MovingU Pte Ltd *v* Trans-Cab Services Pte Ltd
[2011] SGHC 254

Case Number : Suit No 409 of 2010

Decision Date : 28 November 2011

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : R S Bajwa (Bajwa & Co) and Alan Shankar (Alan Shankar & Lim LLC) for the plaintiff; Philip Ling (Wong Tan & Molly Lim LLC) and Lim Khoon(Lim Hua Yong & Co) for the defendant.

Parties : MovingU Pte Ltd — Trans-Cab Services Pte Ltd

Contract

28 November 2011 Judgment reserved.

Andrew Ang J:

Introduction

1 This action was commenced by MovingU Pte Ltd ("the Plaintiff") alleging, *inter alia*, breach of a contract it entered into with Trans-Cab Services Pte Ltd ("the Defendant") for the rental of certain mobile credit card reading devices meant to be used in taxi vehicles. The Defendant filed a counterclaim against the Plaintiff seeking, *inter alia*, refund of all moneys previously paid to the Plaintiff pursuant to the contract, damages, as well as a declaration that the contract was validly terminated by the Defendant on 29 April 2010.

The facts and the evidence

2 The Plaintiff is a supplier and operator of point-of-sale terminals, mobile credit card terminals and card payment processing equipment for use in taxis, *inter alia*, while the Defendant is a taxi operator running a fairly sizeable fleet of taxis in Singapore. The Plaintiff's three directors are Ng Meng Yang Gary ("Gary Ng"), Kim Moon Soo ("Kim") and Koh Beng Kiok Anthony ("Anthony Koh"), while the Defendant's general manager is one Jasmine Tan Siew Kim ("Jasmine Tan").

3 The Plaintiff had previously commenced a legal action against the Defendant in Suit No 481 of 2008 claiming, *inter alia*, breach of contract in a matter that is not of immediate relevance to the present action. That action was subsequently withdrawn pursuant to an out-of-court settlement, one of the consequences of which was that the Plaintiff and the Defendant entered into a written agreement ("the Rental Agreement") dated 15 January 2009 providing for the rental (in stages) of 2,500 units of certain credit card terminals functioning primarily as printers ("the CC terminals"), Nokia handphones and related accessories (collectively known as "the units") from the Plaintiff to the Defendant.

4 Under cl 1.1 of the Rental Agreement, the parties agreed that "[t]he units shall be *enabled* to accept payment via credit cards, debit cards and corporate cards" (emphasis added). At trial, the "enabling" process for each of the units was understood by consensus to include four essential steps, namely:

(a) the "programming" of Nokia software into the Nokia handphone so as to enable it to communicate with the CC terminal;

(b) the "setting up" of the unit by way of "inputting" certain data into the supporting system serving the unit;

(c) the "pairing" and "synchronisation" between the programmed Nokia handphone and the CC terminal so that the two components are able to communicate with each other electronically; and

(d) the "activation" of the unit by way of switching the unit device out of its default suspension mode.

5 Clauses 4.1 and 4.2 of the Rental Agreement provide the following:

4.1 Upon the execution of this Agreement, the [Defendant] shall be deemed to have placed an order for 500 units of the MC Swipe-2 Credit Card Terminals, Nokia handphone and Sim Card with [the Plaintiff] and shall pay a security deposit of S$50,000.00 (being S$100.00 per unit) to the [Plaintiff].

4.2 A minimum order of 200 units shall be placed by the [Defendant] every quarterly commencing three (3) months from the date of this Agreement excluding the first order of 500 units made on the date of this Agreement.

Parenthetically, cl 4.2 is the subject of dispute as to whether the minimum order was correctly stipulated as 200 units instead of 250 units. However, counsel for the Plaintiff agreed that this issue is not critical.

6 By cl 6 of the Rental Agreement, the Plaintiff was to deliver the units to the Defendant within six weeks from the date an order was placed pursuant to cl 4.2 of the Rental Agreement. If the Plaintiff failed to deliver within the stipulated six-week period, a one-week extension for delivery was to be given, beyond which the Plaintiff would be liable to the Defendant for liquidated damages of 1% per week (or any part thereof) on the rental payable on the units ordered but not delivered timeously. In the event the Plaintiff was still unable to deliver the units within eight weeks after the expiry of the initial six-week period, the Defendant would be entitled to terminate the Rental Agreement with the right to compensation for all consequential losses and damage.

7 Pursuant to the Rental Agreement, the first batch of 500 units ("the first batch units") was delivered by the Plaintiff to the Defendant on or about 1 June 2009. Those units were agreed to be "enabled" in a way that required the Defendant to furnish the Plaintiff with the Defendant's taxi drivers' personal particulars (which included the taxi drivers' identification numbers as well as their taxi registration numbers) for the "setting up" of the units prior to their delivery to the Defendant's premises (see [4] above). The Defendant later failed to place the further quarterly order stipulated in cl 4.2 of the Rental Agreement, thereby prompting the Plaintiff's solicitors to write to the Defendant's solicitors on 7 December 2009 reserving the Plaintiff's rights with respect thereto.

8 The Defendant eventually placed a second order with the Plaintiff for a total of another 500 units on 16 December 2009 via a "purchase order". These units ("the second batch units") were delivered by the Plaintiff to the Defendant on 19 March 2010. The Defendant, through its representative Jasmine Tan, received the second batch units delivered by the Plaintiff's representative, Gary Ng. The latter inscribed on the delivery order issued to the Defendant an entry stating, "Received & to be checked later", replacing a printed acknowledgment which read, "Goods

Received in Good Order & Conditions" which Jasmine Tan deleted. It is common ground that the reason for this alteration in the delivery order was because Jasmine Tan had indicated to Gary Ng, and the latter had agreed with her at the time of delivery that she would have no means of verifying the good working condition of the second batch units until such later time when the units were issued to the Defendant's taxi drivers.

9 The delivery of the second batch units was subsequently rejected by the Defendant by way of a letter prepared by the Defendant's solicitors dated 24 March 2010. The letter which was addressed to the Plaintiff's solicitors stated as follows:

> **MC SWIPE-2 CREDIT CARD TERMINAL RENTAL AGREEMENT ("the Agreement")**
>
> We are instructed that your clients delivered the 500 units of the MC Swipe 2 to our clients sometime last week.
>
> We are however instructed that all 500 units cannot be used at all because the handphone and printer are not compatible and cannot be used, and because the chargers also cannot be used.
>
> As such, our clients reject the delivery of all 500 units. Accordingly, your clients cannot be considered to have delivered the 500 units as ordered under the Agreement.
>
> Further, given that the lead time for this batch of 500 units commenced on 20 January 2010, your clients are already in delay, having failed to meet the initial 6 weeks lead time that expired on 3 March 2010.
>
> Please note that our clients reserve all their rights under the Agreement.

10 The events leading up to the Defendant's solicitor's letter of 24 March 2010 are considerably in dispute, save for the following material facts. The second batch units were kept in the Defendant's premises after Gary Ng handed the units over to Jasmine Tan on 19 March 2010. On 22 March 2010, the Defendant directly distributed 25 of the second batch units to its taxi drivers without the Plaintiff's knowledge or assistance. At this time there were 50 units remaining in stock from the first batch. On 23 March 2010, Gary Ng received a telephone call from Jasmine Tan who complained that units from the second batch could not function properly and that the units should have been "programmed" under the generic name "Transcab" instead of the individual names and particulars of the Defendant's taxi drivers as in the first batch. (It is unclear whether the word "programme" was the most appropriate term in view of the clarification at trial of the four steps that the "enabling" process consists of (see [4] above). However, it was also used by Gary Ng in the same conversation.) An audio recording as well as transcript of this telephone conversation was admitted and heard in evidence.

11 According to the Plaintiff, Gary Ng and other personnel from the Plaintiff attended at the Defendant's premises on 25 March 2010 for the purpose of deploying units for any of the Defendant's taxi drivers who turned up that day. A few units were deployed on the same day, although it was not immediately clear whether those units were in fact programmed under the generic name "Transcab" or the individual names and particulars of the taxi drivers who turned up. Anthony Koh alleged that on that same day, he noticed through a glass window of a locked room at the Defendant's premises (where the second batch units were kept) that the units had been removed from their packages (there being 50 in each) and left untidily on the floor of the locked room. It was also on the same day that the Defendant demanded and insisted that the Plaintiff take back all the remaining second batch units including their accompanying chargers which were found to be incompatible for use because the

connector plugs were too big. This was done by Gary Ng on behalf of the Plaintiff the next day (*ie*, 26 March 2010).

12 According to Anthony Koh, from 27 to 28 March 2010, Gary Ng and Kim conducted functionality checks on the returned units and observed that many of the previously working CC terminals did not pass their "Self Print" test function. During the functionality test, the components of the CC terminals were visually examined by Gary Ng aided by a magnifier of three times magnification. Based on the visual examination conducted at the Plaintiff's premises, the three directors arrived at the conclusion that most of the units it took back from the Defendant on 26 March 2010 had been tampered with in that:

(a) there were, *inter alia*, burn marks, screws removed and cuts observed on the "IC component pins"; and

(b) the Printed Circuit Board's components in the units had been removed by hot soldering.

This led to the Plaintiff lodging a police report in the early hours of 31 March 2010. Ten of the units returned by the Defendant were also sent to its manufacturer, Ines Co Ltd ("Ines"), in Korea for analysis on 29 March 2010. The analysis report released on 5 April 2010 by Ines was admitted in evidence ("the Ines analysis report"). By the request of Ines, a further examination of 350 of the second batch units was subsequently conducted by an independent party known as Merit Teletech (M.R.T.) some four months later, from 26 to 29 July 2010, yielding another analysis report dated 29 July 2010 ("the Merit Teletech analysis report").

13 Further in the afternoon of 31 March 2010, the Plaintiff entered the Defendant's premises and, according to the Plaintiff, three broken pieces of electronic components belonging to the second batch units together with what was thought to be a solder bit were found on the floor of the room where the second batch units were previously kept. This discovery was alleged to have been witnessed by a taxi driver known as Ng Teow Seng who happened to be present at the Defendant's premises at the time. To that end, the Plaintiff produced a service form bearing Ng Teow Seng's signature (hereinafter referred to as "MCP Service Form") on which was written: "Note: Witness components found on the floor carpet (Room)". The Plaintiff eventually lodged another police report on 6 April 2010 relating to the alleged discovery on 31 March 2010.

14 As a result of the dispute between the parties, the second batch units were never re-delivered to the Defendant. (The Plaintiff pleaded in para 33 of its Statement of Claim (Amendment No 2) that it was "able, willing and ready" to re-deliver but stopped short of saying that it had attempted to do so. Instead, it merely alleged that the Defendant remained silent, seeming thereby to suggest that it was for the Defendant to call for re-delivery.) On 29 April 2010, the Defendant's solicitor wrote to the Plaintiff's solicitor giving notice that the Defendant had decided to terminate the Rental Agreement pursuant to cl 6 thereunder (see [6] above). As a result, the Plaintiff commenced this action claiming, *inter alia*, loss of profits and damages arising from the Defendant's wrongful termination of the Rental Agreement. As mentioned earlier, the Defendant filed a counterclaim against the Plaintiff seeking, *inter alia*, refund of all moneys previously paid to the Plaintiff pursuant to the Rental Agreement, damages, as well as a declaration that the Rental Agreement had been validly terminated by the Defendant on 29 April 2010.

The issues

15 Whether the Defendant had breached the Rental Agreement and unlawfully terminated it depended principally on the question whether the Defendant had tampered with the second batch

units while the units were kept at the Defendant's premises from 19 to 26 March 2010 ("the issue of tampering") it being common ground that the second batch units had indeed been tampered with. If the Defendant did tamper with the units, that would be the end of the matter since the Defendant could not possibly justify rejecting the goods rendered faulty and unusable by its own culpable conduct. Conversely, if the issue of tampering were to be resolved in favour of the Defendant, it would, for reasons that will be explained later (see [31]–[32] below), be entitled to maintain that it did not wrongfully terminate the Rental Agreement on 29 April 2010.

16 Apart from the issue of tampering, counsel for both sides also spent considerable time during the trial delving into evidence relating to one other issue, namely, whether the Defendant had given instructions to the Plaintiff that in respect of the second batch units the Plaintiff was to have those units programmed under the generic name "Transcab" as opposed to the individual names and particulars of the Defendant's taxi drivers as in the first batch ("the issue of variation"). This issue was considered to be of relevance because one of the reasons given by Jasmine Tan in rejecting the units from the second batch was that the Plaintiff had failed to act on her instructions to dispense with the pre-deployment procedure of programming those units under the individual names and particulars of the taxi drivers.

The decision

The issue of tampering

17 As mentioned earlier, it is not disputed that the CC terminals from the second batch units had been tampered with, as a result of which the CC terminals could not function properly. What is in dispute, however, is whether the Defendant was the one who had tampered with the CC terminals.

18 The Plaintiff contends that it was the Defendant who had tampered with the CC terminals. Anthony Koh testified that while he attended at the Defendant's premises on 25 March 2010, he observed that the units were "scattered and sprawled all over the room" where those units were stored. The Plaintiff relies on two analysis reports in further support of its contention. These reports, alluded to earlier, are the Ines analysis report and the Merit Teletech analysis report (see [12] above). The conclusion in the Ines analysis report (dated 5 April 2010 and therefore five days after the Plaintiff's 31 March 2010 police report) was as follows:

> 1. The Analysis of all the 10 sets of MC50 Printers showed inconsistent damages and missing [*sic*] to the parts.
>
> 2. They were not caused by manufacturing defects but due to manual removal of the parts.
>
> 3. The cuts to the circuit parts and removal of the parts are done using sharp shouldering [*sic*] device.
>
> 4. It could be a deliberate act to the [*sic*] make the printer malfunction.

In the Merit Teletech analysis report (dated 29 July 2010), it was concluded that:

- All the 350 sets MC50 printers showed removal of parts (C,R) and damages to IC PIN (leg).
- The parts removal and cut of IC pin of printer caused multi malfunction of printers.
- They were not caused by manufacturing defects but due to manual removal and cut to parts

(R,C) and IC.

- It is obvious that deliberate act involved to make the printer malfunction.

19 Apart from these reports, the Plaintiff also seeks to rely on its alleged discovery of the three broken pieces of electronic components and what was initially thought to be a solder bit on 31 March 2010, as well as the contents of the MCP Service Form (see [13] above), to bolster its case of tampering against the Defendant.

20 The Defendant vigorously denies all of the Plaintiff's allegations. For the purposes of defending this action, the Defendant engaged TÜV SÜD PSB in around February 2011 to conduct an examination of 15 sample units from the second batch units and to compare the relevant results of the examination with those in the Ines analysis report and Merit Teletech analysis report. The analysis report from TÜV SÜD PSB ("the PSB analysis report") (dated 18 April 2011) stated:

EXAMINATION METHODS

1. Survey on all damaged printers available and sampling some printers for laboratory examination;

2. Visual examination using naked eyes and magnifier (3x magnifier was used in the examination) on the randomly sampled printers.

…

SUMMARY

1. Two kinds of damages or defects, missing components and broken (fracture) pins of IC, were observed in the printers.

2. Much more missing components than those listed in the earlier reports were found in two PCBAs inside all printer samples …

3. Although visual examination directly on the samples using naked eyes and magnifier was slightly better than just looking at the pictures in previous two reports, microscopic features ("finger print") of the broken (separation or fracture) surfaces of pins and soldering surfaces of missing components could still not be revealed clearly, thus, the cause(s) of missing components and pin broken (fracture) could not be confirmed by the current examination methods.

21 I should also mention that counsel for the Defendant suggested to Anthony Koh in cross-examination that the Plaintiff had "staged" the events surrounding the discovery of the three broken pieces of electronic components and what was initially thought to be a solder bit on 31 March 2010, thereby implicitly also suggesting that the tampering of the CC terminals in question was committed by the Plaintiff and not the Defendant. This line of questioning, however, met with strong objection from counsel for the Plaintiff who quite rightly pointed out that the Defendant had not raised any allegation of fraud against the Plaintiff in the Defendant's own pleadings.

22 Looking at the evidence in its entirety, I am not satisfied that the Defendant had tampered with the CC terminals in question. The Plaintiff argues that the fact that the units were found to be "scattered and sprawled all over the room" at the Defendant's premises on 25 March 2010 (see [18]

above) supported its allegation that the Defendant was the one who had tampered with the CC terminals in question. Jasmine Tan explained that the units had been placed outside their packed cartons because she had conducted a physical count of the units prior to distribution to the taxi drivers on 22 March 2010. The Plaintiff challenged this explanation by arguing that a mere counting of the units would not have resulted in the units being "scattered and sprawled all over the room". However, it should be noted that the very assertion that the units were "scattered" and "sprawled" was denied by the Defendant and not corroborated by any objective evidence in the first place. More importantly, Anthony Koh admitted in cross-examination that the units alleged to be "scattered and sprawled all over the room" were still in their individual packaging. This gives me further reason to believe Jasmine Tan's explanation that the units were lying outside their packed cartons because she had opened the cartons to conduct a physical count of the units in the room.

23 In any event, I fail to see why the Defendant, if indeed it had tampered with the units in question, would have left the units scattered in the manner alleged by the Plaintiff and risked discovery when the Defendant well knew that the Plaintiff's personnel would be attending at the Defendant's premises on 25 March 2010 (as was its custom every Thursday) (see [34] below).

24 I am not persuaded by the Plaintiff's explanation that the Defendant had resorted to tampering with the units in order to mount a faux justification for (a) its rejection of the second batch units delivered on 19 March 2010; and (b) its termination of the Rental Agreement pursuant to cl 6. It was implausible that the Defendant would tamper with the second batch units while the units were in its custody, given that tampering would easily have been discovered through forensic analysis by the experts at the end of the day. Indeed, when Anthony Koh was confronted in cross-examination with this reasoning, he had no answer, apart from repeating the bare assertion that the Defendant was all along plotting to get out of the Rental Agreement.

25 It should also be mentioned that by Gary Ng's own admission the chargers forming part of the second batch units on 19 March 2010 were found to be incompatible for use because the connector plugs were too big. This in itself would have constituted ground for complaint.

26 Another reason for my doubting that the Defendant had tampered with the units is that the tampering appears to have been committed by somebody familiar with the circuit boards of the units; in many of the affected units (each consisting of about 150 fairly tiny components) the same PIN numbers were cut and the same components removed. It has not been suggested that the Defendant was familiar with the structure and layout of the circuit boards of the units. I am doubtful that the Defendant on its own would be capable of tampering with the units via such a fairly targeted and precise technical procedure. The Plaintiff did not suggest that the Defendant might have enlisted outside help.

27 I now consider the Defendant's suggestion that the tampering of the CC terminals might in fact have been the doing of the Plaintiff. In so doing, the Defendant cannot hope to secure a finding that the Plaintiff did tamper with the units, given that there is no pleading to that effect. Rather, the purpose can only be to refute the Plaintiff's allegation that the Defendant tampered with the units. I make three observations in this regard. First, Anthony Koh claimed that when he visually examined the CC terminals which were returned to the Plaintiff on 26 March 2010, he was able to observe, *inter alia*, the following aided by a magnifier of three times magnification:

(a) That there were components missing on the circuit board of the CC terminals;

(b) That the components were missing because they had been removed; and

(c) That the components were removed by the process of hot soldering.

However, Anthony Koh's evidence was directly contradicted by the PSB analysis report (see [20] above) where the same examination method (*ie*, using the naked eye and a magnifier of three times magnification) was employed by an expert, Dr Yu Yonghe ("Dr Yu"). In the PSB analysis report, Dr Yu made the following finding:

> Although visual examination directly on the samples using naked eyes and magnifier was slightly better than just looking at the pictures in previous two reports, *microscopic features ("finger print") of the broken (separation or fracture) surfaces of pins and soldering surfaces of missing components could still not be revealed clearly, thus, the cause(s) of missing components and pin broken (fracture) could not be confirmed by the current examination methods*. [emphasis added]

The PSB analysis report was not challenged. It was clearly at odds with Anthony Koh's testimony as regards what he claimed he could visually observe when he examined the units in question. Anthony Koh (and indeed Gary Ng as well) therefore appeared rather uncannily to have had more knowledge regarding the precise nature, extent and cause of the damage to the units than his examination could have afforded at the material time.

28 Secondly, it is common ground that Gary Ng (accompanied by Anthony Koh, Kim and one Esmund Ng ("Esmund") lodged a police report on 31 March 2010 alleging foul play in respect of the CC terminals delivered to the Defendant on 19 March 2010 (see [12] above). In the police report, Gary Ng in categorical terms alleged that he "found out that some sets have sign [*sic*] of the screw being removed, there was a cut sign on the IC component pin, [and] PCB component had been removed by hot soldering". Anthony Koh in his testimony accepted that the police report was based on the Plaintiff's own service report prepared around one or two hours before the police report of 31 March 2010 was lodged. The service report stated:

> Functionality tests/checks were conducted on all the sets brought back on 26th Mar 2010 from TransCab office. During functionality checks, we noticed there were numerous sets that had burnt marks on the self test printed slip. Also there were sign of screws being removed and not properly fastened on the MC50 printer. There were about 339 MC50 sets found to be either cannot be power up or failed the self test print.
>
> We have made further observation on some of the MC50 sets being tampered, either with burnt marks or sign of screw not fastened properly by comparing them with our working MC50 set. We noticed some missing electronic components on the electronic circuitry board.
>
> We gather 10 sets to be sent to Korea manufacturer for details analysis.
>
> In view of the tell tales signs of tampering and burnt marks, we suggested the matters should be reported to the Police Authority for investigation.

But nothing in the service report mentioned any "cut sign" on the IC component pin or removal of the PCB component by hot soldering as described in the police report. When queried on this discrepancy, the Plaintiff's witnesses could offer no satisfactory explanation. I should also add that it was only much later after the police report had been lodged that soldering was confirmed by Ines to have been the method by which components were removed from the circuit boards of the units (see [18] above). Here again, either Gary Ng and others within the Plaintiff were prescient, or one or more of them had something to do with the tampering.

29 Thirdly, all the Plaintiff's personnel (comprising the three directors and one Esmund) visited the Defendant's premises in the afternoon of 31 March 2010 to attend to taxi driver Ng Teow Seng who had allegedly complained that the unit he was issued with could not function properly. According to Anthony Koh, one of the main reasons why the Plaintiff's personnel attended in full force at the Defendant's premises that day was because they had wanted to understand how damage to Ng Teow Seng's unit was done. However, Anthony Koh's account of the facts was directly contradicted by Ng Teow Seng who testified that his attendance at the Defendant's premises on 31 March 2010 was merely for the purpose of receiving training from the Plaintiff's personnel on the proper usage of the unit which had been earlier issued to him. He had not raised any complaint that his unit was faulty, let alone damaged. That was also the same afternoon when the Plaintiff allegedly made the discovery of the three loose electronic components and what was initially thought to be a solder bit at the Defendant's premises – a discovery which the Plaintiff claimed was witnessed by Ng Teow Seng who later signed an MCP Service Form bearing the following: "Note: Witness components found on the floor carpet (Room)" (see [13] above). Ng Teow Seng, however, testified that when Gary Ng verbally asked him to be a witness following the alleged discovery, he declined to do so. In addition, Ng Teow Seng also testified that because he had not read the details stated in the MCP Service Form, it was possible that the Note quoted above was not in the MCP Service Form at the time when he signed it. To be fair, it is equally possible the Note was on the MCP Form when Ng Teow Seng signed it. Be that as it may, the contradiction between Ng Teow Seng's evidence and the Plaintiff's account of the events of the 31 March 2010 afternoon casts some doubt on the latter's account.

30 In the light of the foregoing, and on the balance of probabilities, I am of the opinion that the Plaintiff failed to prove that the Defendant tampered with the second batch units.

Was the Rental Agreement wrongfully terminated by the Defendant?

31 It follows from the above holding that the Defendant did not wrongfully terminate the Rental Agreement on 29 April 2010. The reason is simple. Clause 1.1 of the Rental Agreement provided that the units "shall be enabled to accept payment via credit cards, debit cards and corporate cards". Clearly, the units were unable to do so. If further support was required, s 9 of the Supply of Goods Act (Cap 394, 1999 Rev Ed) (the Act") which I find applicable to the Rental Agreement by virtue of s 6 of the same Act (but which was not brought to my attention by counsel), statutorily implies a condition that goods supplied under a contract for hire thereof must be of satisfactory quality.

32 It is well accepted by both parties that the units in question had been tampered with and were unable to function properly. Those units were therefore not of satisfactory quality as envisaged by ss 9(2) and 9(2A) of the Act. Accordingly, the Defendant was entitled to reject the second batch units and upon failure by the Plaintiff to re-deliver 500 units in working order within 14 weeks after 16 December 2009 (the date the Defendant placed the order for the second batch) to terminate the Rental Agreement.

The issue of variation

33 The foregoing analysis is sufficient to dispose of the matter before me. However, for the sake of completeness, I will now deal with the question whether the Defendant had given prior instructions to the Plaintiff to have the second batch units programmed under the generic name "Transcab" as opposed to the individual names and particulars of the Defendant's taxi drivers.

34 It is helpful to set out in greater detail the relevant background and the arguments raised by the parties in respect of the issue of variation before I give my analysis. The Defendant placed its order for the second batch units via a "purchase order" on 16 December 2009 (see [8] above). The

Defendant claimed that in a meeting held between Jasmine Tan and the Plaintiff's three directors sometime in late November 2009 or in early December 2009, Jasmine Tan had instructed the Plaintiff to programme the second batch units under the generic name "Transcab" and not under the individual names and particulars of the Defendant's taxi drivers who would be the end-users of the second batch units. According to Jasmine Tan, this was because of certain administrative problems previously encountered in respect of the first batch units when taxi drivers decided to return the units after each having been issued with one and the same were issued to other taxi drivers. This necessitated the fresh input of the names and particulars of these other taxi drivers into the same units and the removal of the earlier names and particulars. Such re-programming could only be done by the Plaintiff's personnel who would only officially be present at the Defendant's premises every Thursday of the week. The Defendant's request for the second batch units to be programmed under the generic name "Transcab" was intended to overcome this administrative inconvenience previously experienced not only by the Defendant but by its taxi drivers as well. In fact, having the second batch units programmed under the name "Transcab" as opposed to the names and particulars of individual taxi drivers would enable the Defendant to directly distribute those units to its taxi drivers (as it did on 22 March 2010 (see [10] above)) without being confined to the Plaintiff's narrow time schedule. The other reason for preferring this arrangement was to enable the Defendant to efficiently push out the units to its taxi drivers so as to minimise any "idle" time for which rent was being charged from the moment of their delivery to the Defendant.

35 The Plaintiff, on the other hand, denied that Jasmine Tan had given any instructions as alleged by the Defendant. It sought strenuously to discredit Jasmine Tan who was the Defendant's primary witness. In its submissions, the Plaintiff argues that Jasmine Tan was inconsistent in her evidence; the Plaintiff points out that Jasmine Tan's explanation in cross-examination (that prior to 17 December 2009 she had *unofficially* asked Gary Ng whether there was any way that the second batch units need not be programmed with the Defendant's taxi drivers' particulars) was nowhere found in the Defendant's pleadings or her own affidavit of evidence-in-chief. The Plaintiff further highlighted that Jasmine Tan's affidavit of evidence-in-chief did not square with the Defendant's pleadings as found in para 11 of the Defence whereas the latter stated that prior to the issuance of the purchase order (*ie*, 16 December 2009), Jasmine Tan had a meeting with the Plaintiff's three directors where the programming of the second batch units under the name "Transcab" was discussed. Jasmine Tan's affidavit of evidence-in-chief stated that it was 17 December 2009 when the said meeting took place. In its submissions, the Plaintiff also pointed out that letters exchanged between the Plaintiff's solicitors and the Defendant's solicitors when the present dispute arose made no mention of Jasmine Tan's instructions for the second batch units to be programmed under the name "Transcab". The Plaintiff argues that if indeed Jasmine Tan had given the instructions as alleged, there would be no such glaring omission in those letters exchanged between the two sets of solicitors.

36 Having examined the evidence, I find that the Defendant's version of the facts is ultimately the more believable one, notwithstanding the inconsistencies in Jasmine Tan's evidence which may reasonably be attributed to human imperfection in the recollection of events. The reasons are as follows.

37 First, I find that Jasmine Tan's explanation of how unwieldy it was and would continue to be if the second batch units were to be programmed under the individual names and particulars of the Defendant's taxi drivers sound, reasonable and convincing. I also note that Jasmine Tan had gone further to explain how the Defendant at its end would be able to cope with the change in the way the second batch units were to be programmed, notwithstanding the Plaintiff's concern that there might be consequential problems in the processing of claims from taxi drivers issued with the units. As explained by Jasmine Tan in court, the dispensation with the need to programme the second batch units under the taxi drivers' individual names and particulars would not pose any difficulty to the

Defendant in crediting the taxi fares earned via the respective units to the relevant taxi drivers. This is because the Defendant would be maintaining an internal record to enable it to match the units (identified by their serial numbers) with the taxi drivers using the units. As admitted by Gary Ng in a telephone conversation with Jasmine Tan on 23 March 2010 (see [10] above), the units would still have been able to process credit card transactions without the taxi drivers' names and particulars, albeit the receipts printed out for those transactions would not bear the taxi drivers' vehicle registration number.

38 Moreover, as rightly pointed out by the Defendant in submissions, both Anthony Koh and Gary Ng had actually agreed in cross-examination that there would be no difficulty in the processing of the taxi drivers' claims so long as the Defendant kept an internal record in the manner as described above. Anthony Koh and Gary Ng also agreed that this arrangement was in any event the Defendant's own internal problem which was not for the Plaintiff to deal with. It may further be added that an additional safeguard which the Defendant had intended to put in place to ensure accuracy in the remittance of the fares earned to the individual taxi driver was to require the taxi driver to produce receipts printed out from the CC terminals before his claim in respect of the fares earned was processed. I therefore see no reason to reject Jasmine Tan's explanation in support of the Defendant's case that there were indeed instructions given to the Plaintiff to vary the way the second batch units were to be programmed.

39 Secondly, the transcript of the telephone conversation between Gary Ng and Jasmine Tan on 23 March 2010 (see [10] above) shows that Gary Ng was clearly put on the defensive by Jasmine Tan's complaint, *inter alia*, that the units from the second batch should have been programmed under the generic name "Transcab" instead of the individual names and particulars of the Defendant's taxi drivers. Yet, faced with such allegations, Gary Ng not only failed to immediately deny that such prior instructions had been given by Jasmine Tan to have the second batch units programmed as such, he even appeared apologetic in his responses to Jasmine Tan in that conversation. Why did Gary Ng not deny Jasmine Tan's allegation there and then if no prior instructions to programme the units under "Transcab" were in fact given?

40 Finally, there was a marked difference between the conduct of the Plaintiff in respect of the first batch units and its conduct in respect of the second batch units which suggests to me that there was indeed a variation of instructions relating to the programming of the second batch units. It is undisputed that 15 days after the execution of the Rental Agreement the Plaintiff had communicated to the Defendant via e-mail on 30 January 2009 requesting for the names and particulars of the taxi drivers who would be using the first batch units and at the same time advising that "[a]s creating the driver's data and pairing of the systems are quite complex, [the Plaintiff] would require the drivers' information as soon as possible". The Plaintiff sent a reminder via e-mail on 6 February 2009 chasing for the information. The information was eventually provided by the Defendant, and as a result all units from the first batch were set up and activated under the individual names and particulars of the Defendant's taxi drivers at the time of delivery. However, when it came to the second batch units, there was absolutely no correspondence from the Plaintiff requesting the Defendant to provide the names and particulars of its taxi drivers during the 3-month period prior to delivery. When the second batch units were delivered to the Defendant on 19 March 2010, 100 units had been paired using numbers. In my opinion, this difference in the Plaintiff's conduct is far more telling in favour of the Defendant than the lack of any mention of units being instructed to be programmed under "Transcab" in the letters exchanged between the parties' solicitors (see [35] above) is in favour of the Plaintiff's case. Moreover, in the delivery order accompanying the second batch units issued by the Plaintiff to the Defendant on 19 March 2010 (see [8] above), the field under "Note" which originally stated, "For 500 Taxi details, please see attached list", was amended by Gary Ng to read, "For 500 *Terminal* details, please see attached list" (emphasis added). In my view, this

further supports the Defendant's case in relation to the issue of variation.

41 In summary, I find that the Defendant did give prior instructions to the Plaintiff to have the second batch units programmed under the generic name "Transcab" as opposed to the individual names and particulars of the Defendant's taxi drivers, and that the Plaintiff failed to do so.

Conclusion

42 For the reasons stated, the Plaintiff's action is dismissed with costs. Accordingly, the remedies prayed for in the Defendant's counterclaim are granted with damages to be assessed by the Registrar.