Merchant Industries (S) Pte Ltd v X-Media Communications Pte Ltd
[2001] SGHC 338

Case Number : Suit 274/2001

Decision Date : 13 November 2001

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Philip Ling (Wong Tan & Molly Lim) for the plaintiffs; Francis Ow & Jeannette Chong (SM Ow & Co) for the defendants

Parties : Merchant Industries (S) Pte Ltd — X-Media Communications Pte Ltd

Judgment

GROUNDS OF DECISION

INTRODUCTION

1. The Plaintiffs are a company carrying on business as manufacturers of food products. The Defendants are internet access providers and software consultants. The Plaintiffs claim was for breach of contract. I dismissed their claim.

THE PLAINTIFFS CASE

2 In the Statement of Claim dated 9 March 2001, the Plaintiffs averred that in the latter half of June 1999, the Plaintiffs engaged the Defendants to design, create, develop, install, test, commission and host a web site to be known as Mixtown.com. The Defendants were also to provide training to the Plaintiffs and to provide the necessary warranty, maintenance and technical support for the Plaintiffs website which was to be used for their proposed electronic commerce retail business, in particular, the "Used Book Program".

3 The website was to have been launched on 1 September 1999 and electronic commerce was to have commenced on 1 October 1999 but the Defendants failed to complete the various phases of the project by the due dates. On 1 July 2000, the website was still not operational.

4 In consideration of the Plaintiffs agreeing at the Defendants request not to enforce their rights under the above agreement, the parties entered into a Settlement Agreement on 11 July 2000. The Settlement Agreement is reproduced in full below:

> "July 11, 2000
>
> **SETTLEMENT AGREEMENT BETWEEN MERCHANT INDUSTRIES PTE LTD. AND X-MEDIA COMMUNICATIONS PTE LTD.**
>
> As agreed in our meeting dated 22 June 2000 at 13, Cantonment Road, this is the final settlement to the quotation dated 14 June 1999. Henceforth, neither party shall have any further claims from either party or whatsoever.
>
> X-media Communications Pte Ltd agreed to provide the following settlement conditions to Merchant Industries at free of any charges:

Item	Settlement Conditions	Estimated Value
a.	X-media Communications Pte Ltd ("XMC") will transfer mixtown.com to a new independent machine. The server configuration will be as follows: 1. IBM Server - 2 x Intel Pentium 733 Mhz - 512 Mb RAM (scalable to 2 Gb) - 3 x 9.1 Gb SCSI HDD - 1 x 1.44 Mb FDD - 1 x 32 Mb CDROM - VGA Card (8 Mb) - Raid 5 Support 2. Windows NT 4.0 Server with Service Pack 6 3. Microsoft SQL 7.2 Server or SQL 2000. 4. Cold Fusion Server 4.5 5. Installation and Configuration	$30,000.00

Mixtown.com may at anytime transfer the machine to another service provider during the period of 12 months from the date of the launch of mixtown.com before the year 2001. XMC will assist on the transfer.

The server shall be Merchant Industries property and XMC shall not use it for any other purposes without Merchant Industries written approval.

Mixtown.com will bear the cost of service, upgrade and maintenance of the hardware.

Merchant Industries shall be the sole beneficiary on all applicable warranty for the software and hardware.

b. Migration of web site to independent Server $15,000.00

c. XMC will provide the Server Co-location service for mixtown.com for a period of 12 months. This will include maintenance of the machine. This will not include any additional software (ie. Mail Software, other software). Additional software will be charged separately (software license and installation cost). $14,400.00

Server Co-location will include an IP Address, a 13A power point and a 10base-T network socket.

d. Plan and execute the new design re-vamp of the existing Mixtown.com site on the new server. The re-design will take no more than 2 months to develop starting from the day that the scope of the new design is confirmed by Merchant industries.

If XMC cannot deliver the re-design and development within the 2 months, Merchant Industries shall engage other contractors at XMC cost.

Should there be a change in the scope during the development phase and that it will affect the timeline of the development, either party should notify each other of change of timeline. The additional scope work will only proceed upon agreement by both parties.

e.	XMC will maintain the web site Mixtown.com for a period of 12 months from the date of the launch of mixtown.com before the year 2001. The maintenance covers the following: (1) Uploading and removal of SKUs (2) Changing of text on the web site (up to a maximum of 150 words per page per month) (3) Uploading and removal of Banner Ads (and does not include banner creation) (4) Traffic Statistics of the web site (5) Monthly subscription to payment gateway for the period of July, August, September and October 2000. Mixtown.com is encouraged to start an account, such as with DBS C2Pay so that payment can be credited straight to the merchant once payment is made on the Internet. XMC will cease operations on the conventional Payment Gateway with effect from 1 November 2000. The maintenance does not include additional features or web pages that are not on the Mixtown.com web site. Additional features or enhancement will be charged separately. Images of SKUs will be provided by Mixtown.com The monthly subscription for Payment Gateway does not include bank commission and any other bank charges (ie. Charge Back, etc).	$36,000.00
f.	The following payment outstanding to XMC from Mixtown.com Pte Ltd will be waived: (1) Balance payment for Mixtown.com project (2) Consultancy Charges for eSOS project	$40,800.00
g.	Provision of PC hardware to the value of:	$30,000.00

h. XMC shall recover the server within 48 hours upon complaint from Merchant Industries.

XMC will not be responsible for any down time caused by act of god, riots, war or any other service downtime that are not within XMCs control.

Merchant Industries shall resort to host at a third party hosting company after XMC failed twice to recover the server within 48 hours at the cost of XMC.

i. Planning on the new mixtown.com shall commence on no later than 31st December 2000 unless both parties agree in writing that it should start later.

We hereby agree to the above terms."

5 The Settlement Agreement was signed by Chow Hoo Siong for the Plaintiffs and by Alvin Teo for the Defendants.

6 The Plaintiffs averred that at the time of the signing of the Settlement Agreement, it was agreed or was the common understanding between the parties that the Defendants would place an order for the server immediately but the Defendants failed to deliver the server to the Plaintiffs until 11 September 2000, when in purported performance of the Settlement Agreement, they delivered an IBM Netfinity 3500 M20 server ("the 3500 server"). This server did not comply with the specifications set out in the Settlement Agreement and did not accord with the understanding of the parties. It was also not suitable nor reasonably fit for the particular purposes of the Plaintiffs website. The Plaintiffs therefore rejected the 3500 server delivered.

7 The Defendants also failed to provide the Plaintiffs with hardware for the remaining value of $12,103.56.

8 By a fax dated 12 October 2000 from the Defendants solicitors to the Plaintiffs solicitors, the Defendants purported to discharge themselves from total performance of the Settlement Agreement and thereby evinced an intention not to be bound by it any longer. The Plaintiffs accepted the Defendants repudiation by their solicitors letter dated 2 November 2000 to the Defendants solicitors, thereby terminating the Settlement Agreement.

9 The website was and is still not operational causing the Plaintiffs to be unable to carry on any electronic commerce retail business and thereby to suffer loss and damage. The Plaintiffs particulars of such loss and damage included wasted expenditure incurred for the project (about $53,000), forfeiture of a grant ($14,507.00) under the Local Enterprise Computerisation Programme ("LECP") from the National Computer Board, costs of appointing a replacement contractor to undertake and complete the project with a different website name ($250,000) and loss of profits from the delayed launch of the website and the electronic commerce retail business between 1 January 2000 (the original target date) to 1 July 2001 (the new projected commencement date under the replacement contractor) ($432,000). The Plaintiffs also claimed the amount of $12,103.56 for the remaining value

of hardware not supplied by the Defendants.

10 The Plaintiffs expert witness, Sreedharakurup Sreenivas, a SAP (Solutions Applications Programming) Consultant with Atos Origin Technology (S) Pte Ltd, was asked to comment and advise on the nature, specifications, characteristics and capabilities of the 3500 server with particular reference to its ability and suitability to host a website for electronic commerce.

11 He testified that even the most basic of personal computers could host a website on the World Wide Web. The suitability of a particular server depended on the requirements and the use of the website which would have a bearing on features such as the number of pages, the size of the database, the maximum number of concurrent user connections and the connections response time. For electronic commerce purposes, it would be likely that a server with a high degree of reliability would be insisted upon by the owner of the website so that the website could operate continuously with minimum or no "down-time". "Down-time" referred to any situation where the server had to be shut down resulting in the website not being in operation.

12 To address and eliminate the risk of down-time, certain servers were now equipped with hot swap capability, which essentially allowed certain integral components of the server such as its hard disk to be removed or installed without affecting the running of the system and the operation of the website and without the loss of any data in the process. A website hosted on such a server would not experience any down-time. If the hard disk should crash, it could be replaced with a new one without shutting down the system. This would also be the case if the hard disk had to be removed for maintenance and servicing.

13 The 3500 server did not have hot swap capability. It was not possible to upgrade such a server to have hot swap capability. Therefore, while it could host a website, the running of the website would be disrupted in the event of hard disk replacement due to failure or removal for maintenance and servicing. Accordingly, it was not appropriate for a website intended for round-the-clock electronic commerce.

14 Another IBM server, the Netfinity 5100 ("the 5100 server") would have hot swap capability and was recommended by IBM for internet and intranet web serving. In contrast, the 3500 server was recommended by IBM as only an entry-level application server and for secure internet messaging.

15 Sreenivas clarified under cross-examination that he had not designed any electronic commerce website but had set up servers for electronic commerce. He was told by the Plaintiffs that their proposed website would have a large database, would be open mostly to schools, teachers and parents and would expect a lot of concurrent users although no specific figures were given. Having hot swap capability integrated into the system would avoid down-time for the replacement of the hard disk and hence enhance the systems reliability. Sreenivas agreed that down-time could also be caused by unexpected occurrences such as problems with the Central Processing Unit ("CPU") or the peripheral equipment. There could also be bugs in the software itself which would necessitate down-time. However, unlike these problems, hard disk failure was something expected as it would be working 24 hours a day.

16 He agreed that a software known as Raid 5 could protect against data loss by regenerating data in a hard disk that has crashed in a replacement hard disk. Hot swap capability would facilitate a change of hard disk but would not protect against data loss. There would also have to be at least three hard disks in the system. The IBM 3500 server could be configured to have three or more hard disks. It also has the Raid 5 software.

17 Sreenivas stated that hard disk crashing was the most likely of equipment failure. Whenever the server was shut down to replace a hard disk, the website it hosted would also be shut down. Having hot swap capability would therefore avoid one of the causes of down-time, which Raid 5 could not do. It would take about half an hour to replace a hard disk. In his eight years of experience, working with Hewlett Packard servers and one Compaq server, he had come across three instances of hard disk failure. He had no working experience in respect of IBM servers.

18 Yvonne Loh Ying Lay was the Plaintiffs Administrative Manager. She testified that on the morning of 11 September 2000, she was in the office of the Plaintiffs when the Defendants delivered the IBM 3500 server. She left Emily Lim Hwai Sang, the Operations Manager, to attend to the Defendants delivery man as she was more familiar with the matter. She saw the delivery man hand to Emily Lim a delivery order and going through the details of the server as set out in the delivery order. Emily Lim then informed the delivery man that she would take delivery of the server pending a detailed inspection to be conducted later. She said she would call Lim Cher San of the Defendants should there be any problem with the server. Emily Lim then endorsed the delivery order and returned a duplicate copy to the delivery man.

19 Later, Emily Lim requested Yvonne Loh to fax a copy of the delivery order to a business associate of the Plaintiffs who was working in the information technology industry. Yvonne Loh did so. Just then, the delivery man returned to the Plaintiffs office and requested the return of the original copy of the delivery order, claiming there was something wrong with it. In the meantime, she learned later, Emily Lim received a telephone call from Janice Lim, an accounts manager in X-Media Technologies Pte Ltd (a company related to the Defendants), telling her that they needed to take back the original delivery order to exchange for a correct delivery order which would be issued that same day. Emily Lim told Janice Lim that the delivery man had already taken the duplicate copy of the delivery order and the conversation ended then. The original delivery order was not returned to the delivery man.

20 Emily Lim then telephoned the said business associate of the Plaintiffs and she left the office subsequently.

21 Later that day, Chow Hoo Siong, the Plaintiffs Director, returned to the office and was told by Yvonne Loh that Emily Lim had discovered there was something wrong with the server delivered by the Defendants. Yvonne Loh did not know who the said business associate was.

22 Emily Lim, the Operations Manager, related essentially the same facts as Yvonne Loh did. The delivery order was dated 8 September 2000. After the delivery man returned to the Plaintiffs office and after receiving the telephone call from Janice Lim, Emily Lim became suspicious and called the said business associate. After speaking to him and after perusing the delivery order and inspecting the equipment delivered, she discovered that it was a IBM 3500 server.

23 She then went through the manual of the said server and after making further enquiries, realized that it was not able to support the Plaintiffs proposed high volume electronic commerce website which was intended for students and parents to trade in new and old books and to make purchases online. She explained that it was due primarily to the lack of hot swap capability in the 3500 server. She had downloaded the 3500 servers specifications from the IBM website.

24 After Emily Lim had left the office, she received a telephone call from Chow Hoo Siong. She informed him that the 3500 server was not what they had been expecting and that he might want to check out the matter with the Plaintiffs business associates in the information technology industry.

25 Asked for the identity of the "business associate" to whom they faxed a copy of the delivery order,

Emily Lim disclosed it was Michael Toh, one of the Defendants staff. He was the Plaintiffs business associate in the sense that he was also doing some free-lance business. He was familiar with servers and websites and Emily Lim trusted him.

26 She said that the Eng Seng Group, which was the parent company of the Plaintiffs, employed some information technology staff but did not have a Management Information System Department. She did not ask them about the server as she did not know them.

27 Emily Lim added that she had also consulted other friends. Edmund Lee went to the Plaintiffs office on the afternoon of the day of delivery. Both Edmund Lee and Michael Toh told her that the 3500 server was not correct and would not work for their website. One other person she consulted was Varian who also used to do free-lance work for the Plaintiffs. There could be one or two others.

28 Emily Lim said she had informed the persons she consulted that the Plaintiffs projected database was 400,000 to 500,000 students, not including the parents, and that most of these would be concurrent users, i.e. they would be entering the website at the same time to buy. Although 500,000 was the entire student population and the Plaintiffs had only tied up with 20 schools at the material time, that was still the projected sales. She agreed that the Plaintiffs, in their application for a grant for their proposed electronic commerce website, indicated the projected number of subscribers as 15,000 in the first year and 80,000 in the second year. The Plaintiffs were also targetting the Malaysian market.

29 She knew that a higher-end server would serve the Plaintiffs purpose but was not able to tell whether it should be an IBM 5100 server although she had seen advertisements about it.

30 Chow Hoo Siong, the Director of the Plaintiffs and their main witness in these proceedings, explained that the Plaintiffs started business in 1978 as manufacturers of fruit juice. By the 1990s, the three key areas of their business were food and beverage, hospitality equipment and services, and collegiate products and services. For the last mentioned area, the Plaintiffs supplied educational institutions with items such as stationery, new and used textbooks, apparel and gift items.

31 The Plaintiffs were introduced to the Defendants by their former business executive in their electronic commerce department. The first meeting between the parties were on 14 May 1999 at the Defendants office. Many other meetings and planning sessions followed. In mid June 1999, the proposed website was tentatively named 9storey.com.

32 Eventually, an in-principle agreement was reached by the parties for the Defendants to design, create, develop, install, test, commission and host the Plaintiffs website for electronic commerce retail business. It was decided, after a couple of other names were tossed around, the website would now be known as mixtown.com. One of the main features of the website was the Used Book Programme which would allow students to sell and to buy used textbooks online with the Plaintiffs acting as the intermediary in handling all aspects of collection and delivery.

33 A draft written agreement to define and regulate the scope of the Defendants work and services was forwarded by the Defendants to the Plaintiffs in June 1999. This was followed subsequently by three other draft written agreements known as the Software Development/Warranty Agreement, Merchant-Electronic Commerce Transaction Agreement and the Non-Disclosure Agreement. The terms and conditions set out in these draft agreements were intended by the Defendants to form the basis upon which they would undertake the project for the Plaintiffs.

34 On 21 June 1999, the Plaintiffs applied to the then National Computer Board for a grant to finance

their electronic commerce project under the LECP. The Defendants helped in the preparation of the electronic commerce proposal to be submitted with the application. The Plaintiffs were to pay the Defendants $44,290.00 for the work and services to be undertaken by the Defendants. A deposit of $13,287.00 was paid to the Defendants on 19 August 1999. The proposed launch date of the website was to be 1 September 1999 with electronic commerce to commence on 1 October 1999.

35 On 21 July 1999, the Defendants launched their website www.gatecrash.com. Following its success, the Defendants were acquired by the Ossia Group.

36 The Plaintiffs appointed the law firm of Tan Peng Chin & Partners to review and to advise on the draft contract documents forwarded by the Defendants. In July 1999, they wrote to the Defendants with their proposed amendments to the draft agreements. After some discussions between the parties and with the advice of the said law firm, the parties decided that a fresh agreement be prepared.

37 The fresh agreement was prepared by the said law firm on 30 August 1999 and a draft thereof was forwarded to the Plaintiffs and to the Defendants by email on 6 September 1999. A meeting was then held in the lawyers office on 22 September 1999 to discuss the terms of the draft agreement. It was agreed that the Defendants would pay the legal fees to be incurred for the agreement. To finalize the agreement, the lawyers requested the Defendants to forward to them the timeline/schedule for the project but that was never done by the Defendants and hence the agreement was not executed by the parties.

38 Although the agreement prepared by the lawyers was not executed, the parties proceeded on the basis and the Defendants commenced work on the project on the understanding that the terms and conditions thereof, including those set out in the proposal, were applicable and binding on the parties. Otherwise, the Plaintiffs would not have paid the 30% deposit of $13,287.00 stipulated to be payable upon confirmation of the terms and conditions in the proposal.

39 The Defendants were unable to complete the various stages of the project by the proposed deadlines. Various e-mails flowed between the parties. On 25 February 2000, the Defendants advised that the targetted launch date of the website would be 8 March 2000. There was again delay on the part of the Defendants. A new launch date was set for 15 April 2000. There were problems encountered during the User Acceptance Tests ("UAT") conducted in May and June 2000.

40 After numerous reminders and queries from the Plaintiffs on the projects launch date, a meeting was held on 13 June 2000 at the Defendants premises to finalize matters. At that meeting, the Defendants gave their undertaking and assurance to launch the website on 23 June 2000 in phases. The Defendants also promised to forward a proposal to resolve all matters and to make appropriate compensation to the Plaintiffs for the delay. This was to appease the Plaintiffs and to induce them to agree not to commence legal action in respect of the delay. The Defendants apologised repeatedly for the delay, stating it was caused by their internal problems which should be resolved by the addition of more professional staff.

41 However, the Plaintiffs pointed out to the Defendants that even if the new launch date of 23 June 2000 was met, it would not be of practical use to the Plaintiffs as the range and the prices of the products to be offered for sale were already outdated. The Plaintiffs were also skeptical about the new launch date as it was meant to be a soft launch, with the website still not fully operational on that date. Further, the Defendants previous repeated delays did not inspire confidence in their ability to meet the new target date.

42 Eventually, the Plaintiffs agreed, at the Defendants request, to allow them to proceed with the

launch of the website in its existing state and, in accordance with the phases proposed by the Defendants, to execute a comprehensive revamp of the website thereafter to meet the Plaintiffs requirements. The revamped website would be referred to as mixtown.com 2 for convenience.

43 The Defendants then proposed certain terms of compensation and settlement to the Plaintiffs. On 19 June 2000, another meeting was held at a hotels coffeehouse and certain changes were made to the said terms. The Defendants Lim Cher San came up with the idea of reimbursing the Plaintiffs $30,000 by way of provision of hardware. On 22 June 2000, the parties met again. The Defendants proposed further changes to the settlement package.

44 On 24 June 2000, the Defendants wrote to the Plaintiffs to state that the completion date of 23 June 2000 had been met and that the website would be launched on 1 July 2000. However, when Chow accessed the website, he found that it was still not operational. He then wrote by e-mail on 27 June 2000 to the Defendants to clarify the position.

45 On 28 June 2000, the Defendants sent to the Plaintiffs the specifications for mixtown.com 2. The next day, in accordance with their earlier undertaking to migrate the website to an Intel-based machine with Linux, the Defendants set out in an email the specifications of the server which they recommended to house the revamped website.

46 Due to the breakdowns and numerous other problems still being encountered, the parties met again on 30 June 2000 at the Plaintiffs office to look into the problems. Following that meeting, Chow wrote to the Defendants the same day to reiterate the Plaintiffs demand that the Defendants get the website to be operational.

47 In July 2000, further discussions were held between the parties on the draft settlement agreement which was finally agreed and executed on 11 July 2000 (the terms of which have been reproduced earlier in this judgment).

48 On 29 July 2000, the Defendants wrote to the Plaintiffs to state that they were processing the order for the server and that there would be a waiting period of three to four weeks before delivery. The Plaintiffs asked them for a copy of the purchase order for the server and for the date of delivery.

49 On 1 August 2000, the Plaintiffs received a fax from the Defendants enclosing a copy of the Quotation/Order Confirmation from X-Media Technologies Pte Ltd for the server at the price of $17,149.50. The Defendants stated that there would be a waiting period of three weeks from 1 August 2000.

50 Following a discussion on 24 August 2000, the Plaintiffs wrote to the Defendants the same day to confirm that the work on the revamped website would commence in September 2000.

51 When the server did not arrive by September 2000, the Plaintiffs wrote to the Defendants to enquire about the status to which the Defendants replied that shipment had been delayed. On 8 September 2000, the Defendants wrote to say that the server would be delivered on 11 September 2000 before noon.

52 Chow was not in the office in the morning of 11 September 2000. What happened that day has already been set out in the testimony of Yvonne Loh and Emily Lim.

53 Upon his return to the office and after learning that "there was something wrong with the 3500 server delivered", Chow called the business associates consulted by Emily Lim earlier to verify their

advice about the 3500 server. He was told that it did not comply with the specifications set out in the Settlement Agreement and was not suitable nor reasonably fit for the particular purpose of the Plaintiffs.

54 The same day (11 September 2000), the Defendants sent a fax to the Plaintiffs claiming that they had sent the wrong delivery order and requesting that it be rendered void. A new delivery order was attached to the fax. That did not have the number "3500" stated therein.

55 The same day, the Plaintiffs emailed the Defendants rejecting the 3500 server and requesting them to take it back the next morning. The Defendants did so, stating in their email dated 12 September 2000 that they "will arrange for delivery again once all the outstanding items are in" and apologising to Chow for the inconvenience caused. However, the Plaintiffs replied to emphasize that they "have decided not to have the server". The Plaintiffs also obtained quotations from other suppliers in respect of the IBM 3500 and the 5100 servers.

56 Notwithstanding the rejection of the 3500 server, the Defendants forwarded to the Plaintiffs a write-up on the system requirements for the revamped website on 27 September 2000.

57 In accordance with the Settlement Agreement, the Plaintiffs purchased two sets of hardware costing $18,433.33. Following the rejection of the 3500 server, the Defendants indicated that they would suspend the provision of the remaining amount ($30,000 less $18,433.33) upon leaving that the Plaintiffs would be terminating the Settlement Agreement.

58 On 21 September 2000, the Plaintiffs instructed their former solicitors (Drew & Napier) to write to the Defendants demanding compensation for the breach of the Settlement Agreement. The letter stated:

> "We have been instructed by our clients that you are in breach of the Settlement Agreement (the "Agreement") dated 11 July 2000 entered into with our clients. Full particulars of which you are well aware of, short particulars of which are as follows:-
>
> Particulars
>
> 1) Failing to provide our clients with computer hardware and software as identified under Item (a) of the Agreement. Estimated value of the same being S$30,000.00 together with relevant warranties for the hardware and software.
>
> 2) Failing to provide our clients with PC hardware of up to the value of S$30,000.00 under Item (g). To-date we have been instructed by our clients that you have made provision for only up to the value of $17,896.44. The balance due to our clients being S$12,103.56.
>
> We hereby put you on notice that in the event items (1) and (2) above is not resolved to our clients satisfaction within the next 7 days upon receipt of this letter by you, we have firm instructions to commence legal proceedings against you for damages. In which event you will also be liable to pay legal costs and interest."

59 On 12 October 2000, the Defendants former solicitors (Rajah & Tann) replied as follows:

"1. We refer to your letter addressed to our Clients dated 21 September 2000.

2. Our Clients deny the matters set out in the said letter. On the contrary, our Clients instructions are that your Clients have breached the Settlement Agreement, full particulars of which your Clients are aware of, short particulars of which are as follows:

In relation to Paragraph (1) of the said letter:

(i) On or about August 2000, contrary to the Settlement Agreement, your Clients requested the IBM server described in paragraph (a)(1) of the Settlement Agreement to be provided to them at their office. Our Clients would provide the supporting software thereafter.

(ii) Our Clients delivered the complaint IBM server on or about 11 September 2000. The estimated cost of the IBM server is $17,149.50.

(iii) In breach of the Settlement Agreement, your Clients refused to take delivery of the IBM server. We are instructed that your Clients have not provided any explanation for their rejection despite our Clients request(s).

In relation to Paragraph (2) of the said letter:

(iv) In compliance with paragraph (g) of the Settlement Agreement, our Clients provided your Clients with equipment worth S$18,433.33, full particulars of which your Clients are well aware of, short particulars are as follows:

a) InFocus LP 335 valued at $10,800.00; and

b) Various equipment included in Invoice No. 2008-6972 for the amount of S7,633.33.

(v) Further, our Clients instructions are that your Clients h a d unreasonably requested for the delivery of the equipment listed in paragraph 2(iv) above within an unreasonably short period.

(vi) Further, in breach of the Settlement Agreement, your Clients had purchased the equipment listed in paragraph 2(iv)(b) above from their own supplier and simply invoiced the purchase to our Clients.

(vii) In light of your Clients breach as set out in paragraphs 2(i) and 2(vi) above, our Clients are discharged from total performance of their obligations under the Settlement

Agreement.

3. Pursuant to the matters set out in paragraph 2 above, our Clients reiterate their denial of your Clients alleged claims and we hereby put you on **NOTICE** that your Clients are in breach of the Settlement Agreement. We have our Clients firm instructions to commence legal proceedings against you for damages and to recover all legal costs and interests."

60 On 6 November 2000, the Plaintiffs former solicitors took the position that the Defendants had by their conduct repudiated the Settlement Agreement. Their letter read:

"We refer to your letter dated 12 October 2000.

Before dealing with the specific issues raised in your letter, we put you on notice that your clients are in breach of the Settlement Agreement and have by their conduct repudiated the agreement. Our clients accept your clients repudiation and expressly reserve their rights to sue for damages and/or seek other reliefs.

In relation to Paragraph 2(i) to (iii) of your letter:

Your clients had attempted (after repeated requests by our clients) to comply with paragraph (a.1) of the Settlement Agreement (the "Agreement") on 11 September 2000. However in breach of the terms of the Agreement, your clients had failed to provide our clients with computer hardware and software as identified under paragraph (a.1) of the Agreement. The IBM server your clients had attempted to deliver was not of the correct model or specification.

In addition, your clients had not also delivered the supporting software. Your clients assertion that the supporting software would be provided thereafter was not what was agreed between the parties. Our clients here will refer to the Agreement for its full terms and effects. Your clients representative was duly informed of the reasons for the rejection.

In relation to Paragraph 2(iv) to (vii) of your letter:

As indicated on paragraph (iv) of your letter, we have been instructed by our clients that your clients have provided our clients with equipment worth S$17,896.44 (excluding GST) as indicated correctly in our letter dated 21 September 2000. The balance due to our clients remain at $12,103.56. We note here your clients admission of liability and breach of the terms of the Agreement.

Your clients allegation now raised as an afterthought, that our clients had unreasonably requested for the delivery of the equipment within an unreasonably short period is baseless. Our instructions and evidence seem to indicate to the contrary. As for your clients contention that our clients had in purported breach of the Agreement purchased the equipments as listed on paragraph 2(iv)(b) of your letter, we have been instructed that the same was done with the express and/or implied consent of your clients and in compliance with the terms of the Agreement.

As for the penultimate paragraph of your letter, your clients allegation to the

effect that our clients have breached the terms of the Agreement are hereby and herewith categorically denied. If indeed you have your clients firm instructions to commence legal proceedings then we now write to inform you that we have our clients firm instructions to accept service of legal process on behalf of our clients. In any case please let know if you have your clients instructions to accept service of the Writ of Summons."

61 As the Settlement Agreement had been terminated, the Plaintiffs did not confirm the new design for the website and the Defendants also did not plan and execute the revamped website, which to date was still not operational, resulting in the Plaintiffs being unable to carry out any electronic commerce. The Defendants had also not made any attempt to deliver to the Plaintiffs a server which would comply with the specifications set out in the Settlement Agreement and which was suitable and fit for the Plaintiffs particular purpose. The Plaintiffs claimed they had thereby suffered loss and damage as particularised in the Schedule to their Statement of Claim.

62 In cross-examination, Chow explained that the insistence on having the server delivered to the Plaintiffs premises was essentially to test the Defendants sincerity and ability to carry out the terms of the Settlement Agreement. Asked whether there were differences between the original delivery order and the new one, Chow said that the former mentioned "3500" whereas the latter merely stated "Netfinity". However, he accepted that there were other differences between the two delivery orders although he did not know whether these were the reason the Defendants wanted to substitute the original delivery order.

63 The first draft Settlement Agreement was prepared by the Defendants Alvin Teo. Chow was concerned that the server to be supplied should be a new machine and not one put together by the Defendants using components from various sources. Chow added to the terms by the "cut and paste" method from other documents. He wanted the server to be from IBM or Compaq. Alvin Teo recommended the Raid 5 software. Further, if the server had to be taken away for some maintenance work, it must be brought back within 48 hours. The Defendants were allowed a maximum of two such occurrences the "two strikes and youre out" approach. Alvin qualified that clause by excluding liability for acts of God and other matters not within the Defendants control. There were many drafts of the Settlement Agreement before it was finalized and signed on 11 July 2000. Chow had suggested that they instruct a lawyer to prepare the Settlement Agreement but the Defendants Alvin Teo maintained that there was no need to do so. Chow consulted some friends during the negotiations leading to the Settlement Agreement. He did not, however, seek the advice of the information technology professionals in the Plaintiffs parent company.

64 In respect of the Defendants application for a grant from the NCB under the LECP, one of the conditions imposed was that the project must not commence before the letter of offer was sent by the NCB. The letter of offer would be sent only after NCB had evaluated the proposals of the Plaintiffs electronic commerce project. Asked whether the Plaintiffs had nullified the grant by starting the mixtown.com project before receiving the NCBs letter of offer, Chow was of the view that encoding their products, taking pictures thereof and keying in of data were mere preparatory work. The Plaintiffs had such things ready as they were part and parcel of their non-electronic commerce business.

65 Chows idea of having no down-time was that there should be no unscheduled down-time, i.e. when the website was not operating. Scheduled down-time would be those periods when the server was undergoing regular maintenance and such could be arranged during the off-peak hours. Advance notice could also be given to the users. During the period of servicing the server, at least the websites homepage must be up. There must not be a blank screen. It was crucial to have the website

up 24 hours a day because the Plaintiffs would not just be selling products but would also be creating a lifestyle for the users. Chow was very impressed at that time with the Defendants Gatecrash.com which saw millions of hits daily when it was launched. In fact, it was the Defendants Alvin Teo who advised Chow not to underestimate Internet traffic.

66 According to Chow, hot swap capability was not a mere solution it was a "must have". He first heard about hot swap capability around April 2000 when Alvin Teo or Ernest Eu (of the Defendants) mentioned the term to him in the course of their negotiations for the Settlement Agreement. The Defendants mentioned that the server they were providing was no ordinary server, that it had some "swap" ability and did not have to be shut down unless it was for scheduled maintenance. The requirement of hot swap capability was however not specified in the Settlement Agreement as it was one among so many other terms.

67 After the 3500 server had been rejected, the Defendants arranged a meeting in the morning of 20 September 2000 at the Regent Hotel. Chow went with Emily Lim to meet Alvin Teo and Ernest Eu. Chow did not want further "finger-pointing". He told the Defendants to just give him the server promised and, if they did not have enough funds, to use the $30,000 budgeted for the hardware. He did not say specifically that he wanted a server with hot swap capability and neither did he ask for a 5100 server. He told the Defendants to get a better server.

68 In re-examination, Chow maintained that the website should have no unscheduled down-time and it was up to the Defendants to achieve that, whether by means of hot swap capability or otherwise. There was therefore nothing in the Settlement Agreement about hot swap capability. However, if the unscheduled down-time was caused by something unforeseen, such as act of God, he would not hold the Defendants liable. He accepted that the words "IBM server" in the Settlement Agreement could apply to a 3500 or a 5100 server but only the 5100 server had hot swap capability.

69 Where NCBs condition for the grant was concerned, the Defendants had been engaged by the Plaintiffs as their information technology consultants and were fully aware of NCBs condition from the outset. In the end, the Plaintiffs did not accept the grant from NCB anyway as their website was not up. The Plaintiffs did not approach another consultant to set up the website because their management and their business partners and suppliers were awaiting the outcome of these legal proceedings.

THE CASE FOR THE DEFENDANTS

70 Chua Boon Wee, the Managing Director of X-Media Technologies Pte Ltd ("XMT"), testified that on 31 July 2000, the Defendants placed an order for a server with his company. A Quotation/Confirmation Order dated 1 August 2000 was furnished to the Defendants, quoting $7,900 as the price for the IBM Netfinity server and another $8,750 for add-ons.

71 XMT had to order the components to assemble the server which it did from Digiland.com International Pte Ltd. It was the industry standard that a customized server would take three to four weeks to deliver. Due to the unavailability of stocks, Digiland indicated that it would deliver the server first and the additional components at a later date. These components were the two additional 9.1 GB hard disk, the additional Pentium III-733 CPU, additional 384 MB ECC SDRAM and the RAID controller. They were scheduled to arrive by the end of September 2000.

72 On 30 August 2000, Digiland informed XMT that it would not be able to deliver as scheduled due to a delay in shipment by IBM. The server was delivered to XMT on 8 September 2000, Friday, at 5.30

pm. The Defendants instructed XMT to deliver the server to the Plaintiffs office. On 11 September 2000, Monday, XMT did so.

73 In the evening of 11 September 2000, the Defendants informed Chua that the Plaintiffs had rejected the server and wanted to return it. The next morning (12 September 2000), XMT collected the server from the Plaintiffs office.

74 On 14 September 2000, Alvin Teo informed XMT by email stating that he wanted the Defendants to cease communications with the Plaintiffs for the time being. Upon receipt of the news, Chua immediately instructed his staff to suspend the delivery of the additional components.

75 About two weeks later, Chua was told by the Defendants that they wanted the additional components. The order for those was therefore reinstated. They were delivered subsequently to XMT which was still holding them.

76 Chua explained that the delivery man had handed over the wrong (earlier) delivery order to the Plaintiffs on 11 September 2000. They therefore had to retrieve it in exchange for the correct delivery order the same day. The earlier delivery order which was prepared by one of the account clerks in XMT was supposed to have been rendered void already by the Accounts Department but a copy was left with the delivery department.

77 XMTs purchase order sent to Digiland had the model number "3500 M20" included because the Defendants had informed XMT to look for the model that matched the description in XMTs quotation/confirmation order. XMTs and the Defendants offices were located very close to each other. The Defendants owned 51% of XMT while Chua had a 12% stake in the Defendants.

78 Chua did not know why the model number was deleted from the second delivery order. He believed the information in the second delivery order was keyed in based on the Quotation/Confirmation Order dated 1 August 2000 and that the first delivery orders information came from XMTs Purchase Order to Digiland dated 24 August 2000. He disagreed with the suggestion that the model number was deleted upon the Defendants instructions.

79 The Defendants Further and Better Particulars indicated that the clerical errors in the first delivery order were discovered on or about 8 September 2000. Chua did not know why the errors were not corrected over the weekend until 11 September 2000.

80 Ernest Eu, the Chief Executive Officer of the Defendants, testified that Alvin Teo had been negotiating with the Plaintiffs Chow to reach an amicable settlement over the delays in the Plaintiffs website. Ernest Eu was involved only in the business and not the technological aspects of the Defendants. Alvin Teo was abroad from 20 to 22 June 2000. On 22 June 2000, Ernest Eu and Lim Cher San (the Defendants Chief Operations Officer) met Chow and Emily Lim to discuss further the settlement terms offered by Alvin Teo on 19 June 2000.

81 At that meeting, Chow said he was not satisfied with the terms offered by Alvin Teo. He wanted the Defendants to compensate the Plaintiffs with some $30,000 worth of computer hardware. That meant a cash outlay for the Defendants which they could ill afford. The meeting ended with the parties apparently having agreed on certain terms but that was not to be as there were several more rounds of discussions before the Settlement Agreement was finally signed on 11 July 2000.

82 Around 12 September 2000, Alvin Teo informed Ernest Eu that Chow was very upset and wanted to terminate the Settlement Agreement over the issue of the server. Ernest Eu wanted to resolve the

matter amicably with Chow and therefore called him on 19 September 2000 to arrange a meeting the next day.

83 In the morning of 20 September 2000, Ernest Eu, Alvin Teo and Lim Cher San met Chow and Emily Lim at the Regent Hotel. It was a breakfast meeting. Chow declined the food and drinks and they got down to business. Chow demanded an IBM server of a different and more expensive model from that specified in the Settlement Agreement but did not state the model number. The Defendants representatives explained to Chow that the 3500 server met the specifications but he retorted, "This is not what I want". Chow did not explain further. When told by the Defendants that they could not agree to meet his demand as it went beyond the scope of the Settlement Agreement, Chow left abruptly. The meeting lasted about 20 minutes only. The term "hot swap capability" never featured in the discussions. It only surfaced in the affidavits of evidence-in-chief.

84 Lim Cher San, the Defendants Chief Operations Officer, testified that his part in the mixtown.com project was to ensure that the end product was delivered according to schedule. Although he felt that the Defendants were not completely to blame for the delays in the project, the Defendants decided to work out a settlement plan to compensate the Plaintiffs over the delays. He worked with Alvin Teo towards this end.

85 In the evening of 19 June 2000, Lim Cher San and Alvin Teo met Chow at the Shangri-La Hotel to discuss the draft settlement agreement sent to Chow earlier that day. Chow expressed his displeasure with the website and spoke about doing a rebuild.

86 At the end of that meeting, the parties agreed to do a rebuild of the website as part of the settlement terms. Nevertheless, the website still proceeded to have a User Acceptance Test ("UAT") on 23 June 2000 with a view to a public launch on 1 July 2000. The settlement terms offered by the Defendants were:

> (1) Provision of about $90,000 worth of maintenance services which included service to develop mixtown.com2 and a webpage design revamp service on mixtown.com worth $25,000 to be executed once the project was commissioned;
>
> (2) The Defendants would waive the balance amount due from the Plaintiffs for the mixtown.com project;
>
> (3) The Defendants would assist in selling $100,000 worth of Pacific Internet banner advertisements; and
>
> (4) The Defendants would provide $25,000 worth of credit for any web development services to be provided by them.

87 The mixtown.com2 website would involve a substantial commitment in time although the business model would remain the same i.e. retailing of new and used school textbooks, school uniform, food and beverage via electronic commerce. The revamped website would have to be a complete redesign and rebuild as the original one was based on the PERL platform while the new one would be built on the Cold Fusion platform, a different programming language.

88 Before Alvin Teo left for Bandung in the morning the next day (20 June 2000), he told Lim Cher San to write an email to Chow on his behalf to confirm the settlement terms reached the night before. Lim Cher San did that.

89 Around 21 June 2000, Emily Lim called Lim Cher San to inform him that Chow was still not satisfied with those terms. Instead of the $25,000 credit for any web development services, Chow wanted $25,000 to be used for computer hardware purchases instead.

90 On 22 June 2000, Lim Cher San emailed Emily Lim to say that that would be beyond the Defendants prime business function. At about 2.30 pm that same day, the Defendants (Ernest Eu and Lim Cher San) met Chow and Emily Lim for further discussions. Chow refused to budge on his demand for $30,000 worth of hardware purchases and the Defendants gave in to his demand. The terms of the settlement offer were therefore modified accordingly to become even more substantial and favourable to the Plaintiffs compared with the original proposal made by Alvin Teo to Chow on 15 June 2000.

91 On 23 June 2000, the website passed the UAT successfully. On 26 June 2000, the Plaintiffs complained by email that the registration could not be done on the website. Lim Cher San suspected that it could be due to the Defendants tidying up the codes of the website or could be due to the Plaintiffs using an older version of the Netscape browser which would not support some of the commands.

92 On 28 June 2000, Lim Cher San, Alvin Teo and Sherine Teo met Chow and Emily Lim at the Plaintiffs office at 11 am to try to resolve the registration problem. They would at the same time check on the Plaintiffs browser version. However, Chow refused to accept that there could be a simple explanation for the registration problem. He decided he did not want the mixtown.com website anymore and called off the 1 July 2000 public launch. He wanted the Defendants to concentrate instead on mixtown.com2. In addition, he wanted better settlement terms, in particular, the provision of a server of agreed specifications at the Defendants cost.

93 Lim Cher San was of the view that the website could have been up and ready for electronic commerce by 1 July 2000 had Chow not called off the launch. Lim Cher San was not involved in the further negotiations which followed and which resulted in the Settlement Agreement of 11 July 2000.

94 On 29 July 2000, Emily Lim told Lim Cher San that Chow wanted the new server delivered to the Plaintiffs office. The request seemed strange to Lim Cher San as the server to host the website was meant to be located in the Defendants premises so that they could amend or update the contents of the website. Further, the software for the server had not been installed. He tried to explain all these to Emily Lim but she insisted on the delivery of the server nevertheless. Bemused as the Defendants were, they decided to accede to the Plaintiffs request anyway.

95 Lim Cher San told Emily by email that day that he would be placing an order for the server on 31 July 2000 and that it would take about three to four weeks for the server to arrive. He did so with XMT.

96 Unfortunately, the server was delayed because certain of the additional components were unavailable. When Chow was informed of this, he gave them an ultimatum by email on 7 September 2000 in the following terms:

> "Hi Sherine Cannot simply wait to be informed when delivered please get the company to confirm delivery date. If your contractor is not able to deliver by next Thursday Sep 14 please cancel the server for we want another IBM model and specifications and model. I think the server is standard and not so specially made for us we would rather wait for the server we now wanted. Thank you. Regards, Chow".

97 On 8 September 2000, Lim Cher San informed Emily Lim that the 3500 server would be delivered on Monday, 11 September 2000 before noon and the additional components at the end of the month. That was done. The rejection of the server followed.

98 The Defendants had furnished the proposed draft specifications for the mixtown.com2 to the Plaintiffs on 28 June 2000 but had received no confirmation of their acceptance. As late as 1 September 2000, the time line for the revamped website was still not settled. The Settlement Agreement allowed the Defendants two months to plan, develop and execute the revamped website from the date of the Plaintiffs confirmation of the scope of the new design. Failure to deliver the additional components on 11 September 2000 was not a fundamental or material breach that entitled the Plaintiffs to reject the server. The Defendants were complying with the Settlement Agreement but the Plaintiffs had repudiated it by their unreasonable rejection of the server. The Defendants were therefore discharged from further performance.

99 In cross-examination, Lim Cher San explained that an UAT was the event where, at an agreed time and place, the Plaintiffs as customers and the Defendants as vendors would meet to conduct a quality control test on the website, during which time fictitious data would be fed into the system. After the UAT, the parties would list out any outstanding issues or work to be done. As the UAT was on 23 June 2000 and the launch date was supposed to have been 1 July 2000, the Defendants had to do a lot of work in tidying up the codes of the website and removing the fictitious data. Emily Lim had also given the Plaintiffs a lot of things to do.

100 While the Defendants did not advise the Plaintiffs not to go into the website after the UAT, they were not expecting them to do so either as the test was meant for one day only. If the Plaintiffs had checked with the Defendants about their problems in accessing the website, the Defendants would have told them that they were doing the tidying up. As for the possibility that the problems could be due to an older version of the browser being used by the Plaintiffs, Lim Cher San said there were four or five personal computers at the Plaintiffs office and they had tested the website on only one of them. He therefore would not know what browser was being used in the other personal computers. In any event, the Defendants passed the UAT on 23 June 2000. Since the question of registration was crucial, the Defendants cleaned that up first before doing other things.

101 Lim Cher San agreed that there were discrepancies between the Defendants evidence and their Further and Better Particulars in respect of the date of the meeting during which the launch date of 1 July 2000 was called off, the representatives of the Defendants who attended that meeting and the venue. The Defendants were very relieved that the launch date had been put back as they could now concentrate on mixtown.com2. He disagreed that the launch date had been postponed because the Defendants could not fix the problems relating to registration.

102 Lim Cher San did not see the purpose of the Plaintiffs in wanting the server in their office. Even if they installed the software there, they would still have to bring it back to their Data Centre before the website could go live on the world wide web. There would be unnecessary travelling time. Each time the Defendants needed to do some updating, they would have to bring additional hardware to the Plaintiffs office. There would also be inconvenience should they require to work past normal office hours. During the negotiations for the Settlement Agreement, there was no mention of the date of delivery of the server. He could not remember whether the parties had agreed verbally for the server to be delivered to the Plaintiffs premises on a date to be notified by the Plaintiffs.

103 At the meeting on 20 September 2000 at the Regent Hotel, when the Defendants asked Chow what was it that he wanted if he did not want the 3500 server, Chow merely replied, "put something on the table". The Defendants responded by telling him that they could not do that because what

they proposed could again be rejected. No one talked about the model of the server. Lim Cher San believed that Chow must have felt the 3500 server could not do the job of hosting the website but he could not deduce that from what Chow was saying. If Chow had explained to them in technical terms, perhaps they could have accepted his point. It was only after they had read the Plaintiffs affidavits of evidence-in-chief that they realized Chow wanted something which was not in the Settlement Agreement.

104 Asked why XMT was charging the Defendants more than $17,000 for the things Digiland was supplying to XMT at $9,618, Lim Cher San said there was a mark-up for profit and for setting up the hardware to be fully functional. Lim Cher San disagreed that the 1 August 2000 Quotation/Confirmation Order from XMT to the Defendants was for a 5100 or higher-end server and not for a 3500 server because the amount involved was much larger than XMTs purchase order of 24 August 2000 to Digiland. Prices could have fluctuated between the two dates. Further, the items in the two documents were not identical. The 1 August 2000 document had more items.

105 Lim Cher San reiterated in re-examination that at the 20 September 2000 meeting from which Chow stormed out, Chow never mentioned any of the following:

(1) hot swap capability;

(2) no down-time;

(3) 24-hours accessibility or availability;

(4) 5100 server; and

(5) 3500 server.

106 The final witness for the Defendants was Alvin Teo, the Chief Technical Officer, who negotiated with Chow from the outset. They agreed on the price of $43,000 for the Defendants to develop mixtown.com. The Plaintiffs paid a 30% deposit in August 1999. Alvin Teo would be in charge of the technical aspects of the website. According to him, $43,000 was a steal for the Plaintiffs as he was trying to establish the Defendants in the technology market.

107 Despite discussions about putting the details of the project in writing and although Chow engaged lawyers (Tan Peng Chin & Partners) to prepare the contractual documents, nothing was eventually signed by the parties.

108 Work started in August 1999 up to the end of June 2000. The project encountered delays making Chow very unhappy. Alvin Teo attributed the delays to factors such as the Plaintiffs making numerous changes in product categories throughout the period of development of the website, the Plaintiffs evolving ideas about the website and the fact that they were sometimes not able to furnish the requisite information sufficiently quickly. The delays were also contributed to by the Defendants lack of staff.

109 Being a new player in the market, Alvin Teo decided to please and appease the customer to the best of his ability. He was concerned about Chows complaints and hints at wanting to take legal action. Not wanting that to happen, he assured Chow that whatever his grievances were, the Defendants would compensate the Plaintiffs to their satisfaction, putting aside the question of whether the grievances were justified.

110 On 14 June 2000, Emily Lim emailed to say that the Plaintiffs were looking forward to the completion and inspection of the website on 23 June 2000. That was the deadline set by Chow. On 15 June 2000, Alvin Teo discussed with Chow the terms of the Defendants offer of compensation. Alvin Teo proposed that the Defendants host and maintain the website for 12 months at no extra costs from 23 June 2000, migrate it to a new independent Intel-based machine with Linux, waive all outstanding sums due from the Plaintiffs and help the Plaintiffs source for advertisers.

111 On 19 June 2000, Alvin Teo and Lim Cher San met Chow at 9 pm at the Shangri-La Hotel. In preparation for that meeting, he drafted a Settlement Agreement and emailed it to Chow at 5.32 pm. Since Chow had wanted to know how much the offer was worth in monetary terms, Alvin Teo provided estimates of the value of the various items in the proposal. The total package was worth some $95,200. At the meeting, Chow made known his displeasure with the website and spoke about a rebuild. Alvin Teo then informed Chow that there was now another platform called Cold Fusion and proposed that after the completion and launch of the website, the Defendants could start work to rebuild the website on the Cold Fusion platform.

112 Alvin Teo agreed with Chow to do a rebuild of the website as part of the settlement. He was prepared to do so without charge to please the Plaintiffs. They agreed that the UAT be conducted on 23 June 2000 and the original website proceed with its launch on 1 July 2000. By the end of the meeting, the Defendants offer was to provide $90,000 worth of maintenance services, a webpage design revamp service worth $25,000, to assist in selling $100,000 worth of Pacific Internet banner advertisements, to waive the balance amount due and to provide $25,000 worth of credit for any web development services to be provided by the Defendants.

113 As Alvin Teo was leaving for Bandung on 20 June 2000, he asked Lim Cher San to email to Chow the above terms. That was done in the evening of 20 June 2000.

114 That was followed by the 22 June 2000 meeting between Ernest Eu and Lim Cher San for the Plaintiffs and Chow and Emily Lim for the Defendants where the terms were modified further in the Plaintiffs favour.

115 On 23 June 2000, the UAT was successfully done at the Plaintiffs office. Alvin Teo, Sherine Teo and Emily Lim were present at the UAT. The next day, the Defendants sent an email to the Plaintiffs setting out the results of the UAT and the further actions required, including the "clean up" of the database. The Defendants then went about tidying up the codes in readiness for the launch on 1 July 2000, not expecting anyone to access the website in the meantime.

116 On 26 June 2000, the Plaintiffs complained that the website was not working because registration could not be done. Surmising that the problem was probably due to the "clean up" being done or to the Plaintiffs using an older version of the Netscape browser, Alvin Teo called for a meeting on 28 June 2000 at the Plaintiffs office. On 27 June 2000, Chow again complained about the registration problem.

117 In the morning of 28 June 2000, Alvin Teo, Lim Cher San and Sherine Teo went to meet Chow and Emily Lim to explain to Chow about the "problem". However, Chow refused to listen to reason. He also did not want the website anymore and called off the launch scheduled for 1 July 2000. Instead, he wanted the Defendants to focus their energies on the revamped website. After much discussion, the Defendants agreed to his demand that they provide him with a server of agreed specifications at the Defendants cost. This was despite the Defendants opinion that the website could function as scheduled on 1 July 2000.

118 On 29 June 2000, Alvin Teo emailed Chow the specifications of the server he was recommending, a HP Netserver E60 with Intel Pentium III 550 Mhz. The next day, Chow replied that he wanted either an IBM or Compaq server with two CPUs scalable to four CPUs with a speed of 733 or 866 Mhz as 550 Mhz was already "old". It was finally agreed that the server should have two CPUs with a speed of 733 Mhz.

119 In the course of settling the terms of the Settlement Agreement, Chow insisted that Alvin Teo insert the value of the various items in the agreement so that he could convince his management to approve the settlement package. According to Chow, he had earlier managed to obtain a compensation package from Pacific Internet of $200,000 worth of services. He said it would help him in the obtaining of approval if he could show his management that the settlement was of substantial worth. Alvin Teo therefore arbitrarily inserted various amounts to make up the sum Chow wanted with "the only real figure" being the $30,000 worth of computer hardware that the Defendants agreed to give the Plaintiffs. The other figures were for "internal accountability" only.

120 After a few more drafts, the Settlement Agreement was finally signed on 11 July 2000.

121 The ability of a website to perform electronic commerce required certain components which varied in their performance. According to Alvin Teo, the components specified in the Settlement Agreement "were the best in performance bearing in mind not to overstretch the budget and meeting the Plaintiffs requirements".

122 On 12 September 2000 (the day after the delivery of the 3500 server), Chow telephoned Alvin Teo to say that he was not accepting the server and that he wanted to terminate the Settlement Agreement. On 14 September 2000, Chow spoke to him again and asked that the Defendants reimburse the Plaintiffs $30,000 in place of the server. Alvin Teo did not agree that would be outside the parameters of the Settlement Agreement. He informed Ernest Eu who then arranged the said breakfast meeting on 20 September 2000 at the Regent Hotel.

123 In cross-examination, Alvin Teo said the Defendants did advise the Plaintiffs orally about the prohibition against commencing the project before the NCBs letter of offer was received where the application for the grant was concerned. However, because of the tight schedule of the project, both parties decided to go ahead notwithstanding the prohibition and the risk of forfeiting the grant.

124 Asked about the "real" and "unreal" figures in the Settlement Agreement, Alvin Teo said he was more concerned at that time with the upfront payment. He did not know the cost of the other items then but had "plugged them in" based on a rough gauge to make up the sum in the package that Chow requested. Chow did not suggest the individual figures.

125 Alvin Teo was referred to Chows email to him on 30 June 2000 which included the statement, "Our main objectives include (1) (the more than one-year old simple request that) mixtown.com to work!". Asked how Chow could be saying this if he had decided on 28 June 2000 that he did not want the original website anymore, Alvin Teo replied that Chow was actually referring to the revamped website. There was in truth no version 1 or 2 of mixtown.com. The name of the website would remain the same even after the revamp.

126 Alvin Teo repeated the point made by the Defendants other witnesses that the first time they knew that Chow was alluding to hot swap capability was in the Plaintiffs affidavit of evidence-in-chief. If the Defendants had known this was the issue, they would have suggested that the budget be used for third party solutions such as Escort which would allow hot swap capability to be added to the 3500 server with no compatibility problem. He disagreed with the Plaintiffs experts testimony that

it was not possible to upgrade the 3500 server. The Defendants had incorporated hot swap capability to an IBM server in another project but that was not a 3500 server. In that case (involving an IBM 4500 server), they had an external solution which allowed hot swap capability to be connected to the server via a SCSI cable, which the 3500 server also had. Just because IBM did not recommend the 3500 server for Internet web-serving did not mean that such a server could not be used for that purpose.

127 Alvin Teo agreed that a factor affecting the ability of a website to perform electronic commerce was the question of whether the website was operational continuously with minimum or no down-time. He accepted that a virtual shop like the mixtown.com website should ideally be open 24 hours a day save for scheduled down-time.

128 On the Raid 5 feature, Alvin Teo explained that it provided a fail-safe environment for data storage. At least three hard disks were required. Should one of them fail, the server would still not be down. A down-time could then be scheduled to replace the failed hard disk. When that was done, the system would automatically regenerate the data from the failed hard disk into the replacement. Without hot swap capability, the failed hard disk could not be replaced without shutting down the server. Should a second hard disk fail before the first was replaced, the website would be down.

129 It was the Defendants practice to shut down a server even if it had hot swap capability and this could be done during a period of low traffic in the website. It was advisable to avoid pulling out one hard disk to replace it with another while the server was not turned off because that could cause arcing which could easily damage the Raid 5 controller and if the Raid 5 controller failed, some data could be lost permanently. Therefore while hot swap capability would be good to have, it was not an absolute necessity. However, Raid 5 was definitely necessary.

130 The Defendants paid for Tan Peng Chin & Partners services in preparing the draft agreement although it was never signed between the parties as the Defendants felt partly responsible for the delay by not going through it. There were discussions between the parties but some clauses were not acceptable to the Defendants. Somehow nobody got down to having it formally signed. There were still some blanks left in the draft agreement.

131 The Settlement Agreements final specifications for the server came from Chow who had been consulting the information technology professionals in the Plaintiffs parent company about the terms in the Settlement Agreement.

132 In re-examination, Alvin Teo clarified that the third party solution called Escort, which would be able to perform a hot swap capability type of function, could be regarded as an add-on to the 3500 server and was not an upgrade in the sense that it was not an IBM solution. The Escort solution required only a SCSI interface to work and the 3500 server did have such an interface. The Escort solution would cost about $6,000 and could support more hard disks than the 5100 server.

133 The 3500 server was definitely a more powerful machine than the Sun System server used for Gatecrash.com, which had apparently impressed Chow and which experienced no problem of crashing.

134 With Raid 5 on board, should a hard disk crash, replacement could wait until a scheduled down-time when the server would be shut down and the failed hard disk replaced. The server would then be turned on again and the website would again be functioning. The whole process would take less than half an hour.

135 Alvin Teo had experienced hard disk failure only two or three times within the same machine since

1992. He had never encountered a situation of two hard disks failing simultaneously nor crashing one after the other in his nine years of experience. He reiterated that the 3500 server could host a website 24 hours with no down-time save for scheduled ones. The 48 hours provided in the Settlement Agreement to recover the server was more than sufficient for the 3500 server.

THE DECISION OF THE COURT

136 It was self-evident that the Settlement Agreement of 11 July 2000 was intended by the parties to encapsulate all their rights and obligations arising from the rather unhappy relationship over the previous 13 months. It was to be the "final settlement" and "henceforth, neither party shall have any further claims from either party or whatsoever". It did not incorporate any previous agreement by reference. The rights and obligations of the parties must therefore be construed within the parameters of the Settlement Agreement. Such an approach would be in accordance with Sections 93 and 94 of the Evidence Act.

137 Further, as the Settlement Agreement was forged on the anvils of both parties, I did not think that the *contra proferentum* rule of construction could apply here. There were proposals and counter-proposals and many discussions leading to the final document. It would be highly artificial to apply the said rule of construction to a particular clause simply because it was first mooted by one or the other party. Both had added, altered or subtracted the ingredients over several weeks and it would be only reasonable to consider both parties as the cooks who had prepared the final concoction that appeared on 11 July 2000. After all, the Plaintiffs did consult others on the terms of the Settlement Agreement, notably personnel from the Plaintiffs parent company.

138 It should also be noted that whatever documents that had passed between the parties before 11 July 2000 were never formally executed for some reason or other and appeared to be still malleable.

139 It was not in dispute that the 3500 server did meet the specifications listed in paragraph (a) of the Settlement Agreement with the Defendants having indicated to the Plaintiffs that the items delayed would be delivered towards the end of September 2000. The complaint was not about such items in any event but about the lack of hot swap capability.

140 Chow said that the Defendants had mentioned hot swap capability or words to that effect but curiously there was no hint of that term whatsoever in the Settlement Agreement. It may be that there were many other things to consider but that did not prevent those many other things from finding their way into the Settlement Agreement. It was incredible that something so important to the Plaintiffs would be overlooked by them over the several weeks of negotiations. It was clear from the evidence that the term "hot swap capability" made its debut in this dispute only when the Plaintiffs affidavits of evidence-in-chief were filed. Chow did not even hint about it at the disastrous meeting of 20 September 2000 at the Regent Hotel.

141 The Plaintiffs could not have intended hot swap capability to be an essential feature of the server. Paragraph (h) of the Settlement Agreement contemplated the Defendants having to resolve any malfunction in the server within 48 hours of a complaint from the Plaintiffs. The parties agreed, quite fairly, that the Defendants would not be responsible for down-time caused by *force majeure*, which meant that in the event of down-time (whether it exceeded 48 hours or not) caused by factors beyond the control of the Defendants, the Defendants would not be held accountable. In any other case of unscheduled down-time, if the Defendants failed to get the server and hence the website operating within the said 48 hours, that would be considered "strike one". If the Defendants failed in this manner a second time, the Plaintiffs would be at liberty to change the hosting company at the

Defendants expense because, in the graphic sports language of Chow, "two strikes and youre out".

142 The Settlement Agreement therefore could not be read to have expressly or impliedly provided for a non-stop website (save for scheduled down-time) because it obviously envisaged unscheduled down-time with the attendant sanction already discussed above. That being the case, there could be no question of importing hot swap capability as an essential feature of the server to be provided by the Defendants.

143 The 3500 server met the specifications in the Settlement Agreement and was also capable of hosting the Plaintiffs website. IBMs recommendation of their 5100 server for web hosting did not mean that they were advising against their 3500 server being used for such purpose. As accepted by the Plaintiffs, even an ordinary computer could perform that task. Of course, a hard disk crash was a possibility but that was not a likely event. Even if one hard disk failed, the server could still continue to run without the danger of data loss. The failed hard disk could then be replaced during a scheduled down-time say at 2 or 3 am when traffic was likely to be low. Such replacement would not take more than 30 minutes. It would be extremely rare to have two hard disks crash simultaneously or one soon after the other.

144 The Plaintiffs ought to have accepted the 3500 server and if subsequent events proved the Defendants wrong and they "struck out" twice, the Plaintiffs would be protected within the terms of the Settlement Agreement. I accepted the Defendants evidence that the confusion surrounding the delivery orders was nothing more than an administrative error which, unfortunately, fuelled the Plaintiffs smouldering suspicion that their goose was being cooked. Even if the Defendants had down-graded their order from a higher-end IBM server to the 3500 server, so long as the one provided met the specifications, the Plaintiffs were in no position to insist on the more expensive model. Section 4(5) Supply of Goods Act provides only for reasonable fitness for the particular purpose and not for the best fit. The Plaintiffs had no valid reason for rejecting the 3500 server.

145 Even if the Plaintiffs could insist on hot swap capability, if Chow or Emily Lim had only alluded to the feature by mentioning the term or describing its attribute, the Defendants could have easily accommodated their wishes by the "Escort" add-on. It was unfortunate and unreasonable of Chow to have left the Defendants trying to read his mind at the morning meeting of 20 September 2000.

146 It could not have been contemplated by the Settlement Agreement that the server would have to be delivered and kept at the Plaintiffs premises. For the reasons given by the Defendants, it was impractical and indeed nonsensical to have the server there. Chow was obviously testing the Defendants sincerity and ability by insisting on the hardware before the more important intellectual content was ready. It was telling that he was not really issuing an ultimatum by his email of 7 September 2000 for the Defendants to deliver the server or be in breach of the Settlement Agreement. He was actually informing them to deliver the server by 14 September 2000 failing which they would have to provide "another IBM model and specifications" which the Plaintiffs "now wanted". Nevertheless, the Defendants complied with the Plaintiffs demands by 11 September 2000.

147 I accepted the Defendants evidence on the events after the UAT on 23 June 2000. The Defendants were not given the chance to explain or to rectify any registration problem encountered after 23 June 2000. I accepted that it was Chow who called off the 1 July 2000 launch even though there were mistakes made by the Defendants regarding the venue of the meeting and the identity of one of the Defendants representatives. With so many meetings at diverse places and the different permutations of persons in attendance at those meetings, errors like these could quite understandably be made honestly. I did not think that 28 June 2000 was a date materially different from their pleadings "on or about 27 June 2000". The events and the emails that followed that meeting and

those after 1 July 2000 were entirely consistent with the launch of the website having been postponed.

148 The Defendants had performed their end of the bargain as at 20 September 2000 (and in the case of delivering the server to the Plaintiffs premises, perhaps performed more than their obligations entailed). The Plaintiffs actions in wrongfully rejecting the 3500 server had resulted in the Defendants inability to carry out the rest of the Settlement Agreement. The Plaintiffs had therefore wrongfully repudiated the Settlement Agreement and I dismissed their claim against the Defendants accordingly.

149 On the issue of costs, the Defendants had served an Offer to Settle under Order 22A of the Rules of Court on the Plaintiffs offering an amount in settlement. Order 22A rule 9(3) provides:

> "(3) Where an offer to settle made by a defendant
>
> > (a) is not withdrawn and has not expired before the disposal of the claim in respect of which the offer to settle is made; and
> >
> > (b) is not accepted by the plaintiff, and the plaintiff obtains judgment not more favourable than the terms of the offer to settle,
>
> the plaintiff is entitled to costs on the standard basis to the date the offer was served and the defendant is entitled to costs on the indemnity basis from that date, unless the Court orders otherwise."

A fortiori

, where the Plaintiff does not succeed in his claim at all, the same costs consequences should follow. This was not disputed by the Plaintiffs. I therefore dismissed the Plaintiffs claim and ordered the Plaintiffs to pay the Defendants costs on the standard basis up to the date of the service of the offer to settle and costs on the indemnity basis thereafter, with such costs to be agreed or taxed.

Sgd:

TAY YONG KWANG
JUDICIAL COMMISSIONER

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