GE Capital Services Pte Ltd v Fuelcon Trading Pte Ltd and Others (Fuji Xerox Singapore Pte Ltd, Third Party)
[2008] SGHC 154

Case Number : Suit 497/2006

Decision Date : 18 September 2008

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Alfonso Ang Cheng Ann and Gurmeet Kaur Grewall (A.Ang, Seah & Hoe) for the plaintiff; Andre Maniam and Jacelyn Chan (Wong Partnership) for the first and second defendants; Marina Chin Li Yuen (Tan Kok Quan Partnership) for the third defendant and third party

Parties : GE Capital Services Pte Ltd — Fuelcon Trading Pte Ltd; Kay Swee Tuan; Fuji Xerox Singapore Pte Ltd — Fuji Xerox Singapore Pte Ltd

Contract – Breach

18 September 2008 Judgment reserved.

Choo Han Teck J:

The parties

1 Mr Hobart Kay ("Mr Kay") had, in his words, a passion for horse racing. He seemed to be very knowledgeable about racehorses and the form of the horses in scheduled races. So he started a racing guide in which he published the schedules of races with performance ratings of the horses. The names of the horses and the schedule were provided by the Singapore Turf Club. Mr Kay was the resident expert and he published his racing guide under the title "Racing Guide" which was a competitor of "Punters' Way". Racing Guide was published through Mr Hobart Kay's business known as "Racing Guide Publications". In late 2004, Mr Kay complained to his two sisters, Miss Emma Khim Kay ("Emma") and Miss Kay Swee Tuan ("the second defendant"), that the circulation of pirated copies of Racing Guide had reduced the profitability of his publication. At that time, Racing Guide was printed by contract printers who Mr Kay suspected of printing extra copies and selling them without his knowledge. So his sisters, Emma and the second defendant, incorporated a company called Racing Guide Publications Pte Ltd ("RGPPL") to take over the business of Racing Guide Publications and print the Racing Guide themselves. The second defendant was not a shareholder of RGPPL although she was a director of the company. Racing Guide Publications was duly terminated on 24 March 2005. By that time, Mr Kay had moved to Hawaii and had nothing more to do with the Racing Guide.

2 Before he left Racing Guide Publications, Mr Kay negotiated with Fuji Xerox Singapore Pte Ltd ("the third defendant") and bought a printing system from it through Mr Bobby Cheok ("Mr Cheok"), the third defendant's sales manager. The printing system consisted of two printing machines, known as "Docutech 6180" and another machine known as the "DocuColor" (collectively, "the equipment"). A proposal dated 1 February 2005 was accepted by the second defendant and Fuelcon Trading Pte Ltd ("the first defendant"), which was a company with a registered address at the second defendant's office where she practised as an advocate & solicitor. As the third defendant declined to offer financial assistance to the first defendant (which the Kay sisters had decided to use as the party purchasing the printing equipment), the parties reached an agreement whereby the third defendant sold the equipment to the plaintiff, GE Capital Services Pte Ltd ("the plaintiff") who, in turn, signed

rental agreements ("the rental agreements") leasing the equipment to the first defendant, and the third defendant signed service agreements dated 2 March 2005 in respect of the equipment ("the service agreements") with the first defendant. Under the terms of the rental agreements, the first defendant agreed to rent the equipment from the plaintiff for a term of 60 months commencing 1 March 2005. The equipment were in fact delivered and commissioned in February 2005. The first defendant subsequently failed to complete payment under the rental agreements and also ceased payments on the service agreements. The plaintiff terminated the rental agreements on 13 June 2006 on account of the first defendant's breach of contract, namely cl 7 of the rental agreements. That led to three suits which were subsequently consolidated and heard before me under the title of this action.

3 The three consolidated actions are as follows. In the main Suit (Suit No 497 of 2006), the plaintiff sued the first defendant for arrears of payment, amounting to $793,105.91, and late payment charges under the rental agreements; indemnity costs and delivery up of the equipment. Its claim against the second defendant was on her personal guarantee on the first defendant's account in respect of its obligations under the rental agreements. The plaintiff's claim against the third defendant was for an indemnity in respect of any loss it might incur should the first defendant succeed in its counterclaim against it. This counterclaim was essentially the same as the claim the first defendant made against the third defendant. The first defendant sued the third defendant by a third party claim for breach of warranty of authority in acting for the plaintiff, breach of contract, and misrepresentation. The third defendant counterclaimed against the first defendant under the service agreements, amounting to $162,739.86; and an agreement dated 16 March 2005 ("Staff Agreement") for a special deployment of staff, amounting to $37,370.54; and for goods sold amounting to $29,858.22. This counterclaim was also the subject of a District Court action in DC Suit No 1665 of 2006, re-titled Suit No 579 of 2006 when it was transferred to the High Court. In the third action, namely, Suit No 366 of 2006, the first defendant repeated its claims (with some variations as to the reliefs sought) against the third defendant in the third party claim in the main suit.

4 The plaintiff's evidence showed that a notice of demand was served on the first defendant on 15 July 2005 for overdue rental. That was followed by a letter from its solicitors dated 27 July 2005 giving notice to commence proceedings should payment continued in arrears. The second defendant wrote in reply by electronic mail dated 31 July 2005. That letter stated as follows:

> I refer to your letter dated the 27th of July 2005.
>
> I am also a director of [the first defendant] and am therefore well-versed with the circumstances which led to the [agreements] with GE Capital Services and what happened after the agreements were made.
>
> The rental agreements are for digital printing equipment which were purchased from Fuji Xerox who then introduced GE Capital to us for the leasing arrangements.
>
> It was a term of our agreement with Fuji Xerox that the equipment purchased perform to a certain specified standard in terms of timely delivery of materials printed by the equipment. From the time of its installation to date, the equipment have failed to perform as agreed. Fuji Xerox has been looking to find a solution to this problem as we have incurred and continue to suffer significant losses as a result of their breach.
>
> We have informed your clients' representative of our dilemma even as we have every confidence that Fuji Xerox will be able to come to a satisfactory solution for and with us at the end of the day. We have also requested Fuji Xerox to bear our expenses and losses from March 2005 and

are awaiting their reply.

In the meantime and in order not to let the instalments accumulate additionally, [the first defendant] will commence payment of the rental from August 2005. I understand that your clients' representative have requested for a meeting with us and this should take place this coming week. We will raise the rescheduling of the rental at the meeting and will be inviting the Fuji Xerox representatives to be present also at that meeting.

I would therefore appreciate it if you will advise your clients to hold their hands from proceeding further in order to allow us the time to resolve this matter.

The quality of the equipment was thus the central issue in the consolidated actions, and that, in turn, was connected to what was agreed between the first and third defendants.

5 The case of the first and second defendants was as follows. Mr Kay announced his retirement from publishing Racing Guide, his sisters, including the second defendant incorporated RGPPL on 24 March 2005 to take over the business of Racing Guide which was terminated on the same day. Mr Kay, however, became the consultant for RGPPL until it was wound up in November 2006. His evidence was that in January 2005 he discussed with Mr Cheok and Mr Steven Yap ("Mr Yap") about the supply and installation of a Fuji Xerox printing system to print the Racing Guide. It was clear that at that time RGPPL had not been incorporated so Mr Kay could only be negotiating on behalf of himself as the publisher of the Racing Guide. Racing Guide's General Manager at the time, Mr Daniel Wang ("Mr Wang"), was also a party to the negotiations. According to Mr Kay, he and Mr Wang told Mr Cheok and Mr Yap information as to the Racing Guide's requirements. They told Mr Cheok and Mr Yap that: the Racing Guide would be published three times a week with a run of 3,500 copies each time, but they plan to print 8,000 copies eventually, presumably if demand required it. They said that the first 2,000 copies of the Racing Guide had to be printed and bound within two and a half hours from the time information about the jockey colours and details of races were received from the Singapore and Malaysian turf clubs. That information was normally received at 11am. The remaining 1,500 copies had to be printed within the next two hours. Mr Cheok and Mr Yap were also told that each copy would have between 24 to 36 pages. Every issue would be printed and distributed to the regular distributors two days before the races. Mr Kay and Mr Wang even brought copies of the Racing Guide to give Mr Cheok and Mr Yap a better idea of what was required. Mr Kay testified that they were assured by the third defendant's representatives that they did not see any problems printing the Racing Guide with the third defendant's printing system.

6 Subsequently, there was another meeting on 1 February 2005 with Mr Cheok and Mr Yap. There was a discrepancy in the accounts of this meeting of the second defendant and Mr Kay. In Mr Kay's account, as stated in his statement, the meeting took place at the second defendant's office at 80 Robinson Road. The second defendant's affidavit of evidence-in-chief stated that she was told by Mr Kay that the meeting took place at Mr Kay's residential premises at Sommerville Park. Mr Kay testified that he reiterated what he and Mr Wang had previously told Mr Cheok and Mr Yap. He said that at this meeting he told Mr Cheok and Mr Yap that the Racing Guide must be printed on A3 sized paper. He explained that this would be the most economical standard because the cost charged by the third defendant for each sheet of print would be the same whether A3 or A4 sized paper was used. The printing speed was slower if the larger A3 sized paper was used. Mr Kay said that, however, the two men from the third defendant assured him that this could be done, meaning that there would be no difference in speed – Mr Cheok disputed this evidence. On the same day, Mr Yap sent an email to the second defendant with the third defendant's proposal. It was a sparsely worded proposal in three pages. The text of the first page stated as follows:

ISSUE – 3,500 Booklets circulation

- Print window for first 2.5 hours -2,000 booklets

Process

1. Turf Club fax data by 10.40 AM
2. Data keying takes 5 minutes
3. In postscript format and convert to PDF takes 15 minute
4. Printing start at 11.00 AM
5. Final Printing (POP) end 1.45 PM
6. Reach SPH at 2.15 PM

The second page reads:

PRICE

One unit DocuTech 6180 (New)	– $500,000
One unit DocuTech 6180 (Show-room)	– $300,000
One unit DocuColor 5252 (New)	– $250,000
Two unit Off-line Finisher	– $40,000
One unit Guillotine Cutter	– $15,000

Monthly Maintenance Fee

2 units DocuTech 6180	– $1,800 per month
1 unit DocuColor 5252	– $300 per month

Meter Charge

DocuTech 6180	– 0.6 cts/print
DocuColor 5252	– 15 cts/print

The third page reads:

SOLUTIONS

– To do 2,000 Booklets (48,000 prints) in 2.5 hours

– You require machines to run at the speed at 360ppm

– 2 units DocuTech 6180 (360 ppm)

– 360 prints x 60 minuts = 21,600 prints

– 48,000 prints = 2.2 hrs

7 One of the issues that arose was whether Mr Kay and the second defendant had told the third defendant's representatives that they would be using A3 sized paper or whether, as the latter claimed, the first and second defendants used A3 sized paper against the standard A4 sized paper that was used in a demonstration of the printing process of the equipment for the first and second defendant's benefit prior to the sale. The second defendant further testified that A3 sized paper was within the specification for use in the manufacturer's manual. The point, however, was whether using A3 instead of A4 sized paper would have slowed down the production process, not whether A3 sized paper could also be used. I am not inclined to believe Mr Kay's claim that he told Mr Cheok that the Racing Guide had to be printed on A3 sized paper. Mr Kay's version of this condition appeared only in his statement put in at trial in lieu of his affidavit of evidence-in-chief. It was also not consistent with that of the second defendant. In this regard, I am more inclined to accept the evidence of the third defendant's representatives that A4 sized paper was the standard contemplated by both parties during the negotiation, and it was A4 sized paper that was used in the subsequent demonstration. I do not accept Mr Kay's explanation that the third defendant had only A4 sized paper and no A3 sized paper for demonstration that day. I also accept Mr Cheok's evidence that he had warned the second defendant that using A3 sized paper would slow down the printing process. The second defendant told him that she needed to save costs. It was not disputed that the costs of using A3 sized paper were the same as using A4 sized paper, but A3 sized paper would save on quantity, therein the savings.

8 The plaintiff was not involved in the negotiation as to the nature and quality of the equipment. The first and second defendants' case was that the representatives of the third defendant, namely, Mr Cheok and Mr Yap made the critical representations of quality to the second defendant on 4 February 2005. It was also their case that at around 3 February 2005, Mr Cheok and Mr Yap visited the first defendant's premises at Ubi Techpark where the equipment were to be installed to see if the space was adequate. The second defendant testified that on 4 February 2005 Mr Cheok "informed" her that:

(i) Fuji Xerox was able to advise [the first defendant] as to the procurement of an appropriate digital printing system (ie, the Equipment) to meet [the first defendant's] requirements for the printing of Racing Guide magazine.

(ii) Fuji Xerox would arrange for financing of the equipment with GE Capital Services Pte Ltd ("GE Capital") as Fuji Xerox had a "vendor relationship" with GE Capital whereby GE Capital would provide financing for customers of Fuji Xerox who were purchasing products from Fuji Xerox.

(iii) [The first defendant] would have the option to purchase the Equipment from GE Capital at the end of the "rental period" by paying a nominal sum of not more than one month's rent for each piece of equipment.

The second defendant also testified that since neither she nor the first defendant had any experience

in printing they "relied on the third defendant to provide an appropriate digital printing system which would meet the first defendant's requirements." On 5 February 2005, she received a letter from Mr Cheok stating that:

(i) Fuji Xerox's solution shall be implemented within 4 to 6 weeks (from 4 February 2005) including commission of the Equipment.

(ii) Fuji Xerox's "Xerox Business Services" will print 4,000 or less booklets of Racing Guide magazine for a total of 6 calendar weeks. The cost of this printing would be borne by Fuji Xerox.

9 The second defendant met Mr Cheok again on 2 March 2005 at her office in Robinson Road. There the second defendant signed various documents brought to her by Mr Cheok. They were the rental agreements with the plaintiff, the service agreements with the third defendant, and the personal guarantee by the second defendant to the plaintiff. She testified that "prior to signing the guarantee [she] had asked [Mr Cheok] whether [she] would get into any trouble by signing the guarantee." That seemed to me a strange question coming from an experienced corporate lawyer of many years standing. In the event, she said that Mr Cheok's reply was that the third defendant's printing system would meet the first defendant's requirements "and that [she] would not get into any trouble by signing the guarantee." She also testified that she was under physical and emotional stress at the time she signed those agreements. She also said that she was not given copies of the documents immediately after she signed them because she was told that the plaintiff and the third defendant needed to execute their part on the documents. I am of the view that the second defendant was under no pressure to sign any of the documents. She was an experienced lawyer, and I certainly do not think that there was any excuse for her not to understand the consequences of signing the personal guarantee.

10 The second defendant testified that the first machine, the Docutech 6180, which the first defendant had purchased knowing that it was a "showroom model", broke down on 31 March 2005 when it was due to be commissioned. Consequently, the third defendant printed the Racing Guide for the first defendant on 31 March 2005 as well as 1 April 2005 at its cost. In brief, the first and second defendants complained that the machine broke down repeatedly and they had to pay the third defendant's technician a "substantial amount of overtime pay." On 15 April 2005, the second defendant wrote a letter of complaint to the third defendant. She wrote that "[having] gone through the harrowing experience of the past few weeks, we have no confidence that your re-conditioned showroom set of Docutech 6180 can cope with the demands of our jobs" and concluded by saying "we regret to say therefore that until all the equipment are functioning in good order, we reserve our rights to look to you for redress of our losses." She said that Mr Cheok called her in response and said that the third defendant would fix the problems expeditiously. However, the second defendant testified that the equipment broke down 66 times in ten months from March 2005 to January 2006. On 15 July 2005, the plaintiff wrote a letter demanding payment of arrears due from April to June 2005, and not having received payment, instructed their solicitors to write on 27 July 2005 giving notice of action. The second defendant replied by email on 31 July 2005, asking the plaintiff to hold their hands in view of the fact that the third defendant was still looking for a solution to resolve the technical problems of the equipment (see [4] above where the content of the letter is set out).

11 The plaintiff's counsel, Mr Alfonso Ang, drew the court's attention to the material terms of the rental agreements, namely clauses 2, 5, 7, 10, and 11. Notably, cl 5 stated that the first defendant acknowledges to the plaintiff that it "had selected the equipment" and that:

(a) *the Equipment is of a size, design, capacity, specifications and manufacture as selected by the Customer and is suitable for the Customer's purposes*;

(b) it is aware that the Lessor is not the manufacturer or dealer of the Equipment nor engaged in any product liability for the Equipment;

(c) *the Customer has inspected the Equipment and signed this Agreement relying entirely on its own judgement and without reliance on any statements made by the Lessor, its agents or servants*;

(d) to the extent permissible by law, no warranty of fitness or merchantability or satisfactory quality shall apply to the Equipment;

(e) the Equipment is accepted by the Customer with all faults and defects (if any) and issuance of the acceptance receipt by the Customer shall be conclusive evidence that the Equipment is in good and substantial working order and condition;

(f) no liability shall attach to the Lessor either in contract or in tort or loss injury or damage suffered by reason of any defect in the equipment whether such defect be latent or apparent on examination and the Lessor shall not be liable to indemnify the Customer in respect of any claim made against the Customer by any third party for any such loss injury or damage;

(g) *the Lessor (either directly or through any agent or servant) has not made and does not make any representation or warranty with respect to the merchantability, condition, quality, durability or suitability of the Equipment in any respect whatsoever*;

(h) all promises, warranties and conditions express or implied by statute or otherwise whether given hereunder or collateral hereto or otherwise are hereby expressly negated and excluded;

(i) the Lessor shall not be liable to the Customer for any liability claim loss damages or expense of any kind or nature;

(i) caused directly or indirectly by the Equipment or any inadequacy thereof for any purpose of any defect therein or by the use thereof or

(ii) in relation to any repair, servicing, maintenance or adjustment thereto or in relation to any delay in providing or failure to provide the same or in relation to any interruption or loss of use thereof or any loss of business or any damage whatsoever and howsoever cause; and

(j) the Customer assume all responsibility, risks and liability for the Equipment and for the use, operation, installation and storage thereof and for injuries to or deaths of persons and damage to property howsoever arising from any effect (whether latent or apparent) for the Equipment or incidental to its use, operation, installation or storage, whether such injury to or death of persons be of agents or employees of the Customer or of third parties and such damage to property of the Customer or of others. The Customer will at all times save and hold the Lessor harmless against all losses, damages, claims, penalties, liabilities and expenses including legal costs (on a full indemnity basis) howsoever arising or incurred because of or incidental to the Equipment or the use, operation, installation or storage or alleged use, operation, installation or storage thereof.

[emphasis added]

The terms of the guarantee were not controversial. It was explicit in the guarantee that if the first defendant defaulted in payment, the second defendant would indemnify the plaintiff within 15 days of a written demand served on her. She accepted that under the guarantee she would be liable "as if [she] were the sole principal debtor and not merely a surety."

12 The second defendant wrote to the plaintiff's solicitors on 30 August 2005 asking for an assignment of rights so that the first defendant could make a claim against the third defendant for selling goods not fit for their purpose. Nothing was resolved with either the plaintiff or the third defendant, and on 13 March 2006, the first defendant wrote to the plaintiff's solicitors saying that they had met the third defendants again that morning "to see if [the first and third defendants] could find a solution." The letter ended by saying that it was the first defendant's "intent to make things work and [it] will need the co-operation of [the plaintiff]." The matter remained unresolved insofar as the first defendant continued to be in arrears. In response to further demands for payment, the second defendant wrote an email to a finance officer of the plaintiff stating:

> Hi Bernadette, I have already received a letter from Doreen giving me a deadline to pay up which has expired. I do not take kindly to being threatened and do not give my guarantee lightly.
>
> We have been through very difficult circumstances and even though we feel that we have been taken for a very expensive ride, still have gritted our teeth and are prepared to work out an amicable solution with [the third defendant] as we'd told you at our meeting. That settlement is being worked out at the moment and we have also arranged for [the third defendant] to come down to our printing plant to conduct a sales training session next Tuesday in an effort to re-start and utilise the equipment.
>
> As far as our talks to work with or sell the publication, is concerned, we are in current talks with 3 parties and will be in a better position to consider the options and come to a decision in a week or so when we should have receive firm proposals.
>
> Be that as it may, we will settle all outstandings with you by the 30th of June 2006. What I am requesting for is a waiver of the late payment charges.
>
> In the meantime, I would appreciate if [the plaintiff] can withhold from any legal proceedings as I loathe to pay legal charges.

13 I am of the opinion that the first defendant is liable to the plaintiff under the rental agreements and to the extent that its debt was not paid, the second defendant is liable to the plaintiff under the guarantee. The issue remaining is whether the third defendant is liable to indemnify the first and second defendant.

14 The first defendant in its claim against the third defendant alleged losses, the bulk of which were attributed to the payment of rebates to RGPPL, the company owned by the two sisters of the second defendant. The rebates were calculated pursuant to the "printing agreement" between Mr Kay and the first defendant. It was drafted by the second defendant herself. It was never adequately explained why Mr Kay would sign the agreement dated 2 March 2005 when he had already decided to quit Racing Guide Publications and let his business be taken over by RGPPL that was being incorporated at that time. I agree with Miss Marina Chin ("Miss Chin"), counsel for the third defendant, that the terms of the agreement between RGPPL and the first defendant were onerous to the first defendant where the rebates were concerned. Indeed, the first defendant took the risk of procuring the equipment, but, it was clear that if it had not, RGPPL would have to do that itself. I am a little surprised that the second defendant, as a director of the first defendant, agreed to such terms which do not benefit the first defendant at all. The first defendant took the risk, gave up its floor space to hold the equipment, and subjected itself to a punishing rebate regimen. It was a losing proposition from the start. The printing agreement between the first defendant and RGPPL was, in the circumstances, too peculiar. Even Mr Kay did not appear to understand it. The first defendant was a client of the second defendant. Its majority shareholder, Mr Enrique of the Philippines, did not seem to

be involved. He held 99% of the shares. The first defendant was using the second defendant's office as its registered address and there was no evidence of its business activity here. Further, the second defendant testified under cross-examination that the business of publishing the Racing Guide was sold by RGPPL to a man called Steve Levar about the end of 2006. The agreement with the first defendant, which was to continue to 2010, was not mentioned. When asked by Miss Chin why the sale made no provision for the agreement between RGPPL and the first defendant, the second defendant merely said that she would be only too happy to have the agreement "terminated by consensus as it had been a headache from day one." Miss Chin submitted that the first defendant's agreement with RGPPL was probably a document created by RGPPL and the first defendant to support the claim for loss suffered. I am of the opinion that Miss Chin was probably right, and the agreement was not a bona fide agreement even if the parties concerned went through the process of signing it. In view of my findings concerning the allegations of breaches by the plaintiff and the third defendant, the question of whether the agreement was bona fide or not was of little importance.

15 I would also accept the evidence of Mr Cheok and Mr Ivan Lim of the third defendant company that the softcopy version of the Racing Guide sent to them for the purpose of carrying out the demonstration was a "24 page issue which therefore required 12 sheets of A4 paper." Mr Cheok stated that the third defendant was able to print 2000 booklets of 24 pages, and at the demonstration on 21 February, Mr Kay was satisfied with the demonstration and declared he had seen enough and called an end to the demonstration. He claimed later that he meant only to test the quality and not the speed, but I do not accept this denial. The demonstration was there for the benefit of the customer and it was not rushed. The customer had the time to satisfy itself that the machine was fit for its purpose in all respects. It cannot call off the test and assert that the machine was not fit for a purpose which would have been demonstrated. Furthermore, the log record of the nature of the problems to which the third defendant's technicians attended and the number of occasions they did so showed that there were not that many breakdowns of the nature complained of by the first and second defendants. Considering the circumstances in its totality, it appears to me that the complaints about the equipment were the first and second defendants' back-up plan from the moment the first defendant went into arrears. The first defendant's problems lay in its impecuniosity, and its inability to face the competition of Punters' Way as well as the pirates who copied and sold pirated copies of the Racing Guide. If the equipment did not fit the purpose, the first defendant ought to have repudiated the contract with the plaintiff and sued the third defendant forthwith. Instead, it kept asking the plaintiff to hold off legal proceedings, promising, and hoping, to make payment of arrears. I am of the view that the first and second defendants' allegation that the equipment did not fit the purpose fails.

16 The only issue remaining was whether the plaintiff ought to have mitigated its loss by terminating the rental agreements and repossessing the equipment. In this regard, the evidence from the plaintiff appears to be that some effort was made to see if it could find some other party to take over the equipment. The equipment was, however, too specialised to be worth more than a mere $10,000. There was no contrary evidence to challenge this. On the other hand, the first and second defendants had in their correspondence with the plaintiff indicated that they were trying to get third parties to take over the equipment but even they were unsuccessful. The law requires the defendant to prove that the plaintiff failed to mitigate its loss. The first and second defendants failed to discharge the burden of proof on this issue. It further appears to me that there was some confusion in the second defendant's mind as to who was the proper party to mitigate. Under cross-examination, she asserted that she had done all she could to mitigate. More importantly, it seemed that no one knows what state of repair the equipment stands today, and the situation is complicated by the necessity to pay a large sum of money for the software licence to run it (the licence has already expired); without the licence, no one can test the equipment presently.

17 For the reasons above, I allow the plaintiff's claim against the first and second defendants, and the third defendant's counterclaim against the first defendant in respect of the service agreements. The plaintiff's and the first and second defendants' claims against the third defendant are dismissed. I will make an order as regards the equipment if parties are unable to agree on its disposal. Costs of the consolidated actions are to follow the event and be taxed if not agreed. Parties will settle the draft order of court for my approval.