

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

GROUND 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.

43. The proforma invoice is as follows –

Ms Geraldine Hii
 Chief Financial Officer
 Texcycle Technology (M) Sdn Bhd
 No. 8 Jalan TPK 2/3
 Taman Perindustrian Kinrara
 47100 Puchong Selangor
 Phone 603-80763816
 Fax 603-80763817

S1 Description of Goods / Services	Amount (RM)
1. FACT ERP.NG GAF Version 4 – 15 User (Inclusive of 3 remote login users)	58,076.00
2. Subscription Plan Current Version : FACT ERP.NG GAF Version 4 – 15 User Start Date : Upon Installation Expiry Date : One year from Installation above New Serial# : New	23,498.00
3. Onsite Training & Implementation Scope: 30 Hours Onsite at the Client premises Limited to FACT ERP NG & its functionality Dates to be confirmed later	14,400.00
4. Installation of FACT ERP.NG 15 Users	2,880.00
5. Manufacturing Scope: 30 Hours Onsite at the Client premises Limited to FACT ERP NG & its functionality Dates to be confirmed later	30,000.00

6. Customization	12,000.00
1. Inter Company Transaction	
2. Schedule 6 – Document Designer and DO	
7. Project Consultancy	25,000.00
Scope: 30 Hours Onsite at the Client premises	
Limited to FACT ERP NG & its functionality	
Dates to be confirmed later	
8. Data Conversion and Migration Effort	35,000.00
10 Man Days Effort limited to Master and Opening Balance	
9. Special Discount	[-]9,282.00
Total	RM191,572.00.00

Warm Regards

t.t.

Authorised Signatory

[Continued on Page 2]

44. If one is to examine the proforma invoice, it is clearly stated under the column "Description of Goods of Services" –

1. FACT ERP. NG GAF Version 4 – 15 users Inclusive of 3 remove login users.

45. In the Defendant's email dated 10.8.2014 one Nurul Aida from the Defendant's company had sent an email to the Plaintiff's company, carrying the subject topic of "Introduction FACT ERP. NG – Malaysian GST Ready Software". This is clear evidence that the Defendant's software was touted as being in respect of the implementation of the GST introduced by the Government.
46. The email was in essence an advertisement of the Defendant's FACT product which was trumpeted to be a "*comprehensive real time solution featuring General Ledger (GL), Sales (AR), Purchasers (AP), Fixed Assets, Inventory Control (IC), Manufacturing Management all integrated into one single solution*".
47. It went on to declare that "*On March 12, 2014 FACT System Malaysia Sdn Bhd received its Malaysia GST ready certification from Royal Malaysian Customs Department (RMCD) and that FACT ERP. NG is now fully compliant with the Malaysia GST specifications*".
48. This email was a good 2 months before the proforma invoice which is, by its reference to "FACT ERP. NG" in item 1 of the proforma invoice, incontrovertible evidence that the FACT software was represented to the Plaintiff to be GST compliant and GST ready.
49. From the email conversations between the parties it is clear that the GST deadline was a recurrent concern of the Plaintiff. One such example is the email (from the voluminous emails exhibited in Bundle B3) dated 16.3.2015 from the Plaintiff to the Defendant showing the

parties to be keenly aware of the impending enforcement of the GST Act:

From: Gary<gary@texcycle.com.my>

Date: 16 March 2015 at 17:08

Subject: Customisation plan – Tex Cycle

To: arvind@factsoftware.com

Cc: wiknes@factsoftware.com, Biju Rajan <biju@factsoftware.com>, Richard Wan <richard@factsoftware.com>, Geraldine – TEX Cycle <geraldine@texcycle.com.my>, FACT Malaysia – Hakim <hakim@factsoftware.com>

Dear Arvind,

Good day to you.

Taking into account of the time constraint that we are facing and with the implementation of GST coming soon on 1 April 2015 (2 weeks to go), Management has come up with a solution as below:

Intercompany – Transportation cost

Starting from this year, all lorries will be transferred to Tex Cycle (P2) Sdn Bhd. Since, moving forward less trips are expected from Tex Cycle Sdn Bhd (P1), hence we will do the transportation invoicing manually to P1.

Intercompany – Sales services

In line with the aforementioned, sales for P1 will also be minimal and therefore, we suggest to perform the posting of invoices to P1 manually.

The only customization (if necessary) will be to help us come up with and uninvoiced sales order listing/report (in P2 FACT*) with details on the quantity, state details and etc, in order for us to use that report and

Invoice in P1 FACT. This will enable us to check for accuracy and completeness of postings.

*All sales order entries will be raised at P2.

Appreciate your suggestions on this matter.

If you have further queries, pls do not hesitate to contact us or meet us in person.

Hope this can really speed up the implementation process and we can go live on 1 April 2015 inclusive of any customization necessary.

Thanks.

(emphasis added)

50. It is my finding that the Defendant's denial that the FACT software purchased by the Plaintiff was to meet the GST deadline flies in the face of the evidence adduced and is nothing but a sham.
51. I am satisfied on the evidence presented that the representations as pleaded were made by the Defendant to the Plaintiff. These representations are that, *inter alia*, the FACT software would be able to cater for the implementation of the GST in respect of the Service Requirements of the Plaintiff and also able to meet the GST deadline. It is also my finding that such representations induced the Plaintiff to purchase the software and pay the full amount of RM191,572.00 upfront.

52. The evidence showed that the FACT software as represented was not implemented. There was only a configuration date sign off but no sign off for the go live that was scheduled for 1 April 2015.
53. The Service Requirements were also not met. The Plaintiff's evidence that one Biju Rajan from the Defendant's company admitted that FACT ERP was unable to cater for the Service Requirements was not rebutted by the Defendant.
54. DW1, the Defendant's sole witness, one Arwind Argawalla, had given mostly hearsay evidence as he had no personal knowledge of the transaction between the parties.
55. The Defendant's key personnel dealing with the Plaintiff in respect of the FACT software like Hakim Yusri, Bernard Chua and Adolf Lai were not called to testify.
56. Accordingly, I find that the Plaintiff has proved its case against the Defendant on the balance of probabilities and the Plaintiff's claim is allowed with costs.
57. I find that the Defendant's counter claim is not *bona fides* and no credible evidence has been led in respect of the counter claim and is hereby dismissed.

Order dated 9.12.2015

58. This Order reads –

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF MALAYSIA MALAYSIA

SUIT NO: 22NCVC-398-07/2015

ANTARA

FACT SYSTEM MALAYSIA SDN. BHD.
(Company No: 264708-H)

...PLAINTIFF

DAN

1. AMIT DAS
(Indian Passport No: K0864058)
2. TESCA GLOBAL SDN. BHD.
(Company No: 1124652-M)
3. TESCA SOFTWARE SERVICES SDN. BHD.
(Company No: 1140276-U)
4. TESCA RETAIL SDN. BHD.
(Company No: 1144533-T)
5. DYNAMICS GLOBAL INFOTECH
6. DYNAMICS FINER INFOSOLUTION PVT LTD
(Indian Company Registration No: U74900WB2011PTC170414)

...DEFENDANTS

BEFORE JUDICIAL COMMISSIONER
S. NANTHA BALAN
ON 9 DECEMBER 2015

IN CHAMBERS

ORDER FOR INTERLCOUTORY INJUNCTION (INTER-PARTES)

UPON THE APPLICATION OF FACT SYSTEM MALAYSIA SDN. BHD. AND
UPON READING the Notice of Application dated 28 August 2015, Affidavit in Support

dated 28 August 2015, 1st, 2nd, 3rd and 4th Defendants' Affidavit in Reply (1) dated 9 October 2015 and Affidavit in Reply dated 23 November 2015 as well as the Plaintiff's Submissions AND UPON HEARING Kanarasan Ghandinesen together with Ramesh K Supramaniam counsels for the Plaintiff and the 1st Defendant appearing in person and representing the 2nd, 3rd and 4th Defendants,

IT IS ORDERED AND DIRECTED BY CONSENT that the 1st to 4th Defendants, namely AMIT DAS, TESCA GLOBAL SDN. BHD., TESCA SOFTWARE SERVICES SDN. BHD. and TESCA RETAIL SDN. BHD.

- (a) be restrained either by their own or through their employees, agents, representatives, affiliates and/or subsidiaries from approaching, contacting and/or liaising with the Plaintiff's clients including Tex Cycle Technology (M) Berhad and its subsidiaries pending the disposal of this Action;
- (b) be restrained either by their own or through their employees, agents, representatives, affiliates and/or subsidiaries from marketing, distributing, supplying, installing, implementing or selling Microsoft Dynamics NAV software and/or any other ERP software to the Plaintiff's clients including Tex Cycle Technology (M) Berhad and its subsidiaries pending the disposal of this Action;
- (c) be restrained either by their own or through their employees, agents, representatives, affiliates and/or subsidiaries from doing any act which could damage the business and/or reputation of the Plaintiff pending the disposal of this Action;

AND IT IS FURTHER ORDERED that costs shall be in the cause.


Dated this 9th day of December 2015

Deputy Registrar
High Court
Kuala Lumpur

59. I am of the view that the Order which is an interlocutory injunction dated 9.12.2015 issued by the Kuala Lumpur High Court in C.S. 22NCVC-398-07/2015 does not bind the Plaintiff as that it was never a party in that suit. I concur with the submissions of the Plaintiff in this regard.

60. The following orders are allowed:

- i) Prayer (a) of paragraph 25 of the Statement of Claim – Declaration that the Defendant had breached the contract;
- ii) The refund of RM191,572.00;
- iii) General Damages of RM100,000.00;
- iv) The Order dated 9.12.2015 does not bind the Plaintiff;
- v) Interest at 5% per annum from date of filing of Writ of Summons and Statement of Claim; and
- vi) Costs of RM40,000.00.


(HUE SIEW KHENG)
Judge
High Court Malaya
Kuala Lumpur


Date: 24 September 2018

PEGUAMCARA / PEGUAMBELA

MV Kumar (Tetuan Mas Kumar) – bagi pihak Plaintiff.

Dato' Dhanaraj Vasudevan bersama B. Devandra (Tetuan Kamil Hashim Raj & Lim) – bagi pihak Defendan.

SALINAN DIAKUI SAH

 24/9/2018
AIDA BINTI ABU BAKAR
Setiausaha Pejabat (N27)
Mahkamah Tinggi Kuala Lumpur