

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
GUAMAN NO. WA-22NCVC-379-06/2016
ANTARA**

**TEX CYCLE TECHNOLOGY (M) BERHAD
(642619-P)**

...PLAINTIF

DAN

**FACT SYSTEM (MALAYSIA) SDN BHD
(264708-H)**

...DEFENDAN

**DI DALAM MAHKAMAH TERBUKA
DI HADAPAN Y.A. HUE SIEW KHENG**

HAKIM

FOUNDATIONS OF JUDGMENT

INTRODUCTION

1. The Plaintiff's claim is premised on a contract that it contends was entered into with the Defendant for the installation of a software which could cater for the implementation of GST required by the Government.
2. It is the Plaintiff's contention that the Defendant had represented to the Plaintiff in meetings and exchanges of emails that the Defendant

could meet the GST deadline and also that 2 important service requirements of the contract entered into could be fulfilled.

3. It is the Plaintiff's case that the Defendant had breached the contract entered into as a result of which the Plaintiff had sustained loss and damages and seeks, *inter alia*, the refund of the sum of RM191,572.00 paid by the Plaintiff to the Defendant for the software.
4. The Defendant denies all of the Plaintiff's contentions and counter claims for the sum of RM38,668.80 which represents an additional 76 hours expended on the project.

Plaintiff's Summary

5. The Plaintiff is a public listed company and has 5 associated subsidiary companies which are wholly owned by the Plaintiff. It operates 2 plants in Pusat Perindustrian Kinrara and Teluk Gong known as P1 and P2 respectively and provides a variety of services which have been set out in the Statement of Claim.
6. The Malaysian Government implemented a taxation policy in respect of services provided known as the Goods and Services Tax (**GST**) which was to be enforced on 1.4.2015 (**GST Deadline**).
7. The Plaintiff as the provider of services prescribed under the GST was required to comply with and meet the GST Deadline. Moreover

as a public listed company, such compliance was mandatory and this was overseen stringently by regulatory bodies, including Bursa Saham Malaysia, which are armed with punitive sanctions.

8. On or about 17.9.2017 the Plaintiff was approached by the Defendant in respect of the implementation of GST being automated into their operations. The Defendant was fully appraised of the Plaintiff's requirements and the fact that as a public listed company it had to meet with the GST Deadline.
9. The Plaintiff's office, at the material time was automated by an automated computer system known as Microsoft Navision (**Microsoft Navision**) ERP software.

The Representations

10. The Plaintiff alleged that the Defendant, being appraised of the Microsoft Navision ERP, made representations to the Plaintiff, that FACT, its own software, would be able to cater for the implementation of the GST in respect of the Plaintiff's services and furthermore that the operations of P1 and P2 would be streamlined, all of which would be implemented and effective by the GST Deadline. The particulars of the Defendant's representations have been set out in paragraph 6 of the Statement of Claim.

11. The Plaintiff then contracted with the Defendant, relying upon the representations, for the purchase of its FACT software and the implementation of the same into the Plaintiff's office automated system for the successful implementation of GST before the GST Deadline (**the Contract**).
12. Pursuant to the Contract, the Defendant issued a Proforma Invoice on 13.11.2014 instead of a normal invoice for the sum of RM191,572.00 for the implementation of the Defendant's FACT software.
13. Full payment was made by the Plaintiff on the Proforma Invoice.
14. The Defendant however failed to fulfill its obligations under the Contract.
15. The GST Deadline was not met by the Defendant and the Plaintiff had no alternative but to switch to manually entering the data and generating documents manually to meet the GST Deadline and in the process incurring significant costs and expenses.
16. On 29.5.2015, the Plaintiff had no alternative but to terminate the Contract whereupon a notice of termination dated 29.5.2015 demanding the refund of the contract sum of RM191,572.00 was issued.

17. Subsequently, the Plaintiff was served with an Order dated 9.12.2015 issued by the court in C.S. 22NCVC-398-07/2015 which was filed by the Defendant restraining one Amit Das from dealing with the Defendant's clients including the Plaintiff.
18. The Plaintiff contends that the Order dated 9.12.2015 does not bind the Plaintiff as the Defendant cannot curtail the Plaintiff's freedom and liberty to contract, particularly when they are not a party to such proceedings.

The Defence and Counterclaim

19. The Defendant was approached by the Plaintiff on 10.9.2014 who enquired about implementing the Defendant's Enterprise Resource Planning (ERP) software called FACT ERP.NG for the Plaintiff.
20. The Plaintiff and Defendant subsequently executed the Defendant's Proforma Invoice No. FSM/141113/056/BC747 dated 13.11.2014 (**the Invoice**) for the total contract sum of RM191,572.00.
21. The Defendant was only dealing and implementing their software for Tex Cycle Sdn Bhd (**P1**) and Tex Cycle (**P2**).
22. There was no express term in the Invoice that the Plaintiff was mandatorily required to implement GST and to meet with the GST Deadline.

23. The Defendant denied making any representation to the Plaintiff as alleged. Neither was there any contract entered into as alleged.
24. The Plaintiff's servers had caused a lot of problems to the Defendant until 10.3.2015 which delayed the Defendant in the implementation of its software for the Plaintiff.
25. The Plaintiff also made various modifications to the implementation structure of the Defendant's software from February 2015 until May 2015 which directly delayed the Defendant in the implementation of its software for the Plaintiff.
26. The training and the handing over of the Defendant's software was completed by the Defendant and the Defendant's implementer had advised the Plaintiff to initiate the Plaintiff's data entry on 6.5.2015.
27. Since the Defendant succeeded in implementing their software for the Plaintiff on 28.4.2015, the Plaintiff requested the Defendant to enter the names of the other subsidiaries of the Plaintiff into the Defendant's software so that the Defendant's software can be used for the benefit of the subsidiaries of the Plaintiff.
28. Several representatives of the Defendant were involved in the implementation of the Defendant's software for the Plaintiff whose attendance were acknowledged by the Plaintiff in the Attendance Sheets in respect of the implementation of the Defendant's software.

29. The Plaintiff had only paid the Defendant for a total of 60 hours for the implementation of the software. However, because the Defendant had spent 136 hours for the implementation of the software, the Defendant had issued a Proforma Invoice No. FSM/0725/AA dated 3.6.2015 amounting to RM38,668.80 for the additional 76 hours (**Additional Invoice**) which the Plaintiff refused to pay.
30. Further, the Defendant had hired one Amit Das as its "*Implementation and Delivery Manager*" from 9.3.2015 until 5.6.2015. Amit Das's involvement in this action have been set out in the Defendant's Statement of Defence.
31. The Plaintiff' Termination Notice dated 29.5.2016 was unreasonable because the Defendant had succeeded in implementing its software for the Plaintiff.
32. The amount of RM191,572.00 in the Invoice is not refundable because Term and Condition 9 of the Invoice provides that the services of the Defendant once subscribed to is not cancellable.
33. Therefore, the Defendant prays that the Plaintiff's claim herein be dismissed with costs and the Defendant's counterclaim be allowed with costs.

Agreed facts

34. The Malaysian Government had introduced and implemented a taxation policy in respect of services provided known as the Goods and Services Tax (GST) which was to be implemented with effect on 1.4.2015 (GST Deadline).
35. The Plaintiff is a provider of the services required to implement such GST and meet the GST Deadline.
36. The Plaintiff's office was automated by a computer system (Office Automated System) with an Enterprise Resource Planning (ERP) software, known as Microsoft Navision (Microsoft Navision).
37. The Plaintiff then contracted with the Defendant, for the purchase of their FACT software and the implementation of the same into their Office Automated System.
38. The Defendant issued on 13.11.2014 a Proforma Invoice for the sum of RM191,572.00 to the Plaintiff for the implementation of the Defendant's FACT software.
39. Full payment was made by the Plaintiff on the said Proforma Invoice.

Issues

40. The core issue in this case is whether there was a contract entered into between the parties in respect of the installation and implementation of the Defendant's software FACT system and if so, what is the nature of that contract? A corollary issue is whether the Defendant had made the representations as alleged.

Findings

41. From the evidence presented I am satisfied that the Plaintiff has proved, by cogent and credible evidence that an agreement had been entered into between the parties from the voluminous emails exchanged, the meetings held and last but not least the proforma invoice dated 13.11.2014.
42. The Defendant contends that the only agreement between them is what is contained in the proforma invoice and the Plaintiff is bound by all the terms and conditions of the invoice and further takes the position that no evidence was adduced at all that the Defendant was fully appraised of the fact that the Plaintiff was mandatorily required to implement GST and to meet the GST deadline of 1.4.2015.

