

Encyclocom Education Pty Ltd v Horizeducom Pte Ltd
[2003] SGHC 23

Case Number : Suit 1247/2001
Decision Date : 13 February 2003
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Prakash P Mulani (J Koh & Co) for the Plaintiff; Narayanan Nicholas (J Koh & Co) for the Plaintiff; Vijayendran Gregory (Wong Partnership) for the Defendant; Lim Vanessa (Wong Partnership) for the Defendant
Parties : Encyclocom Education Pty Ltd — Horizeducom Pte Ltd

Civil Procedure – Pleadings – Plaintiff's pleadings failed to plead material facts – If plaintiff allowed to rely on material facts not pleaded, whether defendant should also be allowed to do likewise

Contract – Breach – Defendant failed to submit a marketing plan to their customer – Whether this constituted a breach of their obligation to diligently and actively promote the plaintiffs' products

Contract – Breach – Defendant failed to supply quarterly forecasts and updates to the plaintiff and failed to remove the plaintiff's products from the defendant's customers' servers after the termination of the contract – Whether this was a breach of the agreement

Contract – Breach – Defendant offering a competing product to customers who were already using the plaintiff's products – Whether this was a breach

Contract – Breach – Whether notice of termination was valid

Introduction

1. In this Judgment:

- (a) 'AB' means Agreed Bundle
- (b) 'AEIC' means Affidavit of Evidence-in-chief
- (c) 'DCS' means Defendant's Closing Submission
- (d) 'DRS' means Defendant's Reply Submission
- (e) 'EE' means the Plaintiff Encyclocom Education Pty Ltd
- (f) 'Horizon' means the Defendant Horizeducom Pte Ltd. Its name was previously Educom Pte Ltd
- (g) 'HPIQ' means Horizon PlanetIQ Pte Ltd, a subsidiary of Horizon
- (h) 'KC' means Knowledge Connect Pte Ltd, a Singapore company set up by EE
- (i) 'NE' means Notes of Evidence
- (j) 'PCS' means Plaintiff's Closing Submission
- (k) 'PRS' means Plaintiff's Reply Submission

(l) 'Postkid' means Postkid.com Pte Ltd, a subsidiary of Horizon.

2. The Plaintiff EE is a company incorporated in the state of Delaware in the United States of America. Its principal business is the production and marketing of educational digital video content primarily for schools in the Asia Pacific region.

3. The Defendant Horizon is a company incorporated in Singapore. Its principal business is information technology education and training. In particular, Horizon markets and distributes materials from educational material developers like EE, Encyclopaedia Britannica and Discovery Channel.

4. Prior to mid 1999, Horizon had entered into an agreement between Electronic Education, a division of Pearson Education Inc ('Pearson') who were the licensors of EMG video content. The EMG content is primarily for educational purposes. Under that agreement, Horizon was appointed the exclusive distributor of EMG content in Singapore. Horizon then entered into a contract with the National Library Board ('NLB') to supply NLB with three bundles of EMG content which could be accessed within NLB's physical premises only.

5. Subsequently, by a proposal dated 16 September 1999, Horizon (which was then known as Educom Pte Ltd) proposed to NLB a contract for the supply of EMG content for access from within and outside of library sites. The proposal covered seven bundles of video clips of EMG content. The first three bundles had been supplied to NLB under the earlier contract I have mentioned and would continue to be supplied under the proposal. Another four bundles were also to be supplied under the proposal. The supply to NLB would be for a 12 month subscription period. The proposal was accepted on 17 September 1999. This contract was referred to in the litigation as 'the NLB contract' and I will use that description as well.

6. Subsequently, Horizon also made a proposal dated 24 September 1999 to the Ministry of Education ('MOE') to supply video clips for access by schools through a digital media repository ('DMR'). This proposal was accepted by MOE (although the evidence did not indicate the date of acceptance). This contract was referred to as the 'MOE/DMR contract' and I will refer to it as 'the MOE contract'.

7. At the time when Horizon entered into the NLB contract and the MOE contract, it was allowed to distribute and market EMG content in Singapore through its agreement with Pearson. However, by an agreement dated 8 November 1999, Pearson granted EE an exclusive licence to distribute the EMG content. Accordingly by a Distribution Agreement ('DA') also dated 8 November 1999, EE appointed Horizon as the sole and exclusive distributor of EMG content in Singapore. Under the DA, Horizon would pay to EE 55% of the gross proceeds it received from licensees of EMG content.

8. Subsequent to the DA, EE set up a Singapore company known as Encyclocom Education (Singapore) Pte Ltd to allow Horizon to make payment to a Singapore entity. EE also set up KC in Singapore to develop internet based technology solutions. KC was also the Professional Management Services agent for EE in Singapore.

9. As is obvious, by the date of the DA, Horizon had already entered into the NLB contract and the MOE contract. The main disputes regarding the DA were in respect of the NLB contract and the MOE contract and I will deal with the latter first. Before I do so, I would mention that the provisions in the DA are referred to therein as 'sections' and not 'clauses'. Although the parties used the latter description, I will use the former in my Judgment. As for the provisions in the NLB and MOE contracts, I will use 'clauses'. The people who gave evidence were:

For EE

PW1 Aravind s/o K. Vasu

PW2 Wong Poo Mun

PW3 Sundararajan Vijayan

For Horizon

DW1 Ong Toon Wah, also known as Roland Ong

DW2 Chin Tiong Pheng, also known as Jonathan Chin

DW3 Dr Lubna Alsagoff

DW4 Goh Cho Tong, also known as Joseph Goh

DW5 Chong Cheong Keong

DW6 Teo Swee Teong

The MOE Contract

Whether there was a material breach by Horizon

10 EE alleged that under section 2.5 DA, Horizon had agreed not to distribute or otherwise make available any competitive educational programming product without EE's consent. Furthermore, under clause 3.1(n) DA, Horizon was not to engage in any action or activity that would place Horizon in a position of divided loyalty or conflict of interest with respect to Horizon's obligations to EE.

11 According to EE, Horizon had offered to MOE Encyclopedia Britannica ('EB') video content under the MOE contract and EB content was a competitive product. This was a material breach and EE accordingly terminated the DA as it was allegedly entitled to do. It then sought damages from Horizon.

12 Horizon's position was as follows:

(a) EB content was not a competitive product.

(b) Secondly, Horizon had offered but had not actually entered into a contract with MOE.

(c) Thirdly, there was, in any event, an exception in section 2.5 DA which allowed Horizon to distribute certain competitive products listed in Exhibit C of the DA. EB was listed in Exhibit C.

(d) Fourthly, the offer of EB to MOE was not under the MOE contract.

(e) Fifthly, even if the offer of EB content was in material breach of the DA and EE was entitled to terminate it, EE had not complied with the termination provisions of the DA and hence its purported termination was not valid.

(f) Sixthly, Horizon alleged that EE's conduct in purporting to terminate the DA constituted a repudiation of the DA and it was Horizon which had accepted the repudiation and thereby terminated the DA. Accordingly, Horizon was counterclaiming damages from EE.

13 As regards Horizon's reliance on the exception in clause 2.5 DA, EE took the position that while Horizon was permitted, generally, to distribute certain competitive products, including EB content, Horizon was not allowed to do so under the MOE contract because that contract was exclusively for EMG content. In turn, Horizon disputed that the MOE contract was exclusively for EMG content.

14 Section 2.5 DA stated:

'2.5 No Distribution of Competing Products. In consideration of the rights granted to Educom [meaning Horizon] in this Agreement, Educom agrees that, during the Term, it will not (directly or indirectly, whether through any parent, subsidiary, affiliate (any company which controls, is controlled by or is under common control with Educom) licensee or otherwise) without EE's written consent, which consent shall not be unreasonable withheld, distribute or otherwise make available any educational programming product which in EE's reasonable opinion is competitive with the Programming because when looked at as a whole offers the same or substantially similar functions, features and intended use as Programming (a "Competitive Product"). Without limiting the foregoing, Educom may distribute or otherwise make available the Competitive Products owned, designed or manufactured as designated on Exhibit C attached hereto and incorporated herein by reference.'

[Emphasis added.]

The 'Programming' referred to the EMG content and I will refer to the last sentence of section 2.5 as 'the Exception'.

15 As regards Exhibit C to the DA, it was not disputed that EB was listed therein and hence constituted an exclusion from the non-competitive provision. Therefore, it is obvious to me that the parties had agreed that EB was a competitive product and the assertion by Horizon otherwise must fail.

16 As for section 3.1(n) DA, I am of the view that it does not assist EE because it was subject to section 2.5. It stated:

'3.1 Educom's duties. In addition to Educom's other obligations hereunder, Educom's duties shall include, but not be limited to, the following, which shall be undertaken at Educom's sole expense:

(n) Subject to Section 2.5, avoiding all circumstances and not engaging in any action or activity that would place Educom in a position of divided loyalty or conflict of interest with respect to Educom's obligations to EE; and;'

[Emphasis added.]

17 As regards Horizon's position that it had only offered EB content and had not actually entered into a contract with MOE for it, I am of the view that this distinction is not valid. Under section 2.5, Horizon had agreed not to distribute or 'otherwise make available' any competitive product and the making of the offer was the making available of the EB content to MOE. Besides, I do not think that it would be realistic to restrict section 2.5 to concluded contracts only.

18 I come now to Horizon's reliance on the Exception and its contention that its offer to MOE was not made under the MOE contract but some other contract.

19 EE had learned that Horizon had made an oral offer of EB content to MOE and raised this with

Horizon. However, Horizon initially denied that such an offer had been made. It was only subsequently that Horizon admitted the existence of the offer and belatedly that Horizon sought to suggest that the offer was made to MOE under another contract.

20 The person who made the offer was Teo Swee Teong, who was a Senior Vice-President in charge of sales of HPIQ. He had initially denied in writing (dated 16 May 2001) the existence of the offer under the MOE contract. At that time the focus of his denial was not so much that the offer was not made under the MOE contract but that there was no offer of EB content at all.

21 However, it is a general principle of interpretation that the subsequent conduct of either party should not be considered in construing a contract (see Lewison on The Interpretation of Contracts, Second Ed, 1997 at p 63, para 2.11, *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 and *Schules (L.) A.G. v Wickman Machine Tool Sales Ltd* [1974] AC 235).

22 As for EE's position that the MOE contract was for EMG content exclusively, there was nothing in the MOE contract which expressly said this. However, EE relied on various provisions to establish its position.

23 For example, the first paragraph of clause 2.2 of Horizon's proposal to MOE stated:

'2.2 Purpose of Tender Proposal

The purpose of this tender proposal is to supply educational video clips of less than 8 minutes Total Run Time. These highly specialised video clips have been developed by EMG Networks (USA) over a period of 9 years and are specifically designed to be used by teachers and students.'

[Emphasis added.]

24 Part of clause 2.3 stated:

'The video content

'The video content from EMG Networks was identified as the most relevant and appropriate for the needs arising from the DMR. Educom has been conducting extensive trials in both the digitisation and streaming of EMG video clips over the last 18 months. Educom currently supplies the National Library Board with a range subscription services of video resources from EMG and other video publishers.'

[Emphasis added.]

25 The opening part of clause 3 stated:

'Proposal

Educom Pte Ltd is the exclusive distributor of EMG Networks in Singapore. We are pleased to participate in this tender. Our price quoted covers the following criteria:-...'

[Emphasis added.]

26 On the other hand, Horizon relied on the second paragraph of clause 2.2 which stated:

'Educom proposes to supply these video clips as startup resources for the Digital Media Repository

("DMR") Pilot Project. Our proposal includes the Supply, Digitisation, Delivery and 24-Month Licensing of Video Clips For Access By Schools Through the Digital Media Repository ("DMR") With Option to Extension of License as outlined in the Tender Specification -

MOE000/T/ETD12/99.'

[Emphasis added.]

27 According to Roland Ong, this paragraph illustrated that the EMG content was to be used as a startup only and Horizon could subsequently offer other video content to MOE. Roland Ong also said that the price schedule for MOE was based on the number of minutes used and not on whose video content was used.

28 I am of the view that the MOE contract covered EMG content only. That is why, in the proposal, EMG content had been touted as 'the most relevant and appropriate' and Horizon had stressed that it was the exclusive distribute of EMG content in Singapore. Moreover, the fact that the price schedule did not have a different price for content from different publishers demonstrated that it was to apply only to content from one publisher. After all, the cost to Horizon of obtaining video content from different publishers would, in all likelihood, not be the same. Accordingly, I find that the MOE contract was exclusively for EMG content.

29 However, it does not necessarily follow that because the MOE contract was exclusively for EMG content, Horizon was precluded from offering EB content to MOE. The prohibition against offering competitive products is in the DA and not in the MOE contract. The DA itself had the Exception. It seems to me that if EE had wanted to prohibit Horizon from offering EB content for the same contract or to the same licensee, this should have been expressly stated in the DA. Supposing Horizon had initially offered both EMG and EB content in a package to MOE for the DMR project, would Horizon have been in breach of the DA? I would not have thought so. Furthermore, the nature of the business was such that licensees like MOE were likely to want educational media content (whether it be on video or other means) from different publishers, whether immediately or eventually. This is reinforced by clause 2.2 of the MOE contract which stipulated that the EMG video clips were supplied as startup resources for the DMR project. By allowing the Exception without more, EE had, in my view, allowed Horizon to offer EB content for the same contract and to the same licensee. It would make no difference whether EB content was offered contemporaneously with the initial proposal for EMG content or subsequently. It would also make no difference whether EB content was offered as a variation to the MOE contract or as another separate contract to MOE.

30 Accordingly, I am of the view that there was no breach, let alone a material breach, by Horizon in respect of this claim. However, I will also address the issue as to whether the purported termination of the DA by EE was validly executed, assuming that there was such a material breach by Horizon.

Purported termination of the DA

31 The provisions of the DA on termination and notice were section 7.1 and 8.1.

32 Section 7.1 stated:

'7. TERM AND TERMINATION

7.1 Termination Generally. The term of this Agreement shall be for a period of five (5) years commencing on the date hereof and continuing through midnight on September 24, 2005 (the

"Termination Date") unless terminated earlier hereunder. Each party shall have, in addition to all other remedies available to it, the right to terminate this Agreement immediately upon written notice to the other party that the other party has committed a material breach of any of its obligations set forth in this Agreement and such material breach shall not have been cured or corrected within twelve (12) days (or such later date as may be agreed between the parties) following the other parties receipt of written notice of the same. [The rest of section 7.1 is not relevant.]'

[Emphasis added.]

33 Section 8.1 stated:

'8. GENERAL

8.1 Notices. All notices hereunder shall be in writing and shall be effective when sent by facsimile (provided, however, that any notice which could materially affect the rights of either party shall also be sent by courier as provided herein) or an internationally known courier service such as DHL or Federal Express, addressed to the address written below, or to such other address as either party may have last designated in writing in the manner herein provided. Such notice shall be deemed given when received but in any event no later than four days after sent by an internationally known courier.

All notices and billings shall be sent to the following address:

To EE:

[Details were stated.]

To Educom [meaning Horizon]:

Blk 1008 Toa Payoh North

#05-01

Singapore 318996

Facsimile: 353 0131'

First Notice from EE

34 According to para 11 of Mr Vasu's AEIC, Horizon had failed to pay the licence fees due to EE on invoices issued by Horizon under the NLB contract and by a notice dated 10 April 2000, EE had issued a Notice of Material Breach and Intention to Terminate Agreement. However the actual document (AB 242) shows that that was not the heading of the notice nor its intention. It was simply a Notice of Termination (instead of a Notice of Intention to Terminate) and purported to terminate the DA because of Horizon's failure to pay EE in accordance with clause 4.1(a) DA. Thereafter, Horizon eventually made full payment by 29 May 2000 (after deducting a sum which EE agreed to on an ex gratia basis) and the parties carried on with the DA.

Second Notice from EE

35 However, Horizon again failed to pay EE on invoices issued by Horizon under the NLB contract. As a result, EE issued another notice, dated 15 February 2001, to Horizon with the heading 'Notice of Material Breach and Intention to Terminate Agreement'. This notice stated that unless Horizon cured or corrected the material breaches identified within 12 days of the notice, EE would thereafter terminate the DA. According to para 22 of Mr Vasu's AEIC, Horizon made payment to EE on or around March 2001 but the paragraph did not stipulate whether the payment was made before or after the expiry of the 12 days after 15 February 2001.

Third (set of) Notices from EE

36 According to para 42 to 43 of Mr Vasu's AEIC, the MOE contract was exclusively for EMG content and Horizon was in breach of the DA by offering EB content to MOE under the MOE contract. I have dealt with these allegations above.

37 Paragraph 44 of Mr Vasu's AEIC continued to say that as a result of this material breach, EE issued a Notice of Material Breach and Intention to Terminate Agreement on 9 April 2001. However, there were two documents from EE to Horizon each dated 9 April 2001.

38 The first document was a Notice of Breach of Contract and Claim for Compensation in which EE claimed, inter alia, compensation of \$66,000 for Horizon's breach for offering a competitor's product to MOE under the MOE contract and sought the payment within 12 days. This notice in turn stated in the last sentence, 'We enclose formal notice under the contract accordingly.' The formal notice was the second document also dated 9 April 2001.

39 The formal notice had the heading 'Notice of Material Breach and Intention to Terminate Agreement'. In this notice, EE complained about the promotion of a competitor's product and asked Horizon to cure or correct this material breach also within 12 days but did not seek compensation.

Fourth (set of) Notices from EE

40 According to para 45 of Mr Vasu's AEIC, there was no response from Horizon to the 9 April 2001 notices and no action taken by Horizon. He said that on 11 May 2001, EE again issued a Notice of Material Breach and Intention to Terminate Agreement on the same grounds. However, there were again two notices each dated 11 May 2001. As in the case of the notices dated 9 April 2001, the first

document dated 11 May 2001 had the heading 'Notice of Breach of Contract and Claim for Compensation' which claimed, inter alia, \$66,000 for the breach in offering a competitor's product and the second document dated 11 May 2001 was again headed 'Notice of Material Breach and Intention to Terminate Agreement' and asked Horizon to cure and correct the material breach of promoting a competitor's product within 12 days.

41 At the hearing, EE focussed on the second document dated 11 May 2001 to terminate the DA. I will refer to it as 'the May Notice'. The material parts thereof stated:

' NOTICE OF MATERIAL BREACH AND INTENTION TO
TERMINATE AGREEMENT

TO: Horizon Educom Pte Ltd

Block 998 #06-12/15

Toa Payoh North

Singapore 318996

Facsimile: +65 353 0131

WHEREAS:

A.

B.

C.

NOW TAKE NOTICE:

1. As advised by a Ministry of Education official, (Ms Latha Govindasamy), Horizon Educom Pte Ltd is in material breach of clauses 2.5, 3.1(i) and 3.1(n) of the Distribution Agreement in that it promoted a competitor's product to the Singapore Ministry of Education; did not, by so doing, diligently promote the video programming of Encyclocom Education Pty Ltd and, by promoting the competitor's product, engaged in activity which placed it in a position of divided loyalty or conflict of interest with respect to its obligations to Encyclocom Education Pty Ltd.

2. Unless Horizon Educom Pte Ltd cures or corrects the abovementioned material breaches within 12 days of the date of this notice, Encyclocom Education Pty Ltd will thereafter terminate the distribution agreement.

DATED: 11 May 2001'

[Emphasis added.]

42 EE's pleaded position in para 12 of its Amended Statement of Claim was:

'12. No substantive reply was received by the Plaintiffs from the Defendants, as a result of which the Agreement was deemed terminated on 23 May 2001.'

43 As regards the validity of the May Notice, Horizon's position was that it was invalid because (a) it was not sent to the designated address as stipulated in section 8.1 DA and (b) the DA could only be validly terminated if Horizon had failed to correct or cure the material breach and EE had sent another written notice to Horizon that the material breach had not been corrected or cured within 12 days of the first notice (paras 17 and 18 of the Amended Defence and Counterclaim and para 68 of DCS). There was also the usual general denial in para 36 of the Amended Defence and Counterclaim.

44 Horizon also pleaded that EE was in repudiatory breach of the DA and that Horizon had accepted this breach by its solicitors' letter dated 8 October 2001. I will come back to this allegation later.

45 As regards Horizon's assertion that the May Notice was sent to the wrong address, EE did not dispute this but suggested, during the trial, that in any event Horizon had received the May Notice. EE's reason as to why the Notice was sent to Block 998 #06-12/15 Toa Payoh North instead of to Block 1008 Toa Payoh North #05-01 was that EE's representatives had attended meetings at the former, which was the address of a subsidiary of Horizon.

46 It was not seriously disputed that Horizon had received the May Notice . It was enclosed with the Notice of Breach of Contract and Claim for Compensation also dated 11 May 2001, and, Teo Swee Teong did respond to the Claim for Compensation in his letter dated 16 May 2001 (AB 417 and 418). It was in this response that he denied offering any competitive product to MOE under the MOE contract. The response was on HPIQ's letterhead with the address of Block 998 #06-12/15 Toa Payoh North. In these circumstances, there might have been a waiver by Horizon of the wrong address but EE did not plead a waiver. In the circumstances, I am of the view that the May Notice was invalid by reason of its failure to comply with section 8.1 DA.

47 In any event, EE faced other obstacles regarding the validity of its termination. One of the other obstacles is the point that there should have been a second notice i.e the May Notice itself could not and did not constitute the termination. EE disagreed. I have set out section 7.1 DA in para 32 above. It seems to me that although section 7.1 was not well drafted, two notices are required under it.

48 The first is to notify the defaulting party that it has committed a material breach of an obligation in the DA. The second is to notify the defaulting party that the material breach has not been cured or corrected within 12 days of the first notice and to terminate the DA. If the provision is construed literally, it would mean that the DA is terminated upon the giving of the first and only notice, even before 12 days have expired, and that termination will be effective so long as the breach was not subsequently cured or corrected within the 12 days. This would be like a termination subject to a condition subsequent. I do not think that that was the intention of the parties which, in my view, was the opposite i.e that the defaulting party should first be given a chance to cure or correct the material breach by the giving of a warning notice to it. Thereafter, if the breach is not cured or corrected within 12 days, then the aggrieved party has the right, but is not obliged, to terminate the DA. However, this would require a second notice to be given to terminate the DA.

49 Furthermore, if no second notice is required, one would not know immediately after the 12 days whether the aggrieved party was taking the position that the material breach had been cured or corrected or not. In addition, if no second notice was required, then the DA would have been terminated by one of the earlier notices already, for example, by the formal notice dated 9 April 2001 and not by the May Notice.

50 As for the May Notice itself, it stated that unless Horizon cured or corrected the material breach within 12 days of the date of the notice, EE 'will thereafter terminate the distribution agreement' (emphasis added and see para 41 above). This suggested that an active step would be taken by EE to terminate the DA. In addition, the heading of the Notice was 'Notice of Material Breach and Intention to Terminate Agreement' (emphasis added). In my view, the Notice was only a warning of EE's intention to terminate. It did not constitute the termination itself. I would add that I have considered the May Notice not to aid me in construing section 7.1 DA but to determine whether it even purported to be the termination notice.

51 I also do not think that it was the intention of the parties for the DA to be terminated automatically immediately after the expiry of 12 days from the May Notice because, again, the defaulting party would not know whether the aggrieved party was treating the breach as having been cured or not after 12 days. Also again, the terms of the May Notice suggested that a second notice would be given to terminate rather than an automatic termination after the expiry of 12 days, without more.

52 In addition, the Amended Statement of Claim did not even plead that Horizon had failed to cure or correct the alleged material breach within 12 days of the May Notice. Neither was there any evidence that Horizon had continued to make the offer to MOE after receipt of the May Notice.

53 EE then sought to support its termination of the DA by relying on other alleged breaches by Horizon. This was pleaded in para 21 of its Defence to Counterclaim but Mr Gregory Vijayendran, Counsel for Horizon, argued that these other breaches must be pleaded in the Amended Statement of Claim. I note that, even assuming that the other breaches need not be pleaded in the Amended Statement of Claim and might appropriately be pleaded in EE's Reply, they were not pleaded in the Reply but in the Defence to Counterclaim only.

54 More importantly, the plea did not assert that the breaches were material. It also did not assert that a notice under section 7.1 DA had been sent in respect of any of these breaches or that Horizon had failed to correct or cure the breaches 12 days after such a notice.

55 Accordingly, the cases of *Boston Deep Sea Fishing Ice Co and British and Benningtons Ltd v North Western Cachar Tea Company, Limited* [1923] AC 48 and *The Milhalis Angelos* [1977] 1 QB 165 do not assist EE. They are not cases in which a warning notice must first be given to the defaulting party.

56 Mr Prakash Mulani, Counsel for EE, also relied on *Siti & Anor v Lee Kay Li* [1996] 3 SLR 310. However, the Court of Appeal's decision there was not in the context of the question as to whether a second notice had to be given in order to terminate the contract. In that case, the vendor's solicitors (in the sale and purchase of a property) had first issued a 21 day notice (under the relevant Conditions of Sale of the Singapore Law Society) on 15 September 1995 and then purported to terminate the sale agreement by a second letter dated 7 October 1995. The Court of Appeal found that the first notice dated 15 September 1995 was not valid but as the purchasers were, in any event, still in repudiatory breach, the vendor was entitled to terminate the agreement and had done so by virtue of the 7 October 1995 letter. Those are not the facts in the case before me. There is no second notice of termination and there is no suggestion by EE that Horizon had repudiated the DA nor is this pleaded by EE, unlike the Originating Summons in the *Siti* case in which the vendor had sought a declaration that the purchasers had repudiated the agreement (see p 315 at I of the law report).

57 EE had another argument. In para 28 PRS, it submitted that in any event it did give notice of termination of the DA (after 12 days from 11 May 2001) through EE's letter dated 15 June 2001 and

its solicitors' letter dated 14 September 2001. However, only its solicitors' letter was pleaded in its Reply, at para 11. Paragraph 11 asserted:

'... In any event, the Plaintiffs through their solicitors have confirmed the termination of the Agreement in their letter of 14 September 2001.'

58 In my view, this plea is not enough. Even if EE's solicitors had confirmed the termination, that would not suffice if the purported termination was invalid as there would be nothing to confirm. It would be different if para 11 had asserted that the solicitors' letter of 14 September 2001 constituted the notice of termination, if a notice of termination after the May Notice was required. However, that was not what was pleaded.

59 In any event, EE's solicitors' letter of 14 September 2001 did not in substance constitute a termination of the DA. The material part of it stated:

'Dear Sirs

DISTRIBUTION AGREEMENT BETWEEN ENCYCLOCOM EDUCATION PTY LTD ("EE") AND HORIZONEDUCOM PTE LTD (Formerly known as Educom Pte Ltd) ("Educom") DATED 8 NOVEMBER 1999 (the "Agreement")

We act for Encyclocom Education Pty Ltd and refer to the above matter.

We are instructed that by way of a Notices (*sic*) of Material Breach Termination and Intention to Terminate Agreement dated 11 May 2001 to you, our clients instructed you to cure the Agreement, failing which our clients would terminate the Agreement. We are further instructed that you failed to cure the said breaches within the stipulated time.

Further, pursuant to Clause 7.4 of the Agreement, you are required upon Termination of the Agreement to immediately return the Programming and Publicity Material (the "Material") in your possession to our clients, and to provide our clients with copies of all customer files, support records and any other information with respect to the Programming. You are further required to take steps to ensure that all the Material belonging to our clients was removed from your systems, and that written confirmation be provided to our clients of the same. To date the same has not been received by our clients, despite the fact that more than 30 days have passed since the Agreement has been terminated.'

[Emphasis added.]

In my view, that letter was sent on the basis that the DA had already been terminated.

60 I now come back to Horizon's assertion that it was EE who had repudiated the DA and Horizon had accepted EE's repudiation. It was not disputed that if EE was not entitled to terminate the DA or had failed to terminate it validly, it was in repudiatory breach. Horizon asserted that it had accepted the repudiation by its solicitors' letter dated 8 October 2001. I am of the view that it was entitled to do so and the provisions of section 7.1 DA requiring a warning notice to be given first do not apply to a termination based on repudiation. In the circumstances, I find that EE was in repudiatory breach and that breach was accepted by a letter dated 8 October 2001 from Horizon's solicitors to EE's solicitors.

61 I would add that if Horizon had been in material breach by offering EB content to MOE, then the May Notice would have been validly sent as a warning notice although it did not constitute the termination notice. In that scenario, Horizon would be precluded from relying on the May Notice as constituting a repudiation. As that is the only act which Horizon has pleaded as constituting a repudiatory breach on the part of EE (in para 15 of its Amended Defence and Counterclaim), it may not rely on the subsequent correspondence of EE or its solicitors to constitute repudiation. Accordingly, I would then have concluded that Horizon too did not validly terminate the DA but both sides are estopped from denying the termination. In that scenario, I would not have awarded damages to either side for the termination of the DA.

THE NLB CONTRACT

62 The second main dispute arises from the NLB contract. Under the NLB contract, Horizon supplied seven bundles of EMG content to NLB. The subscription period for Bundles 1 to 3 expired on 14 July 2000 and for Bundles 4 to 7 on 19 December 2000. Furthermore, under clause 1.8 of the NLB contract:

(a) Horizon was to provide a marketing plan to ensure that registered users of NLB were made aware of the availability of EMG content from NLB and to achieve a minimum of 25,000 log-ons of at least one minute each (for each log-on) over 15 months i.e from 20 September 1999 to 19 December 2000.

(b) The marketing plan would include the sales of specific courses through Horizon's franchisees and the courses would incorporate the use of the EMG content.

63 It was not in dispute that the reference to specific courses meant courses conducted by Horizon under its Journalist Explorer Scientist Indiana ('JESI') programme. Paragraph 12 of Dr Lubna Alsagoff's AEIC elaborated on JESI as follows:

(a) The 'J' category was language-related

(b) The 'E' category was for geography

(c) The 'S' category was for science and mathematics

(d) The 'I' category was for history and national education (Mr Vasu said it was for history and archaeology).

64 EE claimed that Horizon was obliged under section 3.1(i) to diligently and actively promote the EMG content and, in the context of the NLB contract, Horizon had failed to discharge this obligation as a result of which NLB did not renew the NLB contract. In the course of the hearing and in submission, this claim focussed on Horizon's alleged omission to provide a marketing plan that would ensure that the minimum target of 25,000 log-ons was achieved and Horizon's alleged failure to include EMG content in JESI courses.

65 However, Mr Vijayendran contended that these allegations were not specifically pleaded in the Amended Statement of Claim or in the particulars thereof.

66 In response, Mr Mulani submitted that:

(a) Paragraph 17 of the Amended Statement of Claim had pleaded the salient conditions of the NLB contract which mentioned the requirement to provide a marketing plan to ensure 25,000 log-ons and the sale of specific courses through JESI which would incorporate the use of the EMG content, and

(b) Paragraph 19(a) of the Amended Statement of Claim had pleaded that Horizon had failed to diligently market the EMG content and 'thus failed to fulfil the conditions of the NLB contract, as a result of which NLB was no longer obliged to and did not renew their subscriptions'.

(see para 55 to 57 of PRS)

67 In my view, leaving aside a typographical error regarding the section number stated in para 19(a), para 19(a) was vague and inadequate, even when read together with para 17 of the Amended Statement of Claim. For example, did it mean one or some or all of the permutations below:

(a) Horizon did not provide a marketing plan at all, or

(b) The marketing plan was provided but not aimed at ensuring 25,000 log-ons, or

- (c) The marketing plan was not diligently executed, or
- (d) The EMG content was not included in the JESI courses, or
- (e) The EMG content was included but not effectively promoted in the JESI courses.

68 Indeed, the further and better particulars supplied of para 19(a) made matters worse for EE. They stated:

'Under paragraph 19(a) of the Amended Statement of Claim

"On or about 6 April 2001, the Plaintiffs discovered that the Defendants had, in breach of Clause 3.1(1), failed to diligently market the Material and thus failed to fulfil the conditions of the NLB Contract, as a result of which NLB was no longer obliged to and did not renew their subscriptions."

Request

State:-

- (a) each and every act by the Defendant constituting the alleged failure to diligently market the material; and
- (b) for each and every act as aforesaid, specify how, as a result of the said alleged failures to fulfil the conditions of the NLB Contract, the NLB was no longer obliged to and did not renew their subscriptions.

Reply

(a) In breach of Clause 3.1 of the Agreement, from on or about October 2000, the Defendants failed to provide the Plaintiffs with quarterly forecasts for existing and prospective customers and quarterly reports regarding the implementation, operation and status of the Agreement. In the circumstances, since October 2000, the Plaintiffs have not been notified of any of the Defendants' marketing activities, including but not limited to sales calls, personal visits, product demonstrations and presentations, and attendances at appropriate trade shows. In any event, the failure on the part of the Defendants' is within the knowledge of the Defendants.

(b) See (a) above.'

69 I am of the view that EE should have obtained the information it needed through pre-action proceedings before it launched its claim on the NLB contract. Its Amended Statement of Claim read

with the particulars supplied do not allow it to rely on the failure by Horizon to provide the marketing plan for 25,000 log-ons. I am also of the view that such pleadings cannot be overcome by Mr Mulani's argument that, throughout the hearing, there was no objection by Horizon that this allegation was not pleaded.

70 However, assuming that EE's pleadings allow it to rely on this allegation, I note that EE was in turn taking the position that certain difficulties raised by Horizon in the marketing of the EMG content were never pleaded in Horizon's Amended Defence and Counterclaim. However, there was a general denial in para 27 of Horizon's Amended Defence and Counterclaim although its particulars in turn did not include the difficulties which it subsequently sought to rely on. In my view, if EE is to be allowed to rely on its allegations about the absence of a marketing plan to ensure 25,000 log-ons and the failure to incorporate EMG content into JESI courses, notwithstanding the state of its pleadings, it is only fair to allow Horizon to rely on the unpleaded difficulties it allegedly faced in the marketing of the EMG content.

71 I am also not persuaded by Mr Mulani's argument that as the unpleaded difficulties were not specifically pleaded, the late inclusion of evidence thereon prejudiced EE because it did not have an opportunity to address the same during the hearing (para 63 of PCS). The unpleaded difficulties were stated in AEICs of witnesses for Horizon and Mr Mulani and EE had had sight of the AEICs before the trial commenced. Various witnesses for Horizon were cross-examined by Mr Mulani on the unpleaded difficulties. Mr Mulani did not, during the hearing, assert that EE did not have an opportunity to present evidence to counter Horizon's evidence. Neither did he seek an adjournment of the hearing. It seems to me that such a suggestion is belatedly made now because EE has realised that it failed to provide contrary evidence to counter the evidence of Horizon on these alleged difficulties.

72 However, at the outset, I would say that I do not accept Horizon's pleaded allegation that the failure to obtain a renewal of the NLB contract was because of EE's own failure to provide an increase in video content by 10%. This increase was applicable only if the NLB contract was in fact renewed.

73 Secondly, as regards Horizon's pleaded allegation that there was a global downturn in internet and broadband applications during the material period, this is relevant in the context of causation but not whether Horizon had discharged its obligation to promote the EMG content diligently and actively. In any event, the evidence adduced by Horizon on this point was vague and unpersuasive. Whether the public was receptive to the Media-On-Demand service of educational material is another matter.

74 On another point, Horizon's Roland Ong sought, during the trial, to suggest that NLB was not obliged to renew the NLB contract on the same terms if the 25,000 log-ons of at least one minute

each had been achieved. However, this point was already conceded in Horizon's pleadings.

75 Paragraphs 17 and 18 of the Amended Statement of Claim stated:

'17. The salient conditions of the NLB Contract with the Defendants were as follows:

(i) The Defendants would supply 7 bundles of the Plaintiffs' Material to the NLB, with the subscription periods of Bundles 1 to 3 expiring on 14 July 2000, and Bundles 4 to 7 expiring on 19 December 2000;

(ii) The Defendants would provide a marketing plan to ensure 25,000 log-ons of at least 1 minute of the content over a 15 month period from 20 September 1999 to 19 December 2000.

(iii) The Defendants would sell specific courses through their network of franchises which would incorporate the use of the content.

18. It was a further term of the NLB Contract that upon fulfilment of these conditions, the NLB would automatically renew the subscription service for the 7 bundles for an additional 12 months, at US\$665,000.00 with the provision of 10% additional content at no charge.'

76 In response, paras 25 and 26 of the Amended Defence stated:

'25. Paragraph 17 of the Amended Statement of Claim is admitted.

26. Save that the NLB would renew the subscription service for the 7 bundles for an additional 12 months on the fulfilment of the 3 conditions stated in Paragraph 17 of the Amended Statement of Claim with the provision of 10% additional content at no charge, the rest of the allegations in Paragraph 18 of the Amended Statement of Claim is denied.'

[Emphasis added.]

77 Besides, the material part of clause 1.8 of Horizon's proposal (which proposal was accepted by NLB) stated:

'1.8. Upon achievement of 25,000 log-ons, NLB agrees to extend this subscription service for an additional 12 month period. Educom and EMG agree to increase the volume of content by 10%

at the start of Year 2 subscription at no additional charge.'

78 In my view, NLB would have been obliged to renew the NLB contract for another 12 months if the 25,000 log-ons had been achieved.

79 On the law, Mr Mulani relied, inter ali, on *Atmospheric Diving Systems Inc v International Hard Suits Inc & Can-Dive Services Ltd* 53 CPR [3d] 459 and *B Davis Ltd v Tooth & Co Ltd* [1937] 4 All ER 118. However, the applicable terms and the facts in those cases were different from those before me and were not of much assistance to me.

80 On his part, Mr Vijayendran referred, inter alia, to Richard Christou's Drafting Commercial Agreements (2nd Ed, 1998) at para 8.2 which states:

'8.2 Precedent 1

....

Clause 3 sets out a standard set of obligations to be undertaken by the distributor. Clause 3.1 contains the usual obligations of due diligence. It is very hard to terminate a distributor for breach of this type of clause, except in cases of the grossest delinquency, but its presence often provides a useful bargaining tool when the principal wishes to persuade the distributor to make greater efforts for sales.'

81 Clause 3.1 of Precedent 1 states:

'3.1 The Distributor shall during the continuance of this Agreement diligently and faithfully serve the Principal as its distributor in the Territory and shall use its best endeavours to improve the goodwill of the Principal in the Territory and to further and increase the sale of the Products in the Territory.'

82 As regards oral evidence, Horizon's Dr Lubna Alsagoff said in her AEIC:

'Creating the Workshops - The Wired Scientist and the Wired Writer

8. The first two school workshops that my curriculum developers wrote for this specific purpose [i.e the Student Virtual Community Project] were the Wired Writer and Wired Scientist workshops.

A copy of the workshop materials and facilitator guides are annexed and exhibited as "LA-1".

9. After these school workshops had been running for about one to three months, I was asked by the Defendant's then General Manager Aravind Vasu to look into specifically using EMG content in our series of NLB-related school workshops. I assigned three curriculum developers to review the EMG content and map them onto our workshop syllabus to examine the best way to promote the use of the EMG content in our school workshop curriculum.

10. Based on the EMG content list I was given, my curriculum developers reported to me that the EMG video clips could not be easily incorporated into the curriculum for three reasons:-

(i) First, the list of the EMG content was not organized in any particular order, and had many typographical errors in the summaries and the categorization of the content;

(ii) Secondly, the EMG videos were not homogeneous in terms of their quality and format which made them difficult to incorporate into student projects - some had narration, some were silent, some had music, some had introductory titles, some were labelled, some were inaccurately labelled etc; and

(iii) Thirdly, the EMG content was of a different type and nature from the JESI workshops we currently had (I elaborate on this in Paragraphs 12-14 of this Affidavit).

[These three reasons were some of the unpleaded difficulties which Mr Mulani had objected to.]

11. In essence, before any workshops could be developed for the Plaintiffs' EMG content, a great deal of work had to be done on the EMG content in order to make it suitable for use with the Defendant's current products for the school.

12.

13

14. Insofar as the "JESI" workshops were concerned, as adverted to earlier, the Plaintiffs' EMG content (as it was) did not sit in well with the fun-based learning concept characteristic of the "JESI" workshops. Although it might have still been possible to rework the "JESI" workshops to include the EMG content (with substantial time, effort and resources), what could not be overcome was the problem of the logistics in delivering the workshops.

Implementing the Workshops & The Problems Faced

15. Being a joint project with the NLB to promote the NLB's MOD [i.e Media On Demand] services as a whole, we had to obtain permission from NLB to conduct our workshops at some of the NLB library branches. I understand from Aravind Vasu and Roland Ong that the NLB's Chan Ping Wah gave the approval for us to conduct the workshops in these NLB branches.

16. After a number of visits to libraries, we decided to conduct the workshops in the main branch at Stamford Road and the Tampines branch. This was because these two (2) libraries were the only ones which had close to at least twenty (20) computers with the technological facilities needed to access the NLB's MOD contents (including the EMG content) in a classroom-like setting.

17. The marketing of these workshops to schools was done by Aravind Vasu (presently with the Plaintiffs) and his sales team. I worked closely with Aravind Vasu from the start, but I was not involved in the sales aspects of the NLB project. My role and my teachers' role primarily came in after schools had signed on with the workshops.

18. Once we had schools signing up for the workshops, we had to arrange for suitable dates to conduct the workshops. We had a lot of difficulty in running the workshops because there were many problems trying to schedule times when the libraries and librarians were available on the dates when the school wanted the workshops to be conducted, and vice-versa.

19. There were other occasions when there were too many students and too few accessible computers. The librarians assisted in the workshops by taking charge of part of the workshops relating to the teaching of library skill.

20. The workshops, being a joint effort, could not be expressly limited to EMG content only. There was no possible way to prevent the students who used the NLB's MOD services from accessing content other than the EMG content. This being the case, I have to say that the students' attention was not and could not have been directed solely at the EMG content.

21. The Wired Writer workshop was conducted during June 1998 to December 1999. As for the Wired Scientist workshop, it was conducted for a brief period at the libraries sometime from May 1999 to December 1999. We later modified the Wired Scientist workshop to be conducted at schools using general Internet content instead.

22. The arrangement for us to conduct workshops at the libraries was soon discontinued. This was an understandable conclusion because of the insurmountable logistical problems.

23. Aravind Vasu and I conferred on this matter several times where I explained to him the difficulties in carrying out workshops at two (2) library branches (i.e the Main Branch at Stamford Road and the Tampines Branch), and especially in a manner to increase end-user hits for the EMG content.

24. We discussed alternatives, such as putting the Plaintiffs' content on CD-ROMs in order to make the videos more easily used in the school workshops. However, this was contrary to achieving one of our most important objectives i.e to try and obtain the maximum number of end-users hits for the Defendants' Media-On-Demand ("MOD") contents (including the Plaintiffs' EMG content).

Workshops incorporating the Plaintiffs' EMG Content - in Schools

25. It was clear that conducting workshops at the library was not feasible because it was not possible to accommodate larger numbers of students at the workshops. Therefore, we decided to try and run the workshops in the schools instead, where IT resources would be available in a classroom setting. At this time, I was also given clearer instructions by Aravind and Roland during one of our management meetings that we (i.e the Defendants) were to focus heavily on increasing end-user hits for the EMG content. Given the nature of the EMG video clips, it was decided that we ought to develop workshops that would use the EMG video clips in students' project work.

26. This idea required the schools to be able to access the MOD contents through the NLB portal from their computers. However, this was not straightforward because the NLB required that access to their servers could only be done through terminals equipped with the "PANS" system, developed for the NLB by NCS [National Computer System]. I remember clearly that the "PANS" licences were expensive, costing between \$10,000.00 to \$20,000.00. Such a high cost obviously meant that we could not easily equip computers with the "PANS" system in order to be able to access the NLB's MOD services from the schools.

27. Other possible solutions suggested included one by Aravind Vasu to have a single computer terminal with the "PANS" system that the teacher could use to lecture and demonstrate to the students. However, I found this idea to be unfeasible because the students would not be able to use or incorporate the video clips for their projects themselves and therefore, it would be difficult to develop any workshops that would effectively utilize the EMG content. Further, this idea would not ensure that there were more end-user hits for the EMG content.

28. Aravind Vasu and I discussed the problem of how to access the NLB content from the schools more than once. One of the efforts we brought to bear on the problem was to propose to the NLB that they set up mini-library hubs in the schools. The idea was to have the NLB fund the project in order for us to have a venue and means to conduct the workshops from the schools. I refined a proposal sent to me by Aravind and emailed this to Ng Bin Tang (Manager, School Library Services) as instructed by Aravind Vasu. Aravind Vasu was to follow up with the NLB on this matter. As I did not hear of any developments in this proposal from Aravind Vasu, I did not continue developing these workshops. A copy of the proposal is annexed and exhibited as "LA-3".

The Curriculum Matrix

29. In mid to late 2000, I was asked by the Defendants' Ong Toon Wah to develop a Curriculum

Matrix in order to be able to map the content that we then distributed (including the EMG content) to the Ministry of Education's ("MOE") syllabus. I worked on this goal and developed the Curriculum Matrix.

30. I started work on the mapping exercise with EMG content first. I mapped some of the EMG video content to this Curriculum Matrix. A copy of the mapped EMG titles is annexed and exhibited as "LA-4".

31. In early 2001, the Defendants' Ong Toon Wah organized a series of meetings in order to strategize as to how to get NLB to renew its content (including EMG) licences.'

83 However, I accept that as regards Horizon's efforts made from early 2001 to promote the EMG content, such efforts were made after the NLB contract had expired on 19 December 2000. By then, the 25,000 log-ons had not been achieved and NLB was not obliged to renew the contract.

84 During cross-examination, Dr Alsagoff elaborated that she did try to incorporate the EMG content in workshops when they were conducted at library sites, but not at workshops conducted at school sites because they had difficulty accessing NLB video content from the schools (NE 219 to 221).

85 When it was suggested to her during cross-examination that one way of incorporating EMG content into the workshops generally was to refer to EMG content as a resource material, her evidence was that any reference to resource material should be to material which was easily available. The ones that were exhibited in p 78 of her AEIC were available from the Internet (NE 225 to 226).

86 It was then suggested to Dr Alsagoff that as EMG content was available on library servers, Horizon could cite EMG content as a resource material and indicate that such content was available on library servers. Dr Alsagoff agreed that this could be done but elaborated at NE 226 to 229:

'Q EMG content is available on library servers, you could cite EMG content and indicate they are available on library servers?

A Yes, I could.

Q This would allow students the option of accessing the EMG content as part of their work on that course?

A Our courses are 6 hour courses. When have excursions, they may extend to 12 hours but it is

rare to extend to 12 hours. Therefore, it would have been quite difficult to ask students to make references to resources which are not available at the premises where we conduct the workshop.

Q Even with the courses, the students are expected to carry on with the work after the course for presentation subsequently?

A Students normally do not get homework. If the course is 6 hours long, it can be run over 2 different sessions. There might be time in between but unless the school teachers ask us specifically, we do not assign them homework to be done by second session. Our courses are supposed to be fun. Homework is not fun.

Q Suggest that it would have been feasible to suggest EMG content as resource material available at library servers?

A Not for the JESI workshops.

Q Your AEIC para 10. Notwithstanding the problems, you managed to incorporate EMG content as seen in LA6?

A When I say incorporate into the curriculum, I mean EMG content can be incorporated into school curriculum although there are still problems.

Q Are the problems in para 10(i) to (iii) specific towards incorporation of EMG content into JESI curriculum?

A Yes. But for school curriculum, (i) and (ii) would present some problem.

Q Did you not say earlier that you did incorporate the EMG content in the Wired Writer and Wired Scientist workshops? You did not have any problems then?

A We referenced the EMG content. That is different from the whole workshop revolving around EMG content. We chose content in a very narrow way, see p.78. Appendix B. Roller coasters. Not a normal topic but many of the EMG content used the topic of roller coasters to teach principles of mathematics and physics.

Q Are you saying that for Wired Writer and Wired Scientist, the EMG content was used as reference material?

A Yes, at the library.

Q Wired Writer and Wired Scientist courses were conducted in schools?

A Wired Scientist but there may be differences. Page 78 was used only when conducted in the library.

Q Even for Wired Scientist conducted in schools, EMG content was used as reference material?

A No.

Ct to DW3 Does p.78 refer to EMG content as one of the resources?

DW3 At the time we conducted the workshops at the library for SVC, there was content from many different publishers. Because the workshops were jointly organised by the library, we could not specifically mention those videos we had a commercial interest in as a company. To overcome that, we point the students to certain type of projects which would make them use the EMG content.

Q Aren't the Wired Writer and Wired Scientist programme part of JESI?

A They were added to JESI.

Q The EMG content was added as resource material when the Wired Writer and Wired Scientist workshops were conducted in the library?

A I would not call them resources. They were made or encouraged to watch the video clips through the way we slanted our project questions.

Q If you say the EMG content was incorporated, how is it that it can be incorporated when the workshops are conducted in the library but not when conducted in the schools?

A It is the duration. The problem is that EMG content can be accessed only from the library servers. When conducted in schools, there is not enough time to go to library and back.

Q If that is true, why couldn't you conduct these courses at the library sites?

A I mentioned in my AEIC that it became problematic because of logistics in the library e.g not enough computers, the scheduling to fit the library's and the librarians' schedules, to fit together with the schools' schedules.

Q You were aware of Toa Payoh Library which has 50 computer terminals?

A I understand that these terminals were confined to being used by a particular programme at the library which was run by a different vendor.

Q Are you saying that you tried to make bookings at Toa Payoh Library?

A No.

Q Scheduling. Did you make any bookings with any library?

A Yes. At the main branch at Stamford Road and at Tampines branch.'

87 Mr Goh Cho Tong, also known as Joseph Goh, also gave evidence for Horizon. He had joined HPIQ in or around January 2000 and was working as a Content Sourcing Person for Horizon B Band Pte Ltd, a company associated with Horizon. He performed a similar role in HPIQ and in December 2000, he was assigned to do sales. Although he was still an employee of HPIQ at the time the draft of his AEIC was prepared, he had ceased to be such an employee by the time he signed his AEIC.

88 In paras 23 to 30 of his AEIC, he said:

'23. Our marketing and/or promotion efforts were not just confined to the EMG content, as our marketing plan was to promote the Defendants' MOD contents (for the NLB Contract) as a whole as opposed to being limited by any specific sub-content.

24. I also understood this to be the NLB's policy in that they wanted a broad based plan to promote all their services, without singling out any one product or content for special mention. Though this policy was never confirmed to us in writing, the NLB's Chan Ping Wah verbally informed me of this policy on a number of occasions.

25. As marketing was a joint responsibility of both the NLB and us, we had to synergise our efforts with the NLB's policies and marketing strategies. It was not open to us to dictate to the NLB what marketing efforts had to be undertaken. However, we supported the NLB in its marketing efforts wherever we could including competitions, road shows, exhibitions etc.

26. In this regard, on or around 17 November 2000, NLB and us jointly organised a web-based competition to try and promote usage of the NLB's MOD contents (including the EMG content) as public reception to the same had not been very good. A copy of the brochure promoting the competition is annexed and exhibited as "GCT-1".

27. Besides such competitions, HPIQ also participated in NLB organised road shows, seminars etc. and supported the NLB whenever they required us to do so in relation to the MOD services. Annexed and exhibited as "GCT-2" are photographs taken of HPIQ's booth promoting the Video-on-Demand/Media-on-Demand services at the Asia International Bookfair from 26 May 2000 to 28 May 2000.

28. As the MOD contents was only available from the libraries (and not accessible from home), our efforts were, to a large extent, directed at people who were likely to go to the library and use the resources.

29. We did not carry out any large scale advertisements blitzes in the newspapers and/or similar

media promoting the MOD contents available in the libraries, as it was not cost-effective and in our view, could not really reach the target audience.

30. From what I remember, the NLB never expressed any dissatisfaction about us and, to the best of my knowledge, have not raised any concerns about our marketing and/or promotion efforts.'

89 At paras 34 and 35, 37 and 40 to 57 of his AEIC, Mr Goh also said:

'34. More importantly, we had, in fact, provided a plan to achieve 25,000 log-ons for the MOD project to the NLB on or about 28 July 2001. A copy of the said proposal is annexed and exhibited as "GCT-3".

35. As is apparent from the proposal, we had planned to achieve the number of log-ons through the following means:-

[Various promotional means were then set out but they were to promote Media-On-Demand services generally and were not specifically for EMG content or JESI courses only.]

36.

37. I was deeply involved in the negotiations with the NLB for the renewal of the contract. Based on several conversations I had with the NLB's Tay Ai Cheng, Michael Loh and Chan Ping Wah, I came to be fully aware of the reasons why the NLB did not renew the contract. The failure to achieve the 25,000 log-ons did not play a significant part (if at all) in the NLB's decision not to renew the contract. The reasons for this decision were much more fundamental and independent of the Defendants' alleged acts and/or omissions.

(a) Downturn in the global broadband industry

38.

39.

40. However at this time, people were not really too keen on MOD contents. This was why, despite efforts by the NLB and HPIQ to promote the MOD contents to the public, not many people logged on to view the contents. Of those who did log-on, many did not stay for at least a full minute to be considered for purposes of determining the number of log-ons achieved.

(b) High costs of the EMG content

41. The EMG content is not cheap. It cost the NLB a sum of US\$665,000.00 for the rights to use the EMG content for one (1) year. Similarly, the other contents which the NLB were using, including BBC and Discovery Channel contents, also cost substantial sums of monies.

42. As I said earlier, when the Defendants (through Aravind Vasu) first approached the NLB in 1999, the whole MOD services idea was a novel one, and something the NLB wanted as part of its' efforts to promote the use of the libraries using technology.

43. Because the NLB contemplated that the public would access the MOD contents, and because the Defendants were prepared to allow such public access of the EMG content, the NLB was willing to pay a high price for the EMG content.

44. Recently, things have changed quite a bit. The NLB's budget has been substantially reduced; consequentially the NLB has to rationalise its allocation of resources, including cutting down on spending on electronic contents like the EMG content.

45. Besides not renewing the NLB Contract for the Programming Material, the contracts for the following electronic contents were also not renewed by the NLB:-

(i) Horizon Broad Band Content;

(ii) Discovery Channel Content

(iii) Westonwood Content

(iv) Tapestry Content

(v) BBC Content

(vi) Skillsoft Content; and

(vii) Net-G Content

46. I understand from NLB's Chan Ping Wah that as a matter of commercial sense (in the light of the budget constraints), the electronic contents (including the EMG content) did not justify their high costs. This was especially so where the public had not really received the MOD contents (including the EMG content) well. Simply put, the whole MOD idea failed.

(c) Poor take-up rate by the public

47. As I mentioned earlier, one of the main reasons why the EMG content was chosen over the others was due to the fact that the Defendants were prepared to give public access to the content.

48. NLB contemplated that besides users in the library, users from home would also come around to accessing the MOD contents (including the EMG content).

49. Unfortunately, the technology existing at that time (and even now) was such that a home user would need hardware which could provide him with the bandwidth necessary for accessing the MOD contents.

50. Access to such a bandwidth was, generally, not available to the public at large. On the unlikely scenario that it is available, the hardware and/or the software needed were of such a prohibitive cost that few would actually obtain it.

51. This meant that one of the main reasons behind the acquisition of the rights to the EMG content - public access - was frustrated. In fact, I am informed by Jonathan Chin and verily believe that the number of end-user hits for EMG content for the years 2000 (August to December) and 2001 (January to August) were 768 and 2,532 respectively. Annexed and exhibited as "GCT-4" is a schedule prepared by HPIQ's Chin Tiong Pheng (also known as Jonathan Chin) stating the number of hits obtained for the EMG content.

52. Therefore, when the NLB did their mathematics, the cost of the EMG content as compared to the number of users of the EMG content in the libraries was grossly disproportionate.

53. This was a significant factor in the NLB's decision not to renew the contract with the Defendants.

(d) Poor quality

54. Finally, from my discussions with Chan Ping Wah, Tay Ai Cheng, Yee Wai Fun and Michael Loh of the NLB, I understand that they were very dissatisfied with the Plaintiffs' EMG content. By end-2000, the feedback I received from them was that the NLB was not going to renew the NLB Contract (i.e for the EMG content).

55. The EMG content was a patchwork of short video clips, with no link or organisation in them. So if I wanted to view a picture of a bullfrog, I could access the EMG content and see a short clip of the same. However, no further information on the bull frog would be provided. For that additional information, you would have to make reference to some other resource.

56. The EMG content stood in stark contrast with electronic contents like Encyclopaedia Britannica, BBC, Discovery Channel etc. which contained information on various topics, picture

and video clips (in some cases). More importantly, these contents were bundled in a wholistic and comprehensive form in which user could move from topic to topic easily and could find compendious sources of information at one go.

57. As such, in comparison, the EMG content was clearly found to be wanting. This lack of quality only compounded the NLB's concerns that renewal of the NLB Contract was not justifiable - in monetary terms or otherwise.'

90 Although the representatives from NLB whose names were mentioned by Joseph Goh were not called by Horizon to give evidence, Mr Mulani did not actually challenge Mr Goh's evidence which I have cited above, although he challenged other aspects of his evidence.

91 Mr Chin Tiong Pheng, also known as Jonathan Chin, also gave evidence for Horizon. He was the Vice-President (Corporate Learning) of HPIQ. He joined Horizon I-Tech Pte Ltd as a Project Manager sometime in mid-2000. Thereafter, sometime in January 2001, he joined HPIQ as an Assistant Vice-President (On-Line Operations) (according to his AEIC). From the beginning in mid-2000, he was involved in supporting the operational aspect of the business. On 30 May 2001, he was an E-Learning Consultant with HPIQ and on 1 October 2001, he was Vice President, Corporate Learning, HPIQ. I need not mention his subsequent designation.

I92 In his AEIC, he said:

' (i) Integration of the EMG content

6. By the time I joined HPIQ, my former colleague, Maurice Philip ("Maurice") from Postkid.com Pte Ltd ("Postkid") and his team had done some work on the Plaintiff's EMG content. In fact, they had just completed the digitisation of the EMG content. I took over Maurice's responsibilities sometime in or about February 2001.

7. It was around this time that I started working with HPIQ's Joseph Goh to integrate the MOD content (including EMG content) with the NLB/National Computer System's ("NCS") user interface.

8. NCS's involvement was because the NLB had "outsourced" their web portal management operations to the NCS. The NCS was overhauling and revamping the NLB's computer systems, including the user interface for all NLB's multimedia services (including the Defendants' Media-on-Demand ("MOD") contents). I understand that this revamp was precipitated by the NLB's desire to further improve their user interface.

9. What NCS did was to provide the required infrastructure to access the various multimedia services (including the Defendants' MOD contents). To use an analogy, essentially, the NCS provided the bookshelves for us to put in the books (i.e material like the EMG content and the BBC content etc.).

10. The NCS/NLB's user interface contained links to various multimedia services, including the EMG content. Part of the work that need to be done to integrate the EMG content with the NCS system was to create a link on the NCS'/NLB's user interface to hyper-link to the EMG content. That way, any registered user of the library accessing the NLB's site would be able to access the EMG content, if they so desired.

11. To that end, I worked closely with the NCS to effect the integration of the EMG content with the NCS user interface successfully. It took us a few months to complete the exercise. I remember that the integration was completed, in tandem with the NLB's revamp, sometime in April or May 2001. Annexed and collectively exhibited as "CTP-1" is a series of emails and meeting minutes on the integration exercise.

12. Once the integration was done, my responsibility was to manage the MOD contents on our "mediahawk" server. This particular server was chosen specifically because at that time (despite its hefty price), it had the capability of handling multiple requests simultaneously. We thought that this was crucial to ensure that our service and commitment to the NLB's MOD project was not compromised at our end due to any technical shortcomings.

13. I was assisted by two (2) systems engineers. Principally, once the system was up and running, we had to make sure that the EMG and other MOD contents provided by the Defendants were online and speedily accessible whenever request(s) came in from the NLB server (i.e from end-users).

14. Further, we were on hand to assist the NCS and/or the NLB whenever there were any problems with accessing the Defendants' MOD contents. Where required, we mobilised personnel to go down on site to investigate the complaints. However, once the system was up and running, I can only recall a single instance when the Defendants' MOD services were interrupted. Upon investigation, we found that the failure was not due to any technical problems with the Defendants' server or the MOD contents. Instead, the fault was due to a hardware failure (i.e a trip in one of the cabinet power supply facilities). Annexed and exhibited as "CTP-2" is a copy of the incident report filed for this failure.

(ii) Reaching out to more end-users - technical constraints

15. I understand that one of the NLB's main objectives was to try and promote the MOD contents to members of the public and get them to log-in and view the contents from wherever they were - be it their homes, offices etc. However, the reality of the situation was that the access rate of the MOD contents within the libraries was not encouraging and consequently, the NLB started exploring options to reach out to the public at large (as opposed to the library going public). I

verily believe that this led to many discussions with the NLB on using MPEG 4 technology to compress the EMG content and on getting home users to access the MOD contents.

16. The revamping of the NCS/NLB user interface was also part of this exercise to make the NLB's MOD content more appealing to the public.

17. However, the main problem with getting people to access the MOD contents was a technical one - the public did not have access to the requisite bandwidth needed to access the MOD contents. In this regard, technically, a large bandwidth was required because the MOD contents, including the EMG content, were of substantial sizes. The reason for their large sizes is that the MOD content had been compressed using the older MPEG 1 or 2 technology.

18. On the technical side, therefore, during the period from December 2000 to January 2001, during internal meetings (on various occasions) and external meetings with the NLB (including the NLB's Yeo Kim Hee, Francis Teo, Halizah Jailani and Peter Pak). We specifically explored the feasibility of using MPEG 4 technology instead to compress the EMG content. There were two (2) advantages to this more advanced technology. First, it would allow the contents to be compressed more efficiently. Secondly and more importantly, the compressed contents would be accessed by more users - i.e those having cable or Singtel Magix access. Annexed and collectively exhibited as "CTP-3" are a series of emails and minutes of meetings on the feasibility of adopting the MPEG 4 technology.

19. Another idea floated at this juncture was to try and make available the MOD contents (including the EMG content) to the Ministry of Education ("MOE") and the schools. However, this idea was eventually canned due to security and/or firewall considerations. As such, we were back to the drawing board in trying to procure more users to know of the MOD contents and use them. Annexed and collectively exhibited as "CTP-4" is a series of emails on the firewall issue.

(iii) Reaching out to more end-users - physical constraints

20. Besides the technical constraints I have referred to above, there were also severe physical constraints for the MOD project.

21. There are on average about ten (10) to fifteen (15) computer terminals in each library that are being used for the NLB's multimedia services as a whole, including the EMG content, BBC, Encyclopaedia Britannica, Kids' Central, Internet Surfing, etc. In the course of my duties, I have had an opportunity to visit a number of the libraries e.g Tampines Regional Library, Orchard Central Library and Pasir Ris Central Library. I observed that many of the users used the limited computer terminals for other purposes besides accessing MOD content - e.g surfing the net and e-mailing purposes.

22. In summary, based on my observations, the EMG content was only one of the many electronic activities competing for the users' attention in the libraries.'

93 Mr Chin's evidence was largely unchallenged.

94 Although Mr Chin's evidence and Mr Goh's evidence also contained some of the difficulties faced by Horizon, which were not specifically pleaded, EE's Amended Statement of Claim and further and better particulars in respect of this claim were themselves vague, as I have elaborated. Also, these allegations were nevertheless found in Mr Chin's and Mr Goh's AEICs and, as I have said, EE did not complain at the hearing that they were prejudiced or did not have the opportunity to present their own evidence to address these allegations.

95 Coming to EE, its evidence on the NLB contract came, again, primarily from Mr Vasu. He joined Horizon in August 1996. At all material times from 1998 up to January or February 2000, he was employed by Horizon as a Sales Director. He then left Horizon and later in April 2000, he joined KC as a Business Development Manager. Mr Vasu stressed that the DA was entered into after the NLB contract. He was suggesting that EE had relied not only on the existence, but, the particular provision of the NLB contract for automatic renewal if 25,000 log-ons were achieved (AEIC para 9, 28 and 33). However, as at the date the DA was entered into i.e 8 November 1999, Mr Vasu was in the employ of Horizon and not EE. Although he had participated in the negotiations for the DA, he was doing so as representative of Horizon and not EE and could not speak for EE (NE 48 to 50). I will say more about this later.

96 Paragraph 29 of Mr Vasu's AEIC said that the mechanics of incorporating the EMG content into Horizon's JESI programme was 'demonstrably easy'. In paras 30 to 32 of his AEIC, he said:

'30. Each primary school has 6 levels of classes and between 5 to 10 classes per level with an average of 35 students per class. Assuming an average of 8 classes, that would amount to 280 students per level. Had the JESI course required each student to view only 5 video clips over a 15 month period, that would amount to 1400 log-ons from just one level and 8400 log-ons from one school of 6 levels. To achieve 28,000 (*sic*) log-ons, the Defendants would only have to incorporate the Material into their JESI programme with 3 schools. There are close to 200 primary schools and about 150 secondary schools in Singapore.

31. The Plaintiffs understanding was that the Defendants JESI programme reached thousands of students. With the purported certainty that the Defendants would achieve the 25,000 log-ons, the Defendants were granted the exclusive distributorship of the Material.

32. Hence, it is clear that the reason that the Defendants did not achieve 25,000 log-ons was that they failed to incorporate the Material into their JESI programme nor did they market the Material so as to achieve this minimum result.'

97 However, in cross-examination, Mr Vasu said he could not be sure how long it would take to achieve the 28,000 log-ons mentioned in para 30 of his AEIC. It is telling that he said, at NE 30:

'Q Your AEIC paras 29 and 30. What is the length of time it would take Defendants to achieve 28,000 log-ons according to your computation?

A I cannot give a definite answer. It could take 2 weeks or 10 years.'

The question at NE 30 regarding 28,000 log-ons was the result of a typographical error originating from Mr Vasu's AEIC para 30. Both should have referred to 25,000 log-ons. However, the thrust of Mr Vasu's evidence remained the same i.e even with his suggestion, he could not be certain how long it would have taken to achieve the minimum number of log-ons.

98 Mr Vasu also accepted that even before EMG content was available, Horizon had problems in running workshops (at libraries of NLB) called Wired Scientist and Wired Writer because of problems of scheduling times to ensure that NLB libraries and librarians would be available (NE 11).

99 I set out below relevant extracts of Mr Vasu's evidence.

100 At NE 11:

'Q There were times when schools wanted the workshops to be carried out on certain days and NLB librarians would not be available and vice versa?

A I do not know the details. Scheduling is always a problem in conducting workshops be it at the school or at National Library, or any other site.

Q Isn't it also true that there were occasions when there were too many students present for the workshops but too few computers available to the students?

A The number of computers varies with different library sites. There may have been library sites where there were insufficient computers. However this is not a new experience for Defendants. Defendants have faced these problems before and innovative solutions were called for including doubling up 2 students sharing one computer or even a group of up to 5 students sharing the computer. The Wired Writer and Wired Scientist were designed to teach information skills which included showing students the extent of library services and how to effectively use the library as a life skill. The computer was therefore a tool in that process. We are talking about workshops that do not incorporate EMG content'

101 At NE 13:

'Q Dr Alsagoff had explained to you the difficulties in carrying out the workshops i.e too many students, too few computers, scheduling problems, and the non-exclusive use of computers even during scheduled times?

A She did say there were difficulties. She would have mentioned reasons. Apart from scheduling, I do not recall the reasons.

Q As a consequence, there were discussions between Dr Alsagoff and you on alternatives such as putting the EMG content on CD roms for Wired Writer and Wired Scientist workshops?

A I reiterate that the Wired Writer and Wired Scientist workshops happened before the use of EMG content.'

102 At NE 15 and 16:

'Q Do you remember suggesting a solution involving a single computer terminal with a PANS system?

A Yes.

Q What is PANS system?

A A library interface system.

Q Isn't it true that the licence for this PANS system was very expensive costing between \$10,000 and \$20,000?

A It cost somewhere in the region of \$10,000.

Q Isn't it also true that Dr Alsagoff's response to this suggestion was that it was unfeasible because students will not be able to use or incorporate the video clips for their projects?

A She said it was not feasible but not for the reason you suggested.

Q Furthermore, the idea using the PANS system would not ensure more end-user hits for EMG content?

A Disagree

....'

103 At NE 18:

'Q Even with other content titles, the problem of student access to these titles outside library branches was always a practical problem?

A Agree. When dealing with technology and the use of new technology, if the company is unfamiliar or incapable of implementing the technology, there will be problems. Those problems are however not insurmountable with the right effort and expertise and interest.'

104 At NE 23 and 24:

'Q Even after NLB contract of 16 September 1999, Defendants would continue to face the same problems as they faced in conducting workshops before 16 September 1999 e.g scheduling time?

A Yes. Problems with scheduling include scheduling within the organisation, with schools, and any site be it National Library or Sentosa. I have been with Defendants since 1996. As GM, scheduling workshops was always problematic but it does not mean workshops cannot be conducted. This is similar to a time-table.

Q Do you accept that even after NLB contract, Defendants would face problem of too many students, too few computers as before in conducting the workshops?

A No. Question of too many students to computers can be addressed in several ways. If, as is the practice with Defendants, to conduct the workshop at schools, there are ample computers for the students as provided by Ministry's IT master plan. Further if Defendants chose to conduct a workshop at a physical library site, there are libraries with ample computer facilities including and particularly the library in Toa Payoh which is directly opposite the Defendants' office.

Q Are you aware that the schools could not access the EMG content of NLB server until the official programme was launched in September 2001?

A I disagree. See AB 53. Clause 1.6 at 3, "All 7 bundles will be hosted by Educom". The servers would be from Educom and not NLB.

Q In order to access the EMG content on Educom's servers, such access is only possible via NLB server?

A I don't know.

Q This is especially so because the 25,000 log-ons referred to in clause 1.8 refers to log-on of

NLB server?

A No. No reference to NLB server.

Q Chin Tiong Pheng's AEIC, para 10. Do you agree that this was part of the work required from technical point of view?

A I do not agree but I am not a trained technologist. However I would like to add that para 10 talks about various multimedia services including the EMG content. I do not know if there were problems and if so whether the various multimedia services caused the problems. Mr Chin took over Maurice Philip's responsibilities in February 2001. The contract with NLB was from September 1999 to December 2000. It appears to me that the Defendants are dealing with a problem after the contract period.'

105 At NE 33 to 36:

'Q The assumption made in para 30 is that students could log-on to the NLB server with NCS interface so as to be able to log-on to Educom's server to access the EMG content?

A I don't make any assumption. Para 30 demonstrates the mechanic of achieving 25,000 log-ons. National Library was interested in usage of EMG content. They were paying a high price US\$665,000. They must justify this and it would come about if there was usage of the content. If there was a problem regarding the NCS server, I would have bypassed the NCS server, and allowed the students to log onto the content on Educom's server with an audit trail which I will then pass back to NLB for demonstration to their satisfaction that the on-line content was indeed being used.

Q Chin Tiong Pheng's AEIC, paras 8 to 11. The suggestion you just made is not plausible because the NCS interface is a mandatory user interface for NLB project?

A No comment.

Q If students do not log onto NLB server, they would not be recognised as registered NLB users for the purpose of ensuring the 25,000 minimum log-ons pursuant to NLB contract?

A Agree. If you do not go through the NLB interface, you will not be recognised as an NLB user. However there are many ways around that problem.

Q Do you accept that the NLB user interface is the same as NCS user interface?

A I don't know.

Q NLB only launched on-line access outside physical library branches in September 2001. Do you agree that if students in the schools could not log onto the NLB server from the schools

themselves, then the suggestion you have put forward in your para 30 cannot be carried out?

A The video was hosted on Educom servers, not NLB servers. Defendants did provide services with access to on-line content which had nothing to do with NLB.

Q For purpose of NLB contract, the only log-ons that count are those from registered users which will require the users to log onto NLB server first?

A Agree. The project was intended for NLB users. One way of recognising NLB user is to go through NLB server. I disagree that you must go through the NLB server.

Q The NLB contract requires 25,000 log-ons of at least one minute by registered users?

A Yes. The EMG content needs to be incorporated into the JESI programme. If it is not, the whole exercise is academic.

Q Do you agree that log-ons counted for purpose of NLB contract would be log-ons via the NLB server only?

A No. The Library was interested in moving from a digital library to a virtual library. That would be a 24 x 7 availability. That was the primary objective. Within that, whatever content that they purchased must be useful and used. Those were the 2 critical considerations of NLB i.e relevant and is available outside the library. Whether the content sat on NLB servers or suppliers' servers was immaterial. One way of recognising that the content is being used is through the library interface but primary objective is for the content to be used, not the interface.

Q See the NLB contract, clause 1.8. AB 53. "Registered Users" refers to users registered with NLB?

A Yes.

Q Where will the details such as name, I/C numbers, password of these users be found?

A I don't know. I guess they would be found on NLB servers.

Q Unless the users access the NLB server to access the Educom server to get the EMG content, Defendants will not know whether these users were NLB registered users for purpose of the NLB contract?

A Probably right. The issue of registered users is an issue pertaining to intellectual property licensing of the videos. The purpose of referring to Registered Users is to demonstrate to the publisher that the access to the content is controlled. That was my understanding at the time of the contract. Additionally, the 25,000 log-ons do not have to come from outside the physical library.

Q Unless students in schools are registered users, meaning able to access the NLB server, any log-ons by such students would not count for purpose of NLB contract?

A Disagree. Reiterate the point about many ways to bypass the NLB server.

Q Due to confidentiality reasons and security arrangements, Defendants could not access the data base of registered users on NLB server to authenticate whether the user is an NLB registered user?

A No comment.

Q That is why the students must access the NLB server first so that Defendants authenticate them as registered users before streaming any video from the Educom server?

A No comment. But there is no magic in determining whether the user is an NLB registered user. It is just identifying the IC number. I believe that there are technical solutions that can allow one to point to the NLB user without going through the NCS interface but I am not a technical person and will not state that with authority.'

106 At NE 52:

'Q It was your evidence that Toa Payoh Library was a venue that Defendants could have conducted workshops?

A I am not sure if that is exactly what I said but I accept that is the general import.

Q The Toa Payoh Library has a hundred computers in a classroom called One Learning Place?

A Cannot confirm. Have not been there personally. But I am reliably informed that that is the case.'

107 I move on to the documentary evidence before the commencement of litigation.

108 As I have mentioned (in para 34 above), the first notice sent by EE to Horizon was dated 10 April 2000.

109 By a letter dated 12 June 2000, Horizon's Roland Ong wrote to EE to say:

'As discussed, we are glad to advance our working relationship as exclusive distributor for Encyclocom product line, EMG Video, with the following renewed commitments.

1. Three persons are assigned to work on the cultivation of marketing and sales activities pertaining to the EMG video product line:

a. Ong Siew Khim, will be overall responsible for the product. She will market the product to major accounts such as NLB and MOE, and also be responsible for communication with Encyclocom.

b. Melissa will assist Siew Khim in the direct sales processes.

c. Jaklyn See will be responsible to cultivate a sales program through Educom's JESI franchise program.

2. We have also set up processes to pay Encyclocom on time in accordance to the contract agreed between us.

3. We look forward in pursuing a good working partnership with Encyclocom and maintain cordial relationship.'

110 On 22 September 2000, there was a meeting between representatives of Horizon and EE. A draft of the minutes of the meeting had been prepared (AB 383 and 384) and its contents were not disputed during the trial.

111 The pertinent parts of the minutes stated:

' Minutes of Meeting

Date: 22 Sep 2000

Time: 2.30p.m.

Venue: Horizon Educom, Toa Payoh

Members Present: Melissa

Joy Soh

Paul Philpot

1 National Library - Introduction

....

2 NLB Renewal of Contract - The Problems

a) In KC's meeting with the NLB on 20 Sep 2000, KC [meaning Knowledge Connect] was informed that NLB was dissatisfied with the Encyclocom content and would probably not be renewing the contract in October 2000.

HE [meaning Horizeducom] confirmed that they had heard about the library's reluctance to renew the contract sometime in August 2000 but saw no need to inform EE about this as the information was heard from unofficial channels and cannot be confirmed as yet.

b) HE [meaning Horizon] claims that the lack of progress in the NLB is partly due to the NLB's failure to develop the necessary infrastructure to support the 60 sites and home use. Apparently:

- Only 16 of the 60 sites have been fully tested
- Home Use will not be accessible until 2001

3 Proposed Action by HE

a) Marketing plans are in place and will be executed in October after HE's meeting with NLB, scheduled in the first week of October. HE plans to market the content through

- Marketing collaterals
- The NLB website

To date, no marketing has been done to promote the content.

b) As part of the renewal contract, HE is proposing 20% discount on the price of the content. KC has requested for a copy of this proposal to NLB for evaluation purposes.

....

6 Problems at Horizon Educom

a) The project has changed hands several times resulting in a lack of continuity.

b) HE is currently in the process of re-structuring and a (*sic*) rather short-handed.

c) There is no technological representative in the HE sales/marketing team for EE's products. HE therefore needs Technological support either from KC or DiversiTech.'

[Emphasis added.]

112 According to Mr Vasu, NLB's dissatisfaction was with the lack of usage of the EMG content and not the content itself (NE 81).

113 In a letter dated 18 October 2000 from KC to Horizon (AB 290 to 291), KC complained about the lack of feedback regarding sales activities for the EMG content. The letter was signed by Paul Philpott, Business Development. In the fifth paragraph of the letter, KC also wanted to know the marketing strategy of Horizon for NLB and schools. This letter was sent near the expiry of the NLB contract on 19 December 2000 and appears to be the first documentary evidence from KC or EE about the marketing efforts of Horizon.

114 After this letter, there must have been an exchange of e-mail and/or meetings because Mr Philpott then wrote again to Horizon on 5 December 2000 (AB 313). The opening sentence said:

'We are pleased to note your efforts in renewing the National Library Board's subscription for [EMG] content'.

The letter then went on to seek information such as the subscription fee and subscription period for Bundles 1 to 3 and Bundles 4 to 7.

115 By 5 December 2000, Mr Vasu had already joined EE. In cross-examination, he sought to explain away the opening sentence in Mr Philpott's letter of 5 December 2000. At NE 71 his evidence was:

'Q See 1st sentence, "We are pleased to note your efforts in renewing the National Library Board's subscription ...". This is not a statement of displeasure by Plaintiffs or Knowledge Connect about the Defendants' marketing efforts in respect of NLB contract?

A I do not accept. It is a courteous opening line by a relatively lower order staff in Knowledge Connect to the Executive VP of Defendants. There is no mention whatsoever in the sentence of anything that could vaguely be construed as being pleased with Defendants' marketing efforts.'

Mr Vasu then accepted that Mr Philpott was a business development manager and finance administrator in KC but explained that his remark about Mr Philpott being a lower order staff was relative to the position which Roland Ong held (NE 73). At that time, Mr Ong was President of Horizon's E-Learning group.

116 Two months later, EE sent the second notice of Material Breach and Intention to Terminate Agreement dated 15 February 2001 which I have referred to above. As I have mentioned, that notice was for non-payment by Horizon and not for Horizon's failure to promote the EMG content diligently or actively.

117 By a letter dated 29 March 2001, KC wrote to Horizon to express its concern, inter alia,

(a) about absence of growth in sales revenue since January 2000,

(b) about the loss of the NLB contract because of failure to deliver EMG content as per Horizon's proposal regarding JESI and 25,000 log-ons.

It also said that Horizon's continuous changes in personnel were quite disturbing.

118 EE then sent the third set of notices dated 9 April 2001. Besides mentioning the offering of a competitive product to MOE under the MOE contract, the first notice dated 9 April 2001 also said that EE understood from NLB that Horizon had failed to deliver on the NLB contract.

119 However, NLB's Michael Loh then sent a letter dated 12 April 2001 to Joseph Goh of HPIQ (AB 398). The material part of the letter said:

'SUBSCRIPTION TO EMG TITLES FOR VIDEO-ON-DEMAND SERVICE

I am writing to inform you that the National Library Board will not be renewing its subscription to the EMG video titles currently available on our video-on-demand (VOD) services.

We have subscribed to the EMG content for two years and we now want fresh content on the VOD Service. Moreover, the treatment of the subject matter is no longer suitable for our needs.

We would be happy, of course to look at any other new VOD content you have which are suitable to our needs.'

120 Strangely, another letter dated 2 May 2001 was also sent by NLB's Michael Loh to Joseph Goh of HPIQ in identical terms (AB 399). This suggests that these two letters from Michael Loh may have been procured by Horizon but nothing more can be said thereon as Michael Loh did not give evidence.

121 Mr Vasu's evidence regarding the letter from Michael Loh was (NE 82):

'Q Teo Swee Teong's AEIC para 47?

A Mr Michael Loh from NLB is a relatively low order staff. The key decision makers are in order: Mr Chan Ping Wah, Ms Tay Ai Cheng and Wai Fun. They have never in my dealings with them both as representative of Defendants and later of the Plaintiffs ever indicated to me that they were dissatisfied with our content or that they would not subscribe to it if the Plaintiffs did not produce new content. Further, it is surprising that Mr Teo himself sometime in August or September 2001 writes to the Plaintiffs on a purported proposal for the supply of EMG content.'

122 Then on 11 May 2001, EE sent the fourth set of notices dated 11 May 2001 comprising two notices, one of which was the May Notice. The first notice dated 11 May 2001 again mentioned Horizon's failure to deliver according to the NLB contract but, again, this alleged breach was not the reason given to terminate the DA.

123 Having considered the evidence, I am of the view that:

(a) When Horizon said in its proposal to NLB that it would provide a marketing plan to ensure a minimum of 25,000 log-ons and the plan would include the JESI courses, this was a marketing ploy to secure the NLB contract. At that time, Horizon had no specific marketing plan in mind to achieve the minimum 25,000 log-ons or to incorporate the EMG content into the JESI courses. However, the ploy succeeded and Horizon secured the NLB contract.

(b) Unfortunately, Horizon was not able to use the library sites effectively because of the problem of scheduling. This was a logistical problem. Although Mr Mulani submitted that Dr Alsagoff had got her dates mixed up in her evidence, the problem of scheduling was corroborated by Mr Vasu and I am of the view that it was not confined to the Wired Scientist and Wired Writer workshops.

(c) Outside of the library sites, even the schools could not access the NLB server. This was a technical problem.

(d) Items (b) and (c) were the two main problems although there were other problems.

(e) It is true that Horizon did not inform EE in writing about its logistical and technical problems in making EMG content more easily available to students. Indeed, as Mr Mulani pointed out, Roland Ong's letter dated 12 June 2000 had stated that Jaklyn See would be responsible to cultivate a sales program through JESI without mentioning any of the difficulties faced. However, in my view, this was because Roland Ong was less than candid. He was trying to win EE's confidence back since the relationship between the two had been strained by Horizon's failure to pay EE its dues. It bears repeating that by 12 June 2000, EE had already sent one notice to Horizon dated 10 April 2000 because of Horizon's failure to pay EE its dues.

(f) On the other hand, if the marketing plan to ensure 25,000 log-ons was as important to EE as Mr Vasu wanted me to believe, it is telling that EE did not ask to have sight of this marketing plan before the DA was signed, given that the NLB contract had already run for about two months from 17 September 1999 before the DA was signed and dated 8 November 1999. Neither did EE ask for it soon after the DA was signed. Inquiries were made of Horizon only after mid-2000.

(g) As I have said, Horizon already had an existing agreement with Pearson before it entered into the NLB and MOE contracts. It seems to me that when Pearson granted an exclusive licence to EE to distribute the EMG content by their agreement dated 8 November 1999, EE must have been required or it made commercial sense for EE to enter into a DA with Horizon so that Horizon could continue to perform its obligations to NLB and MOE as well as seek future contracts for EMG content. That is why the DA is also dated 8 November 1999. However, this did not mean that EE had placed much reliance on the specific terms, as opposed to the existence, of the NLB or MOE contract.

(h) Furthermore, KC and EE knew from the 22 September 2000 meeting that no marketing had been done to promote the EMG content specifically. Yet there was no complaint by EE at that time that Horizon was in breach of section 3.1(i) DA. While KC's Paul Philpott wrote to Horizon on 18 October 2000 to chase for feedback on sales activities for EMG content and on marketing strategies to NLB and the schools, Mr Philpott also subsequently wrote on 5 December 2000 to say that he was pleased to note Horizon's efforts in renewing the NLB subscription (see para 111 to 114 above).

(i) The two main problems were not as easy to resolve as Mr Vasu had suggested. If they were, he would have ensured that they were resolved while he was still in the employ of Horizon, even though he was busy doing other business for Horizon like trying to secure the MOE contract. For example, Mr Vasu was quick to give his ideas as to how technical problems could be solved but when he was asked about the technical issues raised by Chin Tiong Pheng, he had to accept that he was not a technical man. As regards the alleged availability of more computers from the Toa Payoh Library, Mr Vasu's evidence on this was scanty. Indeed, he admitted he had no personal knowledge about Toa Payoh Library (NE 52). Besides, if such computers were indeed so easily available, he should have mentioned the Toa Payoh Library to Dr Alsagoff when she was discussing the problem of scheduling with him.

(j) The problem was compounded by high turnover of staff for Horizon but KC probably also had its own problems. That is why it was only in October 2000, two months before the expiry on 19 December 2000, that Paul Philpott wrote to ask about Horizon's marketing plans and for basic information like the price for the 3 and the 4 bundles, which KC should already have.

(k) While there was no specific marketing plan to achieve 25,000 log-ons for EMG content, there

was some marketing of Media-On-Demand services as alluded to by Joseph Goh. On the other hand, NLB itself was not focussing on EMG content alone.

(I) The case before me is one whereby EE is using Horizon's contractual obligation to NLB to provide a marketing plan to ensure 25,000 log-ons, to establish a breach of Horizon's contractual obligation to EE to diligently and actively market the EMG content. Yet there was no evidence of any complaint by NLB about the efforts of Horizon to promote Media-on-Demand services generally or EMG content specifically.

124 I am of the view that the failure by Horizon to provide the marketing plan to ensure 25,000 log-ons is not necessarily a breach of Horizon's obligation to EE. On the evidence before me, I am not persuaded that EE has established such a breach. It would not make sense to provide a marketing plan when the logistical and technical problems had not been resolved. Furthermore, it was not feasible to market EMG content only. That is why the marketing was done in relation to Media-On-Demand services generally. Also, when Horizon proposed a plan, albeit after the expiry of the NLB contract, to secure a renewal, that plan was also not to promote EMG content only (see para 35 of Joseph Goh's AEIC). Neither was Horizon's inability to use more of EMG content for JESI courses the result of a breach by Horizon in view of the logistical and technical problems Horizon had faced. Besides, as Joseph Goh had said, the whole Media-On-Demand idea did not take off, the EMG content was not cheap and the EMG content was not the only content for which the contract was not renewed (see his AEIC paras 41 to 46 again).

125 I now come to the other claims of EE against Horizon.

Failure to update EE

126 Section 3.1(I) stated:

'3.1 Educom's duties In addition to Educom's other obligations hereunder, Educom's duties shall include, but not be limited to, the following, which shall be undertaken at Educom's sole expense:

(I) Keeping informed as to the acceptance of the Programing in Singapore, including, without limitation providing to EE the following reports (and such other reports as are reasonably requested by EE from time to time):

- quarterly forecasts for existing and prospective customers; and
- quarterly reports regarding the implementation, operation and, status of this Agreement;'

127 I am satisfied from the evidence that Horizon failed to provide quarterly forecasts and reports either in writing or orally. KC had to chase for the forecasts and reports and it was only when KC chased that Horizon or HPIQ would respond by having meetings with KC. Even then, details were not forthcoming and KC had to continue chasing for more information. I find that Horizon has failed to make out its position that it had orally given the information. For example, the exchange of e-mail from Kelly Chua and various representatives of Horizon from 27 March to 2 May 2001 (AB 416 to 412) showed that she was still chasing for information but the representatives of Horizon were passing the buck from one person to another. Eventually, Teo Swee Teong came up with the belated allegation that he had given instructions to withhold information to KC because he had heard that KC was also going to schools to offer EMG content (NE 329). I am of the view that this was an untruthful allegation because it was made so late in the day and there was no real evidence that KC was going direct to schools to offer EMG content.

128 On the other hand, there was evidence that Horizon had withheld information of sales of EMG content to, at least, two schools i.e Serangoon Garden Technical School ('SGTS') and Yishun Town Secondary School ('YTSS'). Even after EE/KC had discovered these sales, Horizon continued to deny these sales as a result of which EE eventually applied and obtained summary judgment against Horizon for EE's share of the licence fees paid by these two schools.

129 However, as the forecasts and reports are no longer material because the DA has been terminated, I will award EE nominal damages of \$1,000 only for this claim. In addition, I will order an accounting by Horizon, details of which will be set out below.

Leaving EMG content on NLB'S Servers after expiry of the NLB contract

130 EE also complained that after the expiry of the NLB contract on 19 December 2000, Horizon had left the EMG content on NLB servers for some time until September 2001. Relying on section 4.1(d) DA, EE alleged that Horizon was not entitled to do that and claimed damages.

131 Section 4.1(d) DA stated:

'4.1 License Fees In full consideration for the grant of the license, the appointment as distributor and the grant by EE or relinquishment by Educom of any other rights hereunder, Educom shall pay EE license fees as follows:

(d) EE and Educom shall agree on the pricing to be charged to the Licensees for the distribution

of the Programming of such Licensees.'

EE's position was that in view of section 4.1(d), Horizon needed its consent in respect of the price of the EMG content before distributing it (para 41 of PCS).

132 Mr Mulani also submitted that Horizon's reason, that it was part of its marketing plan to leave the EMG content on the NLB servers, was weak as such a marketing strategy would be relevant if one is enticing non-existing clients to purchase the EMG content. By leaving the EMG content on NLB servers, there was no incentive for NLB to renew the contract as they could use the EMG content for free.

133 On the other hand, it was Horizon's position that it had not withdrawn the EMG content because it was still trying to persuade NLB to renew the contract. Mr Vijayendran submitted that this was a common marketing industry practice and consistent with the best marketing efforts to maintain goodwill (para 112 of DCS). He also submitted that NLB's Mike Loh (not Low) had requested (in an e-mail) as late as September 2001 (Defendants' Bundle p 59) that:

'Hi Joseph,

I have gone through the contract and discussed it with Ping Wah. He has asked me to revert the following to you:

1. we would like to subscribe 4500 minutes (@S\$100 per minute) with Horizon throwing in 1500 (an additional 500 minutes to your offer) minutes content free of charge making it a total of 6000 minutes.

2. the contract will only be signed when the final selection is made. Please send me the content lists for selection asap as I will be going on leave from 22/9 till the end of the month. Until the contract is signed, the content currently available should not be taken off the server and should be made available to us on a "trial basis" until the contract is signed. So please send me the listings for selection so that the signing will not be delayed further.

I hope to hear from you soon.

Thanks.

Mike

NLB'

However, as I have said, no evidence was given by Mike Loh.

134 As regards section 4.1(d) DA, I do not think it is applicable. Although it was pleaded, its breach was not pleaded (see para 19(b) and 20(b) and (d) of the Amended Statement of Claim).

135 Secondly, section 4.1(d) DA would have been applicable only if Horizon was charging a price to a licensee for use of the EMG content. However, Horizon did not charge NLB for the period when the EMG content was left in NLB's servers after the expiry of the NLB contract.

136 It may be that it was implied in the DA that Horizon was to remove EMG content immediately or within a reasonable time after the expiry of a licence but that also was not pleaded by EE. What it had pleaded was that Horizon had failed to remove the EMG content without pleading Horizon's duty to remove.

137 In any event, I will also deal with the substance of EE's complaint on this issue.

138 In my view, it was part of good marketing strategy and goodwill to let the EMG content remain while Horizon was trying to secure a renewal of the NLB contract. If Horizon had succeeded, EE would have shared in the pie.

139 However, Horizon was not entitled to act unilaterally, even though its motive may make commercial sense, and even if NLB had really wanted the EMG content to remain pending negotiations for the renewal, Horizon was not entitled to let the EMG content remain on NLB's servers especially after EE had sent a notice dated 11 May 2001 claiming compensation for leaving EMG content on NLB's servers after expiry of the NLB contract (AB 401). This was one of the fourth (set of) notices dated 11 May 2001 which I have referred to.

140 On damages, para 20(d) of the Amended Statement of Claim asserted that EE had suffered loss of profit and/or subscription fees for the period when the EMG content was made available after the expiry of the NLB contract. However, there was no evidence to suggest that the EMG content left on NLB's servers was the only copy of EMG content that EE had. EE surely must have the master tape or disc from which EMG content can be made easily available to any other interested party who was

minded to pay a license fee for the same. There was also no evidence to suggest that if the EMG content had not been left on NLB's servers, Horizon or EE would have been able to secure a contract from another party.

141 Indeed, in para 44 PCS, EE sought to present its claim for damages in a different manner. Paragraph 44 PCS stated:

'44. To this end, the Plaintiffs have only agreed to the NLB having the Material for a second year, at a price as set out in the NLB Contract. Thus the Plaintiffs are clearly entitled to damages for the Defendants' breach in allowing the NLB access to the Material for free in the sum of US\$338,250.00 or alternatively, the sum of US\$302,500.00 as computed below:

i. The subscription fees for Bundles 1 to 3 (that expired on 14 July 2000) amount to US\$225,000.00.

ii. The subscription fees for Bundles 4 to 7 (that expired on 19 December 2000) amount to US\$440,000.00.

iii. The Material was left on the NLB's server without the Plaintiffs' knowledge or consent until September 2001.

iv. After deducting the Plaintiffs' contribution of the hosting fee of US\$50,000.00 and the Defendants' margin of 45%, the damages due to the Plaintiffs are US\$302,500.00.

(a) Bundle 1 - 3

(July 2000 - June 2001)

(@US\$225,000.00/years) : US\$225,000.00

(b) Bundle 4 - 7

(December 2000 - September 2001)

(10 months)

(@US\$440,000.00/years) : US\$366,666.00 US\$591,666.00

Less:

(c) Hosting fee : US\$41,666.00

(@US\$50,000.00/years) US\$50,000.00

(10 months)

(d) Plaintiffs' Claim : US\$302,500.00

(55%) '

142 In my view, this was a different approach from that in para 20(d) of the Amended Statement of Claim because para 44 PCS focussed not on subscription fees that EE could have earned from a third party but was based on the premise that the NLB contract was renewed or should have been renewed. Yet EE had been complaining when the very purpose of leaving the EMG content on NLB's servers was to try and secure the renewal.

143 Secondly, the claim as asserted in para 44 PCS is special damages which were not pleaded in the Amended Statement of Claim.

144 Most importantly, as Horizon did not secure the renewal, I do not see why EE should be allowed its claim under para 44 PCS, as though such renewal had been obtained.

145 It seems to me that EE was trying to have two bites at the cherry. First, by claiming US\$338,250 for Horizon's alleged failure to market the EMG content diligently and actively and, alternatively, by claiming US\$338,250 or US\$302,500 (the latter being for 12 months for Bundles 1 to 3, and 10 months for Bundles 4 to 7 up to September 2001) for Horizon's failure to remove the EMG content after the expiry of the NLB contract. At most, I may have granted nominal damages of \$1,000 to EE for this claim but, even then, I have decided not to do so in view of the state of its pleadings.

Alleged breach by Horizon of section 2.3 DA

146 Section 2.3 DA stated:

'2.3 Proprietary Nature of Programming Educom shall acquire no ownership rights or title to the Video. Educom will not, and will not permit others to remove, obscure or alter any notice of

trademark, patent, copyright, trade secret or other proprietary rights notice on or in the Programming. Educom shall prohibit Licensees from (save in accordance with the provisions of this Agreement and the End-User License Agreement) sublicensing, distributing, renting, leasing, transferring and otherwise making available the Programming or any copy thereof or any use of the Programming to any third party. Educom agrees to at all times protect the Programming from unauthorized access and to take the highest precautions, consistent with the best industry practices, to protect the programming from unauthorized duplication and distribution. Educom agrees to promptly inform EE, in writing, of any unauthorized use or distribution of Programming that comes to its attention and to use its best efforts to terminate such unauthorized use of distribution.'

147 EE's claim in respect of section 2.3 DA was set out in para 14(d), (e) and (f) and 20(e) of the Amended Statement of Claim. EE claimed that it discovered that the EMG content that was made available on a server in SGTS contained a logo belonging to Postkid, a subsidiary of Horizon, and that EE had never been informed that Postkid was supplying the EMG content to end users or was being given access to EMG content. In so doing, Horizon had allowed Postkid to infringe on EE's intellectual property rights or allowed Postkid to pass off EMG content as its own in breach of section 2.3 DA. EE claimed that this had caused it damage to its reputation and goodwill.

148 From the evidence, I am satisfied that at the material time EE knew that Horizon was using Postkid to market the EMG content, although EE was not told about the sale to SGTS. At that time, EE had not sought to draw a distinction between marketing and handling the EMG content and it is too late for EE to say that Horizon should not have allowed Postkid to handle the EMG content.

149 However, Horizon went too far when it allowed Postkid to use its own logo on EMG content. That was an infringement of EE's intellectual property rights.

150 On the other hand, EE has not established any damage to its reputation and goodwill and I am not inclined to make any order for assessment of damages. It may be that Horizon and/or Postkid were trying to appropriate EE's reputation and goodwill but that is a different matter. In any event, as I have said, I will be ordering Horizon to give an accounting of sales of EMG content.

Summary

151 In my view, Horizon did not act bona fide in various respects. For example:

(a) it did not pay EE its dues and EE had to chase for payment,

(b) it failed to disclose the sales to SGTS and YTSS and denied the same when asked.

152 However, the burden was and is on EE to establish its claims. In view of what I have decided, I order that:

(a) Horizon is to pay EE \$1,000 damages forthwith for the reason stated in para 129 above.

(b) Horizon is to account to EE for all sales of EMG content made by Horizon or any of its related companies and to pay to EE its share of the licence fees in accordance with the DA, in so far as such payment has not already been made. EE may direct in writing that such payment be made to Encyclocom Educom Education (Singapore) Pte Ltd or KC.

(c) All other claims of EE are dismissed.

(d) EE is to pay Horizon damages for its repudiation for the DA, such damages to be assessed.

153 I will hear the parties on costs incurred up to-date but costs of the accounting and assessment of damages are to be determined by the Registrar.

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