to produce the physical smartcard to be used in the government project.[136] Mr Vanhoucke also gave evidence asserting that an emulator could not have been used as actual components were required for testing.[137]

(b) Sandipala's own expert, Choong Wan An ("Mr Choong"), acknowledged at trial that the E-KTP documents had stipulated that physical chips were required for testing at the POC Stage, and not emulators.[138] While he sought to suggest that the Indonesian Government officials could have exercised their discretion and allowed testing to be carried out using an emulator, he admitted that he was merely speculating[139] as he had not seen any documents that reflected

135 Mr Vanhoucke's Affidavit of Evidence in Chief, [28].

136 Mr Lam's supplemental expert report dated 22 March 2016, [6].

137 Transcript of 28 March 2016, p 106 at line 15 to p 107 at line 3.

138 Transcript of 19 May 2016, p 17 at lines 2 to 11.

what was actually tested and evaluated during the POC Stage.[140] He also conceded that the POC Stage involves a "very thorough process"[141] and that tests are not conducted on just one card, but a set of ten to 20 cards.[142] I note that his suggestion that an emulator could have been used is inconsistent with his own description of testing that is usually conducted at the POC Stage:[143]

> …So it's a very thorough process and at the end of that exercise, where they have -- you call them judges, the technical person, you are locked up in a room, you have the computer in front of you with your equipment and setup. You have your set of sample cards or sample blank cards and you have to perform all these tests in front of these judges step by step and the outcome of that is your test scores.

81 Mr Tannos then shifted his position and adopted a theory posited by Mr Choong, which claimed that ST-AP chips encoded with RUA operating system could have been tested. However, when pressed to confirm that this was indeed his case (as opposed to mere speculation), Mr Tannos appeared hesitant, stating only that he "was not involved in the [POC], as [he] mentioned many time[s]".[144]

82 Mr Tannos' hesitation to confirm his position was unsurprising in light of the undisputed fact that the initial batch of chips encoded with the RUA operating system could not work. If those chips had been tested, it would be

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139 Transcript of 19 May 2016, p 18 at lines 15 to 19.

140 Transcript of 19 May 2016, p 17 at line 16 to p 18 at line 5.

141 Transcript of 19 May 2016, p 35 at line 20.

142 Transcript of 19 May 2016, p 35 at lines 18 to 19.

143 Transcript of 19 May 2016, p 35 at line 19 to p 36 at line 3.

144 Transcript of 14 March 2016, p 108 at lines 7 to 21.

extremely surprising that the Indonesian Government would have awarded the Tender to the PNRI Consortium. Therefore, I find that it is highly unlikely that the chips that were encoded with the RUA operating system were tested as part of the tender evaluation. I note also that Sandipala has not adduced any documents showing exactly what chip and software were tested at the POC Stage.

83 In the face of these difficulties, Sandipala changed tack again and claimed that the "Tender Evaluation Chips" were only a means of identifying the chips in the pleadings and these chips may not have in fact been used for the tender evaluation.[145] The new position was that it had wanted chips identical to the 100,000 chips that ST-AP had actually supplied to Softorb in September 2011.[146]

84 I agree with the defendants that these claims are quite different from what has been pleaded by Sandipala. Sandipala had identified the Tender Evaluation Chips by reference to what it said had been tested at its factory in May 2011. Since it has been established that the chips supplied by ST-AP to Softorb could not have been tested then, Sandipala should not then be permitted to make such a glaring departure from its original pleaded position.

85 Before leaving this issue, I add that I find Sandipala's evidence in relation to the dealings between Softorb and ST-AP to be extremely unsatisfactory. Mr Tannos, the main actor behind Sandipala, admitted that he had no personal knowledge of ST-AP's dealings with Softorb; he was only

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145 Transcript of 14 March 2016, p 81 at lines 14 to 18.

146 Transcript of 1 April 2016, p 77 at lines 20 to 24.

informed of Softorb's involvement in PNRI's sourcing of chips only after the dispute had arisen in mid-2012.[147] He also confirmed that he did not know:

(a) Whether any member of the PNRI Consortium had provided the technical specifications to ST-AP in order for ST-AP to recommend suitable chips and software.[148]

(b) Details of any alleged dealings between Quadra or Softorb and ST-AP as of the first half of 2011.[149] In particular, Mr Tannos conceded that he did not even know whether Softorb was procuring chips for the PNRI Consortium.[150]

(c) The specifications of the chips or the software that was ultimately proposed by the PNRI Consortium during the tender submission.[151]

86 Even though Mr Tannos did not have experience of the electronic smart card industry, he clearly is a seasoned business man. The general tenor of his evidence was that he had little information on the technical aspects of the tender award and that he had no direct knowledge of what chips had been tested and approved. This was so even though POC testing had taken place at Sandipala's own premises. It bears repeating that Sandipala is but one member of the PNRI Consortium. Even if Sandipala and Mr Tannos did not have direct knowledge of the chips and operating system, it is difficult to accept that he

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147 Transcript of 14 March 2016, p 60 at lines 18 to 24.

148 Transcript of 18 March 2016 p 21 at line 6 to p 23 at line 1.

149 Transcript of 18 March 2016 p 17 at lines 12 to 15.

150 Transcript of 18 March 2016, p 18 at lines 15 to 21.

151 Transcript of 18 March 2016, p 17 at lines 4 to 7.

did not or could not find out the necessary information from other PNRI Consortium members such as Quadra.

Whether Sandipala knew from the outset that the chips that were to be supplied by Oxel would not work with the pre-existing systems

87 After having evaluated the evidence and arguments, I accept the defendants' contention that Sandipala knew from the outset what it was purchasing under the Agreement; its claim that it had been tricked into purchasing chips that could not work was an afterthought.

88 I will examine the evidence on related sub-issues in the sections that follow. These related sub-issues are:

(a) Whether Sandipala was instructed by PNRI to procure chips of the type that were approved by the MHA from ST-AP;

(b) Whether Sandipala was shopping around for different operating systems;

(c) Whether Mr Tannos had embarked on steps to modify the existing card system; and

(d) Whether Sandipala's reaction in 2012 was consistent with one who had been defrauded.

Whether Sandipala had been instructed by PNRI to procure from ST-AP chips of the type approved by the MHA

89 According to Sandipala, the initial arrangement within the PNRI Consortium was that PNRI would purchase all 172m chips required for the E-KTP Project and sell Sandipala the chips it required at a price of US$0.60.[152]

Sandipala claims that PNRI later reneged on that agreement and in early July 2011, instructed Sandipala to purchase from ST-AP chips of the type that were approved by the MHA.[153] This was said to corroborate Sandipala's claim that it only wanted to purchase such chips.[154] It also claims that this was the context in which Mr Tannos was introduced to Mr Cousin by Mr Isnu Wijaya ("Mr Isnu") of PNRI for the purpose of Sandipala's purchase of chips from ST-AP.[155]

90 I do not accept these assertions. The documentary evidence did not reflect the alleged agreement that PNRI would purchase all 172m chips required for the E-KTP Project and sell Sandipala the chips it required. On the contrary, as mentioned earlier, the evidence shows that Sandipala had been in direct contact with NXP since early-June 2011 to obtain the details of the pricing of NXP's chips. This is evident from an email sent by Mr Tannos to Mr Isnu on 11 June 2011 which he stated "I am still waiting for the final price from NXP".[156]

91 Further, Sandipala's claim that it had been specifically instructed to purchase chips from ST-AP simply does not make sense. Sandipala had up to that point been using only NXP chips and it was Mr Tannos' own evidence that Sandipala had the right to choose between NXP's or ST-AP's chips for the production of E-KTP Cards.[157] I cannot see any reason why Sandipala would unquestioningly follow PNRI's instructions to purchase chips from ST-

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152 Mr Tannos' Affidavit of Evidence in Chief, [33].

153 Closing Submissions of Sandipala, [67].

154 Closing Submissions of Sandipala, [52(a)].

155 Mr Tannos' Affidavit of Evidence in Chief, [34].

156 Plaintiff's Bundle of Documents Vol 4, p 1501.

157 Transcript of 15 March 2016, p 89 at line 22 to p 90 at line 1.

AP. For these reasons, I reject Sandipala's claims that it had been instructed by PNRI to purchase chips from ST-AP and had been introduced to Mr Cousin for that purpose.

Whether Mr Tannos had been shopping around for other operating systems

92 As summarised earlier, it is clear that in the second half of 2011 and prior to entering the Agreement with Oxel, Mr Tannos had been shopping around for chips and alternative operating systems from various companies. These include ST chips encoded with Ubivelox operating system as well ST chips with Oberthur software. Indeed, it bears repeating that Sandipala had even been offered ST23YR12 chips encoded with RUB software by ST-AP.

93 Nonetheless, Mr Tannos denied that he had been actively sourcing for other operating systems. According to him, quotations received regarding Ubivelox's products were unsolicited. He claims that the meeting between Mr Kim and himself was the product of Mr Cousin's initiative and was held with the intention of introducing an alternative software supplier to Mr Tannos without his knowledge that the software had not been approved for use in the E-KTP Project.[158] As for the Oberthur discussions, Sandipala submits that its course of dealings with Oberthur evidenced a desire to only procure "Tender Evaluation Chips encoded with the approved software for the E-KTP [P]roject".[159] Given the significance of these dealings and the credibility of Mr Tannos' evidence, the evidence on his dealings or contacts with Ubivelox and Oberthur is discussed in more detail below.

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158 Closing Submissions of Sandipala, [99].

159 Closing Submissions of Sandipala, [94].

(1) The dealings with Ubivelox

94 On 4 August 2011, Sandipala received two quotations for ST23YR12 chips encoded with an operating system from Ubivelox, a Korean company that was in the business of providing smart card solutions. The first quotation ("the Ubivelox Quotation") was attached to an email from Mr Kim, then Managing Director of Ubivelox's Singapore subsidiary, to Mr Tannos.[160] The Ubivelox Quotation included quotes for Ubivelox's KMS, maintenance for KMS, Ubivelox's Security Access Module ("SAM") and various forms of chips encoded with the Ubivelox operating system.[161] Ubivelox quoted US$0.45 per chip for "Wafer + OS" and US$0.52 per chip for the "Module + OS".[162] The second quotation was attached to an email sent from Mr Cousin to Mr Tannos ("the ST-Ubivelox Quotation").[163] The ST-Ubivelox Quotation was for ST23YR12 wafers encoded with Ubivelox's operating system at US$0.45 per chip.

95 Mr Kim, who was called as Oxel's witness at trial, provided an account of how his meeting with Mr Tannos came about, what transpired at the meeting and the context in which he sent Mr Tannos the Ubivelox Quotation. According to him, his business associate, Mr Ruddy Hartanto, informed him that Mr Tannos wanted to meet to discuss possible opportunities in relation to the E-KTP Project.[164] He agreed and flew to Jakarta to meet with Mr Tannos, Mr Hartanto and Mr Cousin on 4 August 2011.[165] Mr Kim said that Mr Tannos

160 2AB 793.

161 2AB 794.

162 2AB 794.

163 2AB 795.

164 Mr Kim's Affidavit of Evidence in Chief, [5]–[6].

165 Mr Kim's Affidavit of Evidence in Chief, [6]-[7].

had expressed interest in purchasing ST23YR12 chips encoded with Ubivelox's operating system, a new KMS and SAM to be used together with the Ubivelox operating system. Mr Kim testified that Mr Tannos asked for a quotation for these items which he (Mr Kim) then provided after the meeting.[166]

96 Mr Kim also said that Mr Tannos' request for a quotation for a new operating system, KMS and SAM struck him as odd because it seemed that Mr Tannos wanted to use those components in place of what had been approved by the Indonesian Government for the E-KTP Project.[167] Mr Kim said that he warned Mr Tannos that these changes would require redevelopment as well as modification work and that the Indonesian Government would have to approve and accept the modifications.[168] Mr Kim also noted that Mr Tannos said he was aware of that and did not appear concerned.[169] Since Mr Tannos seemed to know what he was doing and appeared to be a serious potential customer, Mr Kim prepared that the Ubivelox Quotation that set out the prices of the Ubivelox KMS, maintenance for the KMS, the Ubivelox SAM and chip module encoded with Ubivelox operating system.[170]

97 In his AEIC, Mr Tannos claimed that the Ubivelox Quotation was unsolicited and that he had received it before he met with Mr Cousin and Mr Kim.[171] Mr Tannos also claimed that his meeting with Mr Kim took place at the initiative of Mr Cousin who was trying to convince him to use chips

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166 Mr Kim's Affidavit of Evidence in Chief, [7].

167 Mr Kim's Affidavit of Evidence in Chief dated 5 February 2016, [8].

168 Mr Kim's Affidavit of Evidence in Chief dated 5 February 2016, [8].

169 Mr Kim's Affidavit of Evidence in Chief dated 5 February 2016, [8].

170 Mr Kim's Affidavit of Evidence in Chief dated 5 February 2016, [9].

171 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [37]–[40].

encoded with Ubivelox's operating system.[172] According to Mr Tannos, he declined to purchase the chips encoded with Ubivelox operating system since he was not prepared to accept chips different from the Tender Evaluation Chips.[173]

98 On the whole, I find Mr Kim to be an honest witness and his account is consistent with and supported by the contemporaneous evidence. First, I am unable to accept Mr Tannos' claim that the Ubivelox Quotation had been sent to him before the meeting on 4 August 2011. The brevity of Mr Kim's email attaching the Ubivelox Quotation suggests that some discussion had taken place prior to that email and therefore is more consistent with Mr Kim's evidence that he had sent the Ubivelox Quotation after the meeting on 4 August 2011. Significantly, Mr Tannos accepted under cross-examination that there was a discussion during the 4 August 2011 meeting about a quotation being sent after the meeting.[174]

99 Secondly, it is clear from Mr Kim's evidence and the Ubivelox Quotation that Mr Tannos had, at the very least, demonstrated some interest in the Ubivelox operating system. I find it quite unlikely that Mr Kim would have prepared a quotation for these items if Mr Tannos had not demonstrated any interest in such items. Further, the fact that the Ubivelox Quotation included items such as the KMS and the SAM is also telling. These components were required for the purpose of modifying the system so that the Datacard machines could personalise ST chips. Their inclusion in the Ubivelox Quotation is consistent with Mr Kim's evidence that he had

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172 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [43].

173 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [43].

174 Transcript of 15 March 2016, p 49 at lines 9 to 12.

explained these components to Mr Tannos and had informed Mr Tannos that the use of new software would require redevelopment as well as modification work. This undermines Mr Tannos' claim that he was not seeking to reinvent the wheel and was only looking for Tender Evaluation Chips.

100 I find no reason to disbelieve Mr Kim's account of the meeting on 4 August 2011 since he was an independent witness who had no interest in the outcome of the proceedings. While Mr Tannos suggested that Mr Cousin had sought to persuade him (Mr Tannos) to consider the use of alternative operating systems, I do not accept this suggestion since I do not see why Mr Cousin would have an incentive to procure a change in the operating system since he was at all material times representing ST-AP, a hardware manufacturer.

(2) The dealings with Oberthur

101 Separately, it will be recalled that in September 2011, Mr Tannos exchanged a series of correspondence with representatives of Oberthur.

(a) On 3 September 2011, Leow Sue Wei ("Ms Leow") of Oberthur sent Mr Tannos a quotation for 1m "ID ONE modules … Product Specs compliant to the specification based on the tender of the National Administration of NIK-based Citizenship ID" at a price of US$0.425 per chip.[175] The price included "Perso Services per Card".[176]

(b) On 7 September 2011, Ms Leow sent Mr Tannos a revised quotation for 30m "ID ONE modules (Using ST23 Series – NXP

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175 3AB 876 – 877.

176 3AB 876 – 877.

P3/P5 Series)" at a price of US$0.43 per chip.[177] Similarly, the price included "Perso Services per Card".[178]

(c) On 8 September 2011, Mr Tannos replied to say that "the price of chips is OK" and requested for 20 samples of both ST-AP's and NXP's chips for testing by the MHA.[179] In the same email, Mr Tannos also asked that a draft sales agreement be sent to him.[180]

(d) On 10 September 2011, Mr Tannos informed Peter Wong ("Mr Wong") of Oberthur that Sandipala's manager, Mr Yulianto, would meet with Oberthur's technical manager.[181]

(e) On 15 September 2011, Mr Wong sent Mr Tannos a document[182] explaining that Oberthur would provide a "Common Personalisation System" which would support the personalisation of the Oberthur operating system using multiple chips. The document also described the provision of a "Standalone [KMS]" that would be used for "key exchange between the government KMS and the perso bureau KMS".

(f) On 16 September 2011, Mr Wong informed Mr Tannos that:[183]

> … the present DPP (Datacard Production System) setup is only customize to Perso the P3 NXP Module. The DPP is not able to Perso the STM, TMC and maybe not even the NXP P5 module. … Whereas our system is

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177 3AB 878 – 891.

178 3AB 879.

179 3AB 882.

180 3AB 882.

181 3AB 884.

182 3AB 886–890.

183 3AB 894.

> able to Perso NXP, STM, TMC or even any future requirements. … More importantly, we are able to provide the Single OS on multiple chips.

(g) On 19 September 2011, Mr Tannos contracted to purchase from Oberthur 30m "ID ONE modules (Using ST23 Series – NXP P3/P5 Series)". The purchase order was made subject to "testing and approval by the Authority".[184]

102 The aforementioned correspondence between Mr Tannos and the representatives of Oberthur contradicts Mr Tannos' claim that he was only looking for chips that were identical/similar to the Tender Evaluation Chips. Importantly, he was informed that there were limitations to the existing Datacard Production System which could only personalise the "P3 NXP Module". Notwithstanding that, he had contracted to purchase 30m chips from Oberthur. I note in particular that the document attached to Mr Wong's email dated 15 September 2011 had also included a reference to a KMS that would be provided by Oberthur. This corroborates Mr Kim's evidence that Mr Tannos was interested in making modifications to the existing card system that would be achieved by procuring, amongst other things, a new KMS.

103 Apart from an intention to modify the E-KTP infrastructure, Mr Tannos' dealings with Oberthur also showed that he was sourcing from Oberthur cheaper alternative chips. This puts paid to his claim that he did not want to purchase chips that were different from the Tender Evaluation Chips. Besides the NXP P3 and ST23YR12 chips that had been approved by the Indonesian Government, the quotations issued by Oberthur included the NXP P5 chip which had not been approved.

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184 4AB 1288.

(3) The dealings with Hongda

104 Apart from Ubivelox and Oberthur, it appears that Mr Tannos was in contact with Hongda which was a chip distributor. In his AEIC, Mr Tannos said:[185]

> Hongda was a distributor that had approached me and offered to sell Sandipala the exact same microchips as the tender evaluation chips. As a precaution, I insisted that Hongda send me a Letter of Support from ST before I would discuss purchasing any of their microchips. Hongda did not send me any letters of support from ST or ST-AP, and accordingly, we did not enter into any discussions or negotiations regarding Hongda's microchips. The only parties I had entered into discussions and negotiations for the tender evaluation chips were ST-AP, Oxel and Oberthur.

105 Again, Mr Tannos tried to dissociate himself from his dealings with Hongda by claiming that his meeting with Hongda was unsolicited. Under cross-examination, Mr Tannos admitted that he had "many meetings with Hongda".[186] However, he maintained, quite unconvincingly, that what he did in those meetings was to insist on a proposal for Tender Evaluation Chips which Hongda could not provide.[187] In this regard, I agree with the submission of ST-AP/Mr Cousin that it is more likely that Mr Tannos' discussion with Hongda went beyond the proposal stage.[188] It would be illogical and indeed unnecessary for Mr Tannos to have "many meetings with Hongda" so as to insist on a proposal that Hongda could not provide. The inference that Mr Tannos' discussion with Hongda went beyond that is further reinforced by the

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185 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [102].

186 Transcript of 18 March 2016, p 63 at lines 6 to 11.

187 Transcript of 18 March 2016, p 67 at lines 6 to 21.

188 Closing Submissions of ST-AP and Mr Cousin, [118(d)].

following exchange between Mr Tannos and Mr Winata on Blackberry Messenger. Mr Winata said:[189]

> Sir, actually right now… I don't really need letter from adminduk. The urgent one is your letter because now besides Oberthur, there is hongda that claims that they win E-KTP order from Mr [Tannos] again… We need to erase all 'noise' to be able to concentrate [for] production.

106 In his reply, Mr Tannos did not deny Hongda's claim that it had won the order but simply said:

> Ok we will stop oberthur and Hongda.

I note also that Mr Tannos' reply is inconsistent with his evidence that his dealings with Hongda were limited to his insistence on a proposal which Hongda did not provide. If that was the case, it would not have been necessary for him to "stop" his dealings with Hongda.

(4) The dealings with Oxel

107 There is a dispute as to how and why Mr Tannos was introduced to Mr Winata of Oxel. Mr Tannos claims that Mr Cousin had introduced Mr Winata to him. On the other hand, Mr Cousin claims that it was Mr Tannos who actively persuaded Mr Cousin to introduce him to Mr Winata but Mr Winata refused to meet Mr Tannos.[190] According to Mr Cousin, Mr Tannos was eventually introduced to Mr Winata by one Jack Budiman ("Mr Budiman").[191] Mr Winata confirmed that he had refused Mr Tannos' approaches until

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189 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016 at [101].

190 Transcript of 5 April 2016, pp 116 to 123; Mr Cousin's Affidavit of Evidence in Chief, [58].

191 Mr Cousin's Affidavit of Evidence in Chief, [58].

October 2011 when he finally agreed to meet Mr Tannos on account of Mr Budiman.[192]

108 This dispute of fact is significant because Sandipala's case that there was a conspiracy between ST-AP and Oxel (to offload on it chips that could not work) would be severely damaged if it was Mr Tannos who had actively sought an introduction to Mr Winata.

109 I pause here to note that Mr Budiman was supposed to give evidence at the trial but ultimately did not do so. However, I am not inclined to draw any adverse inferences against Oxel for Mr Budiman's absence from the trial. I find unimpressive Sandipala's suggestion that Mr Budiman got cold feet about testifying in Singapore. I accept Oxel's explanation that Mr Budiman was ready to appear in the first tranche of the trial but was unable to make it to Singapore on the new dates when the dates for his appearance at trial was shifted because (*inter alia*) Mr Tannos' cross-examination lasted longer than expected.[193] I do not think that anything more than that should be inferred from his absence. Further, even if Mr Budiman's evidence were put aside, I find Mr Cousin's and Mr Winata's evidence that it was Mr Tannos who had actively courted Mr Winata to be supported by an exchange between Mr Tannos and Mr Cousin on Blackberry Messenger in September 2011. For easy reference, the relevant part of the Blackberry chat is reproduced as follows:[194]

> PT: Hi vincent, can you help arrange so I can meet [your] friend?
>
> V: I talked to him and it seems very… difficult now…

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192 Mr Winata's Affidavit of Evidence in Chief, [17].

193 Closing submissions of Oxel, [350].

194 ST-AP and Mr Cousin's Core Bundle, p 21

> PT: We can meet in private and I [have] business proposition to him
>
> V: OK Pak. I will update him and ask again.
>
> PT: We can meet and if no agreement is ok. I would like to propose that will benefit everyone. Meeting should be very confidential
>
> PT: Just meet me and listen to my proposal. If not agree ok, if agree then it will benefit everyone
>
> V: OK Pak. Noted, I pass the message. Indeed confidentiality is absolutely key….

In his AEIC, Mr Cousin confirmed that the "friend" referred to in the above exchange was Mr Winata. The exchange was also forwarded by Mr Cousin to Mr Winata the next day and Mr Winata confirmed that he had received the message containing the exchange.[195]

110 During cross-examination, Mr Tannos did not confirm or deny the exchange that took place between him and Mr Cousin. He initially claimed that he did not remember such an exchange.[196] Upon further questioning, he accepted that the chat may have taken place but suggested that words may have been added to the exchange.[197] I am satisfied that the chat had indeed taken place and Mr Tannos had attempted to seek an introduction to Mr Winata through Mr Cousin. Mr Tannos' evasiveness on the stand simply fortifies my view in this regard. I also have no reason to disbelieve Mr Winata's evidence that Mr Tannos had mentioned his intention to change the E-KTP infrastructure at their first meeting.[198] This is wholly consistent with

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195 Transcript of 17 May 2016, p 26 at lines 4 to 7.

196 Transcript of 21 March 2016, p 15 at lines 4 to 5.

197 Transcript of 21 March 2016, p 15 at line 25 to p 16 at line 1.

198 Mr Winata's Affidavit of Evidence in Chief, [20].

the reason why Mr Tannos sought an introduction to Mr Winata: he had a business proposition for Mr Winata.

111 All in all, the overall picture of the state of affairs between September and October 2011 is that Mr Tannos was shopping around for alternative chips and operating systems. While Mr Tannos characterised his discussions with Oberthur, Hongda and Ubivelox as "unsolicited", feigned disinterest in their proposals and even denied that his first meeting with Mr Winata took place at his initiative despite evidence to the contrary, I am unable to accept his characterisation of the relevant events. Instead, I find that he had been actively sourcing for alternative chips and/or software for use in the E-KTP Project.

Whether Mr Tannos had embarked on steps to modify the existing card system

112 I am also satisfied on the evidence that Mr Tannos had embarked on plans to modify the existing card system. Mr Winata gave evidence that around October to November 2011, he met with representatives of Datacard at Mr Tannos' request.[199] At that time, Datacard was preparing a proposal for Sandipala on how to modify the personalisation system and the KMS in the card system so that they would work with the PAC operating system that was encoded on Oxel's chips.[200] It will be recalled that Sandipala had ordered 14 Datacard personalisation machines in June/July 2011. These were configured for use with the NXP P3 chip and system. According to Mr Winata, Mr Tannos wanted him to explain to Datacard the specifications of Oxel's chips, the PAC operating system encoded on those chips, and other proprietary information about the operating system.[201] While the technical discussions

199 Mr Winata's Affidavit of Evidence in Chief, [56] – [58].

200 Mr Winata's Affidavit of Evidence in Chief, [57].

201 Mr Winata's Affidavit of Evidence in Chief, [58].

were ongoing, Mr Tannos told Mr Winata that Sandipala wanted to order 100m chips to be delivered as soon as possible.[202] Mr Tannos confirmed that he was aware and understood that the chips supplied by Oxel would be encoded with the PAC operating system and would not work with the existing card system.[203]

113 I pause to note that it is understandable why Mr Tannos should request that 100m chips be delivered as soon as possible. Time was ticking. Sandipala was already behind schedule in meeting its production quota for 2011. It is apparent that for 2011, Sandipala was using NXP chips. Sandipala, for whatever reason, was looking for ST chips for 2012. If Sandipala was to be able to meet its quota for 2012, it stands to reason that he needed to secure the chips as soon as possible.

114 I note that Mr Winata's version of events is corroborated by the evidence of Ms Monica Lim ("Ms Lim") of Datacard. According to Ms Lim, Mr Tannos informed Datacard that Sandipala wanted to produce E-KTP Cards using chips manufactured by ST and wanted to know if Datacard could provide an alternative solution in order to personalise the E-KTP Cards with chips from ST. Mr Tannos requested for a proposal for modifications to be made to the personalisation systems so that they would be able to personalise E-KTP Cards using ST chips. It was in this context that Mr Tannos introduced the Datacard team to Mr Winata.

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202 Mr Winata's Affidavit of Evidence in Chief, [65].

203 Mr Winata's Affidavit of Evidence in Chief, [66].

115 By an email dated 5 December 2011, Datacard provided Sandipala with a draft proposal for modification works to be made to the card system. The "Project Description" section of the draft proposal stated:[204]

> Sandipala has expressed interest in migrating the existing Indonesia NID card personalization system to a new platform, which supports ID management system provided by Logii and chip cards provided by ST Micro. Logii will be responsible for managing the entire migration process. Datacard will provide professional service to assist Logii for the migration.

116 The draft proposal was later revised and the "Project Description" section of this revised proposal stated:[205]

> Sandipala has expressed interest in upgrade [*sic*] the existing Indonesia NID card personalization system at the service bureau to support new ID management system, Hardware Security Module and Smartcards provided by Logii. Datacard is pleased to provide this quotation to Sandipala for the professional service for upgrade [*sic*] the system.

117 These draft proposals (collectively "the Draft Proposals") provide clear evidence of Mr Tannos' intention to modify the card system in December 2011, well before the first batch of Oxel's chips were delivered to Sandipala in January 2012. Therefore, his intention to procure such modifications could not have been made in response to his alleged discovery in January 2012 that Oxel's chips could not work.

118 Mr Tannos' intention to modify the card system was also corroborated by a number of other witnesses:

(a) Mr Vanhoucke stated that Datacard was asked to assist in the migration or modification of the existing personalization system and

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204 3AB 1088.

205 4AB 1213.

KMS used in the E-KTP Project so that the systems would be compatible with the PAC operating system, and he met representatives from Datacard to assist them for this purpose.[206] The target was to complete the migration process before the end of December 2011, which was when the first batch of Oxel's chips was expected to be delivered.[207]

(b) Mr Cousin also gave evidence that during the first meeting he attended with Mr Winata and Mr Tannos in the second half of October 2011, Mr Tannos said that Sandipala would be making arrangements to secure changes to the personalisation system and the KMS to ensure that they would be compatible with the PAC operating system and asked Mr Cousin if ST could assist with technical matters.[208]

(c) Mr Nanang Faizal, an IT consultant hired by Oxel, gave evidence that he attended meetings from November 2011 to January 2012 with Mr Tannos and Mr Winata and it was clear to him that Mr Tannos intended to modify the existing E-KTP infrastructure to work with Oxel's chips and the PAC operating system.[209]

119 In the face of the evidence outlined above, Mr Tannos' denial that he had embarked on a course to modify the card system rings hollow. I note that Mr Tannos had attempted to explain away the effect of the modification proposals had on Sandipala's case by suggesting that modifications outlined in the Draft Proposals were necessary because there were issues pertaining to the

206 Mr Vanhoucke's Affidavit of Evidence in Chief, [47] and [49].

207 Mr Vanhoucke's Affidavit of Evidence in Chief, [48].

208 Mr Cousin's Affidavit of Evidence in Chief, [63]–[65].

209 Mr Faizal's Affidavit of Evidence in Chief, [15], [18].

performance and speed of the Datacard machines that had been supplied.[210] The response of Ms Lim in her supplemental AEIC (which I accept) was that the aim of the Draft Proposals was to enable the Datacard machines to personalise the E-KTP Cards using Oxel's chips and had nothing to do with operational efficiency.[211] Indeed it bears repeating that Sandipala was using Datacard machines in 2011 to personalise NXP chips. There is clear evidence that the Datacard machines needed to be adjusted to be able to personalise ST chips in a manner that was compatible with the E-KTP card system. I have no doubt that Mr Tannos was well aware of this fact.

120 Instead, issues regarding operational efficiency were addressed by way of a separate proposal pertaining to "perso centre optimization"[212] that was provided in January 2012, not the Draft Proposals that had been prepared in December 2011. This was conceded by Mr Tannos during cross-examination.[213] In the circumstances, I am unable to accept Mr Tannos' explanation that the Draft Proposals had been prepared with the intention of maximising operational efficiency, as opposed to changing the E-KTP card system. I instead find that the Draft Proposals constitute clear evidence that Mr Tannos had planned to modify the E-KTP infrastructure even before the first batch of Oxel's chips were delivered on 22 December 2011.

121 Sandipala sought to undermine the effect of Ms Lim's evidence on the basis that she was not the author of the Draft Proposals and therefore did not have the personal knowledge required to give evidence about the Draft

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210 Mr Tannos' Supplemental Affidavit of Evidence in Chief, [14] – [21].

211 Ms Lim's Supplemental Affidavit of Evidence in Chief, [19].

212 4AB 1391.

213 Transcript of 18 March 2016, p 95 line 6 to p 96 line 4.

Proposals. I am unable to agree with Sandipala in this regard. The evidence shows that Ms Lim had personally dealt with Mr Tannos and would have the requisite knowledge to give evidence about the Draft Proposals. In any case, I find the contents of the Draft Proposals to be self-explanatory and they clearly speak about Sandipala's intention to procure changes to the existing card system to ensure compatibility with Oxel's chips.

122 Sandipala also sought to undermine Ms Lim's evidence by pointing to the references to "Logii" and "Mr Andi Winata" in the Draft Proposals and a reference to "Danatel" in an earlier draft proposal prepared by Datacard but not circulated to Sandipala. Sandipala also suggests that Mr Tannos/Sandipala had not been involved in discussions leading up to the Draft Proposals.[214] To this end, they highlight certain discussions between representatives of Datacard, Oxel and ST-AP.[215] The essential point asserted is that Sandipala was wholly unaware that Oxel's chips would not work with the existing E-KTP infrastructure; it was Mr Winata who had dealt with Datacard exclusively on the pretext of ensuring the operational efficiency of Datacard machines when personalising Oxel's chips.[216]

123 I am not persuaded that it was Mr Winata who had driven a conspiracy by dealing with Datacard to secretly integrate the PAC operating system. Sandipala's claim that it had not been involved in the discussions leading up to the Draft Proposals is premised on a selective presentation of the facts. Ms Lim has consistently maintained that the Draft Proposals were prepared pursuant to Mr Tannos' intention to modify the Datacard machines to ensure

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214 Closing Submissions of Sandipala, [143].

215 Closing Submissions of Sandipala, [142] and [145].

216 Closing Submissions of Sandipala, [138].

compatibility with Oxel's chips.[217] Ms Lim has also given evidence that there were meetings in November 2011 which Mr Tannos attended.[218] The purpose of these meetings, according to her, was to understand and obtain information from Oxel's technical consultants to enable the personalisation system to be built to work with Oxel's chips.[219] While there may have been discussions (between representatives of Datacard, Oxel and ST-AP) that Sandipala was not part of, this is consistent with the evidence of Mr Vanhoucke, Mr Cousin and Mr Winata that ST-AP and Oxel were roped in to assist with the technical aspects of the proposed modifications. As for the reference to "Danatel" in the earlier draft proposal that was never circulated to Sandipala, Ms Lim has testified that the reference to "Danatel" was a mistake and that although she was not the author of that draft proposal, she had personal knowledge of the mistake because it had been brought up during a meeting which she attended.[220] In my view, Mr Tannos' intention to modify the Datacard machines to be compatible with a different operating system is also consistent with the evidence that he had been shopping around for alternative operating systems before Sandipala entered into the Agreement.

124 Mr Winata's position is that on 18 April 2012, Mr Tannos had informed him by Blackberry that he "could force the change in the system since the beginning of the agreement".[221] Counsel for Oxel submits that Mr Tannos did not refute or deny making this statement.[222] Counsel for Sandipala

217 Ms Lim's Supplemental Affidavit of Evidence in Chief, [21].

218 Ms Lim's Affidavit of Evidence in Chief, [15].

219 Ms Lim's Affidavit of Evidence in Chief, [15].

220 Transcript of 30 March 2016, p 37 line 21 to p 39 at line 4.

221 Oxel's Bundle of Documents which have been Excluded from the Agreed Bundle Vol 15, 5684 –5685.

222 Closing submissions for Oxel at [128(b)].

points out that the authenticity of the Blackberry message is disputed. Whilst the authenticity of this Blackberry message was never satisfactorily resolved, I have come to the view, based on the evidence and circumstances as a whole, that Mr Tannos was well aware of the need to obtain the consent of MHA to make changes and that he was confident that this could be done.

125 Furthermore, I note that Mr Tannos, through MLU, acquired a 55% stake in Quadra in December 2011.[223] A number of aspects of this acquisition should be noted.

(a) This acquisition was made around the time when Datacard was starting work on the Draft Proposals.

(b) Mr Tannos was the Deputy Managing Director of Quadra even before MLU's acquisition of Quadra.[224]

(c) The agreement between Quadra and MLU provided that "PT QUADRA SOLUTION has provided details of equipment and services required for the e-KTP 2012 (two thousand and twelve) Project".[225] Mr Tannos must have known what chips had been approved and what was needed.

(d) The agreement between Quadra and MLU also contemplated the "optimization … of the provisioned equipment" of the E-KTP infrastructure through the "replacement of same or better specifications and lower prices".[226]

223 Mr Tannos' Supplemental Affidavit of Evidence in Chief, [196].

224 Closing Submissions of ST-AP and Mr Cousin, [199(e)].

225 Closing Submissions of ST-AP and Mr Cousin, [199(f)].

226 Closing Submissions of ST-AP and Mr Cousin, [201(c)].

126 These aspects of MLU's acquisition of a controlling stake in Quadra fell into place with the rest of the evidence which showed that Sandipala was actively embarking on a campaign to control the technical aspects of the E-KTP Project, when Quadra was the PNRI Consortium member responsible for technical advice to the PNRI Consortium.

Whether Sandipala possessed the technical know-how

127 Sandipala contends that it never had the requisite expertise to ascertain the precise type of chips that was compatible with the E-KTP system.[227] The E-KTP Project was Mr Tannos' first foray into smartcard production involving the use of silicon semiconductor integrated microchips[228] and he had relied on the advice of professionals on technical matters.[229]

128 Further, by reason of its role as the card producer, Sandipala contends that it was not involved in the development of the operating system for the chips or the purchase of the chips[230] and as such, lacked knowledge of the type of chips and operating system that was approved in the tender.[231] It further asserts that even though the testing was conducted in Sandipala's factory during the POC Stage, the PNRI Consortium's team managed the process.[232]

129 In my view, Sandipala's plea of ignorance is not supported by the evidence. The evidence shows that Mr Tannos knew enough to appreciate that

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227 Closing Submissions of Sandipala, [66].

228 Closing Submissions of Sandipala, [61].

229 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [11].

230 Closing Submissions of Sandipala, [62].

231 Closing Submissions of Sandipala, [62].

232 Transcript of 14 March 2016, p 102.

Oxel's chips would not be compatible with the existing card system that had been approved by the Indonesian Government. As mentioned above, Mr Kim stated that he had explained to Mr Tannos the details of the KMS, the personalisation system and the security access issues.[233] Mr Kim had also testified that Mr Tannos had some knowledge of KMS and issues related to "personalisation of software"[234] albeit "not in full details".[235]

130 Further, in an email dated 16 September 2011, Mr Tannos was expressly informed by Mr Wong of Oberthur that the Datacard personalisation machines could not personalise ST's chips.[236] Thus, Mr Tannos was aware that the chips to be supplied by Oberthur and Oxel (both of which were manufactured by ST) were incompatible with the existing card system.

131 In any event, even if Mr Tannos himself did not have expertise to determine the type of chip that was required for the E-KTP Project, it is clear that he had access to the technical expertise of Sandipala's staff as well as the other members in the PNRI Consortium including Quadra. First, as pointed out by Oxel, Sandipala claims that it was a pioneer in smartcard printing and was staffed with the relevant experts.[237] This is consistent with the fact that Mr Tannos was assisted by one Mr Yulianto[238] and Mr Benny Prawira who was tasked with meeting the technical teams from Sandipala's suppliers such as Oberthur and Datacard.

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233 Transcript of 5 April 2016, p 46 at lines 8 to 13.

234 Transcript of 5 April 2016, p 44 at lines 15 to 16.

235 Transcript of 5 April 2016, p 44 at line 17.

236 3AB 894.

237 Closing Submissions of Oxel, [75].

238 3AB 884.

132 Secondly, it will also be recalled that Quadra and Len Industri's role in the PNRI Consortium was to procure and install the necessary systems, such as the central government database, fingerprint and iris information collection systems and the KMS (see above at [12]).

133 I note that Mr Tannos did not dispute that Quadra and Len Industri had the relevant technical expertise.[239] In this regard, there is an exchange of emails on 6 July 2011 which showed that Sandipala was working with Quadra in relation to its dealings with Datacard. The emails also showed that Sandipala was also assisted by one Mr Indra, a technical expert from Len Industri. The overall picture is also very much consistent with Mr Winata's evidence that Mr Prawira, together with a technical team from Quadra, had met Oxel's technical consultants and had, during those meetings, asked questions about Oxel's chips and the PAC operating system that was encoded on Oxel's chips.[240]

134 Given my view that Mr Tannos was not completely clueless about smartcard systems and that he had access to technical expertise in the form of Sandipala's technical staff and the other members of the PNRI Consortium who were in charge of the technical aspects of the Tender, the fact that he went ahead with the purchase of chips from Oxel gels with the suggestion that he had known what he was purchasing under the Agreement. Indeed, the financial commitment of Mr Tannos and Sandipala to the E-KTP project was very substantial. As a seasoned businessman, he would be well aware of the importance of knowing what he was committing to.

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239 Transcript of 16 March 2016, p 14 lines 1 to 6; Transcript of 22 March 2016, p 84 lines 11 to 18.

240 Mr Winata's Affidavit of Evidence in Chief, [53].

Whether Sandipala's reaction in 2012 was consistent with one who had been defrauded

135 Sandipala's case was that it realised all of Oxel's chips could not be personalised in January 2012. Mr Tannos also claimed that in mid-January 2012, he met with Husni Fahmi ("Mr Fahmi") from the MHA, who told him that his preliminary assessment was that the issues with Oxel's chips arose because the chip operating system was different from that of the Tender Evaluation Chips.

136 In my view, Sandipala's reaction after their alleged discovery that Oxel's chips could not work is incongruent with its case that it had been defrauded. There is no indication that Mr Tannos or Ms Tannos were surprised or outraged after they allegedly found out that Oxel's chips could not be used in January 2012. They did not at any time say that they had been supplied the wrong chips despite having ample opportunities to do so. It is not disputed that there were on-going communications between Sandipala, Oxel and ST-AP during the first quarter of 2012.

137 Most tellingly, there was no mention of the Tender Evaluation Chips in their communications with Oxel or ST-AP. On 10 January 2012, Ms Tannos, on behalf of Sandipala, sent a letter to Oxel stating *inter alia*:

> We would like to advise that Adminduk has now decided that Sandipala's portion for blank cards and perso is reduced to 60 million cards for the year 2012 target. We attach a copy of their letter for your perusal. We are naturally challenging this.
>
> As also recognized, we had produced ID cards (E-KTP) using these chips and these cards cannot be personalized at our Patra Jasa personalization centre yet. This is because the current system is not compatible to your chips operating system. Adminduk also has to approve the new system that can personalize the ST Micro chips with your operating system software.
>
> We have decided to temporarily reduce our order of 100 million STM chips … to the first 10 million chips that is due to arrive within the first quarter of 2012.
>
> I hope you understand the difficult situation we are facing.
>
> Thank you for your understanding.

138 There is no suggestion in this letter that Sandipala had been duped into buying chips that could not work or that there was any wrongdoing on the part of Oxel, ST-AP or Mr Cousin. More importantly, Sandipala did not reject Oxel's chips. Instead, Sandipala appeared to be seeking an indulgence from Oxel by asking to reduce Sandipala's order temporarily. The tone of the letter is consistent with the defendants' case that Mr Tannos had known at all material times that Oxel's chips would not work with the existing card system.

139 On 13 January 2012, Mr Cousin met with Ms Tannos and Mr Jerry Chum ("Mr Chum") of Sandipala in Jakarta. The conversation was recorded by Mr Cousin. The focus of their discussion was on Sandipala's dealings with Oberthur and neither Ms Tannos nor Mr Chum suggested any wrongdoing on the part of Mr Cousin or Oxel.

140 On 22 January 2012, Mr Cousin and Mr Tannos met in Jakarta. Their conversation was again recorded by Mr Cousin. There is no dispute that they

were jointly exploring ways to change the system to accommodate the PAC operating system that was encoded on Oxel's chips. In this regard, I agree with ST-AP and Mr Cousin that if Mr Tannos had realized by this point that he had been cheated into buying chips that could not work or possibly could not work, it is indeed surprising that he would sit down and hear ideas from Mr Cousin on how Sandipala should move forward.[241] I note also that Mr Tannos had told Mr Cousin at various points in the conversation that they were in the "same team". Again, this is an odd reaction for someone who claims that he has been defrauded to the tune of US$60m. Apart from this observation, there are a number of aspects of this conversation that are worth noting.

(a) The issue of the Tender Evaluation Chips was not reflected in the transcript of the conversation despite Mr Tannos' insistence that he did raise it during the meeting.

(b) Early on in the conversation, Mr Cousin is recorded to have said "Yes. Yea. But the initial plan was to change everything which is not possible anymore". Mr Tannos responded by saying "Yeah not possible".[242] It is evident from this part of the conversation that there was indeed an initial plan to change the E-KTP infrastructure.

(c) Mr Tannos was recorded as saying to Mr Cousin that he intended to "force in our own KMS" if the modifications were not accepted.[243]

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241 Closing Submissions of ST-AP and Mr Cousin, [260]

242 ST-AP's and Mr Cousin's Core Bundle 106.

243 ST-AP's and Mr Cousin's Core Bundle 105; Closing Submissions of ST-AP and Mr Cousin, [262(b)].

141 After the 22 January 2012 meeting, it seems that Mr Tannos and Mr Cousin continued to remain in contact to find a solution to Sandipala's situation. On or around 6 February 2012, Mr Tannos sent two Blackberry messages to Mr Winata:[244]

> …Today I met [Mr Fahmi]. He asked whether the type of chip is the same as in POC, it is also suggested to use o/s used at the time of POC, so current o/s is overwritten, Can it be done and possible? Later for additional budget, only then new o/os will be used.
>
> …
>
> I have bb through group [Mr] Fahmi's suggestion, this time to change system will take time, so he propose to use just the working o/s or adjusted AW o/s. Later with new budget available in 2012 only then new o/s will be used Can I meet you now? Telling you what I discussed with [Mr Fahmi]?

142 I pause to comment that unlike the Blackberry message referred to by Mr Winata and discussed above at [124], these messages are not in dispute and indeed are set out in Mr Tannos's own AEIC. As may be readily observed, the relationship between Mr Tannos and Mr Cousin remained cordial and they were still jointly working towards the common aim of changing the E-KTP infrastructure. The only logical explanation for this is that Sandipala had contracted to purchase Oxel's chips despite being aware that they would not work unless changes were made to the E-KTP infrastructure. In my view, Sandipala's case that it has been defrauded simply does not hold up in the face of the evidence that has been adduced.

143 I will also briefly address Sandipala's contention that the efforts of ST-AP and Oxel to render assistance (after the alleged discovery that Oxel's chips could not work) supported its case that it had been defrauded. According to

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244 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, pp 1142 and 1146.

Sandipala, if Mr Tannos had requested for chips with an unapproved operating system, Mr Cousin and Oxel should have told him that he was not entitled to complain and seek assistance from ST-AP or Oxel. However, "not only did Mr Cousin and Oxel not blame Mr Tannos, the former attempted to address the problems by meeting with Mr Tannos and feigned ignorance that there was no reason for the government to reject the chips".[245] Bearing in mind the sequence of events and the evidence as set out above, I do not think it is fair or reasonable to conclude that ST-AP's and Oxel's efforts to render assistance to Sandipala indicates a "guilty conscience" on their part. They were more likely to have stemmed from a genuine attempt to assist Sandipala out of goodwill. Further, I note that much of the discussions between the parties stemmed from Sandipala's attempts to renegotiate the bargain it had entered into with Oxel.

144 Oxel submits that Sandipala wanted chips with a different operating system for reasons of its own, in the hope that it could change and thereby control the E-KTP system.[246] Sandipala denies this and says that it was Oxel that stood to gain the most from a modification of the E-KTP infrastructure and had orchestrated the entire fiasco in collaboration with ST-AP and Mr Cousin.[247]

145 It is true that Oxel stood to gain from a modification of the E-KTP infrastructure to suit its chips. However, the same could be said for Sandipala. The evidence shows that PNRI and Sandipala, though they were fellow consortium members, were in competition with each other. It bears recalling that a large chunk of Sandipala's work allocation had been redistributed to

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245 Closing Submissions of Sandipala, [92].

246 Closing Submissions of Oxel, [158].

247 Closing Submissions of Sandipala, [115].

PNRI on 19 December 2011 (see [40] above). The nature of the relationship between Sandipala and PNRI is also evident from the transcript of the discussion that took place between Mr Cousin and Mr Tannos in April 2012 which suggests that Mr Tannos had intended to complete the modifications to the E-KTP infrastructure and to produce as many blank E-KTP Cards as possible with the aim of outperforming PNRI.[248] Thus, Sandipala clearly stood to gain from the modification of the E-KTP infrastructure.

Conclusion on whether Sandipala knew that Oxel's chips will not work with pre-existing systems

146 To briefly conclude this section, I am satisfied on a balance of probabilities that Mr Tannos knew that the chips that were to be supplied by Oxel pursuant to the Agreement would not work with the pre-existing system unless a system change was effected. He had approached ST-AP on his own accord, not on PNRI's instructions. He also shopped for chips with different operating systems, and the evidence of one such other operating system provider, Mr Kim, showed that Mr Tannos was aware that the systems he was shopping for would not work with the pre-existing systems. After entering the Agreement with Oxel, Mr Tannos had also taken concrete steps towards securing system changes in the E-KTP Project. Further, while I accept that Mr Tannos may not have been an expert in the field, I am satisfied that he knew enough to appreciate that the chips that Sandipala had contracted to purchase under the Agreement would not work unless certain changes were made to the E-KTP infrastructure. I am also satisfied that he had access to technical expertise. Finally, I find Sandipala's reaction in 2012 to be patently

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248 Closing Submissions of ST-AP and Mr Cousin, p 166.

inconsistent with the reaction of one who has just discovered that he has been defrauded.

147 In short, Mr Tannos knew what he wanted to purchase and Oxel had, in turn, supplied what Mr Tannos requested for. On the basis of these facts, I will proceed to assess the merits of the claims and counterclaims.

Sandipala's claims

148 Sandipala has pleaded four causes of action against ST-AP: (a) fraudulent misrepresentation; (b) breach of a collateral contract; (c) breach of a duty of care; and (d) unlawful means conspiracy.

149 Against Mr Cousin, Sandipala has pleaded two causes of action: (a) fraudulent misrepresentation; and (b) unlawful means conspiracy.

The claim in fraudulent misrepresentation (against ST-AP, Oxel and Mr Cousin)

150 Against ST-AP, Sandipala's claim in fraudulent misrepresentation is founded on the following representations that were allegedly made by Mr Cousin:[249]

(a) ST-AP would supply the same electronic chips as the Tender Evaluation Chips;

(b) Mr Winata's company was the exclusive distributor of ST-AP's chips for Indonesia; and

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249 Statement of Claim (Amendment No 4), [52B].

(c) All orders for ST-AP's chips would have to be placed through Mr Winata's company.

151 Against Mr Cousin, Sandipala's claim in fraudulent misrepresentation is founded on the following representations that were allegedly made by Mr Cousin:[250]

(a) Oxel was the exclusive distributor of ST-AP's electronic chips in Indonesia;

(b) The chips offered by Oxel in its quotation dated 9 November 2011 were the same electronic chips as the Tender Evaluation Chips supplied by ST-AP during the tender submissions; and

(c) Oxel would be able to procure from ST-AP and supply Sandipala with the same type of electronic chips as the Tender Evaluation Chips used by Sandipala and/or the PNRI Consortium in the tender evaluation to make the E-KTP Cards.

152 Against Oxel, Sandipala's claim in fraudulent misrepresentation is founded on the following representations that were allegedly made by Mr Winata:[251]

(a) Oxel was the exclusive distributor of ST-AP's chips in Indonesia; and

(b) Oxel would be able to and would supply Sandipala with the chips needed to make E-KTP Cards.

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250 Statement of Claim (Amendment No 4), [52T].

251 Statement of Claim (Amendment No 4), [52I].

(c) Oxel would be able to procure from ST-AP and supply Sandipala with the same type of electronic chips as the Tender Evaluation Chips to make the E-KTP Cards.

153 It is well-established that a representee, who is the victim of a fraudulent misrepresentation, will be able to claim damages in an action in the tort of deceit: see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 11.004.

154 As set out in the Court of Appeal's decision in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14], the essential elements of a claim in the tort of deceit are as follows:

(a) A representation of fact was made by words or conduct.

(b) The representation was made with the intention that it be acted upon by the plaintiff or by a class of persons which included the plaintiff.

(c) The plaintiff acted upon the false statement.

(d) The plaintiff suffered damage by doing so.

(e) The representation was made with knowledge that it was false; it must be wilfully false, or at least made in the absence of any genuine belief that it was true.

155 In the present case, apart from Mr Tannos' unsubstantiated assertions, there is no evidence that Mr Cousin/Mr Winata had represented that Mr Winata's company (or Oxel) was the exclusive distributor of ST-AP chips in

Indonesia. In any event, even if the representation was made, I find that it is highly improbable that Mr Tannos had relied upon it when he entered the Agreement with Oxel.

156 First, ST-AP had in fact offered to supply Sandipala the ST23RY12 chips encoded with RUB operating system. Mr Tannos' own evidence was that the operative cause of its agreement to purchase chips from Oxel was that Oxel offered more favourable payment terms. In his AEIC, Mr Tannos said that ST-AP (through Mr Cousin) insisted on a letter of credit for the full sum of its quotation[252] and this was not acceptable to Sandipala. He said that Mr Cousin offered him a lifeline by introducing to him "the authorised and exclusive distributor of ST-AP's microchips for Indonesia" which required only a 20% down payment upon acceptance of quotation and the full price after delivery.[253]

157 Secondly and more importantly, while Mr Tannos sought to give the impression that he was also swayed by the fact that Oxel was the "authorised and exclusive distributor" of ST-AP's chips in Indonesia, I am not convinced that Mr Tannos believed in the truth of the representation (even if made).

158 As pointed out by ST-AP and Mr Cousin, and as I have earlier found, Mr Tannos was also in discussions with other firms (such as Oberthur and Ubivelox) for the supply of ST-AP's chips. Against this factual backdrop, it is highly improbable that he would have believed that Oxel was the sole distributor of ST-AP's chips in Indonesia.

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252 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [56] and [57].

253 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [58] and [59].

159 As regards the alleged representation (by Mr Cousin) that Oxel would supply chips that were the same as the Tender Evaluation Chips, Sandipala's entire case hinges on the existence of the Tender Evaluation Chips that were allegedly supplied for the PNRI Consortium's use during the POC Stage. I have found earlier that ST-AP did not supply any chips for the PNRI Consortium's use in May 2011 (when the testing took place in Sandipala's factory); the chips that were ordered by Softorb (ST23YR12 with RUB) were only in fact delivered in September 2011. Viewed in this light, Sandipala's allegation that Mr Cousin represented that Oxel would supply chips that were the same as the Tender Evaluation Chips is factually unsustainable.

160 As for the alleged representation (by Mr Winata) that Oxel would be able to and would supply Sandipala with the chips needed to make E-KTP Cards, there is similarly no evidence to substantiate or corroborate Mr Tannos' claim that such a representation had been made. Indeed, Oxel was not involved in the E-KTP tender at the bidding stage.

161 Even assuming that the representation had indeed been made, I would also reject any suggestion that Sandipala had relied on this representation in entering the Agreement.

162 To conclude this section, I am of the view that Sandipala has not adduced sufficient proof to show on a balance of probabilities that these alleged misrepresentations were indeed made.

163 Indeed, these alleged misrepresentations are contrary to the evidence which shows that Sandipala (through Mr Tannos) had actively courted Oxel (through Mr Winata) and that Sandipala was interested in purchasing alternative chips that were encoded with different operating systems.

Therefore, even assuming these misrepresentations had been made, I am not convinced that Mr Tannos had relied on them in entering the Agreement.

164 I turn now to Sandipala's contractual claim against Oxel.

The contractual claim against Oxel

165 Sandipala pleaded that the Agreement contained the following terms:[254]

> (i) It was an express term of the Agreement that [Oxel] would supply to [Sandipala] 100 million pieces of electronic chips that were identical to the Tender Evaluation Chips.
>
> (ii) Further or alternatively, by reason of the matters pleaded in paragraphs 21, 22, 22A and 23 above, the Agreement contained either an express term or, pursuant to Section 14(3) of the Sale of Goods Act (Cap. 393), an implied term that the electronic chips to be supplied by [Oxel] would be fit for the particular purpose made known to [Oxel], *ie* for the purpose of producing E-KTP Cards.
>
> (iii) Further or alternatively, the Agreement contained a term implied by fact that the electronic chips that [Oxel] would supply are identical to the Tender evaluation chips. …
>
> (iv) Further or alternatively, the Agreement contained either an express term or, pursuant to Section 13(1) of the Sale of Goods Act (Cap. 393), an implied term that the electronic chips to be supplied by [Oxel] would correspond to the agreed description, namely that the electronic chips would be the same as the Tender evaluation chips.
>
> (v) Further or alternatively, it was an implied term by law and/or fact of the Agreement that [Oxel] would deliver a batch of sample electronic chips to [Sandipala] for functional testing before mass producing the electronic chips.
>
> (v) Further or alternatively, the Agreement contained either an express condition or, pursuant to Section

254 Statement of Claim (Amendment No 4), [24].

> 15(2) of the Sale of Goods Act (Cap. 393), an implied condition that the electronic chips to be supplied by [Oxel] would correspond with the samples supplied by [ST-AP]. The relevant samples 100,000 pieces of the Tender Evaluation Chips upon which [Sandipala] contracted to purchase under the Agreement.

The effect of the entire agreement clause

166 There are some suggestions that the terms that Sandipala claims are part of the Agreement are barred by reason of the entire agreement clause contained in Oxel's standard terms and conditions. It is unnecessary for me to resolve this issue. As will be seen, even if the entire agreement clause were disregarded altogether, I am of the view that Sandipala has failed to prove the terms that it alleges were part of the Agreement.

The express/implied term that Oxel would supply 100m chips identical to the Tender Evaluation Chips

167 Sandipala claims that there was an express or implied term that Oxel would, pursuant to the Agreement, supply 100m chips that were identical to 100,000 chips that were allegedly supplied by ST-AP and tested during the tender evaluation. Sandipala's claim in this regard fails *in limine* given that it has been established that there were no such chips tested during the tender evaluation process. However, as mentioned above, Sandipala has abandoned its definition of the Tender Evaluation Chips as set out in its pleadings. In its closing submissions, Sandipala re-defines Tender Evaluation Chips as:[255]

> … the microchips manufactured by STM that had been approved by the MHA in the [POC] stage of the E-KTP tender evaluation process. It is also clear, from the evidence before this Honourable Court, that the operating system approved by the MHA for use in the E-KTP system with the ST23YR12 microchip was the RUA operating system… from [Softorb],

[255] Closing Submissions of Sandipala, [54].

> which was subsequently updated to the RUB operating system… and STM encoded on the 100,000 chips they supplied to the PNRI consortium.

168 Leaving aside the pleading point, it is uncontroversial that no term will be implied at common law in the face of an express term to the contrary: *Lewison on Interpretation of Contract, 1989*, at para 6.06 and *Lim Kim Yiang and another v Foo Suan Seng and others* [1991] 2 SLR(R) 141 at [9]. For instance, where the contract stipulates a monthly tenancy, the court would not imply a term that it was a tenancy for life. In the present case, in the face of an express term that Oxel would supply 100m chips described as "ST-Micro ST23YR12AW0NPACA" (*ie*, ST23YR12 chips that were encoded with PAC operating system), it would not be appropriate to imply a term that the Agreement was for the supply of chips with a completely different operating system (*ie*, the RUB operating system) and I decline to do so.

169 Whilst there is some evidence that the MHA had approved the ST23YR12 chip (together with the NXP P3 chip) it will be recalled there was no indication at all of the operating system that was to be encoded on the ST23YR12 chip. Additionally, in light of my finding at [146] above that Mr Tannos knew that the chips offered by Oxel came with the PAC operating system, there is in any event no factual basis to imply the term as argued by Sandipala.

The term that Oxel would supply chips that would be fit for the purpose of producing E-KTP Cards

170 Sandipala claims that there was a fitness of purpose term as it had made known to Oxel the particular purpose of the chips it ordered, that they were to be used for producing E-KTP Cards. In this regard, Sandipala relies on

s 14(3) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("the SOGA") which states:

> (3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known —
>
> (a) to the seller; or
>
> …
>
> any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller. …

171 On the facts, I am of the view that as part of its broader plan to obtain greater control over the technical aspects of the E-KTP Project, Sandipala had entered into the Agreement with the specific intention of procuring chips that had an alternative operating system. This was the particular purpose that was made known to Oxel which eventually supplied goods that would have been fit for this purpose. As such, I cannot see how Oxel could be said to have breached any obligation to supply goods that are reasonably fit for the purpose that was made known to it.

172 Further and in any event, I find that it would have been unreasonable for Sandipala to have relied on the skill or judgment of Oxel. As pointed out earlier, it is not disputed that Oxel was not involved in the tender process; it came into the picture only after the Tender had been awarded to the PNRI Consortium. It is not surprising that Oxel had limited knowledge of the tender requirements. Mr Tannos has sought to suggest otherwise by claiming that Mr Winata had been provided with a thumbdrive containing copies of the PNRI Consortium's tender submission documents by one Mr Sudihardjo.[256] The

evidence in this regard is extremely thin. Mr Sudihardjo was not called to give evidence and I note also that Mr Tannos had himself conceded that he could not be absolutely certain that what Mr Sudihardjo passed to Mr Winata was a copy of the tender documents but assumed it was so.[257] It will also be recalled that there was no copy of these documents before the Court, given Sandipala's own position that Sandipala itself did not have a copy (above at [13]). Given the paucity of evidence, I am unable to conclude that Oxel knew the type of hardware and software that Sandipala required for the E-KTP Project. Sandipala, in contrast, would have been in a far better position to ascertain for itself the type of hardware and software that was required to fulfil its card production obligations. In the circumstances, it would not have been reasonable for Sandipala to have relied on the skill or judgment of Oxel in procuring chips for the production of E-KTP Cards.

The implied term that Oxel would provide samples before mass producing the chips

Term implied by custom

173 Sandipala claims that there is a term implied by custom that Oxel would provide samples before mass producing the chips. Its case is that it is the usual and customary practice for manufacturers and/or distributors of electronic chips which are specifically made for a particular purpose (as opposed to "off the shelf") to produce a batch of sample electronic chips and deliver these sample electronic chips to the customer for functional testing in order to ensure that the electronic chips met the customer's requirements and purpose before they are put into mass production.[258]

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256 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [79].

257 Mr Tannos' Affidavit dated 27 March 2013, [24].

174 A term will only be implied based on custom or usage where the relevant custom or usage is "notorious, certain and reasonable" (see *The Law of Contract in Singapore* at para 06.087) and is something more than a mere trade practice (see *Chitty on Contracts* (Sweet & Maxwell, 32nd Ed, 2015) at para 14-021).

175 I am not satisfied that there is such a custom or usage in relation to the provision of samples before mass production in the smartcard industry. Sandipala's own expert, Mr Choong, agreed that if a purchaser of chips wishes to have samples, or if he wishes to make his order conditional on the acceptability of the samples, then he should make provision for them in the relevant purchase order.[259] Oxel's expert, Mr Lam, also testified that there are many different practices in the smart card industry relating to the provision of samples and it is up to the parties involved in each transaction to decide how they want to structure the terms of that particular transaction. Indeed, there is evidence that when an IT solution provider wishes to place a bulk order with ST, for a particular chip that is to be encoded with an operating system the solution provider is developing, the agreement will often include specific provisions on the provision of samples to be provided for testing, evaluation and approval by the solutions provider before bulk production. That said, even in these circumstances, there is nothing to prevent the solutions provider from entering into the contract on the basis that he will take the risk of the software failure. Take, for example, the order placed by Softorb with ST-AP for the ST chip encoded with RUA and summarised above at [72]–[73] and [77].

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258 Statement of Claim (Amendment No 4), [27].

259 Transcript 19 May 2016 p 27 line 3 to p 28 line 1.

176 I note in this regard that Sandipala had indeed asked for samples to be provided and tested in respect of the order it had placed with Oberthur (see [101(c)] above). This does not, however, mean that there is an implied term *by custom* that such samples would be provided.

Term implied in fact

177 Sandipala also claims that there is a term implied in fact that Oxel would provide samples before mass producing the chips. Sandipala submits that applying the officious bystander test and business efficacy test, there must be an implied term that Oxel delivers a batch of sample electronic chips to Sandipala for functional testing before mass producing the chips as this would accord with the presumed intention of the parties. To that end, Sandipala asserts that the provision of samples is necessary for business efficacy for these reasons:[260]

> (a) For security related applications and at a nation-wide scale, sample cards testing are mandatory and very common to ensure that there are no security loopholes in the entire process and to ensure that there are no counterfeit or duplicated cards in the market;
>
> (b) The supplier would not want to risk supplying a large quantity of goods that do not work. It is in the commercial interest of a supplier/distributor to ensure that its product has been qualified, tested, and proven to be compatible with its intended purpose;

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[260] Closing Submissions of Sandipala, [162].

(c) It is important to get an official sign-off from the end-user or governmental agencies so as to ensure the testing result meets their needs and objectives.

178 Sandipala's submissions on this point are factually and legally unsustainable. First, the business efficacy test does not ask whether the terms in the contract would be accorded greater commercial sense if the term is implied; instead, it asks whether the contract would lack commercial or practical coherence without the term that is sought to be implied: *ACTAtek, Inc and another v Tembusu Growth Fund Ltd* [2016] 5 SLR 335 ("*Tembusu*") at [91]–[93]. As stated by the Court of Appeal in *Tembusu* at [94], there will often be room to think one can improve a contract with the benefit of hindsight, but that is emphatically not the test for implication. Here, there is nothing on the facts to suggest that the Agreement would lack commercial or practical coherence without the provision of samples prior to mass production. Oxel promised to deliver ST23YR12 chips encoded with PAC operating system according to a stipulated timeline in exchange for Sandipala's payment according to the agreed terms. This bargain could be performed regardless of whether samples were provided before the commencement of mass production.

179 Secondly, the implication of a term that Oxel was obliged to supply samples for testing prior to mass production is inconsistent with the context in which the Agreement was concluded. This transaction should be distinguished from dealings such as the one between Softorb and ST-AP in which Softorb was in the process of developing its own operating system and required chips for testing. In the present circumstances, Sandipala ordered a specific set of chips that were to be encoded with specific software that Oxel had licensing

rights to, with the knowledge that they would not work unless changes were made to the E-KTP infrastructure.

180 For completeness, I note that Sandipala has suggested in its closing submissions that there was an express term of the Agreement that Oxel would provide samples before mass producing the chips.[261] This submission is a non-starter since this alleged express term was not pleaded. Even if it had been pleaded, I would venture to observe that there is no merit in the allegation of an express term in this regard. To support the existence of an express term, Sandipala points to the request for samples that was made by Ms Tannos on 11 November 2011 and Mr Zhang's response that "the samples are being taken care now and our rep in Indonesia will contact you".[262] I am unable to see how these communications support the existence of an express term that Oxel would provide samples before mass producing the chips. At its highest, the correspondence would show that Oxel was willing to provide samples. There is also nothing to suggest that Oxel was only entitled to proceed to mass produce the chips upon providing Sandipala with samples.

The contractual claim against ST-AP

181 Sandipala pleaded that it had entered into a collateral contract with ST-AP, the terms of which were as follows:[263]

> (i) It was an express term of the Collateral Contract that [ST-AP] would supply electronic chips that were identical to the Tender evaluation chips and ensure that such chips be supplied by [Oxel] to [Sandipala] under the Agreement.

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261 Closing Submissions of Sandipala, [158].

262 Closing Submissions of Sandipala, [157].

263 Statement of Claim (Amendment No 4), [24A].

> (ii) Further or alternatively, all the terms in the Agreement which related to the specifications of the electronic chips to be supplied were incorporated into the Collateral Contract such that [ST-AP] was obliged to supply electronic chips which conformed to those specifications and ensure that they be supplied to [Sandipala] through [Oxel].

182 As pointed out by ST-AP, this claim rests on allegations that Mr Cousin had made various representations to Mr Tannos at their meetings in end-October and early-November 2011.[264] These claims also formed the basis of Sandipala's claim in fraudulent misrepresentation. In the light of my finding that the representations were not made, there is no basis to find a collateral contract and this claim fails as well.

The negligence claim against ST-AP and Oxel

183 The negligence claim against ST-AP and Oxel may also be quickly disposed of. Sandipala claims that ST-AP and Oxel owed a duty of care in the following respects:[265]

> (a) To exercise reasonable care and skill when proposing to Sandipala chips for producing E-KTP Cards;
>
> (b) To alert Sandipala to the fact that the chips that were prepared to be supplied by ST-AP through Oxel could not or could possibly not be used to produce E-KTP Cards; and
>
> (c) To assist Sandipala to render such chips usable for producing E-KTP Cards if they were not so usable.

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264 Closing Submissions of ST-AP, [359].

265 Statement of Claim (Amendment No 4), [52Q].

184 The alleged duties of care in the first two aspects are factually unsustainable. I will first deal with the alleged duty to exercise reasonable care and skill when proposing to Sandipala chips for producing E-KTP Cards. The fundamental thread that underlies Sandipala's claims in these proceedings is the claim that it wanted to purchase chips that were similar to the Tender Evaluation Chips (which it now claims are the 100,000 chips that were encoded with the RUB operating system and supplied by ST-AP to Softorb in September 2011). If Sandipala had known what chips it required from the outset, it would be unnecessary for ST-AP or Oxel to propose chips for use in the E-KTP Project, let alone exercise reasonable care and skill in doing so. Indeed, it bears repeating that ST23YR12 chips encoded with the RUB operating system were first offered to Mr Tannos but rejected by him on account of payment terms.

185 I turn to the alleged duty of care for ST-AP or Oxel to alert Sandipala to the fact that the chips that were to be supplied by ST-AP through Oxel could not or could possibly not be used to produce E-KTP Cards. I have found earlier that Sandipala was at all material times aware that Oxel's chips would not work unless changes to the E-KTP infrastructure were made and approved by the MHA. Sandipala and Mr Tannos have no basis to claim that it should have been alerted to what it must have known from the outset.

186 Finally, I am of the view that there is no legal basis for imposing a duty on ST-AP to assist Sandipala to render Oxel's chips usable for producing E-KTP Cards.

187 I accept ST-AP's submission that it is not correct, as a matter of law, to frame a duty of care in tort as a specific positive obligation. In *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559, the appellant businessman

opened two accounts with the respondent bank and suffered significant losses on certain investments. The appellant sued the respondent in contract and tort, and argued, *inter alia*, that the respondent had tortious and contractual duties to advise him on his investments. The Court of Appeal held it was incorrect for the appellant to frame a duty of care as a specific positive obligation without reference to any contractual duty and reasoned as follows (at [19]):

> …A duty of care in the tort of negligence, however, is in general imposed by law upon the tortfeasor, and as a result it is necessarily a broad duty to take such care as is reasonable in the circumstances. Hence, it is not, strictly speaking, correct to speak of a "tortious duty to advise" without more and, in particular, without reference to any related contractual obligation (see by analogy the House of Lords decision of *A C Billings & Sons Ltd v Riden* [1958] AC 240 at 264 (*per* Lord Somervell of Harrow)). If there could be a "tortious duty to advise", there would be no logical limit to how far a duty of care in the tort of negligence could be subdivided: the courts would be flooded with claims of specific "tortious duties" to answer telephone calls, respond to e-mails, read the newspapers or the like (see for instance the House of Lords decision of *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743). Of course, it could well be a breach of a tortious duty of care (if one was owed) for someone not to give advice in certain circumstances, but that is not the same as saying that there was a tortious duty to give advice. As the author of T Weir, *A Casebook on Tort* (Sweet & Maxwell, 10th Ed, 2004) put it (at p 129), "[m]atters of detail are best treated as part of the question of breach, not as raising sub-duties with a specific content" (see also J Murphy, *Street on Torts* (Oxford University Press, 12th Ed, 2007) at pp 114–115). To frame a duty of care in the tort of negligence as narrowly as a specific contractual obligation (as in the case of a "tortious duty to advise") would render the question of breach nugatory, for the tortfeasor would then be under a duty to do precisely that which he has been accused of not doing (*eg*, give advice), and there would be no room for the court to inquire whether it was in fact *reasonable* for him not to have done it – an indispensable element of the tort of negligence – with the result that, to quote a learned commentator (see D Howarth, "Many Duties of Care – Or A Duty of Care? Notes from the Underground" (2006) 26 OJLS 449 at p 466), "[t]he concept of fault would disappear" (see too, by the same author, "Negligence after *Murphy*: Time to Re-Think" [1991] CLJ 58 at p 72). Consequently, "[t]here is no reason why the law of tort should

> impose duties which are identical to the obligations negotiated by the parties" (see *Robinson v Jones* at [79] (*per* Jackson LJ)), in so far as the content of those contractual obligations is of a *different scope* from a tortious duty of care.
>
> [emphasis in original]

188 In the present case, while there was some suggestion by Mr Choong, Sandipala's expert witness, that technical assistance must come from ST-AP, the ultimate supplier of the chips,[266] it is unclear what purpose this suggestion was intended to serve. To the extent that this suggests an attempt to imply a term based on custom or usage, such an attempt must fail since Sandipala has not pleaded that ST-AP was under a specific contractual duty to render assistance and therefore had to take reasonable care in so doing. As for Oxel, Sandipala has not pleaded that the Agreement contained an express or implied term for Oxel to assist Sandipala in making the chips usable for the E-KTP Project. In the circumstances, its pleaded case that ST-AP or Oxel owed it a tortious duty of care to render assistance is incorrect as a matter of law and it is not entitled to any relief in this regard.

189 Before leaving this issue, I note in passing that Sandipala had dropped its negligence claim against Oxel completely in its Opening Statement which stated that its claim against Oxel is for damages arising out of (a) Oxel's breach of the Agreement; (b) fraudulent or negligent misrepresentation; (c) conspiracy by unlawful means to injure Sandipala; and (d) alternatively, that there was a unilateral mistake in the formation of the Agreement.[267] It also appears that the negligence claim against both Oxel and ST-AP has not been addressed in Sandipala's closing submissions.

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266 Mr Choong's Expert Report, p 16 at [4(b)].

267 Sandipala's Opening Statement, [20] and [23].

The conspiracy claim against ST-AP, Oxel and Mr Cousin

190 Sandipala claims that the defendants combined to injure Sandipala by convincing Mr Tannos to buy chips from Oxel when they knew Sandipala was looking for chips that were identical to the Tender Evaluation Chips. It claims that this was part of an overall scheme to offload chips from the defendants' other projects. It also claims that its lack of technical expertise and inexperience in the security card industry was exploited by ST-AP, Mr Cousin and Mr Winata.[268]

191 I note that this conspiracy claim rests on the wrongful acts/omissions of the ST-AP, Oxel and Mr Cousin in relation to the alleged misrepresentations and breaches of collateral contract. It follows that the success of Sandipala's conspiracy claim hinges on those claims. Since I have dismissed the claims on the basis that Sandipala knew what it was purchasing when it entered into the Agreement, Sandipala's conspiracy claim has no legs to stand on.

192 In any event, there is no evidence that Mr Cousin and Oxel were acting in concert to execute the alleged plan to offload on Sandipala chips that could not work. As I have found above, it was Mr Tannos who had sought an introduction to Mr Winata; the evidence does not support the assertion that Mr Cousin had deliberately introduced Mr Tannos to Mr Winata in furtherance of their alleged conspiracy. Further, the allegation that the defendants intended to offload on Sandipala chips that were meant for a wholly separate project finds no support in the evidence. Counsel for Oxel, ST-AP and Mr Cousin have

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268 Closing Submissions of Sandipala, [298].

pointed out many problems with Sandipala's allegation in this respect. It would suffice for me to address two key points.

193 First, Sandipala claims that the first three batches of Oxel's chips that were delivered in December 2011 contained chips with 18kb in memory capacity and that this indicates that the chips that Oxel proposed to supply under the Agreement had not been manufactured solely for the E-KTP Project.[269] Sandipala has not proved its allegation that the first three shipments of chips contained 18kb chips. Oxel has disclosed documents from Chilitag which shows that the packing lists for the first to third shipments of chips stated that these shipments contained ST23YR12 chips, *ie*, 12kb chips.[270] Sandipala relies on a delivery order (which Sandipala's counsel said was received by Sandipala with Oxel's first shipment[271]) to suggest that the first three shipments contained 18kb chips. In this regard, I accept Oxel's point that none of Sandipala's witnesses have given evidence that the said delivery order was indeed received with the first shipment. In any case, the delivery order on its own would not suffice to establish on a balance of probabilities that the first three shipments contained 18kb chips, especially since the Chilitag documents clearly point to a different conclusion.

194 Second, Sandipala claimed that the absence of an end-user statement for Oxel's chips meant that the chips had not been exported from Singapore and gave rise to suspicions that they were imported into Indonesia for another purpose and use by another party.[272] Sandipala suggests that it is a legal

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269 Closing Submissions of Sandipala, [327(b)] and [328].

270 Ika Kusuma's Affidavit of Evidence in Chief, [59]; pp 121-123.

271 Transcript of 16 May 2016, p 14 lines 9 to 10.

272 Mr Tannos' Affidavit of Evidence in Chief, [153]

requirement for Oxel to ask Sandipala to endorse an end-user statement for the export of chips from Singapore. However, I note that the shipping documents that have been disclosed by Oxel show that the chips in the present case originated from Taiwan and were transported to Singapore before being shipped to Sandipala in Jakarta.[273] Thus, I am not prepared to infer anything sinister from the lack of an end-user statement for Oxel's chips.

The alleged unilateral mistake

195 As a measure of last resort, Sandipala submits that the Agreement is void as it had been labouring under a mistake of fact, namely that Oxel was to provide chips that were the same as the Tender Evaluation Chips or that Oxel's chips would be fit for their intended use.[274] This submission falls away in the light of my earlier finding that Sandipala was aware (and therefore could not have been labouring under a mistake of fact) that Oxel's chips would not work unless changes to the E-KTP infrastructure were approved by the MHA but had nonetheless set out to purchase these chips, confident that the MHA would approve the relevant modifications to the E-KTP infrastructure.

Oxel's counterclaims against Sandipala

196 Oxel claims against Sandipala for failing to accept the shipments of chips and pay for them in accordance with the Agreement.

197 A total of 19,426,284 chips were produced for Sandipala. It is undisputed that Sandipala accepted the first four shipments of 1,068,489 chips

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273 Closing Submissions of Oxel, [271] and the documents referred to therein.

274 Statement of Claim (Amendment No 4), [52AD].

from Oxel and had paid for them. Sandipala also paid for the down payment for Q4 2011.

198 Sandipala also accepted the next five shipments (*ie,* the fifth to ninth shipments) of 4,805,875 chips by signing on the delivery orders for those shipments, but has not paid for them.

199 Sandipala rejected the next six shipments (*ie,* the tenth to 15th shipments) of 6,457,414 chips and has not paid for them. Sandipala has also refused to make the down-payments due at the beginning of the first, second and third quarters of 2012. These chips are in a warehouse in Jakarta.

200 From the above, it can be seen that 12,331,778 chips were delivered by Oxel to Sandipala in Jakarta and either accepted or rejected by Sandipala. Another 7,094,506 chips remain in Singapore. These were never sent to Sandipala in Jakarta because it was clear that Sandipala would not receive the chips.

201 Oxel relies on s 49 of the SOGA which provides:

> **Action for price**
>
> 49.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
>
> (2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.

202 In reliance on this provision, Oxel claims for the unpaid portion of the price of the chips that were shipped, and the unpaid down payments. Oxel claims damages (comprising loss of profits, payment to suppliers, storage costs and freight charges) for the remainder of the chips that were not shipped, and as an alternative claim for the chips that were shipped. These claims will be discussed in detail at [232]–[282] below.

203 The core of Sandipala's defence is that it was entitled to reject Oxel's chips and refuse to pay for them because of Oxel's failure to comply with the terms of the Agreement and provide chips identical to the Tender Evaluation Chips.[275] This aspect of its defence stands or falls with Sandipala's claim for a breach of the Agreement. Sandipala has also advanced an alternative defence that Sandipala only made a confirmed order for 10m chips and was only bound to accept those chips, but not the other 90m chips.[276]

204 As I have earlier found that the Agreement did not impose on Oxel any obligation to supply chips that were the same as the Tender Evaluation Chips or more generally, chips that would satisfy the requirements of the E-KTP Project, Sandipala's main defence that it was entitled to reject Oxel's chips for non-compliance with the Agreement must necessarily fail.

205 As for Sandipala's claim that it only made a confirmed order for 10m chips, it does not hold up in the face of the evidence that has been adduced.

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275 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [297].

276 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [184].

206 First, Oxel's quotation, which was signed by Ms Tannos on behalf of Sandipala, stated that the order was for a "Committed Quantity" of 100m chips at a price of US$60m.[277]

Item No.	Description	Quantity	Unit Price	Amount
◯	ST-Micro ST23YR12AW0NPACA	100,000,000	$ 0.60	$ 60,000,000.00
	Committed Quantity: ~10 Mu: Q4 2011 - Q1 2012 ~30 Mu: Q1 2012 - Q2 2012 ~30 Mu: Q2 2012 - Q3 2012 ~30 Mu: Q3 2012 - Q4 2012			
			Total	$ 60,000,000.00

The purchase order which was signed by Ms Tannos on behalf of Sandipala contained the same table (albeit in a slightly different format):[278]

ITEM	Product Description	Unit Price (USD)	Quantity (pcs)
1	ST-Micro ST23YR12AW0NPACA Committed Quantity: 10 Mu: Q4 2011 - Q1 2012 30 Mu: Q1 2012 - Q2 2012 30 Mu: Q2 2012 - Q3 2012 30 Mu: Q3 2012 - Q4 2012	0.60	100.000.000
		TOTAL	**USD 60,000,000**

When confronted with what was stated on the face of the quotation, both Mr Tannos and Ms Tannos admitted that Sandipala agreed to purchase all the quantities listed under the "Committed Quantity" portion of the quotation.[279]

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277 3AB 991.

278 3AB 992.

207 I am also unable to accept Sandipala's explanation that it had only made a down payment for the first 10m chips because the order was only confirmed to the extent of those 10m chips. The reason why Sandipala had only made a down payment for the first 10m chips is simple — the purchase order stated:

> **Payment Terms:**
>
> 20% Down Payment based on committed quantity *at the beginning of each quarter*
>
> 80% Remaining upon arrival based on quantity
>
> [emphasis added]

According to these payment terms, the down payment for the first 10m chips was due in the fourth quarter of 2011 since it was due to be delivered between "Q 4 2011 – Q1 2012". The down payments for the remaining batches of chips would be payable at the beginning of subsequent quarters. Nothing on the face of the quotation or the purchase order suggests that the order for the remaining 90m chips would only be confirmed upon Sandipala's payment of the subsequent tranches of down payments. In this regard, I accept Oxel's submission that the payment structure had nothing to do with whether the order had been confirmed and I accept the evidence of Oxel's witnesses that the reason for this payment structure was that Sandipala had limited working capital at the time and Oxel agreed to allow down payments to be made in tranches.[280]

208 My view is fortified by Sandipala's letter of 10 January 2012 which clearly shows that Sandipala knew that the order was for a confirmed quantity

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279 Transcript of 21 March 2016, p 57 lines 14 to16; Transcript of 23 March 2016, p 77 at lines 1 to 4.

280 Closing Submissions of Oxel, [326].

of 100m chips. In that letter, Sandipala asked for a temporary reduction of "*our order of 100 million STM chips* … to the first 10 million chips that is due to arrive within the first quarter of 2012" [emphasis added]. If the order was indeed for a confirmed quantity of only 10m chips, Sandipala would have been entitled to cancel the unconfirmed order of 90m chips and it would not have sought a *temporary reduction* of the quantity of chips ordered. I find that the claim that Sandipala had placed a firm order for only the first 10m chips was an afterthought. It only surfaced in a letter sent on 19 January 2012 from Sandiapala to Oxel[281] after Oxel had on 13 January 2012[282] rejected Sandipala's 10 January 2012 request for a temporary reduction of the quantity of chips ordered. I should add that while the letter was dated 12 January 2012, the letter was only sent to Oxel in an email dated 19 January 2012.[283]

209 In the premises, I find that Sandipala had breached the Agreement by wrongfully rejecting Oxel's chips that were delivered in the last six shipments (*ie*, the tenth to 15th shipments) and failing to make payment for Oxel's chips (save for the first down payment (Q4 2011) and payment for those chips that were part of the first four shipments). I will come to the issues relating to Oxel's entitlement to its pleaded reliefs later on.

Oxel's counterclaim against Sandipala, Mr Tannos, Ms Tannos and Mrs Rawung

210 Oxel claims against Sandipala, Mr Tannos, Ms Tannos and Mrs Rawung for conspiracy to injure Oxel by unlawful means.

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281 4AB 1407.

282 4AB 1370.

283 4AB 1406 – 1407.

211 Oxel's claim is premised on the significant financial interest that Mr Tannos, Ms Tannos and Mrs Rawung have in Sandipala.[284] It is well-established that the tort of conspiracy is constituted by the following elements set out in *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80 ("*Nagase*") at [23]:

> (a) a combination of two or more persons and an agreement between and amongst them to do certain acts;
>
> (b) if the conspiracy involves lawful acts, then the predominant purpose of the conspirators must be to cause damage or injury to the plaintiff but if the conspiracy involves unlawful means, then such predominant intention is not required;
>
> (c) the acts must actually be performed in furtherance of the agreement; and
>
> (d) damage must be suffered by the plaintiff.

212 It is also settled law that a company could be regarded as co-conspirator with its directors. In *Nagase*, Judith Prakash J (as she then was), held that there could be a conspiracy between a company and its controlling director to damage a third party by unlawful means notwithstanding that the director might have been the moving spirit of the company (at [22]). *Nagase* was followed in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318 in which Andrew Ang J added his observations on this point of law. Ang J drew a distinction between the situation where the company is a victim of the alleged conspiracy and the situation where it is not

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[284] Defence and Counterclaim of Oxel (Amendment No 4), [6.1.2].

and has in fact benefited from the conspiracy. His observations in this regard (at [23] and [24]) are apposite:

> 23 … where the company is a *victim* of an alleged conspiracy of its directors and sues its directors for breach of duties, the company does not become a co-conspirator with its directors just because its directors are the conspirators: see also *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2006) … at para 25–119. The rationale underlying such an interpretation is that it prevents the company's errant directors from otherwise escaping liability by contending that, as co-conspirator, the plaintiff tortfeasor company cannot sue the errant tortfeasor directors for damages resulting from the directors' conspiracy.
>
> 24 However, the position is different where the company and its directors are in an established arrangement which benefits the company, to the detriment of third parties. In this case, the company is no longer a victim of an alleged conspiracy of its directors. Instead, the third party is the victim of the alleged conspiracy between the company and its directors. Taking a leaf from the reasoning of McCarthy J in [*Sydney Taylor v Philip Smyth* [1991] 1 IR 142]), I can see no reason why the assets of a limited company and/or that of its errant director, even where such a director is the controlling mind of the company, should not be liable to answer for conspiracy where either or both of their assets have been augmented as a result of the action alleged to constitute the conspiracy.
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> [emphasis in original]

213 In view of the above, I consider it a settled principle of law that a company (such as Sandipala) can be liable as a co-conspirator along with its controlling directors and this is even more so in a case such as the present where the alleged conspiracy (if established) would have benefited Sandipala to the detriment of Oxel. Since this point has not been taken up by Sandipala, I say no more on it.

214 In the present case, Oxel must show that there was an agreement between the defendants (by counterclaim) to pursue a particular course of conduct and that concerted action was taken pursuant to that agreement. The

agreement need not be express: it can be tacit and inferred from the parties' overt acts and the surrounding circumstances: *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [113]. Since Oxel's claim is for a conspiracy by unlawful means, it follows from the above (see [210]) that a predominant intention to cause damage or injury is not required. Instead, the requisite mental element is that the injury to the claimant must have been intended as a means to an end or an end in itself (see *EFT Holdings* at [101]).

215 On the facts of the present case, I am satisfied that an inference can be drawn that Sandipala, Mr Tannos and Ms Tannos had an agreement to extricate Sandipala from its contractual obligations and had taken concerted action towards that end. I am, however, not satisfied that Mrs Rawung had participated in that conspiracy.

Acts in furtherance of the alleged conspiracy

216 I accept Oxel's submission that there was indeed a paper trail that appeared to have been created so as to found a claim against Oxel. Shortly after Sandipala had its request for a temporary reduction of its order of 100m chips rejected, Sandipala (through a letter signed by Ms Tannos) tried a different tack and stated that there was only a firm order for 10m chips and that the order for the remaining 90m chips would only be confirmed upon further down payments.[285] I do not think that Ms Tannos held a genuine belief in her claim that Sandipala's order was only confirmed to the extent of 10m chips. Her claim is obviously contrary to her previous letter on 10 January

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285 4AB 1407.

2012 in which there was an implicit recognition that Sandipala had ordered 100m chips and was requesting for a temporary reduction of its order.[286]

217 In a similar vein, Ms Tannos sent a further letter to Oxel a letter on 13 February 2012 claiming, among other things, that Sandipala's order from Oxel of 100m chips was only an "indicative order".[287] In that letter, Ms Tannos also claimed that there was an agreement that:

> (a) "[T]he indicative order of 100 (one hundred) million" would be "changed into 80 (eighty) million to be delivered in 2 (two) years, first batch of 40 (forty) million in 2012 and follow [*sic*] by second batch of 40 (forty) million in 2013".
>
> (b) The price would be "USD 0.55 (UD fifty five cents) per chip and payment for the 80 (eighty) million would be no down payment and on the condition that these chips are accepted by [MHA], then full payment is made 60 (sixty) days after delivery".

218 This letter painted quite a different picture from what the evidence shows was operating in the parties' minds at that time. I accept Oxel's submission that it did not agree to those terms. This is consistent with the recorded conversation between Mr Tannos and Mr Winata which took place on 21 April 2012. During that meeting, Mr Tannos asked whether Sandipala could make payment for 40m chips in 2012 and for the remaining 40m chips in 2013,[288] whether it was possible for Sandipala to not make any down payment and whether Sandipala could have 45-day payment terms.[289]

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286 4AB 1336.

287 4AB 1544.

288 6AB 2183 at 08.30 – 08.33.

Significantly, Mr Winata said that Oxel could not accede to these terms.[290] He also stated that the best compromise Oxel could offer was for the delivery and payment of the 80m chips to be split into 50m in 2012 and 30m in 2013.[291] It is evident from the transcript that there was no understanding that the order of 100m chips was merely an indicative one or that it could be split into two tranches of 40m chips. As for the payment terms, there was also no understanding that there was no need for down payments or that Sandipala could have 45-day payment terms. Further, if the parties had by then reached an agreement on these matters, it would not have been necessary for Mr Tannos to send Mr Winata a further Blackberry message on 24 April 2012 asking for those terms to be approved:[292]

> Paulus Tannos [E-KTP] #2:
>
> Morning, looking forward for your consideration in approving the terms of the purchase transaction of the chip. Payment would be done in two transactions within two years; 40 million 2012 and another 40 million in 2013. The first payment would be done 45 hours after the delivery and without any bank collateral. …

This Blackberry message is disputed by Mr Tannos, even though it is broadly consistent with the recording of the meeting of 21 April 2012. I thus conclude that the alleged agreed terms that were set out in Sandipala's letter of 13 February 2012 (see [217] above) were invented to give a false impression of the state of affairs at the material time.

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289 6AB 2183 at 08.43 – 08.49.

290 6AB 2183 at 08.49 – 09.08.

291 6AB 2189 at 12.17 – 12.49.

292 Mr Winata's Affidavit of Evidence in Chief dated 5 February 2016, pp 765–766.

219 That was not all. In a letter to Oxel dated 14 May 2012, Mr Tannos alleged that Mr Winata had mentioned during the meeting on 21 April 2012 that:[293]

> …if we agree to sign the sales agreement for the purchase of 80 million STM chips over 2 (two) years of 2012-2013, then immediately you will fully support us to solve the technical issue, OXEL will send the necessary software specialist/engineer to ADMINDUK in order to find and solve the technical problems, so the STM chips you supplied to us can be used for [the] E-KTP project….

220 I agree with Oxel that no agreement of this sort was reflected in the transcript of the meeting on 21 April 2012. Mr Tannos, who was present at the meeting, would know that there was no basis for his suggestion that the parties agreed that it was Oxel's responsibility to solve the alleged "technical problems" so that its chips could be used for the E-KTP Project.

221 In view of the above, I am compelled to agree with Mr Winata's suggestion that "every time [they] agreed, after the meeting shook hands, went back, the deal changed immediately in the form of a letter".[294] These attempts were clearly intended to convey a different impression of what had been agreed and to suggest that it was Oxel's (instead of Sandipala's) responsibility to ensure that its chips would work with the E-KTP infrastructure.

222 The next plank of Oxel's case is that there was a conspiracy to bring a false, trumped up claim to apply pressure on Oxel. This aspect of Oxel's case is also accepted. Initially, Sandipala pleaded that it had lost profits of US$11.8m from the reduction in its work allocation on 19 December 2011 and that this reduction was the result of Oxel's breaches of the Agreement.

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293 5AB 1667.

294 Transcript of 18 May 2016, p 105 at lines 16 to 23.

However, it later transpired that the first delivery of Oxel's chips only took place on 22 December 2011 and thus there could not have been a causal link between the alleged discovery that Oxel's chips could not work and the reduction in Sandipala's work allocation.[295] In addition, the fact that the size of Sandipala's claim was reduced considerably from US$23.7m to the present US$4.7m is also indicative of the trumped up nature of its claim.[296]

223 There is also some indication that Mr Tannos was responsible for causing to be published articles that contained allegations that he knew to be false. In particular, on 28 April 2013, an article entitled "A Conflict Over ID Cards" was published in the Tempo magazine. This article alleged, *inter alia*, that Oxel insisted that Sandipala buy 100m chips as agreed but Mr Tannos had refused because the chips delivered were not the kind he ordered.[297] As has been established above, Sandipala had ordered a specific kind of chips and had been delivered those chips and there is therefore no basis for Mr Tannos' suggestion that the chips delivered were not the kind he ordered. Further, while Mr Tannos initially denied that he had supplied information to the Tempo, he admitted in the end that he had "met Tempo reporter for a short period of time. It can be considered chatting, it can be considered interview, but for short period of time".[298] On a separate note, I observe in passing that in the Tempo article, Mr Tannos is recorded as saying that he had bought Oxel's chips from Mr Winata at the urging of Mr Budiman.[299] If his views were

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295 Closing Submissions of Oxel, [376]; see also BOP-147 to BOP-150 (Further and Better Particulars served pursuant to the 2nd Defendant's request dated 8 December 2014).

296 Closing Submissions of Oxel, [377].

297 Oxel's Bundle of Documents excluded from the Agreed Bundle Vol 17, 6457.

298 Transcript of 17 March 2016, p 111 at lines 18 to 21.

299 Oxel's Bundle of Documents excluded from the Agreed Bundle Vol 17, 6457.

indeed reported accurately, this assertion is clearly at odds with Mr Tannos' evidence in these proceedings that it was Mr Cousin who had introduced him to Mr Winata pursuant to a conspiracy between *inter alia* Mr Cousin and Mr Winata to injure Sandipala.

224 In my judgment, the above demonstrates a consistent overall pattern of conduct by Mr Tannos and Ms Tannos — the propensity to make allegations without a genuine belief in their truth. I am satisfied that the above is sufficient proof, on a balance of probabilities, that there was a conspiracy to injure Oxel as a means to an end, the end being the release of Sandipala from its contractual obligations under the Agreement.

The extent of parties' involvement

225 It is clear from the above that Mr Tannos was the moving spirit behind the company. There is no doubt about his involvement in the conspiracy to injure Oxel. As for Ms Tannos, despite her claims of ignorance and naiveté in these proceedings, I find that she was equally or substantially involved in Sandipala's dealings in respect of the E-KTP Project. She claimed that she was following instructions from her father and was not involved in any form of contractual negotiations, meetings or commercial decisions.[300] She also alleged that the letters that she had sent on behalf of Sandipala were drafted either by her father or pursuant to his instructions.[301]

226 I am not persuaded that Ms Tannos was a mere unthinking conduit and was blindly following her father's instructions. In particular, I find her suggestion that she did not even read the pleadings in this suit hard to accept

300 Catherine Tannos' Affidavit of Evidence in Chief, [4].

301 Catherine Tannos' Affidavit of Evidence in Chief, [8].

since she is a defendant to Oxel's counterclaim and was one of the original plaintiffs in the main suit.[302] Her attempts to downplay her involvement in and knowledge of Sandipala's dealings with, *inter alia*, ST-AP and Oxel were contrary to the evidence that has been presented to the court and seriously undermined her credibility. I highlight especially the evidence of Ms Lim (of Datacard) that Ms Tannos understood the purpose of the meetings between Sandipala and Datacard and what was going on during the meetings.[303] Ms Tannos had also signed off on letters that contained false allegations that were intended to extricate Sandipala from its contractual obligations (see above at [216] – [217]). I am not inclined to believe that she would have unquestioningly and unthinkingly signed off (as a director of Sandipala) on these letters without digesting their contents. In the premises, I find that Ms Tannos was sufficiently involved in the conspiracy such that she should fairly and justly be held liable.

227 As for Mrs Rawung, Oxel has adduced evidence to show that she was involved in Sandipala's affairs. This includes evidence of her participation in annual general meetings[304] as well as her procuring of financial resources to support the E-KTP Project.[305] However, even if she was well informed about Sandipala's business in general, the evidence at best shows her involvement as a passive bystander (albeit a supportive one) in respect of the acts that were intended to injure Oxel. During the trial, while Mrs Rawung had admitted that she was very eager for Mr Tannos to prevail in the proceedings against Oxel[306]

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302 Transcript of 22 March 2016, p 142 line 11 to p 144 line 7.

303 Ms Lim's Supplemental Affidavit of Evidence in Chief, [22].

304 Closing Submissions of Oxel, [421].

305 Closing Submissions of Oxel, [422].

306 Transcript of 24 March 2016, p 44 at lines 12 to 14

and that she had stood side by side with him,[307] nothing in her admissions warrant the inference that she had acted in tacit agreement with Mr Tannos and Ms Tannos so as to be properly considered a party to the conspiracy. Further, the fact that Mrs Rawung was also financially invested in Sandipala, while relevant to an extent, does not in itself ground an inference that she had participated in that tacit agreement to injure Oxel. On the whole, I decline to find that Mrs Rawung was a party to the conspiracy.

Oxel's entitlement to its pleaded reliefs

228 Sandipala has raised the following objections to the sums claimed by Oxel. It bears noting that the following summary of Sandipala's objections do not include issues going towards liability: [308]

(a) Payments made to suppliers Danatel and Logii: The contract that Oxel entered into with Danatel was made prior to the Agreement. Further, the contracts that Oxel entered into with Danatel and Logii were accounted for in the Agreement and Oxel is not entitled to make a double claim on their losses.

(b) Loss of profits: Oxel is not entitled to make a claim in this regard because there is no clear assessment provided by Oxel as to the extent of its alleged loss of profits. I address this point together with the preceding point at [260]–[280] below.

(c) Freight charges: Sandipala did not have an obligation under the Agreement to pay for freight charges to Indonesia. It also takes the

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307 Transcript of 24 March 2016, p 41 at line 24 to p 42 at line 1.

308 Closing Submissions of Sandipala, [469].

position that Oxel's claim for freight charges is not supported by evidence. This point is addressed later at [282].

(d) Mitigation of losses: Oxel did not attempt to mitigate its losses. There is no expert evidence that there was no market for Oxel's chips.[309]

Decision on heads of damages

Mitigation of losses

229 I first address Sandipala's contention that Oxel did not attempt to mitigate its losses.[310] Following the decision of the Court of Appeal in *The "Asia Star"* [2010] 2 SLR 1154, the claimant may not recover damages in compensation of losses which could have been avoided had the claimant taken reasonable steps to mitigate the loss. *The Law of Contract in Singapore* at para 22.114 helpfully underscores the point that this does not mean that the claimant is under a duty to the promisor-in-breach. What it means is that the claimant shoulders the responsibility for *reasonably avoidable* losses. Neither does it mean that the claimant must take the best or most effective form of mitigation. The question simply is whether the innocent party has behaved reasonably.

230 As earlier stated, Sandipala contends that there is an available market for Oxel's chips.[311] However, I note that Sandipala has not adduced any evidence to support its contention that there is an available market for the chips. Sandipala merely pointed to the Mr Cousin's and Mr Vanhoucke's evidence that the PAC software was used for a driving licence project in 2012[312]

309 Closing Submissions of Sandipala, [472].

310 Closing Submissions of Sandipala, [471].

311 Closing Submissions of Sandipala, [473].

as well as Mr Winata's evidence that the PAC software could be used for a number of different projects, such as those involving access door cards and loyalty cards.[313] I reject this suggestion. At its highest, the aforementioned evidence merely shows that there were alternative uses for the PAC software; it does not show that there was an available market for over 90m ST23YR12 chips encoded with PAC software. Further, there is also no evidence or submissions on the scrap value of these chips.

231 On the other hand, Oxel's position is that there is no available market for the chips that were produced pursuant to the Agreement because the ST23YR12 wafer chip is not a type of chip commonly used, and was in fact created specifically for the E-KTP Project.[314] Oxel states further that the problem is compounded by the fact that (a) the chips are encoded with the PAC operating system which would further restrict the market for the chips; and (b) the extremely large volume of unsold chips in this case.[315] Further, Mr Winata has provided evidence that Oxel could not sell or dispose of the remaining chips in its possession after it lodged the police report in Indonesia against Sandipala as the chips formed part of the evidence in the criminal investigations.[316] Indeed, property in many of the chips had passed to Sandipala under the *ex-works* contract. I am more inclined to accept Oxel's position that there was no available market for the chips that were produced pursuant to the Agreement. Consequently, I disagree with Sandipala's submission that Oxel failed to mitigate its loss.

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312 Closing Submissions of Sandipala, [475] and [476].

313 Closing Submissions of Sandipala, [477].

314 Closing Submissions of Oxel, [499].

315 Closing Submissions of Oxel, [499].

316 Mr Winata's Affidavit of Evidence in Chief, [146]–[147].

Price of delivered chips and down payments

232 Oxel claims:

(a) the price of the 11,263,289 chips (in the fifth to 15th shipments) that were delivered to Sandipala between January and April 2012 but which remain unpaid; and

(b) the down payments amounting to US$10.8m. I will address each claim in turn.

Price of delivered chips (80% of sale price)

233 Section 49(1) of the SOGA provides that where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods. It is well established that an action for the price of goods sold is a claim for a debt. The concept of remoteness does not apply. The duty to mitigate also does not generally apply: see Michael Bridge gen ed, *Benjamin's Sale of Goods* (Sweet & Maxwell, 9th Ed, 2016) ("*Benjamin*") at para 16-004.

234 It will be recalled that Sandipala accepted the first four shipments of 1,068,489 chips from Oxel and had paid for them. Sandipala also accepted the next five shipments (*ie,* the fifth to ninth shipments) of 4,805,875 chips by signing on the delivery orders for those shipments, but has not paid for them. Thereafter, Sandipala rejected the next six shipments (*ie*, the tenth to 15th shipments) of 6,457,414 chips and has not paid for them (see [197]-[199] above). In total, therefore, 11,263,289 chips in the fifth to 15th shipments that were delivered to Sandipala between January and April 2012 remained unpaid for.

235 Oxel's claim for the price of the 11,263,289 delivered chips hangs on its assertion that the property in the chips passing to Sandipala upon leaving the seller's premises.

236 I do not think it can be seriously disputed that the property in the 4,805,875 chips[317] that were delivered in the fifth to ninth shipments had passed. Sandipala had accepted delivery of those chips but has failed to pay for those. Therefore, I allow Oxel's claim for price in respect of these chips.

237 The situation is not as clear in respect of the 6,457,414 chips[318] in the tenth to 15th shipments, which Sandipala rejected when the chips were delivered to it in Jakarta.[319]

238 Section 17 of the SOGA provides that the property in goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred and in order to ascertain the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. In the present case, the Agreement was evidenced by Sandipala's purchase order and Oxel's quotation. Under Sandipala's purchase order, the chips were sold by Oxel on an "*ex-works*" basis. The purchase order contains an express reference to "*ex-works*" under the section marked "Terms and Conditions."[320] Oxel's quotation is also endorsed "EXW Singapore" under the heading "Shipment Terms". Whilst the latter

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317 Closing Submissions of Oxel, [318].

318 Closing Submissions of Oxel, [318].

319 Exhibit 2DB1 p 2 r/w Transcript of 17 March 2016 p 125 at line 14 to p 126 at line 25 and Transcript of 22 March 2016, p 69 at line 14 – 25; Ika Kusuma's Affidavit of Evidence in Chief, [100].

320 3AB 987.

endorsement was not raised in cross examination, I am satisfied that it can only mean "*ex-works* Singapore." This makes sense since Oxel is a Singapore company and is also based in Singapore (see also Andrea Lista, *International Commercial Sales: The Sale of Goods on Shipment Terms* (Routledge, 2017) at p 8 where a sale on "EXW" terms is treated in the same way as a sale on "ex-works" terms).

239 Sale of goods on an "*ex-works*" basis essentially means that the seller's obligation is only to make the goods available at the *seller's* premises. A sale of goods "*ex-works*" can hardly be considered an export sale at all since it is the buyer's duty to take delivery at the works in question: see John Adams and Hector MacQueen, *Atiyah's Sale of Goods* (Pearson, 12th Ed, 2012) ("*Atiyah*") at p 408; see also *Benjamin* at para 21-003. It follows that seller is not responsible under the "*ex-works*" contract to make arrangements to send the goods to the buyer. The buyer is to arrange for the pickup from the supplier's designated site and is also responsible for clearing customs and completion of export documentation.

240 The situation in the present case is "unusual" in that according to Oxel, Sandipala requested Oxel to assist in making the arrangements to ship or transport the chips to Sandipala in Jakarta, even though the contract was on "*ex-works*" terms. This was apparently because Sandipala did not have contacts with freight forwarders in Singapore. It was for this reason that Oxel "obliged" and arranged for the chips to be delivered to Sandipala in Jakarta.

241 Oxel cited the English case *Sabaf SpA v MFI Furniture Centres Ltd* [2003] RPC 14 ("*Sabaf*") on the effect of a sales contract entered into on "*ex-works*" terms. In that case, an issue arose as to whether the defendant seller was liable for patent infringement on the basis that it had imported the goods

into the United Kingdom. The goods in question were made in Italy and sold on "*ex-works*" terms to the English buyer. The English Court of Appeal held at [61] that title and risk in the goods passed as soon as the goods left the factory gate. Even though the defendant had made the relevant contract of carriage, it did so without having an ultimate interest in the goods. If property and risk had passed to the buyer before or at the beginning of the carriage, the contract of carriage is made on behalf of the buyer even if it is the seller who agrees that he will make the contract.

242 In the present case, I accept that the contract was entered into on an "*ex-works*" basis and that it was Sandipala who requested Oxel to assist in arranging carriage to Jakarta for Sandipala. On this basis, based on *Sabaf*, I am satisfied that property passed to Sandipala when each shipment of chips left Oxel's premises into the hands of the carrier or forwarder.[321]

243 On this basis, I find that the property in the chips delivered in the tenth to 15th shipments had passed to Sandipala. Accordingly, Oxel is entitled to maintain an action for the price of these chips.

244 Given my earlier findings and holdings, it follows that Oxel is entitled to claim the price for fifth to 15th shipments of delivered chips which remain unpaid, *ie*, 11,263,289 chips x US$0.60 x 80% = US$5,406,378.72.[322] To be clear, Oxel's claim for the price of the unpaid chips delivered represents only 80% of the full sale price which is payable on delivery (see [37] above). It

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321 Ika Kusuma's Affidavit of Evidence in Chief, [46]; Closing Submissions of Oxel, [247].

322 Oxel closing submissions at [436].

does not include the 20% down payment which is a separate head of claim that I will now turn to examine.

Down payments (20% of sale price)

245 Oxel also claimed for the unpaid down payments due at the beginning of the Q1, Q2 and Q3 2012, *ie* 1 January, 1 April and 1 July 2012 (amounting to US$10.8m).[323] It should be noted that one down payment was made by Sandipala in Q4 2011 (see [35(c)] above).

246 This claim must be assessed in the following context. By the time Sandipala claims to have discovered that the chips ordered did not work with the E-KTP system, it was already January 2012. By this time, the down payment of US$3.8m for 1 January 2012 was due. This was not paid. By the middle or late January 2012, Sandipala was changing its position from a request for a temporary halt or reduction of production to a bold assertion that Sandipala had only bound itself to purchase 10m chips. Thereafter, Oxel made several unsuccessful attempts to deliver chips in February, March and April 2012. On 27 February 2012, Oxel by letter demanded payment of the arrears due.[324] Although there was a meeting in April 2012 between Mr Winata, Mr Tannos, Ms Tannos and Mr Cousin, the relationship between Oxel and Sandipala was already at a low ebb. The suit by Sandipala was commenced not long after, on 28 June 2012.

247 Oxel submits that the down payments are to be treated as payments towards the price. Oxel relies on s 49(2) of the SOGA which provides that a seller can maintain an action for the price where under the contract of sale, the

323 Closing Submissions of Oxel, [436].

324 Mr Tannos' Affidavit of Evidence in Chief dated 5 February 2016, [204]–[205].

price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to make payment, even though the property in the goods has not yet passed and the goods have not yet been appropriated to the contract.

248 The first question is whether the down payments provided for are to be treated as deposits or part payments of price. If they amount to deposits, tricky questions may follow as to whether the deposit is a forfeitable deposit. *Benjamin* at para 15-134 and *Atiyah* at p 553 state that that payments by way of earnest (as a forfeitable deposit) are not recoverable by the party in breach. This can be distinguished from a part-payment of the price that is recoverable even by a buyer (in default).

249 For example, in *Dies and another v British and International Mining and Finance Corporation Limited* [1939] 1 KB 724 ("*Dies*"), the defendants contracted to sell to one Q certain rifles and ammunition for a total sum of 270,000*l*. The purchaser paid 100,000*l* but thereafter, in breach of the contract, neither completed the payment of the purchase price nor took delivery of any rifles and ammunition. The vendors elected to treat the contract as at an end. It was held that the advance payment was not in the nature of deposit or earnest, but was a part-payment of the price, and that the purchaser was accordingly entitled to recover the sum subject to the defendants' claim to damages for the purchaser's breach of contract.

250 The law on deposits, part-payments and the rights of the parties was not however dealt with in any detail by the parties in the submissions. Oxel's submissions simply treat the down payments as relating to payment of price in advance of passing of property.[325] Sandipala's submissions on the other hand

simply disputes liability, *inter alia*, on basis of a total failure of consideration and a repudiatory breach by Oxel, save for the arguments already summarised at [228]. They do not address the issue of recoverability of the down payments *per se*.[326] Nevertheless, whilst this court does not have the benefit of detailed submissions from learned counsel some observations on the case law may be helpful.

251 *Dies* represents the traditional position that draws a sharp distinction between deposits and part-payments. Deposits are security for performance and are forfeited when a contract is discharged, whereas part-payments are simply advance payments that can be recovered after discharge unless the contract expressly provides for otherwise (see Jack Beatson, *Discharge for Breach: The position of instalments, deposits and other payments due before completion* (1981) 97 LQR 389 at 390–391).

252 *Atiyah* at p 555 sets out some criticisms of the decision in *Dies* in the light of the decision of the House of Lords in *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129 ("*Hyundai*"). These include in particular whether the decision is best confined to a pure contract of sale of goods as opposed to a contract to manufacture and sell goods (contract for goods and services).The position in *Hyundai* was more complicated partly because the law lords adopted different approaches.

253 Beatson's position is that the question of recoverability of a down payment is essentially a matter of construction (see also Donald Harris, David Campbell & Roger Halson, *Remedies in Contract & Tort* (Cambridge

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325 Closing Submissions of Oxel, [446] onwards.

326 Closing Submissions of Sandipala, [468] and [469].

University Press, 2nd Ed, 2002) at p 150 that the rights should depend on the construction of the clause requiring advance payment: was the right to retain the payment intended to be conditional upon performance by the payee of his obligations or was it intended to be a security for performance of the payer's obligations?) This is an approach which has found favour in recent English cases such as *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm) ("*Cadogan*") and *Griffon Shipping LLC v Firodi Shipping Ltd* [2013] EWHC 593 (Comm) ("*Griffon*"). For example, in *Griffon* at [16], the court held that in any case where the question is whether a payment which accrued due before termination remains payable after termination it will be necessary to construe the contract with a view to determining whether the obligation to pay accrued due unconditionally or conditionally. This will depend upon the nature of the contract and the purpose of the part-payment. For example, where the contract is a simple contract of sale the part-payment may be regarded as accruing due conditionally upon the contract of sale being performed. But an express term which provides that the part-payment remains payable will be given effect, as in *Cadogan*.

254 In Singapore, the most recent Court of Appeal decision on this area is *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*"). The law was stated at [84]–[85] as follows:

> 84 The invariable judicial approach to forfeitable deposits at common law is that the deposit will be forfeited to the payee upon the discharge of the contract on the default of the payer, irrespective of whether it would have been deemed part-payment had the contract been completed. The payer cannot insist on abandoning the contract and yet expect to recover the deposit as this would enable him to take advantage of his own wrong (*Howe v Smith* (1884) 27 Ch D 89 at 98). An advance payment, on the other hand, does not fall within the category of forfeitable deposits and is neither designed nor intended to secure performance (*Lim Lay Bee v Allgreen Properties Ltd* [1998] 3 SLR(R) 1028 ("*Lim Lay Bee*")). This is

> underscored by the premise that the vendor is already amply protected by the recovery of damages he has sustained (*Dies v British and International Mining and Finance Corporation Limited* [1939] 1 KB 724).
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> 85 Whether the sum of $750,000 is recoverable by the party in default if the contract is discharged by reason of his breach therefore depends upon the construction of the contract. The object that the parties had in mind must be ascertained (*Mayson v Clouet* [1924] AC 980). In the absence of any specific provision, recoverability of the $750,000 hinges on the nature of the payment (ie, whether payment is construed as a deposit entitling forfeiture upon default, or as an advance payment, which is returnable) as evinced by the intention of the parties expressed in the Agreement.

255 I should make clear that in coming to my decision, I make no comment on how Singapore law as set out in *Lee Chee Wei* should develop. This must await an appropriate case.

256 In the present case, the contract was for a total committed quantity of 100m chips at a total price of US$60m. The chips were to be delivered in stated quantities (of 10m, 30m, 30m, 30m) over four quarters (see [35(b)] above). Within any given quarter, it is evident that the specified quantity would be delivered over several lots or instalments. The payment terms provided for a 20% down payment based on the quantity specified for the quarter to be paid at the *beginning* of the quarter. The balance of 80% (for each quarter) was to be paid upon the quantity on delivery of the chips.

257 Even though detailed submissions were not made by the parties on the distinction between deposit and down payment, I am satisfied that the result will be the same whichever approach is taken. On the *Dies* approach, I am of the view that the down payments are clearly meant as advance payment of price, not deposits, and thus are mostly not claimable by Oxel. Even if the more recent English cases were followed, the question is whether the down payment was conditional upon the contract of sale being performed. This is a

question of construction. In my view, the down payment was conditional upon the contract of sale being performed because there is no suggestion by Oxel that the down payment was a deposit, and such language does not appear on the face of the contract. Instead, the contract between Oxel and Sandipala is a simple contract of sale akin to *Dies*. The contract of sale for *most* of the Q1 2012 chips and all of the Q2 and Q3 2012 chips was not performed, and thus these down payments cannot be claimed by Oxel. Either way, it should be remembered that Oxel is not left hanging dry: its remedy is in damages, which it also pleaded for as an alternative head of claim.

258 In the preceding paragraph, I have alluded to the fact that a small portion of the down payments remain claimable. I shall explain further here. It will be recalled that I have found that property in 12,331,778 chips (see [200] above) have passed from Oxel to Sandipala. In other words, in relation to these chips, the contract has been performed on Oxel's part. Oxel is therefore entitled to the down payment for them. In this regard, Sandipala has made a down payment for Q4 2011 (see [35(c)] above), but this covered only the 10m chips delivered in that quarter (see [35(b)(i)] above). Oxel is still entitled to claim the down payment for the 2,331,778 chips (being 12,331,778 chips for which property has passed, less 10m chips for which down payment has been made). Accordingly, I allow the claim for down payments to the following extent: 2,331,778 chips x US$0.60 x 20% = US$279,813.36.

259 Leaving aside the price of the 11,263,289 chips which Oxel is entitled to, Oxel is also entitled to damages for the breach. This essentially comprises the claims for storage and freight, the consequential losses in respect of payments made to Danatel and Logii as well as for Oxel's loss of profits on the remaining chips under the 100m order. I will examine each in turn.

Loss of profits and payments made to suppliers

Payments made to suppliers

260 It will be recalled that Oxel had to place orders with Danatel and Logii in order to fulfil its contract with Sandipala. I reject Sandipala's contention that Oxel is double claiming on their losses in respect of loss of profits and the payments Oxel has made to its suppliers, as will be evident from [273]–[276] below.

261 Oxel claims (a) sums that it has paid to its suppliers; and (b) loss of profits that it would otherwise have earned. These are two separate losses altogether. It will be useful to briefly illustrate this point by reference to *Todd Trading Pte Ltd v Aglow Far East Trading Pte Ltd* [1997] 1 SLR(R) 494 ("*Todd Trading*"), a case which Oxel has brought to my attention.

262 In *Todd Trading*, the defendant promised to buy a consignment of Vietnamese rice from the plaintiff. Subsequently, the defendant informed the plaintiff that the transaction was cancelled. The plaintiff had to cancel the contract with its supplier and paid compensation to its supplier. The court allowed the plaintiff's claim for (a) its loss of profits it would have made if the defendant had not defaulted (*Todd Trading* at [47]); and (b) the compensation that it had paid to its supplier (*Todd Trading* at [53]). The latter head of damages was allowed on the basis that it was foreseeable by or within the contemplation of the defendant that if it defaulted, the plaintiff would have to pay compensation to their supplier (*Todd Trading* at [52]).

263 In the present case, Sandipala knew that Oxel did not manufacture the chips that it had contracted to supply under the Agreement. In fact, it claims to have been told that Oxel was a distributor of ST-AP's chips. Thus, it would be

within Sandipala's contemplation that Oxel would be liable to its own suppliers in relation to the chips that it had promised to supply to Sandipala. I am thus satisfied that Oxel is entitled to its claim for losses that it had incurred in meeting the payment obligations it owed to its suppliers.

264 In order to meet its obligations under the Agreement, Oxel entered into two contracts with its suppliers, Danatel and Logii.

265 Although (as Sandipala pointed out) Oxel's contract with Danatel was entered into about five days before Oxel entered into the Agreement with Sandipala, it was clear from the evidence that Oxel's contract with Danatel was entered into for the purposes of the Agreement (see [37] above).

266 The Danatel contract with Oxel was for 100m ST23YR12 chips encoded with the PAC operating system. The total price was US$34m.[327] The evidence was that a total of 19,426,284 chips were delivered to Oxel (via Chilitag in Taiwan) under the contract.[328]

267 I pause to note that the evidence as to how many chips were actually produced by ST-AP for Danatel is rather unclear. The order placed by Danatel to ST-AP for the first tranche was for 50m chips.[329] Once Sandipala discovered the problems (as alleged) with the chips, attempts were made to reduce or halt production on account of the requests being made by Mr Tannos. According to Mr Cousin, production stopped "around 24.6 million" chips.[330] The final figure

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327 Closing Submissions of Oxel, [468].

328 Ika Kusuma's Affidavit of Evidence in Chief, [12], [14] and [111]–[112].

329 Mr Vincent Cousin's Affidavit of Evidence in Chief, [73]; Closing Submissions of Oxel, [496].

330 Mr Vincent Cousin's Affidavit of Evidence in Chief, [129].

used by Oxel in its closing submissions was however 19,426,284, the same figure as the number of chips delivered to Oxel (no explanation was given as to why the figure provided by Mr Cousin was not used; the figures were not discussed in Mr Cousin's oral evidence).[331]

268 I note that the figure of 19,426,284 chips was also used by Sandipala's counsel in cross-examining Ms Ika Kusuma (of Oxel). Ms Kusuma's position on the other hand was that she thought the figure was somewhere between 25m and 27m.[332] No witness from Danatel was called to give evidence.

269 In these circumstances, there is some uncertainty whether production stopped at 19,426,284 or around 25m chips. What is clear, however, is that Danatel only placed an order for 50m chips with ST-AP. There is no evidence before the Court that the second 50m tranche was ever ordered. No claim appears to have been made by Danatel against Oxel or by ST-AP against Danatel.

270 The total amount paid by Oxel to Danatel was US$18,323,076.62. This was made up of:

(a) US$680,000 paid as 20% down payment for first batch of 10m chips;

(b) US$578,053.58 for 80% remainder of the price for the remaining 2,125,197 chips;

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331 Closing Submissions of Oxel, [495].

332 Transcript of 16 May 2016 p 69 line 20 to p 70 line 12.

(c) US$6.9m for 80% remainder of the price for 7,874,803 chips and 20% down payment for the second batch of 30m chips;

(d) US$10,165,023.04 being a 50% down payment for the remaining 60m chips.[333]

271 I note in passing that based on the total contract price of US$34m it follows that US$15,676,923.38 (being US$34m less US$18,323,076.62) remained outstanding on the contract between Oxel and Danatel.[334] There is no evidence, however, that Danatel has made any claim against Oxel for that sum. Indeed, Oxel has not claimed the outstanding amount from Sandipala. Whilst it may be that this is because Oxel was able to settle its position with Danatel[335] it is not necessary for me to comment further on the sum of US$15,676,922.

272 The Logii contract was entered into in respect of the licence to use the PAC operating system for the 100m chips referred to above.[336] The total price was US$25.8m.[337] As noted, a total of 19,426,284 chips were produced and delivered to Oxel.[338] The total amount paid by Oxel to Logii was US$5,011,981.27.[339]

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333 Oxel submissions at [469]

334 See also Ika Kusuma's Affidavit of Evidence in Chief at [153] and Exhibit IK-109 (letter from Danatel to Oxel dated 27 December 2013; minor discrepancy of US$1.38).

335 See Transcript of 16 May 2016, p 86 at lines 18 to 25; p 88 at lines 12 to 14, p 89 at line 17 to p 90 at line 4.

336 Ika Kusuma's Affidavit of Evidence in Chief, [38]–[40].

337 Closing Submissions of Oxel, [468].

338 Ika Kusuma's Affidavit of Evidence in Chief, [172]; Closing Submissions of Oxel, [485].

339 Ika Kusuma's Affidavit of Evidence in Chief, [172]; Closing Submissions of Oxel,

273 It follows that, under these two contracts, Oxel has paid US$23,335,057.89 in total. This consists of the US$18,323,076.62 paid to Danatel and the US$5,011,981.27 paid to Logii.

274 However, Oxel claims only the sum of US$15,960,654.65 as representing the losses suffered by Oxel to meet its obligations under the contracts with its suppliers.[340]

275 The sum of US$15,960,654.65 is derived from the US$23,335,057.89 paid by Oxel less the sum of US$7,374,403.24 which represents the amount paid by Oxel to its suppliers for (i) the 1,068,489 chips that Sandipala had paid for (see [197] above); and (ii) the 11,263,289 chips Oxel claims the price against Sandipala for (see [244] above).[341]

276 The figure of US$7,374,403.24 is calculated as follows:

(a) US$0.34 (price per wafer chip under Oxel's contract with Danatel) plus US$0.258 (price per module under Oxel's contract with Logii) = US$0.598.

(b) US$0.598 x (1,068,489 + 11,263,289) = US$7,374,403.24.[342]

277 For ease of reference, the table below summarises Oxel's claim in relation to payments made to its suppliers:

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[468].

340 Closing Submissions of Oxel, [436(b)(iii)].

341 Closing Submissions of Oxel, [436(b)(iii)].

342 Closing Submissions of Oxel, [436(b)(iii) n 517].

Nature of payment	**Amount (US$)**
Oxel's payment to Danatel	18,323,076.62
Oxel's payment to Logii	5,011,981.27
Subtotal of payments made to suppliers	*23,335,057.89*
Less	
(a) 1,068,489 chips Sandipala paid for; and (b) 11,263,289 chips Oxel claims for the price against Sandipala	7,374,403.24
Total claim	***15,960,654.65***

Loss of profits

278 As for the loss of profits, the evidence shows that Oxel would have made a profit of US$200,000 had the Agreement been performed.[343]

279 After adjusting the sum to take into account the payments for the 1,068,489 chips that have already been made by Sandipala and the 11,263,289 chips that Oxel is entitled to claim the price of, I find that Oxel is entitled to a

343 Closing Submissions of Oxel, [466].

pro-rated sum for its loss of profits for the remaining 87,668,222 chips. Oxel has proffered the sum of US$175,336.44 in this regard.[344] It appears that this figure is based on 0.2 cents profit per chip (US$200,000 for 100m chips), given thatthe price charged by Oxel for the 100m chips to Sandipala was US$60m and the cost of acquisition of the chips from Danatel and Logii was US$59.8m. I have no reason to doubt Oxel's evidence on the profit per chip under the agreement and so make the award on this basis.

280 For completeness, I note that Mr Tannos has made an allegation that Oxel, Danatel, Logii and Wahyu are related companies or companies which are ultimately owned by Mr Winata or his family and therefore Oxel has not truly and genuinely suffered the losses it alleges it has suffered. Two points are significant. First, this allegation is a non-starter since it has not been pleaded. Secondly, whether Mr Winata and his family were the ultimate controllers/owners of Oxel, Danatel, Logii and Wahyu is a complete red herring. The question before the court is whether Oxel, as a company, has suffered any losses flowing from Sandipala's breach of the Agreement; the court is therefore not concerned about whether Mr Winata or his family has sustained any overall losses from the same.

Storage costs

281 The 7,094,506 chips that Oxel received from its suppliers between April and July 2012 are presently stored in a warehouse in Singapore. Oxel has been incurring, from May 2012, onwards monthly storage costs amount to S$9,729.50.[345] I see no reason to deny Oxel's claim in this regard. Incurring

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344 Closing Submissions of Oxel, [436(b)(ii)].

345 Closing Submissions of Oxel, [473].

such storage costs is a direct and natural consequence of Sandipala's refusal to accept delivery of the chips that it had agreed to purchase. To this end, *Benjamin* at para 16-030 notes that the seller may be entitled to claim damages for expenses incurred by him – for example for storage of the goods.

Freight charges

282 It will be recalled that a term of the Agreement was that the price was "ex-works Singapore". Mr Tannos accepted during cross-examination Sandipala would be the party responsible for arranging for the transportation of the chips from Singapore to Jakarta:[346]

> Q … So you understood prices are ex-works Singapore, meaning?
>
> A. Meaning the goods -- when the good arrive in Singapore, Oxel will inform me. Then I will come to -- I will come or I will send representative to Singapore to inspect the good. If I accept the good, then I pay. I would arrange the exporting from the Singapore to Indonesia. I would prepare the end-user certificate, arrange the transportation to Indonesia, pay the value added tax in Indonesia of 10 per cent -- there is no import duty tax for this -- sign the tax declaration in Indonesia, and then the good would arrive in my factory. That would be the steps.

I am, therefore, satisfied that Sandipala is responsible for freight charges that Oxel had incurred to transport the first 15 shipments of chips to Sandipala in Jakarta, and I allow Oxel's claim in this regard claimed at S$29,478.88, as supported by the relevant invoices.[347]

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346 Transcript of 16 March 2016, p 82 lines 2 to 14.

347 Paragraph 5.1.2a and prayer (2) of the Defence and Counterclaim; Ika Kusuma's Affidavit of Evidence in Chief at [97]–[98], Exhibit IK-88 at pp 223–239 (invoices).

Conclusion

283 Given the gaps in relevant documentary evidence, many issues turned on the testimony of the witnesses. The hearing of the evidence took considerable time and it was necessary to delve into the oral evidence in considerable detail. The facts and issues raised were complex and the court is appreciative of the manner in which the trial was conducted and the assistance it has received from the submissions placed before it by learned counsel.

284 For the reasons set out above, I make the following orders:

(a) Sandipala's claims against ST-AP, Oxel and Mr Cousin are dismissed;

(b) Oxel's counterclaim against Sandipala as well as its counterclaim against Sandipala, Mr Tannos and Ms Tannos are allowed as follows:

(i) Oxel is entitled to the price of the 4,805,875 chips that were delivered in the fifth to ninth shipments. Oxel is also entitled to the price of the 6,457, 414 chips in the tenth to 15th shipments (amounting to 11,263,289 chips altogether). The total award for price is assessed at US$5,406,378.72.

(ii) Oxel is entitled to US$279,813.36 being the down payment in respect of 2,331,778 chips.

(iii) Oxel is entitled to US$15,960,654.65 being the losses suffered by Oxel in respect of the payments made to Danatel and Logii.

(iv) Oxel is entitled to a pro-rated sum for its loss of profits for the remaining 87,668,222 chips amounting to US$175,336.44.

(v) Oxel is also entitled to damages for the monthly storage charges from May 2012 to the date of this judgment for the 7,094,506 chips that Oxel received from its suppliers and which are presently stored in a warehouse in Singapore. The only evidence before this court of the monthly storage costs is the sum incurred until November 2015, based on the evidence of Ms Kusuma.[348] This amounts to S$9,729.50.

(vi) Oxel is also entitled to recover the freight charges of S$29,478.88.

(c) Oxel is entitled to interest as follows:

(i) Interest at the contractual rate of 1.5% per month[349] for the price of the chips that was assessed at US$5,406,378.72 and the down payments assessed at US$279,813.36.

(ii) Interest at the usual rate for the other awards.

(d) Oxel's counterclaim against Mrs Rawung is dismissed;

(e) Sandipala is to pay ST-AP, Oxel and Mr Cousin costs incurred in defending Sandipala's claims in the main suit;

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348 Ika Kusuma's Affidavit of Evidence in Chief, [100]; Closing Submissions of Oxel, [473].

349 Defence and Counterclaim (Amendment No 4) of Oxel, prayer 4, r/w [4.1.1d] and [5.1.1(b)]; Ika Kusuma's Affidavit of Evidence in Chief, p 54 (Oxel's standard terms and conditions).

(f) Sandipala, Mr Tannos and Ms Tannos are to pay Oxel the costs incurred in bringing the counterclaims;

(g) Oxel is to pay Mrs Rawung the costs she incurred in defending the counterclaim; and

(h) The aforementioned costs are to be taxed if not agreed.

George Wei
Judge

Prem Gurbani, Govintharasah s/o Ramanathan and Sarah Kuek (Gurbani & Co LLC) for the plaintiff and the defendants (by counterclaim);
Ong Tun Wei Danny, Yam Wern-Jhien, Eugene Ong and Jeremy Gan (Rajah & Tann Singapore LLP) for the first and third defendants;
Davinder Singh SC, Zhuo Jiaxiang and Timothy Lin (Drew & Napier LLC) for the second defendant and the plaintiff (by counterclaim).