

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2021] SGHC 219

Suit No 847 of 2020

Between

Dathena Science Pte Ltd

... Plaintiff

And

Justco (Singapore) Pte Ltd

... Defendant

JUDGMENT

[Contract] — [Discharge] — [Frustration]

[Contract] — [Contractual terms] — [Unfair Contract Terms Act]

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Dathena Science Pte Ltd
v
Justco (Singapore) Pte Ltd

[2021] SGHC 219

General Division of the High Court — Suit No 847 of 2020
Lai Siu Chiu SJ
26–29 January, 15 March, 5 April 2021

28 September 2021

Judgment reserved

Lai Siu Chiu SJ:

Introduction

1 This is one of the first cases, if not the very first case, that resulted from the measures that were taken by the Singapore government to control the spread of the Covid-19 pandemic in 2020. It culminated in a claim for \$286,891.50 and a counterclaim of \$2,399,796.00.

The facts

2 The plaintiff, Dathena Science Pte Ltd (“Dathena”), is a cybersecurity company incorporated in Singapore in 2016 and is in the business of developing software that provides data security and privacy applications to its clients. Its founder and chief executive officer (“CEO”) is Christopher Vincent Muffat

(“Muffat”). Besides Singapore, Dathena has offices in Bangkok, Geneva, Lausanne, Paris, London and New York City.

3 The defendant JustCo (Singapore) Pte Ltd (“JustCo”) was incorporated in Singapore in 2015 and is in the business of providing workspaces to its customers in offices or commercial buildings that it rents. Apart from Singapore, JustCo also has operations in other Asian cities such as Bangkok and Jakarta.

4 Sometime in end-2019, as Dathena was expanding, JustCo proposed that it let to Dathena units located at #12-01, #13-01, #14-01 and #15-01 in No 63, Chulia Street, OCBC Centre East, Singapore (“the OCBC Premises” or where the context refers to the entire building, “OCBC CE”). Due to the nature of its business, it was of paramount importance to Dathena that the OCBC Premises could meet its information technology (“IT”) requirements and that Dathena could move its servers into the OCBC Premises before the start date of the lease.

5 JustCo confirmed to Dathena that its IT requirements would be met. The agreed requirements and costs are as follows:¹

	Location	Item	Quantity	Charges
1	Server room	Full server rack (each rack is 42U) rental	2	\$2,500 per rack per month x 2 = \$5,000
2	Server room	Dedicated SSID - within suite	1	\$150 per month

¹ Affidavit of evidence-in-chief (“AEIC”) of Rohaidah bte Ripangi (“Aida’s AEIC”) at para 2.3.6.

3	Server room	Internet service provider (“ISP”) Co-ordination fee 1 x site survey 1 x site installation	1	\$500
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6 On 16 January 2020, Dathena and JustCo entered into an agreement (“the Membership Agreement”) whereby Dathena agreed to lease the OCBC Premises from JustCo for two years commencing from 1 May 2020 to 30 April 2022 (“the Lease”) which was referred to as the Security Term in the document. In the Membership Agreement, Dathena was referred to as “the Member”, JustCo was referred to as “the Company” and the OCBC Premises were referred to as “the Allocated Office Space”.

7 The salient terms of the Membership Agreement are as follows:²

(a) Dathena would pay JustCo a monthly sum of \$99,991.50 (termed “the Membership Fee”) which comprised of a membership fee of \$72,050 and a miscellaneous fee of \$21,400 plus applicable Goods and Services Tax;

(b) Dathena would pay JustCo a refundable security deposit of \$186,000 (“the Security Deposit”) throughout the duration of the Lease;

² AB145–150 (the Membership Agreement).

- (c) Under cl 2(a)(iii) of the Membership Agreement,³ Dathena could request JustCo to provide “Additional Services” at extra cost and upon such other terms as were advised by JustCo.

The court will return to the Membership Agreement later for its other terms and conditions relevant to this dispute. It will also be seen later that the terms and conditions of the Membership Agreement were heavily weighted in favour of JustCo against its members. One prime example would be the lack of a termination clause to enable a member to terminate the Membership Agreement but JustCo unilaterally had such right.⁴ Indeed, a member could not even assign or transfer its membership to another party without prior written consent from JustCo.⁵ On the other hand, JustCo could unilaterally replace a member’s “Allocated Office Space” with alternative spaces⁶ if “necessary due to the operational requirements of [JustCo]”.⁷

8 In the Appendix attached to the Lease,⁸ Dathena separately agreed to pay JustCo \$40,000 as a one-time construction cost for the following items:

- (a) three managerial rooms;
- (b) one additional phone booth;

³ AB146 (*ibid* cl 2(a)(iii)).

⁴ AB147 (*ibid* cl 8).

⁵ AB147 (*ibid* cl 9).

⁶ AB146 (*ibid* cl 2(c)).

⁷ AB146 (*ibid* cl 2(c)).

⁸ AB149 (*ibid* Appendix).

- (c) a larger meeting room (from four to six persons) and a storeroom;
- (d) 84 data ports (entitlement 50 ports with an additional 34);
- (e) air-conditioning and fire sprinkler works; and
- (f) all building approvals.

9 Pursuant to the Membership Agreement, Dathena paid JustCo on 5 March 2020 the sum of \$286,891.50 (“the Deposit”). The Sum comprised of the Security Deposit and the monthly membership fee (\$72,050) due for May 2020.

10 However, Dathena did not occupy the OCBC Premises starting 1 May 2020 or at all due to unexpected and/or unforeseen events as set out below and which are pleaded in Dathena’s statement of claim (“SOC”).

11 On 11 March 2020, the World Health Organisation (“the WHO”) declared the Covid-19 pandemic to be a global health crisis.

12 With the increasing number of Covid-19 cases in Singapore, the Singapore Government announced on 3 April 2020 that it would, on 7 April 2020, implement what came to be known as the Circuit Breaker Measures (“the CB Measures”) promulgated under the Covid-19 (Temporary Measures) (Control Order) Regulations 2020 (“Covid-19 Regulations”). Under the CB Measures, the Government required non-essential services to cease. Service-providers like Dathena had to adopt home-based remote telecommuting arrangements for their workforce and cease operations at its physical office(s). The CB Measures were originally scheduled to end on 4 May 2020. However, on 21 April 2020, the Government announced that the measures would be

extended to 1 June 2020 as the Covid-19 situation in Singapore remained critical.

13 Due to the CB Measures, JustCo claimed it could not ready the OCBC Premises for Dathena in time for moving in on 1 May 2020. This posed a problem for Dathena as its then tenancy at One George Street (“OGS”) would expire on 1 May 2020. It should be noted at this stage that the OCBC Premises were part of OCBC Centre East (“OCBC CE”), a new development which was still under construction in early 2020.

14 The representative from Dathena who negotiated with JustCo was its Lifestyle Manager Rohaidah Binte Ripangi (“Aida”) and her counterpart was Sian-Tzu Casteels (“Sian-Tzu”) who was then JustCo’s Assistant Manager of Enterprise Sales. Other people involved on Dathena’s side were its IT personnel Jérémie Simon Arnaud (“Jeremie”) and Sai Tun Nay Lin (“Sai Tun”). On JustCo’s part, the persons involved were Sheena Goh (“Sheena”) who is its Assistant Vice President & Director (Enterprise Sales) and Sharlene Poh (“Sharlene”) another Assistant Manager of Enterprise Sales.

15 The salient events that unfolded after the Membership Agreement was signed are set out in the following paragraphs.

16 On 23 January 2020, Aida and Dathena’s IT personnel met representatives of JustCo to discuss Dathena’s requirement for early access to the server room of the OCBC Premises to enable Dathena to move in its servers in order to minimise disruptions to its operations on 1 May 2020. Early moving-in of Dathena’s servers meant that JustCo also had to provide power supply (for network installation and air-conditioning) to the server room. Dathena further

required JustCo to grant early access to Dathena's ISP who was M1, so that internet connectivity could be activated before 1 May 2020.

17 Aida emailed Sian-Tzu with the list set out earlier at [5] on 19 February 2020. JustCo provided a quotation of the listed items on 19 March 2020 which Muffat signed on 20 March 2020.⁹ "Item No 2" of JustCo's quotation was for the supply of two server racks in the server room at \$5,000 per month. Aida emailed the signed quotation back to JustCo on 23 March 2020. On Aida's email inquiry on 17 March 2020 on the timelines,¹⁰ Sharlene emailed Aida on 24 March 2020 with the following timelines ("the First Timelines"):¹¹

- (a) IT works: 23 March–24 April 2020;
- (b) Server room set-up: 30 March–6 April 2020;
- (c) Power supply for server room: 1–24 April 2020;
- (d) Dathena's equipment & installation: 1–24 April 2020;
- (e) AV & AP set up, IT Testing & Commissioning: 22–28 April 2020; and
- (f) Moving in: 1 May 2020.

⁹ AB843–844 (Quotations dated 19 March 2020).

¹⁰ AB430 (Aida's email to Sian-Tzu dated 17 March 2020).

¹¹ AB504–507 (email chain between Sharlene and Aida with attachment).

18 On 25 March 2020, Sharlene informed Dathena that there would be a delay such that frosting (of glass) could only be done after Dathena moved into the OCBC Premises.¹²

19 On 8 April 2020, after the CB Measures were announced, JustCo informed Dathena that there would be a one month's delay in Dathena's moving into the OCBC Premises.¹³

20 On 10 April 2020, Muffat and Aida had a telephone conversation with Sian-Tzu. In that call,¹⁴ JustCo was informed that:

(a) Dathena wanted a revision of the commercial terms of the Membership Agreement (either by way of temporary rent waiver or rent reduction) since it was not otherwise acceptable that the OCBC Premises would not be ready by the original agreed date of 1 May 2020;

(b) Dathena was required to vacate its premises at OGS by 5 May 2020 and it was imperative that it could move into or at least house its servers in, the OCBC Premises;

(c) due to the CB Measures, Dathena's staff had to telecommute and it only required premises for about 65–70 staff (bearing in mind mandatory social-distancing requirements and split-team arrangements).

¹² AB653–654 (Sharlene's email to Aida dated 25 March 2020).

¹³ AB631–632 (Sian-Tzu's email to Aida dated 8 April 2020).

¹⁴ Aida's AEIC at para 3.5.8.

JustCo kept notes of the conversation but Dathena did not.¹⁵ However, Aida disagreed with Sian-Tzu's notes that stated "Dathena have stopped expansion plans" and "reduce number of staff to 65–70 pax". Aida denied both statements were ever made.¹⁶

21 On 13 April 2020,¹⁷ Sian-Tzu emailed Aida referring to the telephone conversation 10 April 2020 and said:

... we have taken note of your request to renegotiate the commercial terms of your membership agreement signed with JustCo in OCBC Centre (including membership fees free period or reduction in the monthly membership fees). While we empathise the situation that your business is going thru, we are however not in a position to allow any change in commercial terms as our operating costs remain unchanged. We are still committed and obligated to our landlord, vendors and staff to pay the full cost of our rent, services and salary during this period.

Aida replied to the above email on the same day to reiterate that Dathena required at least 64 seats and inquired what options were available to Dathena since the OCBC Premises were not ready.¹⁸

22 On 16 April 2020, JustCo informed Dathena that the latter could move into the OCBC Premises by 1 June 2020. On the same day, Sian-Tzu revised the First Timelines in [17] to the following ("the Second Timelines"):¹⁹

(a) IT works: 5–15 May 2020;

¹⁵ Aida's AEIC exhibit RR-16 at p 416 (Sharlene's email to Sian-Tzu dated 10 April 2020).

¹⁶ Aida's AEIC at para 3.5.10.

¹⁷ AB647 (Sian-Tzu's email to Aida dated 13 April 2020).

¹⁸ Aida's AEIC at exhibit RR-17 at p 469 (Aida's email to Sian-Tzu dated 13 April 2020).

¹⁹ AB581 (Sian-Tzu's email to Aida dated 16 April 2020).

- (b) Server room set-up: 14–18 May 2020;
- (c) Power supply for server room: 18 May 2020 onwards;
- (d) Dathena’s equipment & installation: 18–22 May 2020;
- (e) AV & AP set up, IT Testing & Commissioning: 19–27 May 2020;
- (f) Moving in: 29 May–1 June 2020.

23 After the Government announcement on 21 April 2020 that the CB Measures would be extended to 1 June 2020 (as mentioned at [12]), Sian-Tzu emailed Aida on 22 and 30 April 2020 to say that item (f) in the Second Timelines (*ie*, moving in) at [22] would be pushed back to 30 June 2020.²⁰

24 On 30 April 2020, Sian-Tzu further revised the First Timelines in [17] to the following (“the Third Timelines”):²¹

- (a) IT works: 2–12 June 2020;
- (b) Server room set-up: 15–19 June 2020;
- (c) Power supply for sever room: 19 June 2020 onwards;
- (d) Dathena’s equipment & installation: 17–23 June 2020;

²⁰ AB605 (Sian-Tzu’s email to Aida dated 22 April 2020); AB635 (Sian-Tzu’s email to Aida dated 30 April 2020).

²¹ AB643 (Dathena’s timeline dated 30 April 2020).

(e) AV & AP set up, IT Testing & Commissioning: 22–26 June 2020; and

(f) Moving in: 30 June 2020.

25 On 18 May 2020, Sian-Tzu emailed Muffat to say: ²²

We are targeting to let you move in sometime end of June (as soon as possible). However, the agreement will be from 1 July onwards thus you are right – you will not be paying for space at OCBC Centre East in June.

26 In his AEIC,²³ Muffat described the rent waiver for June 2020 and alleged cost saving thereby as illusory since Dathena could not occupy the OCBC Premises in June 2020 in any event and should not be paying rent for that month.

27 In a telephone call on 26 May 2020, Dathena was informed by JustCo that it could not be certain when the OCBC Premises would be ready.²⁴ Despite the uncertainty surrounding when Dathena could move into the OCBC Premises, JustCo had sent an invoice dated 1 May 2020²⁵ for \$18,350.50 to Dathena as a follow-up to the quotation in [17] (*ie*, based on the First Timelines) which Dathena promptly paid on 2 May 2020.²⁶

²² AB691 (Sian-Tzu’s email to Muffat dated 18 May 2020).

²³ Muffat’s AEIC at para 2.3.11.

²⁴ Aida’s AEIC at para 3.1.1(e).

²⁵ AB847 (JustCo’s tax invoice to Dathena dated 1 May 2020).

²⁶ AB848 (outward FAST payment transaction advice of DBS dated 2 May 2020).

28 It should be noted at this stage that the chronology of events set out in [16] to [27] are not exhaustive of the communication between the parties – only the salient events have been identified.

29 As a result of the telephone call mentioned at [27] which was the proverbial last straw, Dathena issued a notice of termination to JustCo on 29 May 2020 (“the Notice of Termination”) signed by Muffat. Paragraphs 3 and 4 of the Notice of Termination read as follows:²⁷

3. Regrettably, we consider the [Membership Agreement] to be now terminated, or frustrated, for the following reasons:

a. Dathena’s use and occupancy of the Premises has not been able to commence up till now, even though the commencement date of 1 May 2020 (“**Commencement Date**”) has come and gone. JustCo has explained to us on three (3) occasions that this Commencement Date has been delayed due to delays in construction and renovation work on the Premises. But there is no indication or visibility given as to when the construction and renovation work can be completed and, more importantly, when the Premises will be available for occupancy. We trust that it can be appreciated that it was not in the contemplation of the parties that Dathena would have to wait for an indefinite period of time for the use and occupancy of the Premises to commence.

b. Furthermore, in view of the Covid-19 epidemic (“**Covid-19**”) situation that was unforeseen by all, the broad scope of social-distancing measures implemented by the Singapore government, as well as the continued expectation of Singapore government for all businesses to telecommute from home as far as possible for the foreseeable future, it would be reasonable to say that Dathena’s original intended use of the Premises is now no longer possible or viable.

4. In light of the above, we would kindly request for a refund of the Security Deposit and Advance Payment within the next 14 days.

²⁷

AB726–727.

[emphasis in original]

The “Advance Payment” referred to in para 4 was the one month’s rental of \$93,450.00 for May 2020 which Dathena had paid (see [27]). Dathena’s refund request was for the Deposit of \$286,891.50 (the Security Deposit of \$186,900 plus advance Membership Fee of \$99,991.50).

30 Not unsurprisingly, Dathena’s request for a refund was rejected by JustCo’s vice president and general counsel Nicholas Song (“Song”) whose reply by email on 1 June 2020 (“JustCo’s Response”) to the Notice of Termination, *inter alia*, stated:²⁸

We note that Dathena’s inability to obtain access to its Allocated Office Space at OCBC [Centre] East is due entirely to the mandatory circuit breaker measures imposed by the Singapore government to address the Covid-19 crisis. These measures include prohibitions on non-essential services from working in the office and on the conduct of renovation works during the circuit breaker period. OCBC [Centre] East is a brand new [centre] and our renovations at OCBC [Centre] East are well advanced; until the circuit breaker measures were imposed, we were on track to be able to make the Allocated Office Space available to Dathena by the stipulated commencement date.

Unfortunately, with the prohibition on renovation works during the circuit breaker period, and with the restrictions on renovation works following the end of the circuit breaker period, we are not yet able to confirm when Dathena’s Allocated Office Space will be available. This is entirely dependent on when the Building and Construction Authority will allow us to resume our renovation works at OCBC [Centre] East. Please be assured that we [are] following up with the Building and Construction Authority very actively and very regularly on this. No one can be more eager than us to complete the renovation works at OCBC [Centre] so that we can open it to our members.

Accordingly, we are not able to agree that the membership agreement is terminated or frustrated. The delay in making the Allocated Office Space available is due to reasons entirely beyond our control. The delay is only temporary and we are

²⁸

AB728.

doing our best to persuade the authorities to allow us to finish the renovation works as quickly as possible. Also, the membership agreement allows us to provide alternative office space to Dathena in lieu of the originally specified Allocated Office Space, and it also provides that the member will not have any claim against us for any interruption, disruption or cessation of the use of the [centre] or the Allocated Office Space.

Notwithstanding our rights under the membership agreement, we do [recognise] the disruptions and difficulties which Dathena is experiencing as a result of the delay in moving into the Allocated Office Space, and we are willing to work with Dathena to find a mutually acceptable solution. On a without prejudice basis, for example, we would be willing to provide Dathena with alternative office space at preferential rates until OCBC [Centre] East is ready.

The court will return to the Notice of Termination as well as JustCo's Response in the course of this judgment. Dathena described JustCo's Response as entirely self-serving and disappointing.²⁹

31 It was JustCo's case that due to the CB Measures then in force, JustCo and/or the developers of OCBC CE could not apply for permission to install internet services "as essential services" (a category exempted from the CB Measures, as elaborated at [193]) because this work was considered as part of the prohibited construction category of works.

32 Notwithstanding Dathena's termination of the Membership Agreement, it was still prepared to consider JustCo's offers of alternative premises for its occupation. JustCo offered Dathena a temporary space at Verizon's premises at Ocean Financial Centre ("the Verizon Premises") for the period 6 to 31 May 2020, where Dathena had a pre-existing lease. Dathena could not accept the offer as the floor plan provided by JustCo for the temporary space showed that

²⁹ Aida's AEIC at para 3.9.13.

Dathena would be sharing that space with other companies, which was not ideal, given the safe-distancing and contact tracing requirements of Covid-19 regulations.³⁰

33 In her AEIC,³¹ Aida complained that despite not being able to deliver the OCBC Premises to Dathena either on 1 May or 1 June 2020, JustCo attempted to invoice Dathena for rent due on 1 June 2020 despite Sian-Tzu's email dated 16 April 2020 to Dathena where she said:³²

... the term will start only from 01 June 2020 instead of 01 May 2020 thus you will have some cost savings from there ...

Aida deposed she was shocked to receive from JustCo via email on 11 May 2020: (a) an invoice for \$21,239.50 for provision of Telecommunications & IT, rental of server racks and usage etc for the months of May and June 2020 (even though no such services were provided) and (b) another invoice for \$99,991.50 being rent for June 2020.³³ Item (a) was a double billing as Dathena had been billed and paid, for May 2020. She felt that JustCo simply wanted to keep charging Dathena even though nothing had been delivered.³⁴

34 When Dathena pointed out the invoicing mistakes to JustCo, Aida deposed that Sian-Tzu confirmed that JustCo would issue credit notes to offset Dathena's payment for May 2020 for the server rack rental charges, which JustCo did. However, nothing was said and to-date, no credit note(s) have been

³⁰ Aida's AEIC at paras 3.5.15(d)–3.5.16(a).

³¹ Aida's AEIC at para 3.8.

³² AB630 (Sian-Tzu's email to Aida dated 16 April 2020).

³³ Aida's AEIC at para 3.8.2.

³⁴ Aida's AEIC at para 3.8.3.

issued for JustCo's invoice(s) for June 2020. During Sian-Tzu's cross-examination it appeared that JustCo's failure to issue credit notes was JustCo's hope (even up to the trial according to her) of a "solution" to the dispute.³⁵

35 Following a teleconference call between Muffat and Aida with JustCo on 3 June 2020, Sian-Tzu emailed Dathena the same evening to offer premises at No 51 Bras Basah Road ("the Bras Basah Premises") at a monthly rent of \$48,000 for 45 open workstations or \$1,060 per workstation. While Dathena was prepared to consider the Bras Basah Premises, it was not in a prime location like the OCBC Premises and were more expensive as the OCBC Premises worked out to \$778.75 per workstation. Aida conveyed Dathena's views to JustCo. Notwithstanding Dathena's rejection, Aida agreed at Muffat's request to inspect the Bras Basah Premises.³⁶

36 Aida visited the Bras Basah Premises on 10 June 2020. She took a video to show to and discuss with Muffat subsequently. Muffat and/or Aida felt the Bras Basah Premises were not suitable (apart from its location) due to the fact that Dathena had to share the premises with personnel from other companies (including the only available conference room on the entire floor) and it did not have a storeroom which Dathena needed to store spare parts for its IT equipment.³⁷

37 Aida conveyed Dathena's reservations in [36] to Sian-Tzu on 15 June 2020 via WhatsApp³⁸ and repeated them on 18 June 2020 in a telephone call

³⁵ Transcripts dated 28 January 2021 at pp 560–561.

³⁶ Aida's AEIC at paras 4.1.1–4.1.6.

³⁷ Aida's AEIC at paras 4.1.8–4.1.9.

³⁸ AB750.

with JustCo.³⁹ However, Sian-Tzu continued to push the Bras Basah Premises to Dathena and presented the OCBC Premises as a second option projected to be ready by September 2020.⁴⁰

38 Out of goodwill, Muffat (with Aida) inspected the Bras Basah Premises on 1 July 2020 with Sian-Tzu. However, the visit only confirmed the unsuitability of the premises. Aida alleged in her AEIC that at the site visit, Sian-Tzu informed them JustCo was facing cash flow problems as many of its tenants were seeking to terminate or withdraw from their leasing arrangements due to Covid-19.⁴¹

39 On 7 July 2020,⁴² Muffat emailed Sian-Tzu to explain why both options presented by JustCo were not acceptable. During his cross-examination,⁴³ Muffat explained that the OCBC Premises could have allowed Dathena to expand its office to accommodate 120 staff but not the Bras Basah Premises. However, the OCBC Premises were no longer considered as there was no clarity as to when it would be delivered. On the same day, Sheena responded via email,⁴⁴ repeating JustCo's response, that the Membership Agreement was still in force and the OCBC Premises would be ready by 9 September 2020.

³⁹ Aida's AEIC at para 4.2.1(a).

⁴⁰ AB769 (Sian-Tzu's email dated 18 June 2020).

⁴¹ Aida's AEIC at para 4.2.1(c).

⁴² AB792 (Muffat's email to Sian-Tzu dated 7 July 2020).

⁴³ Transcripts dated 27 January 2021 at p 326.

⁴⁴ AB791–792.

40 By then, Dathena had signed a lease for alternative and larger premises at No 43 Niven Road and at No 11 Blair Road.⁴⁵ Hence, on 8 July 2020, Muffat and Aida, in a conference call with JustCo, repeated Dathena’s request for a refund of the Deposit as stated in the Notice of Termination.⁴⁶

41 Although Sheena had on 9 July 2020 emailed Muffat and Aida to say that Dathena’s request was “pending” the management’s decision,⁴⁷ she reverted by email on 16 July 2020 to say Dathena’s request was denied.⁴⁸ Attached to Sharlene’s email was JustCo’s letter signed by Kong Wan Long dated 14 July 2020 (“Kong’s Letter”) who is its co-founder and chief commercial officer. Kong’s Letter reiterated JustCo’s Response, insisted that the Membership Agreement remained in effect and binding, that JustCo did not agree to its termination and it did not accept that the Membership Agreement was frustrated.

42 On 22 July 2020, Dathena’s solicitors sent a letter of demand (“Dathena’s Letter of Demand”) to JustCo requiring refund of the Deposit within 14 days.⁴⁹

43 On 27 July 2020, Song responded on JustCo’s behalf to Dathena’s Letter of Demand reiterating JustCo’s Response and added in paras 4 and 5:⁵⁰

⁴⁵ Muffat’s AEIC at para 5.2.1; Transcripts dated 27 January 2021 at p 358.

⁴⁶ Muffat’s AEIC at para 5.2.3.

⁴⁷ AB791 (Sheena’s email to Muffat and Aida dated 9 July 2020).

⁴⁸ AB802.

⁴⁹ AB804–807.

⁵⁰ AB810–811.

4. There is also no frustration of the Membership Agreement.

a) Dathena could not in any case have access to the Allocated Office Space during the circuit breaker period.

b) We had offered to discuss with Dathena various accommodation options while its Allocated Office Space is being [finalised] for occupation after the Building and Construction Authority has permitted the works to resume ...

c) It is also not correct that Dathena has been left to wait indefinitely for its Allocated Space to be available. Apart from offering Dathena various accommodation options, we advised Dathena on 18 June 2020 that its Allocated Office Space would likely be available in September 2020. We followed up with Dathena on 7 July 2020 to confirm that its Allocated Office Space would be available on 9 September 2020. Given the length of the term of the Membership Agreement, a short adjournment of the commencement date necessitated by mandatory measures imposed by the government, coupled with our willingness to provide alternative interim measures, which are within our contractual rights, cannot be said to have frustrated the Membership Agreement.

d) Also, Dathena has not indicated that it was imperative that it must be able to move into its Allocated Office Space and no other space, immediately after the end of the circuit breaker period. We believe that the real reason underlying Dathena's desire to exit the Membership Agreement is due to business considerations which do not form the basis of frustration.

44 The comment in the first sentence in para 4(d) seems to suggest that no one in JustCo had apprised Song of the fact that JustCo had been informed by Dathena on 10 April 2020 that its lease at OGS expired on 5 May 2020 and it needed to have a new office immediately thereafter (as mentioned at [20(b)]). Indeed, it was Sian-Tzu's testimony that from the outset (in November 2019), she knew that Dathena's lease at OGS would expire in May 2020.⁵¹

⁵¹ Transcripts dated 28 January 2021 at p 470.

45 The last sentence in 4(d) above seemed to imply that it was Dathena's financial situation or difficulties that motivated the Notice of Termination and its need to reduce its headcount and office space. This was a reliance by JustCo on the notes that Sian-Tzu purportedly made of the meeting on 10 April 2020 with Dathena but, as noted earlier at [20], Aida had contested those comments. In any case, Song's surmise is at odds with the fact that Dathena's lease at No 43 Niven Road and No 11 Blair Road (as mentioned at [40]) was for space that was even larger than the OCBC Premises. Moreover, in its closing submissions,⁵² JustCo disclosed its "business was badly hit by the financial pressures brought about by the pandemic". Indeed, JustCo's conduct throughout its dealings with Dathena suggests it was operating under financial pressures.

46 Dathena took the view that JustCo's reply in [43] was wholly unfounded. In his AEIC, Muffat referred to his and Aida's telephone conversation with Sian-Tzu on 10 April 2020. He felt that Song's response in [43] demonstrated that JustCo had never really listened to Dathena's concerns and was attempting to force Dathena to choose one of two equally unviable options.⁵³

47 On 1 September 2020, Sheena suddenly sent an email to Dathena stating Dathena had not responded to JustCo's letter of 27 July 2020 at [43] and that the Membership Agreement and Allocated Office Space for the OCBC Premises would be available from 9 September 2020 to 30 April 2022.⁵⁴

⁵² JustCo's Closing Submissions at para 7.

⁵³ Muffat's AEIC at para 5.2.9(c).

⁵⁴ AB816.

48 As Dathena considered the Lease to have been terminated/frustrated by the Notice of Termination in [29], Aida immediately replied to Sheena’s email as follows:⁵⁵

We already served the notice of termination and/or frustration of the membership Agreement on JustCo on 29 May 2020 and our position still stands.

There is no basis for JustCo to consider that Dathena is continuing with the agreement.

49 Even so, Aida (on Muffat’s instructions) visited the OCBC Premises on 4 September 2020 as a matter of courtesy to ascertain if JustCo was lying again. Aida went alone as Muffat was busy. In her AEIC, Aida deposed that she felt “ambushed” as JustCo at the site inspection kept insisting that it assumed Dathena would continue with the Membership Agreement as the OCBC Premises were ready for occupation on 9 September 2020. According to Aida, JustCo wanted to strike a deal even though Muffat was not present and she was told that JustCo would keep the Deposit which would be set-off against the rent if Dathena moved in. Aida responded that she had no authority to make any decision as she was not part of the management of Dathena.⁵⁶

50 Aida took issue with JustCo’s Defence and Counterclaim⁵⁷ that alleged that she “had conveyed to [JustCo’s] representatives during the site inspection, amongst others, that [Dathena] intended to significantly reduce its staff size, and that [Dathena] is open to explore options to resolve the issues relating to the Membership Agreement amicably”. Aida contended that the allegation was

⁵⁵ AB815–816.

⁵⁶ Aida’s AEIC at paras 4.3.5–4.3.7; Transcripts dated 28 January 2021 at p 435, lines 17–21.

⁵⁷ At para 4(m).

misleading. She had only said that Dathena was downsizing an overseas office. She pointed out JustCo would have been aware of this fact as Dathena did not renew its Bangkok lease with JustCo. She asserted that Dathena did not intend to downsize its Singapore office and she never told JustCo it would do so.⁵⁸

51 Aida briefed Muffat on the outcome of the site inspection.⁵⁹ Muffat felt that the parties were at an impasse. Accordingly, he instructed Dathena’s solicitors to and they did, commence this suit on that day itself (*ie*, 4 September 2020).⁶⁰

The pleadings

The Statement of Claim (“SOC”)

52 In the SOC, Dathena relied, *inter alia*, on cl 2 in the Membership Agreement which states:

(a) [Dathena] accepts and [JustCo] agrees to provide business studio/suite facilities at [the OCBC Premises] (“Business Studio/Suite Services”) ... as set out below:

(i) (for Business Studio/Suite Services) the use of the Allocated Office Space together with the non-exclusive right in common with [JustCo] and other members on the [OCBC Premises] to use the passageways, lavatories, pantries, breakout areas and other common areas in [the OCBC Premises];

(ii) the non-exclusive use of fixtures, fittings, furniture and other facilities provided by [JustCo] at the [OCBC Premises] ...

⁵⁸ Aida’s AEIC at para 4.3.8.

⁵⁹ Aida’s AEIC at para 4.3.11.

⁶⁰ Muffat’s AEIC at para 5.3.9.

Dathena further referred to provisions in the Membership Agreement relating to payment of the Membership Fees and refundable Security Deposit, as mentioned at [7].

53 Dathena then averred that JustCo had breached the Membership Agreement by referring to the timelines that JustCo provided at [17], [22] and [24] but which it breached. Dathena contended that it did not accept and/or acquiesce to the delays proposed in JustCo's emails of 22 April 2020 at [23] and 18 May 2020 at [25]. Dathena added that as a result of JustCo's breaches, Dathena was unable to use the OCBC Premises from the commencement date of 1 May 2020. This amounted to a repudiatory breach of the Membership Agreement and a breach of a fundamental term and/or a breach depriving Dathena of the whole or substantial benefit of the Membership Agreement and/or it evinced JustCo's intention to no longer be bound by the Membership Agreement.⁶¹

54 Dathena said it was therefore entitled to and did, terminate the Membership Agreement on 29 May 2020 by the Notice of Termination. As a result, Dathena had suffered loss and damage by the claim amount (as set out at [29]).⁶²

55 In the reliefs set out in the SOC, Dathena claimed a declaration that the Membership Agreement was terminated with effect from 29 May 2020 and prayed for a refund of the Deposit.

⁶¹ At para 7.

⁶² At paras 8–9.

The Defence and Counterclaim

56 JustCo not only put up a blanket denial of Dathena’s allegations in the SOC but also countered with a substantial counterclaim.

57 In the Defence, JustCo relied heavily on provisions in the Membership Agreement to assert that Dathena did not have a claim of any nature against JustCo. In particular, JustCo relied on:⁶³

- (a) Clause 2(c), to say this gave JustCo the right to replace the Allocated Office Space (as defined in the Membership Agreement) with any other premises of comparable size in the event where it may be necessary due to JustCo’s operational requirements;
- (b) Clause 8(c)(i) to assert that Dathena is liable to JustCo for the Membership Fee for the remainder of the membership term;
- (c) Clause 12(b)(i) to say that Dathena has no claim whatsoever against JustCo;
- (d) Clause 11 to say that Dathena has to indemnify JustCo against all claims, demands, actions etc; and
- (e) the absence of a termination provision in the Membership Agreement to assert that the Notice of Termination is invalid.

58 Relying on the CB Measures (as well as their extension to 1 June 2020) and the emails set out earlier at [21] and [25], JustCo asserted that it did its best to offer alternative arrangements in the continued performance of the

⁶³ At paras 4 and 9(3).

Membership Agreement. JustCo further referred to its email of 13 April 2020 in [21] above to contend that it was prepared to “renegotiate the commercial terms” of the Membership Agreement. JustCo also referred to its email of 16 April 2020 where it offered Dathena alternative temporary space from 6 to 31 May 2020 given that no construction works were allowed at OCBC Premises during the period the CB Measures were in force.⁶⁴ JustCo added that it was prepared to push back the commencement date of the Lease to 1 June 2020.

59 JustCo added that it had offered Dathena alternative space for immediate occupation at the Bras Basah Premises which Dathena did not accept.

60 JustCo also asserted it had offered Dathena two options namely either:

- (a) occupy the Bras Basah Premises; or
- (b) occupy the OCBC Premises at a later date of 9 September 2020.

61 However, Dathena rejected both options on 7 July 2020. JustCo had informed Dathena that its rejection of both options did not amount to a termination of the Membership Agreement. The message was repeated in Kong’s Letter dated 14 July 2020 emailed on 16 July 2020 to Dathena (as mentioned at [41]).

62 JustCo refuted the allegations in Dathena’s Letter of Demand and rejected the demand for refund of the Deposit by Kong’s Letter.

⁶⁴ AB581.

63 On 1 September 2020, JustCo informed Dathena via email that the OCBC Premises would be available from 9 September 2020 to 30 April 2022. Dathena requested to visit the said premises. The site inspection took place on 4 September 2020 during which Dathena's representative Aida conveyed to the JustCo's representatives that (a) Dathena intended to significantly reduce its staff size and (b) Dathena wanted to resolve amicably the issues relating to the Membership Agreement. However, in bad faith, Dathena commenced this suit on the same day.

64 JustCo sought a declaration that Dathena had repudiated the Membership Agreement and that it was entitled to terminate the same. JustCo further counterclaimed from Dathena \$2,399,796 for the Membership Fee for the entire duration of the Lease.

65 Dathena's detailed Reply and Defence to the Counterclaim joined issue with JustCo's Defence and Counterclaim. Dathena averred that the parties had a pre-existing relationship since 2019 as Dathena had used JustCo's office space Bangkok between February 2019 and January 2020. In December 2019, Dathena had also taken office space from an entity related to JustCo at Ocean Financial Centre #16-01 (presumably the Verizon Premises). Dathena pleaded that after the Notice of Termination was issued, Dathena continued to engage JustCo in good faith and without prejudice to Dathena's termination of the Membership Agreement, as the OCBC Premises were not ready for Dathena's use by the commencement date. Dathena referred to the first timeline in [17] that Dathena failed to meet in regard to the IT works.

66 Dathena averred that the Membership Agreement was based on JustCo's standard written terms of business. It contended that cl 2(c) is unenforceable by

reason of ss 3 and 11 of the Unfair Contracts Terms Act (Cap 396, 1994 Rev Ed) (“the UCTA”). In the alternative, cl 2(c) ought to be read *contra proferentum* against JustCo.

67 As for JustCo’s Counterclaim, Dathena alleged that JustCo was obliged to take all reasonable steps but failed, to mitigate its losses and is not entitled to recover the Membership Fees in full or in part.⁶⁵

68 JustCo filed a Rejoinder where it joined issue with JustCo’s Defence and Counterclaim. JustCo averred that the server room was set up prior to 6 April 2020 (including installation of an internet router by M1 Dathena’s ISP). IT testing and commissioning, clearing and preparation works were disrupted by the CB Measures as the period during within which they were to take place fell with the CB Measures period. JustCo added that it went above and beyond what was required in the Membership Agreement to render assistance and suggest alternatives for housing Dathena’s servers.⁶⁶ JustCo further alleged that by its conduct, Dathena showed unequivocally that the Membership Agreement could still be performed and that it was still willing to perform the same after 1 May 2020.⁶⁷

69 In response to JustCo’s Rejoinder, Dathena filed a Surrejoinder in which it asserted that the server room was still not ready by 6 April 2020. While the router had been installed, the internet line had not yet been activated.⁶⁸

⁶⁵ Reply and Defence to Counterclaim at para 38.

⁶⁶ Rejoinder at para 3.

⁶⁷ Rejoinder at para 4.

⁶⁸ Surrejoinder at para 2.

The evidence

70 Five witnesses testified during the four days’ trial before this court. Dathena had three witnesses in Aida, Jeremie and Muffat while JustCo’s witnesses were Sian-Tzu and Sheena.

Dathena’s case

71 The facts that Aida deposed to in her AEIC have been set out in [5] to [51] above with other facts being extracted from Muffat’s AEIC.

72 In cross-examination, Aida agreed that Dathena did not convey to JustCo before 19 January 2020 its requirement to have the server room set up by a certain timeline. Neither was the requirement included in the Appendix to the Membership Agreement.⁶⁹ However, Aida’s email to Sharlene of 25 March 2020 stated (albeit for the first time) that Dathena required to move in and set up its equipment (servers) in the OCBC Premises between 27–30 April 2020.⁷⁰ Counsel for JustCo, Mr Leong, pointed out to Aida that JustCo did not promise to meet this timeline.⁷¹ Even so, a day earlier on 24 March 2020,⁷² Aida had been given timelines by Sharlene in graph format which included setting-up the server room between 30 March–6 April 2020.⁷³ It should be noted that on 9 January 2020,⁷⁴ Dathena had apprised JustCo of its IT requirements but did not indicate a deadline.

⁶⁹ Transcripts dated 26 January 2021 at pp 14–15; AB105.

⁷⁰ AB551.

⁷¹ Transcripts dated 26 January 2021 at p 37.

⁷² AB504.

⁷³ AB507 (Dathena Timeline).

⁷⁴ AB157–158 (Aida’s email to Sian-Tzu).

73 In his cross-examination of Aida,⁷⁵ Mr Leong sought to make a distinction. He said there was a difference between *housing* the staff of Dathena at the OCBC Premises which was, and *housing* Dathena’s servers which was not, JustCo’s contractual obligation. Aida disagreed stating it was for both purposes. She further disagreed with Mr Leong’s suggestion that after the CB Measures were implemented, Dathena’s priority shifted from wanting office space to wanting server space.⁷⁶

74 Because of JustCo’s delays and/or failure to give any updated timelines with regard to the OCBC Premises to Dathena, Aida testified Dathena moved its servers to a third party data centre provider, Volden Internet Solutions Pte Ltd (“Volden”) located in Changi because Dathena’s space at the Verizon Premises could not house its servers.⁷⁷

75 Mr Leong further suggested to Aida (who disagreed) that it was Dathena’s responsibility not JustCo’s, to arrange with M1 to set up the internet service line at the OCBC Premises. She testified that JustCo should but did not apply for M1 as an “essential service” to be allowed to do the installation.⁷⁸ She further disagreed that it was Dathena’s not JustCo’s responsibility to apply to the relevant authorities for exemption so that M1 could set up the internet connection. She pointed out that JustCo was the tenant *not* Dathena, of the OCBC Premises.⁷⁹

⁷⁵ Transcripts dated 26 January 2021 at p 45.

⁷⁶ Transcripts dated 26 January 2021 at p 54.

⁷⁷ Transcripts dated 26 January 2021 at pp 50, 72.

⁷⁸ Transcripts dated 26 January 2021 at p 60.

⁷⁹ Transcripts dated 26 January 2021 at p 67.

76 Mr Leong had also put it to Aida (who disagreed) that the Verizon Premises were a real option and alternative for Dathena to move to, when the OCBC Premises were not ready by 1 May 2020.⁸⁰ He drew her attention to the fact that JustCo even introduced Dathena to a third party (“KDDI”) on 5 May 2020 who could provide Dathena with server racks and a data centre to house its servers temporarily until the OCBC Premises were ready for occupation.⁸¹ On 18 May 2020, in accordance with Dathena’s request, JustCo cancelled the rental for the server racks.⁸²

77 As for the Bras Basah Premises, JustCo’s case was that Dathena used the excuse that it lacked storage space to reject it as a real option. Not surprisingly, Aida disagreed pointing out that those premises were too small to house all staff of Dathena as well as the fact that although it is not in as prime a location as the OCBC Premises, it was more expensive on a per square foot basis.⁸³

78 Aida testified that JustCo’s offer to Dathena to lease the OCBC Premises for two years starting in September 2020 with two months’ rent waiver was not a viable option because Dathena had already issued the Notice of Termination and JustCo kept pushing back the commencement date. Aida also disagreed with Mr Leong’s suggestion that Dathena backed out of the Membership Agreement for the OCBC Premises because it no longer made financial sense to Dathena as its expansion plans were put on hold due to the pandemic.⁸⁴

⁸⁰ Transcripts dated 26 January 2021 at p 90.

⁸¹ AB659 (KDDI’s email to Aida).

⁸² AB676.

⁸³ Transcripts dated 26 January 2021 at pp 125–126.

⁸⁴ Transcripts dated 26 January 2021 at p 130.

79 Jeremie was, at all material times, Dathena's head of its IT team. His role, as his designation suggests, was to take charge of the internet and computers set-up for Dathena at the OCBC Premises.⁸⁵ In his AEIC,⁸⁶ Jeremie explained the importance of Dathena's IT requirements at the OCBC Premises.

80 For security reasons and in their interests, Jeremie deposed that Dathena stored their clients' data in Dathena's servers rather than on the cloud. In addition, Dathena's operations in Singapore and overseas rely on Dathena's servers in Singapore. Jeremie therefore had to ensure that Dathena's servers ran smoothly and without interruption for both its clients and employees (both local and overseas). If there was any outage on the data centres hosting the servers and/or downtime on the servers, there would be severe disruption to Dathena's operations globally as their clients would face downtime and Dathena as well as its overseas offices, may be unable to work. It was therefore undesirable for Dathena to relocate its servers often, as frequent moves would lead to service disruption and heighten business continuity risks.

81 Jeremie was aware that Aida handled negotiations with JustCo on the lease for the OCBC Premises and would have conveyed to the latter the IT requirements of Dathena. If the OCBC Premises could not accommodate Dathena's IT requirement, he doubted that Dathena would have considered leasing the same. Jeremie deposed that Dathena required a dedicated server room with certain hardware specifications.⁸⁷ He referred to and relied on Aida's

⁸⁵ Jeremie's AEIC at para 1.1.1.

⁸⁶ Jeremie's AEIC at paras 2.1.2–2.1.3.

⁸⁷ Jeremie's AEIC at paras 3.1.1–3.1.4.

email to Sian-Tzu dated 9 January 2020⁸⁸ (sent after consulting him) where Dathena's IT requirements were clearly spelt out.

82 On or about 23 January 2020 (as mentioned at [16]), Jeremie, along with Aida, Sai Tun and Lylian Kieffer, met up with JustCo's representatives.⁸⁹ On Dathena's side there were concerns regarding the date when the server room at the OCBC Premises could be set up as well as when Dathena could have early access to those premises. Jeremie deposed it was crucial for Dathena to move its servers into the OCBC Premises before it moved its staff out of OGS, to ensure business continuity and minimise disruptions to Dathena's operations. He recalled he had emphasised the importance of the server set-up to JustCo's representatives many times in their interactions after 23 January 2020. In particular, Jeremie stated he had highlighted Dathena's need for power, air-conditioning and networks to be installed early. Dathena also requested early access to the server room so that its ISP could complete connecting its internet line and Dathena could ensure smooth installation of its equipment and servers.

83 In response to JustCo's email (from Sharlene) dated 30 January 2020 requesting IT requirements and port-mapping,⁹⁰ Jeremie replied on 5 February 2020 setting out in detail Dathena's requirements for (a) network; (b) physical set-up and (c) office arrangement as well as providing a network diagram by way of illustration.⁹¹ Sian-Tzu replied to Jeremie's queries on 7 February 2020.⁹² In answer to his following question:

⁸⁸ AB157–158.

⁸⁹ Jeremie's AEIC at para 3.2.2.

⁹⁰ AB166.

⁹¹ AB206.

⁹² AB236

How early can we get our ISP deployed in the OCBC JustCo server room?

Sian-Tzu replied:

The server room is targeted to be ready between 10-20 March. We can reorganise this once you confirm your ISP.

84 After further toing and froing, Sharlene requested Jeremie to confirm on 12 February 2020 the additional chargeable works for additional quotes for JustCo’s assistance with IT-related installation set-up.⁹³ Aida responded on 19 February 2020 to confirm Dathena’s requirements and the charges payable.⁹⁴

85 Between end-February and end-March 2020, Jeremie and/or Sai Tun corresponded with Sian-Tzu, Sharlene and Raymond Ow (“Ow”) as well as KDDI’s David Hen on Dathena’s IT requirements and logistical set-up.⁹⁵

86 Jeremie referred to Sharlene’s email of 24 March 2020 (as mentioned at [17]) which showed that the original timeline of 10–20 March 2020 for IT works was shifted to 23 March–24 April 2020.

87 Due to the CB Measures which required employees to telecommute from home, Jeremie deposed in his AEIC that Dathena required a static Internet Protocol (“IP”), not the dynamic IP that JustCo had.⁹⁶ This was to ensure that Dathena’s employees working from home or overseas could remotely access Dathena’s internet domain.

⁹³ AB245.

⁹⁴ AB244–245.

⁹⁵ Jeremie’s AEIC at para 3.2.8.

⁹⁶ Jeremie’s AEIC at para 4.2.1.

88 Jeremie linked Ow up with M1 in mid-March 2020 so that JustCo could grant M1 inspection of and access to the OCBC Premises to prepare for internet connection.⁹⁷ On 13 March 2020, M1 emailed Dathena and provided the following timelines:⁹⁸

- (a) Site survey: 17–19 March 2020;
- (b) Fibre cabling: 19–23 March 2020;
- (c) Fibre router installation: 23–27 March 2020.

89 For all three installations, M1 needed to liaise with the “building management” of OCBC CE. By 1 April 2020, only item (c) was outstanding. Consequently, Jeremie emailed Ow on 1 April 2020 to inform JustCo. Once M1 had installed the router, Jeremie stated that Dathena would like to start moving in its servers, firewall and switches. Ow’s response on the same day merely said “[w]e will revert again on this and wait for my Que [*sic*]”.⁹⁹

90 Jeremie ascertained on 3 April 2020 that the router had been installed but the internet line was not activated. He emailed M1 copied to JustCo, on the same day to inquire as to the reason.¹⁰⁰ M1 replied to inform that its “Field Engineer will be going down to check, and [M1] will need [Dathena’s] confirmation if [Dathena] will be available”.¹⁰¹

⁹⁷ Jeremie’s AEIC at para 4.2.2.

⁹⁸ AB428–429.

⁹⁹ AB516.

¹⁰⁰ Jeremie’s AEIC at para 4.2.8 and see AB528–529.

¹⁰¹ AB526–527.

Ow’s unhelpful response was as follows:¹⁰²

Sorry no one will be around at the work site, due to Govt. rule.
We will re-arrange on the date and timing again.

Without any further action by JustCo, Jeremie emailed Aida, Lylian Kieffer and Sai Tun on 8 April 2020 and said:¹⁰³

FYI, JustCo is delaying the internet installation, which will likely prevent us from moving in time should we stick to the date of the 4th of May.

91 It did not help either that on the same day, Sian Tzu emailed Aida to say that the lockdown would delay completion of the whole OCBC CE since no construction work was allowed.¹⁰⁴ Dathena’s allocated office space would only be ready 29 May or 1 June at the earliest and “subject to the actual timeline that we are working on currently, and provided that the lockdown is not extended”.

92 In response, Aida emailed Sian-Tzu on 15 April 2020 as follows:¹⁰⁵

1. Can JustCo or OCBC apply for the Essential Services under MOM for M1 to install internet services?
2. Once CB ends on the 4th, will the server room in OCBC be ready by then? If not, what is the timeline?
3. Can you please send us the new timeline as if it would be ready 29th May or 1st June?

Moving the server to Verizon is not an option for us. Question 1 is a priority for us, so please let us know what the processes on your side are. We would need to start planning ASAP.

¹⁰² AB526.

¹⁰³ AB526.

¹⁰⁴ AB583.

¹⁰⁵ AB582–583.

93 Despite Aida's rejection of the Verizon Premises, Sian-Tzu replied to Aida's above email on 16 April 2020 stating, *inter alia*:¹⁰⁶

Temporary Space from 06 May – 31 May 2020

Since some of your team is already seated at Verizon, we thought it would be easiest to house everyone in that centre as well.

...

Monthly Lumpsum rental - SGD40,900.

...

With regard to the issue on the servers, please find our responses below ...:

1. Unfortunately internet is not under essential services in this case as this is part of the construction category;
2. We expect the server room and permanent and reliable power supply to be ready 2 weeks upon lifting the circuit breaker. In this case, we are looking at about 19 May. You may then bring in your servers. If you are unable to house the servers in your current premises until 19 May, we have actually found options where you can house your servers on short term rental (2-4 weeks) in a data centre. We expect the high level cost to be about SGD4,000/Month. The moving cost and installation to be done by Dathena.
3. Please find attached timeline that we have prepared to capture the changes.

94 All sense of urgency on the part of Dathena as conveyed in Aida's email of 15 April 2020 appeared to be lost on JustCo, judging by its above reply. The timeline Sian-Tzu referred to in her para 2 meant that Dathena would need to wait for two weeks after the CB Measures ended on 1 June 2020 (*ie*, until 15 June 2020 at the earliest), to be able to move into the OCBC Premises.

¹⁰⁶ AB581.

95 In his AEIC, Jeremie explained why the option in para 2 as proposed by JustCo was not viable.¹⁰⁷ The alternative third party data centre that JustCo recommended to Dathena (for short term rental of server storage space) (*ie*, KDDI) was not suitable because it provided an internet speed and bandwidth of 20Mb per second which was 100 times slower than what Dathena's servers required as a technology and cybersecurity firm. M1 could have provided a speed of 2 Gb/second at the OCBC Premises had M1 been able to complete the internet installation there. When Sian-Tzu testified, it was noted that JustCo only suggested introducing KDDI to Dathena as late as on 30 April 2020.¹⁰⁸ KDDI was wholly inadequate for Dathena's server storage requirements.

96 Dathena had managed to obtain an extension up to 8 June 2020 from its landlord to vacate the OGS Premises.¹⁰⁹ Based on the revised timeline given by JustCo in [94], it meant that after Dathena vacated OGS on 8 June 2020, it had nowhere to go if the OCBC Premises could only be ready in mid-June 2020. Jeremie had explained (at [80]) the risks involved in moving the servers for a short-term period. Due to the exigencies of the situation, Jeremie deposed that Dathena had no alternative but to move Dathena's servers to Vodien in mid-May 2020.

97 Notwithstanding the delays Dathena encountered, Jeremie and Aida continued their email exchanges with JustCo between 19–21 May 2020 in regard to the IT set-up at OCBC Premises until Jeremie was told about Sian-

¹⁰⁷ Jeremie's AEIC at para 4.4.2.

¹⁰⁸ AB635; transcripts dated 28 January 2021 at p 536 at lines 11–12.

¹⁰⁹ Jeremie's AEIC at para 4.4.2.

Tzu's telephone call to Muffat on 26 May 2020, which prompted the issuance of the Notice of Termination in [29].¹¹⁰

98 During Jeremie's cross-examination, JustCo's counsel Ms Chai sought to show that it was due to no fault on JustCo's part that the OCBC Premises could not be ready for occupation by Dathena on 1 May 2020. She suggested that it was Dathena that was responsible for arranging with M1 for internet connectivity.¹¹¹ She added that M1 was responsible for the delay in activating the internet line¹¹² because it failed to activate the router within the scheduled timeline mentioned at [88] (*ie*, 23–27 March 2020) set by M1's Mr Lim Ming Yao in his email to Jeremie of 13 March 2020.¹¹³ Ms Chai went further to suggest to Jeremie that due to the CB Measures, it was in JustCo's interests to prevent anyone from entering the construction site at OCBC CE during the circuit breaker period. Jeremie's response was to point out that JustCo should have made some efforts to arrange for Dathena to move forward.¹¹⁴

99 Ms Chai further suggested to Jeremie that Ow's email of 8 April 2020 set out earlier at [90] was to safeguard JustCo's interest. Ms Chai's cross-examination of Jeremie placed the burden on Dathena to request JustCo to apply for exemption from the Ministry of Manpower ("MOM") to grant access to the OCBC Premises for M1's technicians to activate the internet connection.¹¹⁵ The court rejects JustCo's position for the reason set out at [115] below.

¹¹⁰ Jeremie's AEIC at para 4.4.3.

¹¹¹ Transcripts dated 26 January 2021 at pp 195–200.

¹¹² Transcripts dated 26 January 2021 at pp 202–203.

¹¹³ AB531.

¹¹⁴ Transcripts dated 27 January 2021 at pp 221–222.

¹¹⁵ Transcripts dated 27 January 2021 at pp 224–226.

100 Muffat was Dathena's third and last witness. His evidence-in-chief very much echoed Aida's testimony which has been dealt with above at [5] to [51]. Hence, the court turns to Muffat's testimony during cross-examination.

101 JustCo's case put to Muffat in cross-examination was identical to that put to Aida – that Dathena never informed JustCo prior to the execution of the Membership Agreement that its server room had to be put up by a certain date.¹¹⁶

102 It was also suggested to Muffat that as a cybersecurity company, its staff need not be physically present at the location of its servers or where a cybersecurity issue arises; Muffat disagreed.¹¹⁷ He explained that Dathena has two activities: (a) it develops software or artificial intelligence which can be done remotely but with high collaboration;¹¹⁸ (b) servicing its clients which requires Dathena to have confidential information from its clients' data centre.¹¹⁹ For activity (b), working remotely may be complicated from time to time for security reasons.¹²⁰ It was Dathena's preference to have its staff physically near its servers in case there is an outage.¹²¹ He added that while he had not experienced an outage during his years in Singapore, Dathena had experienced outage internally due to hardware deficiency and it require quick intervention on Dathena's part.¹²²

¹¹⁶ Transcripts dated 27 January 2021 at p 263.

¹¹⁷ Transcripts dated 27 January 2021 at p 265.

¹¹⁸ Transcripts dated 27 January 2021 at p 270.

¹¹⁹ Transcripts dated 27 January 2021 at p 269.

¹²⁰ Transcripts dated 27 January 2021 at p 269.

¹²¹ Transcripts dated 27 January 2021 at p 271.

¹²² Transcripts dated 27 January 2021 at p 273.

103 Mr Leong went further to suggest to Muffat that because Dathena was cash-strapped, it did not accept any of the alternative proposals put forth by JustCo. Not surprisingly, Muffat disagreed. He said he gave Aida a budget to set up the new office at the OCBC Premises and compared with the Bras Basah Premises, the former was cheaper on a per seat basis.¹²³

104 Mr Muffat's attention was drawn to the fact that the Membership Agreement had no termination clause.¹²⁴

105 Notwithstanding the Notice of Termination, it has been noted earlier at [37] that JustCo had emailed Dathena on 18 June 2020 offering the Bras Basah Premises at a reduced monthly rate of \$38,000 instead of the original asking price of \$48,000.¹²⁵

JustCo's case

106 As stated earlier at [70], Sian-Tzu and Sheena were JustCo's witnesses. Both their AEICs were not particularly helpful as they were purely narrative in content with no personal input. Sian-Tzu, JustCo's first witness, reports to Sheena who is her manager. For expediency, the court will review her testimony in cross-examination as her chronology of events did not differ from Dathena's version.

¹²³ Transcripts dated 27 January 2021 at pp 314–315.

¹²⁴ Transcripts dated 27 January 2021 at p 299 and 28 January 2021 at p 424.

¹²⁵ AB769.

107 In her AEIC and oral testimony,¹²⁶ Sian-Tzu confirmed that JustCo's lease at the Verizon's Premises was a temporary measure to house 22 employees until a larger permanent office could be found. In cross-examination, Sian-Tzu said she also knew by 9 January 2020 that Dathena needed to house its servers in a server room and its other equipment in a storeroom.¹²⁷ In fact, JustCo had invoiced Dathena on 19 March 2020 \$5,000 for the server room's server rack.¹²⁸ This was followed by Sharlene's email 24 March 2020 giving timelines of 30 March–6 April 2020 and 1–24 April 2020 respectively, for the setting up of the server room and Dathena's equipment and installation respectively.¹²⁹

108 Sian-Tzu was also aware from her and Sharlene's conference call with Muffat and Aida on 10 April 2020 that Dathena may have to vacate OGS by 5 May 2020.¹³⁰ In her AEIC,¹³¹ Sian-Tzu deposed that both Muffat and Aida in that call had requested for JustCo to waive the Membership Fee for a few months or reduce the same temporarily because Dathena's business had been affected by Covid-19. She was told Dathena intended to reduce its headcount to about 65–70 from the original figure of 120. She added that JustCo could not accede to Dathena's request and informed Dathena accordingly in her email dated 13 April 2020.¹³² As pointed out earlier at [20], Aida disputed Sian-Tzu's version of the conversation in that conference call.

¹²⁶ Sian-Tzu's AEIC at para 6; transcripts dated 28 January 2021 at p 465.

¹²⁷ Transcripts dated 28 January 2021 at p 472; AB66.

¹²⁸ AB498.

¹²⁹ AB504 and 507.

¹³⁰ Transcripts dated 28 January 2021 at p 518.

¹³¹ Sian-Tzu's AEIC at paras 30–31.

¹³² AB558–559.

109 Sian-Tzu confirmed that by 13 April 2020, JustCo had billed Dathena \$18,350 for “Telecommunications & IT” as well as “Workspace Services”.¹³³ The provision of these services would come under the ambit of “Additional Services” in cl 2(a)(iii) of the Membership Agreement alluded to earlier at [7(c)] above.

110 On the issue of giving Dathena early access to the server room after 6 April 2020, Sian-Tzu was not sure it was a contractual obligation; she said JustCo was just giving Dathena a helping hand.¹³⁴

111 It was during her cross-examination that Sian-Tzu acknowledged that besides its limited capacity (for only 64 persons) to accommodate all the staff of Dathena, the Verizon Premises were also not exclusive to Dathena, unlike the OCBC Premises.¹³⁵ This can be seen when the floorplan of the OCBC Premises is compared with that of the Verizon Premises.¹³⁶ Further, the Verizon Premises did not have server or storage space. Sian-Tzu conceded that the Verizon Premises was only a temporary solution that was offered to Dathena.¹³⁷ In answer to the court’s questions,¹³⁸ Sian-Tzu agreed that the OCBC Premises had more exclusivity than the Bras Basah Premises. Notwithstanding those negative factors, not only was JustCo very insistent in Dathena’s moving to the Verizon Premises but it further expected Dathena to bear the costs of moving

¹³³ AB846.

¹³⁴ Transcripts dated 28 January 2021 at p 505.

¹³⁵ Transcripts dated 28 January 2021 at p 531.

¹³⁶ AB150 and 588.

¹³⁷ Transcripts dated 28 January 2021 at pp 556–557.

¹³⁸ Transcripts dated 28 January 2021 at pp 612–613.

there and from there, move again to the OCBC Premises when the latter premises were ready as mentioned at [93].

112 Cross-examined, Sian-Tzu disagreed that it was “unfair” to expect Dathena to bear two sets of moving costs, one from OGS to the Verizon Premises and the second set from the latter to the OCBC Premises in order to accommodate JustCo. She said that “everyone was just trying to manage the situation”.¹³⁹ The court reminded her that, in relation to the parties’ respective obligations under the Membership Agreement, Dathena was not the party at fault as it was JustCo that was late and failed to meet the timelines – why then should Dathena bear the additional moving charges? Sian-Tzu’s explanation was that the delay was not caused by JustCo *per se* – it could not continue with construction due to the pandemic. As will be elaborated below, her excuse is not tenable in the light of the court’s findings below at [113]–[116].

113 Sian-Tzu’s attention was drawn by counsel for Dathena, Mr Tay, to JustCo’s revised timelines showing it had re-scheduled the setting-up of Dathena’s server room to 14–18 May 2020 when the earlier timeline was 30 March–6 April 2020.¹⁴⁰ Mr Tay pointed out 6 April 2020 was the eve of the implementation of CB Measures. Had JustCo adhered to its own earlier timeline, Dathena’s servers could have been installed and internet connectivity activated before 7 April 2020 if there had been power supply. Sian-Tzu opined that the May 2020 timelines were an error.¹⁴¹ However, as the revised schedule

¹³⁹ Transcripts dated 28 January 2021 at pp 541–542.

¹⁴⁰ AB at p 590 (Dathena Timeline).

¹⁴¹ Transcripts dated 28 January 2021 at pp 544–545.

was prepared by Sharlene who did not testify, her answer did not advance JustCo’s case.

114 Sian-Tzu disclosed that she relied on information from JustCo’s own IT team to say that the building control authorities would not have allowed access to the OCBC Premises during the CB Measures period. She did not conduct her own independent checks to verify whether IT works constituted essential services that were exempted from CB Measures restrictions.¹⁴² She was not even aware of Time Limited Exemptions from CB Measures until Aida brought it up and she then checked with her IT team. Again, Sian-Tzu took her team’s word that Time Limited Exemption was strictly disallowed without verifying the information independently. In fact, JustCo’s IT team made no attempts to apply for such exemption.¹⁴³ In the light of JustCo’s inaction, Sian-Tzu’s answer during cross-examination that “we are always looking to help” rings hollow.¹⁴⁴

115 Further, Sian-Tzu deposed that:¹⁴⁵

[JustCo’s] obligation in relation to the server room was to ensure that the space would be ready for [Dathena] to install its equipment. As M1 was directly contracted by [Dathena] to be its internet service provider, [JustCo] had no obligation to follow up with the installation or activation of internet fibre services by M1.

This ignored the realities of the situation and the legal niceties – that JustCo as the tenant (and not Dathena) had the *locus standi* to gain access to OCBC

¹⁴² Transcripts dated 29 January 2021 at pp 730–733.

¹⁴³ Transcripts dated 28 January 2021 at pp 537–538.

¹⁴⁴ Transcripts dated 28 January 2021 at p 619.

¹⁴⁵ Sian-Tzu’s AEIC at para 24(d).

Premises if it had made efforts to obtain a Time Limited Exemption for M1 from MOM to activate the internet connectivity.

116 Sian-Tzu had also informed Aida that:¹⁴⁶

the installation of internet services is not an essential service, and therefore, [JustCo] could not apply to the government for permission to install internet services in the OCBC [Premises] during the circuit breaker period.

This clearly showed that JustCo was unaware of Time Limited Exemptions to Covid-19 restrictions on work activities and JustCo's misapprehension of what was lacking in relation to Dathena's internet connectivity. All that was required was for the internet line to be *activated*, not *installed*. This was made even clearer when the court questioned Sian-Tzu.¹⁴⁷

117 Despite repeatedly being asked in cross-examination, Sian-Tzu would not agree that JustCo's attempts on 18 June 2020 to have Dathena sign a new agreement pertaining to either taking up (a) the OCBC Premises or (b) the Bras Basah Premises amounted to a new agreement.¹⁴⁸ She maintained it was an amendment to the Membership Agreement.¹⁴⁹ To make matters worse for Dathena, should it opt for the Bras Basah Premises, Sian-Tzu's email of 18 June 2020¹⁵⁰ stated that it had to pay JustCo \$13,050 for reinstatement and other costs JustCo had apparently incurred at OCBC Premises even though such costs were attributable to JustCo's actions.

¹⁴⁶ Sian-Tzu's AEIC at para 33(a).

¹⁴⁷ Transcripts dated 29 January 2021 at p 731–737.

¹⁴⁸ AB at pp 769–770 (Sian-Tzu's Email to Muffat and Aida dated 18 June 2020).

¹⁴⁹ Transcripts dated 28 January 2021 at p 620.

¹⁵⁰ AB751.

118 During her re-examination Sian-Tzu sought to suggest that the delay in delivering to Dathena the OCBC Premises was a blessing as Dathena could not in any event have used the space during the CB Measures period thereby saving rent. Further, even after the CB Measures ended on 1 June 2020, only half of Dathena's workforce would have been allowed to resume working at its office. Hence, a smaller office like the Verizon Premises would have suited Dathena better and result in costs savings in rent.¹⁵¹ Such self-justification does not detract from the fact that the four months' delay in commencement of Dathena's lease was simply not what parties had agreed to under the terms of the Membership Agreement.

119 The same observation would apply to Sian-Tzu's testimony that the fact that JustCo offered Dathena the OCBC Premises at reduced rental rates meant that it was "not relevant to bring anything about comparable space",¹⁵² and that it was also not relevant to talk of a substitute space for Dathena in the light of its reduced workforce at its office.¹⁵³

120 It would be appropriate at this stage to point out that JustCo's allegation that Aida had, at the Bras Basah Premises site meeting on 1 July 2020, said Dathena did not want the OCBC Premises because they downsized their operations and needed less office space requirements is contradicted by Dathena's act in taking bigger premises at No 43 Blair Road and No 11 Niven

¹⁵¹ Transcripts dated 29 January 2021 at p 693.

¹⁵² Transcripts dated 29 January 2021 at p 695.

¹⁵³ Transcripts dated 29 January 2021 at p 696.

Road. Yet, when she was confronted with this fact, Sin-Tzu disagreed that she must have misheard what Aida said.¹⁵⁴

121 Sian-Tzu disclosed that by the time of the trial, JustCo had found a replacement tenant for the OCBC Premises for six months; the lease signed in December 2020 commenced on 1 February 2021.¹⁵⁵ Despite that fact, JustCo did not amend its Counterclaim filed on 28 September 2020, to reduce its claim for \$2,399,796 which was the Membership Fee for the entire Lease period from 1 May 2020 to 30 April 2022 (*ie*, 24 months).¹⁵⁶ Although the rent JustCo received is about 6% lower than Dathena’s under the new contract,¹⁵⁷ JustCo sought to claim the full value of the Membership Fee, which – on JustCo’s own evidence – could not have been an accurate estimation of its damages caused by the plaintiff’s alleged breach.

122 Sian-Tzu repeatedly mentioned that the Covid-19 pandemic rendered it impossible for JustCo to fulfil its contractual obligations to Dathena (which is addressed at [194]). That is the test for frustration under s 2(2) of the Frustrated Contract Act (Cap 115, 2014 Rev Ed) (“the FCA”) and it contradicts the stand taken in JustCo’s Response mentioned at [30] as well as by Sheena, that there was no frustration of the Membership Agreement.

123 Although cl 2(c) of the Membership Agreement gave JustCo the right to provide alternative premises to Dathena to replace the OCBC Premises, Sian-

¹⁵⁴ Transcripts dated 29 January 2021 at p 632.

¹⁵⁵ Transcripts dated 28 January 2021 at p 451; Transcripts dated 29 January 2021 at p 667.

¹⁵⁶ Defence and Counterclaim at para 18.

¹⁵⁷ Transcripts dated 29 January 2021 at p 664.

Tzu admitted that JustCo did not invoke that clause when she offered Dathena the alternatives of the Bras Basah and Verizon Premises. It had already been noted earlier (at [32] and [35]) that neither premises could be considered comparable in terms of size, which Sian-Tzu admitted was JustCo's obligation to provide under that clause.¹⁵⁸

124 I move now to look at Sheena's testimony. She deposed that she was not involved in direct communication with Dathena until she participated in the conference call with Muffat and Aida on 26 May 2020 although she was in the email loop for communication between both parties.¹⁵⁹ Neither was Sheena present when Aida made a site visit to the Bras Basah Premises on 1 July 2020 despite which, Sheena deposed to what transpired thereat.¹⁶⁰

125 In her email to Muffat on 7 July 2020,¹⁶¹ Sheena stated that the OCBC Premises "will now be ready on 9 September 2020". This was more than four months after the agreed commencement date of 1 May 2020 for Dathena's lease. The court had pointed out to Sian-Tzu that four months equated to $\frac{1}{6}$ of the 24 months' term under the Membership Agreement.¹⁶² Further, despite the 4 months' delay in commencement of the lease, Dathena's lease would still terminate on 30 April 2022 which meant that the lease could have only been for 20 months in any event, not 24 as JustCo counterclaimed.

¹⁵⁸ Transcripts dated 29 January 2021 at p 655.

¹⁵⁹ Sheena's AEIC at para 7.

¹⁶⁰ Sheena's AEIC at para 20.

¹⁶¹ AB776.

¹⁶² Transcripts dated 29 January 2021 at p 639.

126 Sheena’s involvement in the dispute after the Notice of Termination on 29 May 2020 is also largely irrelevant. Her version of the teleconference on 16 July 2020 between herself and Sian-Tzu with Muffat and Aida did not differ very much from Dathena’s version.¹⁶³

127 However, for Sheena to depose¹⁶⁴ that Muffat’s email of 7 July 2020 did not state that the Membership Agreement was terminated is to conveniently overlook the Notice of Termination as well as Muffat’s email to Song on 1 June 2020 which stated:¹⁶⁵

Let’s agree to disagree. So far, we did not receive any viable alternative from JustCo that would suit our needs. We are now out of options (we left our previous office), hence we consider the agreement frustrated.

128 Despite the above message and Dathena’s Letter of Demand,¹⁶⁶ Sheena opined in her AEIC that she believed Dathena had accepted that the Membership Agreement remained operational because it did not respond to JustCo’s letter dated 27 July 2020 signed by Song.¹⁶⁷

129 In this regard, it is to be noted that Dathena’s Letter of Demand clearly stated that “Dathena reiterates its position that **the Agreement has been terminated** and the **Refund is due and owing**...” [emphasis in original].

¹⁶³ Sheena’s AEIC at para 26.

¹⁶⁴ Sheena’s AEIC at para 22.

¹⁶⁵ AB732.

¹⁶⁶ AB807.

¹⁶⁷ Sheena’s AEIC at para 30.

130 The material portions of JustCo’s response letter dated 27 July 2020 have already been set out earlier at [43] save for paras 2 and 5 which state:¹⁶⁸

2 We do not agree that the [Membership Agreement] ... has been terminated or has been frustrated. Accordingly, the Membership Agreement remains in effect and we are not obliged to pay to Dathena the amounts demanded in the [Letter of Demand].

...

5 We further refer to Section 16 of the Covid-19 (Temporary Measures)(Amendment) Act 2020 passed by the government on 5 June 2020. It is noteworthy that the contemplation of the law is to allow a party to seek just and equitable adjustments to its obligations under a contract affected by construction delays rather than to allow a party to simply walk away completely from the contract.

It is noteworthy that apart from the above brief reference to s 16 of the Covid-19 (Temporary Measures) (Amendment) Act 2020 (the “Covid-19 (Amendment) Act”), no evidence was presented by JustCo that it invoked that provision either with Dathena and/or more pertinently, with the landlord of OCBC CE to obtain waiver and/or reductions in rent.

131 Sheena’s assumption that the Membership Agreement continued is not credible as counsel for Dathena put to her, in the light of the very clear language used in Dathena’s Letter of Demand to which JustCo’s letter dated 27 July 2020 was a reply.¹⁶⁹ The court said as much to Sheena and likened JustCo’s attitude to that of an ostrich putting its head into the sand, not wanting to know what was going on in the world outside.¹⁷⁰

¹⁶⁸ AB810–811.

¹⁶⁹ Transcripts dated 29 January 2021 at pp 763–767.

¹⁷⁰ Transcripts dated 29 January 2021 at p 765.

The issue(s)

132 In respect of the plaintiff's claim, the issues the court needs to decide in this case are:

- (a) Was Dathena entitled to and/or justified in giving the Notice of Termination?
- (b) If the Notice of Termination was valid, did Dathena waive its rights of termination by viewing/considering the Verizon and Bras Basah Premises as alternatives to the OCBC Premises? Were those premises alternatives to the OCBC Premises?
- (c) Alternatively, was the Membership Agreement frustrated by the implementation of the CB Measures?
- (d) Are certain provisions in the Membership Agreement unenforceable under the UCTA?

133 In respect of the defendant's Counterclaim, the court will consider whether JustCo has a valid Counterclaim.

The submissions

134 Before the court makes its findings, it turns to review the main points made in the parties' closing submissions.

Dathena's submissions

135 Dathena set out the chronology of events in its submissions which the court need not repeat, as the events are not disputed save for what Aida purportedly said to JustCo in the telephone call on 10 April 2020 (as mentioned

at [20]) and at the site inspection of the OCBC Premises on 4 September 2020 (as mentioned at [49]).

136 Citing *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 and *Tian Teck Construction Pte Ltd v Exklusiv Auto Pte Ltd* [1992] 1 SLR(R) 948 in support of its position, Dathena submitted that JustCo's delays in delivering the OCBC Premises to Dathena amounted to a breach of a condition of the Membership Agreement. Dathena's position was that the start date of 1 May 2020 was a condition of the contract with time being of the essence.

137 Dathena submitted that it was undisputed that as at 26 May 2020, the situation was that the delays were indefinite (as mentioned at [27]). It was only well after the Notice of Termination had been issued (*ie*, 29 May 2020) that by Sian-Tzu's email of 6 July 2020,¹⁷¹ JustCo gave a definite date of 9 September 2020 for Dathena to move into the OCBC Premises.

138 Dathena added that JustCo's fundamental breach extended to its inability to provide the server room, the benefit of which Dathena was substantially deprived.¹⁷²

139 As an alternative, Dathena's position was that the Additional Services to be provided by JustCo as part of the Membership Agreement included the

¹⁷¹ AB777–778; transcripts dated 29 January 2021 at pp 642–643.

¹⁷² Dathena's Closing Submissions at Section 3, para 3.5.2.

supply of a server room which was confirmed by JustCo's issuance of a quotation dated 19 March 2020 (mentioned at [17]).¹⁷³

140 Consequently, Dathena argued that JustCo was in repudiatory breach of the Membership Agreement for its inability to deliver the OCBC Premises for more than four months (1 May to 9 September 2020). Dathena submitted that the repudiatory breach occurred from 8 April 2020 onwards when JustCo first informed Dathena that it could not deliver the OCBC Premises on time (as mentioned at [19]).¹⁷⁴

141 Dathena also submitted that JustCo bore the responsibility for M1's inability to complete the internet installation.¹⁷⁵ It added that JustCo's proposed alternative third party data centre at KDDI to store Dathena's servers was not a viable alternative not to mention that JustCo expected Dathena to pay for the same.¹⁷⁶

142 Dathena further submitted that it neither waived JustCo's delays nor varied the Membership Agreement¹⁷⁷ – neither its conduct nor communication prior to this suit indicated that the Lease was continuing. Its Notice of Termination was irrevocable at law.

¹⁷³ Dathena's Closing Submissions at para 3.1.8; transcripts dated 28 January 2021 at p 503.

¹⁷⁴ AB631–632.

¹⁷⁵ Dathena's Closing Submissions at para 3.3.

¹⁷⁶ Dathena's Closing Submissions at paras 3.4.5–3.4.8.

¹⁷⁷ Dathena's Closing Submissions at paras 4.1.1 to 4.1.10.

143 Dathena added that JustCo did not offer comparable alternative premises by way of the Verizon and Bras Basah Premises. Even if the alternative premises were of comparable sizes in terms of square footage, other factors other than square footage must be considered such as (a) the location of the premises; (b) the exclusivity of the space to Dathena’s use without the need to share the space with another entity; and (c) the provision of a server room and other amenities. In any case, the alternative premises were “not even comparable in terms of size” to the OCBC Premises.¹⁷⁸

144 As against JustCo’s Counterclaim, Dathena submitted that JustCo failed to take all reasonable steps to mitigate its loss,¹⁷⁹ assuming Dathena was in breach. Relying on *Klerk-Elias Liza v K T Chan Clinic Pte Ltd* [1993] 1 SLR(R) 609, Dathena submitted that JustCo could not claim for losses which could have been mitigated by finding alternative tenants within a reasonable time period. Dathena also submitted that the quantum that JustCo sought in its Counterclaim was “preposterous” as it was an overestimation of the alleged damages suffered as a result of Dathena’s alleged breach.¹⁸⁰

145 The court will later address Dathena’s submissions that cl 2(c) of the Membership Agreement is unenforceable under ss 3 and 11 of the UCTA and that JustCo cannot rely on cl 2(c) of the Membership Agreement in relation to the Verizon Premises.

146 In the alternative, Dathena submitted that the Membership Agreement was frustrated, relying on s 2(2) of the FCA (which will be elaborated at [183]).

¹⁷⁸ Dathena’s Closing Submissions at paras 5.1.9–5.1.10.

¹⁷⁹ Dathena’s Closing Submissions at paras 9.2.1–9.2.3.

¹⁸⁰ Dathena’s Closing Submissions at para 9.3.1.

JustCo's submissions

147 Not surprisingly, JustCo's submissions contended that Dathena is not entitled to a refund of the Deposit as the Membership Agreement was not frustrated and there was no basis for the Notice of Termination.¹⁸¹

148 JustCo accused Dathena of leading it by the nose for over three months during which time it signed lease agreements for office space at No 43 Niven Road and No 11 Blair Road with third party landlords *without* notifying JustCo. JustCo alleged that Dathena continued to send mixed signals to JustCo even after it found alternative office space by requesting a site visit to the OCBC Premises as late as 4 September 2020. Even after Dathena's Letter of Demand, Dathena's representatives continued to provide JustCo with inconsistent messages.¹⁸²

149 JustCo denied it had breached the Membership Agreement by not providing a server room.¹⁸³ It asserted that it had no contractual obligation to allow Dathena to move its servers into the OCBC Premises by 6 April 2020. There was nothing in the Appendix to the Membership Agreement which imposed this obligation on JustCo. Neither did the parties agree, subsequent to the signing of the Membership Agreement, as to when Dathena should be able to move its servers into the OCBC Premises. Further, the dates in the construction timelines provided by JustCo to Dathena were always subject to change.

¹⁸¹ JustCo's Closing Submissions at para 6.

¹⁸² JustCo's Closing Submissions at para 4.

¹⁸³ JustCo's Closing Submissions at paras 26–33.

150 Additionally, at no point before the imposition of the CB Measures did Dathena inform JustCo that it was imperative that the former be allowed to move in its servers by 6 April 2020.¹⁸⁴ On the contrary, Aida’s emails to Sharlene of 19 February 2020¹⁸⁵ and 25 March 2020¹⁸⁶ talked of moving Dathena’s equipment (servers) into the OCBC Premises by late April 2020. Realistically, Dathena would not have shifted its servers into the OCBC Premises during the CB period in any event as the permanent electricity supply would only be installed closer to the completion of the construction works which were projected to be late April 2020 under the First Timelines at [17].¹⁸⁷

151 As the permanent electricity supply was to power the whole co-working space leased by JustCo at the OCBC CE, it was not possible to set up the permanent electricity solely for the server room. Temporary power had been installed in the server room by the start of April 2020 but JustCo would not allow its clients to move their servers into the OCBC Premises without permanent electricity supply being installed because (according to Sian-Tzu) “if the temporary power supply were to be disrupted, then it would be very detrimental to the information kept within the server”.¹⁸⁸

152 In any case, Dathena could not have moved its servers into the OCBC Premises by 6 April 2020 because Dathena’s ISP failed to activate the fibre router before 7 April 2020 when the CB Measures were imposed.¹⁸⁹

¹⁸⁴ JustCo’s Closing Submissions at paras 34–38.

¹⁸⁵ AB241.

¹⁸⁶ AB522.

¹⁸⁷ AB504.

¹⁸⁸ Transcripts dated 29 January 2021 at p 721, lines 12–15.

¹⁸⁹ JustCo’s Closing Submissions at paras 39–46.

153 JustCo alleged that Dathena had informed JustCo in early April 2020 that it had stopped its expansion plans and it wanted “rental reliefs” to lower its expenditure on office space. Prior to the purported Notice of Termination, JustCo understood from its communications with Dathena that the latter’s main concern was with costs. Hence, the purported Notice of Termination came as a surprise to JustCo – Dathena’s concerns over the temporary arrangements offered by JustCo (at the Verizon and Bras Basah Premises) had never been communicated to JustCo.¹⁹⁰

154 JustCo submitted that the Membership Agreement continued to subsist post the commencement date, because of cl 2(c) of the Membership Agreement.¹⁹¹ In any case, JustCo argued that Dathena had waived its right in respect of the commencement date – it did not terminate the Membership Agreement based on JustCo’s failure to meet the commencement date and in that regard, accepted that the commencement date had to be postponed.¹⁹² As indicated earlier at [145], the court will return to cl 2(c) later when it makes its findings.

155 In regard to Dathena’s reliance on ss 3 and 11 of the UCTA, JustCo submitted those provisions do not render cl 2(c) of the Membership Agreement unenforceable.¹⁹³ JustCo also submitted that the Membership Agreement was not frustrated by the implementation of the CB Measures.¹⁹⁴

¹⁹⁰ JustCo’s Closing Submissions at paras 56–60.

¹⁹¹ JustCo’s Closing Submissions at paras 150–152.

¹⁹² JustCo’s Closing Submissions at paras 185–186.

¹⁹³ JustCo’s Closing Submissions at para 32.

¹⁹⁴ JustCo’s Closing Submissions at paras 195–198.

156 As for its Counterclaim, JustCo maintained it was entitled to claim the Membership Fees for the full term of the Lease.¹⁹⁵ It however conceded it should deduct the Membership Fees received from the replacement tenant of the OCBC Premises amounting to \$87,843 per month for a period of six months. Less what it received from the replacement tenant, JustCo reduced its Counterclaim to \$1,585,846.50. In the alternative, it claimed damages to be assessed.¹⁹⁶

The findings

Was Dathena entitled or justified in giving the Notice of Termination?

157 It is noteworthy that although the Membership Agreement clauses favoured JustCo, there was no provision that gave JustCo the right to deliver the OCBC Premises to Dathena *after* 1 May 2020. Earlier at [125], the court had observed that the four months' delay (*ie*, 1 May to 9 September 2020) in the commencement of the Lease amounted to $\frac{1}{6}$ or approximately 17% of the duration of the Lease. Moreover, in the telephone call between parties on 26 May 2020 mentioned at [27], JustCo could not state with any certainty when Dathena could occupy the OCBC Premises. It was this lack of clarity and the uncertainty attendant thereto that prompted Muffat to issue the Notice of Termination three days later.¹⁹⁷

158 It is also to be noted that it was JustCo's own evidence that the parties had a pre-existing relationship before 2019 as Dathena had rented office space from JustCo's Bangkok office with Sian-Tzu being Dathena's main point of

¹⁹⁵ JustCo's Closing Submissions at paras 202–204.

¹⁹⁶ JustCo's Closing Submissions at para 204.

¹⁹⁷ Muffat's AEIC at para 3.1.7.

contact for that transaction.¹⁹⁸ Consequently, JustCo/Sian-Tzu were cognisant of the nature of Dathena’s business and its IT requirements.

159 Mr Leong’s attempts during cross-examination to extract from Aida and Muffat an admission that JustCo’s contractual obligation was to provide office (and not server space) to Dathena is misconceived.¹⁹⁹ Because of their previous business relationship, JustCo well knew that Dathena as a cybersecurity company cannot operate without servers and internet connectivity, be it in an office or a home setting. Moreover, as Dathena pointed out in its Reply Submissions,²⁰⁰ JustCo had issued a quotation and invoice to Dathena for the server room (which was mentioned at [17]) and, it was thus contractually obligated to deliver such Additional Services under the Membership Agreement. It was not a mere moral obligation as JustCo sought to argue, relying on the case of *Hongkong and Shanghai Banking Corp Ltd v Jurong Engineering Ltd and Others* [2000] 1 SLR(R) 204;²⁰¹ the case is not relevant.

160 It had earlier been noted at [7] that there is no clause in the Membership Agreement that allows Dathena to terminate the contract, unlike JustCo which can do so under cl 8, which will be addressed at [171] and [179]. That cannot be right as a matter of contract law in a commercial context.

161 Clause 16 of the Membership Agreement is an entire agreement clause.²⁰² According to the appellate court’s decision in *Ng Giap Hon v*

¹⁹⁸ Sheena’s AEIC at para 5.

¹⁹⁹ Transcripts at pp 52 and 282.

²⁰⁰ At para 1.1.2(a).

²⁰¹ JustCo’s Closing Submissions at paras 135–138.

²⁰² AB at p 104 (Membership Agreement at Clause 10).

Westcomb Securities Pte Ltd and Anor [2009] 3 SLR(R) 518 that Dathena cited,²⁰³ such a law does not preclude the implication of terms into a contract. Even if an entire agreement clause might be able to exclude the implication of terms into a contract, if in substance it is an *exception* clause, the clause would be subject to both the common law constraints on exclusion clauses as well as the UCTA, which legislation the court turns now to consider.

162 The court finds that Dathena was justified in issuing the Notice of Termination for the Membership Agreement due to JustCo’s failure to deliver the OCBC Premises for its occupation on 1 May 2020.

163 As Dathena submitted in its reply submissions,²⁰⁴ it does not lie in JustCo’s mouth to accuse Dathena of seeking to get out of its contractual obligations (as it did in its closing submissions)²⁰⁵ when it was JustCo that failed to deliver on its contractual obligations.

164 The evidence adduced from Aida and Muffat clearly showed that neither the Verizon nor Bras Basah Premises were of “comparable size” to OCBC Premises as required under cl 2(c) of the Membership Agreement. The court finds it hard to appreciate JustCo’s insistence conveyed through Sian-Tzu, that Dathena should move to the Verizon Premises as a “temporary compromise” in order to suit JustCo’s convenience and from there move to the OCBC Premises when the same were ready.²⁰⁶ If JustCo was in breach of the Membership Agreement, then as the defaulting party, it is in no position to dictate terms to

²⁰³ Dathena’s Closing Submissions at p 27.

²⁰⁴ Dathena’s Reply Submissions at para 1.1.2.

²⁰⁵ JustCo’s Closing Submissions at para 22.

²⁰⁶ Transcripts dated 27 January 2021 at p 351.

Dathena as it repeatedly sought to do. The same comment would apply to JustCo’s attempts to have Dathena take the Bras Basah Premises in lieu of the OCBC Premises.

165 The court therefore finds that JustCo’s offers to Dathena of the two alternatives to the OCBC Premises did not come within the definition of alternative “Allocated Office Space of comparable size” under cl 2(c) of the Membership Agreement.

166 A repeated refrain in JustCo’s submissions was that JustCo had no contractual obligation to allow Dathena to move its servers into the OCBC Premises by 6 April 2020.²⁰⁷ The short answer to that submission is that JustCo should not then have led Dathena to believe that it could move in its servers earlier, let alone invoiced Dathena on 19 March 2020 based on that date. It bears mentioning that Sian-Tzu was aware, even before the execution of the Membership Agreement, from a meeting with Dathena on 15 January 2020, of Dathena’s IT requirements and timelines.²⁰⁸

167 For JustCo’s counsel to put to Muffat that it was Dathena’s not JustCo’s responsibility to obtain the requisite approval from MOM to enable M1 technicians to enter the OCBC Premises is again to ignore the fact that the master lessee of the OCBC Premises with the landlord was JustCo *not* Dathena.²⁰⁹ Dathena would have had no *locus standi vis-à-vis* the landlord to make such an application which if made, would likely not have been entertained. In this regard, it is noteworthy that JustCo’s invoice dated 19 March

²⁰⁷ JustCo’s Closing Submissions at paras 140, 149 and 208.

²⁰⁸ Transcripts dated 28 January 2021 at p 475.

²⁰⁹ Transcripts dated 27 January 2021 at p 241.

2020 for “Additional Services” included a charge of \$500 for “ISP-JustCo Coordination fee for survey and installation” (as highlighted at [17]) which invoice Dathena promptly signed the day after on 20 March 2020. JustCo did not deliver what it invoiced to Dathena. Despite the signed invoice, Ow’s response in his email on 8 April 2020 on the same issue of internet connectivity (when pressed by Dathena) was wholly unhelpful (as noted at [90]).

168 Equally, there was no duty on the part of Dathena to inform JustCo that it had successfully applied for Jeremie and Sai Tun to enter the OGS Premises under MOM’s Time Limited Exemptions to Covid-19 restrictions.²¹⁰ With due respect, it is not relevant to Dathena’s SOC or JustCo’s Defence. Indeed, the court found it surprising that Sian-Tzu was not even aware of such an exemption until Aida told her (as highlighted at [114]).

Do any provisions in the Membership Agreement offend and are unenforceable under the provisions of the UCTA?

169 The court must consider the UCTA in conjunction with the terms in the Membership Agreement upon which JustCo relied in its Defence and Counterclaim (as summarised at [57]). Earlier, the court had commented at [7] how the terms and conditions of the Membership Agreement are heavily skewed in favour of JustCo and how Dathena is disadvantaged as a “member”.

170 Relevant extracts of cl 2 of the Membership Agreement were set out earlier at [52]; the clause also contained the following extracts:

[Dathena] accept and [JustCo] agrees to provide ...and/or (iii) any other additional services (“the Additional Services”) that may be provided by [JustCo] upon request by [Dathena], at

²¹⁰ Transcripts dated 26 January 2021 at p 242.

such extra cost and upon such other terms to be advised by [JustCo] where applicable....

(c) [JustCo] reserves the right to replace [Dathena's] Allocated Office Space, if any, with another Allocated Office Space of comparable size at [OCBC CE] or any other of [JustCo's] operating premises in the event where this may be necessary due to the operational requirements of [JustCo] for the provision of the Services and/or Additional Services.

171 Next is cl 8(c)(i) which states:

(c) In the event that this Agreement is terminated by [JustCo] pursuant to Clause 8(a), [Dathena] shall be liable to pay to [JustCo]:

(i) the Membership Fee for the remainder of the Service Term in full within fourteen (14) days from the date of [JustCo's] written notice; ...

172 Then there is cl 11 which states:

[Dathena] shall indemnify and hold harmless [JustCo], the Justco Group, its directors, employees, agents, affiliates and/or third party service providers (together with [JustCo] and the JustCo Group, the "Indemnified Persons"), from and against all claims, demands, actions, proceedings, judgments, damages, losses, costs and expenses of any nature including legal costs on a full indemnity basis which any of the Indemnified Persons (as the case may be) may at any time and from time to time sustain, incur or suffer relating to or arising out of;

(a) any occurrences whatsoever in the [OCBC Premises]...;

(b) any default by [Dathena] ... in complying with the provisions of this Agreement...;

(c) any claims against [JustCo] or a JustCo Group Company by any party in relation to any matter arising out of or in connection with the Rights granted to [Dathena] hereunder; or

(d) the use of the Services or Additional Services by [Dathena] and or its Permitted Occupier.

173 Finally, there is cl 12(b)(i) which states:

(b) Notwithstanding anything herein contained, none of the Indemnified Persons shall be liable to [Dathena] and/or its Permitted Occupier nor shall [Dathena] and/or its Permitted Occupier have any claim of any nature against any of the Indemnified Persons in respect of or arising out of:

(i) any interruption, disruption or cessation in [Dathena's] use of the [OCBC Premises] and/or any other premises under the JustCo group and/or Allocated Office Space for any reason whatsoever; ...

174 It was Dathena's pleaded case that cl 2(c) of the Membership Agreement is unenforceable under ss 3 and 11 of the UCTA. JustCo however had argued in its closing submissions that ss 3 and 11 of the UCTA would not apply as Dathena was not dealing as a "consumer" with JustCo and in any case, cl 2(c) of the Membership Agreement satisfies the test of "reasonableness" under s 11(1) of the UCTA.

175 The relevant portions of ss 3 and 11 of the UCTA states:

3.—(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term —

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled —

(i) to render a contractual performance substantially different from that which was reasonably expected of him; or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.

11.—(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part and section 3 of

the Misrepresentation Act [Cap. 390] is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in the Second Schedule; ...

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

176 Under the Second Schedule to the UCTA, the guidelines for application of the “reasonableness” test include:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer’s requirements could have been met;

...

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; ...

Under s 12(3) of the UCTA, the burden is on JustCo to prove that Dathena is not a “consumer”.

177 The court is of the view that Dathena is indeed a “consumer” within the meaning of s 3 of the UCTA. Assuming *arguendo* that JustCo is correct and Dathena is not a “consumer”, Dathena would still come under the second disjunctive limb of s 3(1) as dealing with JustCo “on the other’s written standard terms of business”.

178 In its closing submissions,²¹¹ JustCo sought to show that although the initial draft agreement was provided by JustCo, the executed Membership Agreement was a product of negotiations between the parties and JustCo would have been open to changes in the contract terms if Dathena had requested. Therefore, the terms were “fair and reasonable” within the ambit of s 11(1) of the UCTA. The court is sceptical of this submission. It is quite apparent that the Membership Agreement terms are JustCo’s standard terms and conditions applicable to all its clients or “members”. No evidence was presented that there was room for negotiation of those standard terms. What was in evidence was that Dathena signed a similar agreement for its Bangkok office. Contrary to JustCo’s submissions,²¹² Sian-Tzu’s evidence at trial, which JustCo referred the court to in its submissions, did not suggest that JustCo was open to negotiating the standard terms of the Membership Agreement. Quite to the opposite, Sian-Tzu testified that the Membership Agreement is “just a standard agreement that it was -- is generated from the system”.²¹³ In that regard, Sian-Tzu confirmed multiple times at the trial that the Membership Agreement is a standard contract used by JustCo for its clients “until the appendix page”.²¹⁴

179 The court views the terms in the Membership Agreement set out earlier at [170]–[173] as grossly unfair and disadvantageous to Dathena and an affront to the UCTA. Those provisions are unenforceable.

²¹¹ JustCo’s Closing Submissions at para 172.

²¹² JustCo’s Closing Submissions at para 172; transcripts dated 28 January 2021 at p 478, lines 2–7.

²¹³ Transcripts dated 29 January 2021 at p 653.

²¹⁴ Transcripts dated 28 January 2021 at p 478.

Did Dathena waive its rights to terminate the Membership Agreement by considering the Verizon Premises and inspecting the Bras Basah Premises as alternatives to the OCBC Premises?

180 Once the Membership Agreement was validly terminated as the court finds, it was Dathena’s prerogative (not obligation), to decide whether it would waive the Notice of Termination and accept any alternatives proposed by JustCo to replace the OCBC Premises. As the court pointed out to Sian-Tzu,²¹⁵ Dathena cannot be forced to accept the alternatives of the Verizon and Bras Basah Premises just because it suits JustCo’s purpose to do so.

181 The evidence does not show that Dathena waived the Notice of Termination. Dathena’s willingness after 29 May 2020 to look at alternative premises offered by JustCo (including the OCBC Premises on 4 September 2020) was on the basis that it was without prejudice to the Notice of Termination. Further, having given the Notice of Termination, the court cannot comprehend how Dathena, as JustCo alleged,²¹⁶ can be said to have repudiated the contract on 4 September 2020 by filing this suit.

182 Sheena’s assumption that the Membership Agreement continued because of Dathena’s conduct after 29 May 2020 is not credible (as counsel for Dathena said to her), in the light of the very clear language used in Dathena’s Letter of Demand. The court said as much to Sheena and likened JustCo’s self-denial to that of an ostrich putting its head into the sand, not wanting to know what was going on in the world outside.²¹⁷

²¹⁵ Transcripts dated 29 January 2021 at p 737.

²¹⁶ JustCo’s Closing Submissions at para 5.

²¹⁷ Transcripts dated 29 January 2021 at p 765.

Was the Membership Agreement frustrated by the implementation of the CB Measures?

183 Dathena’s alternative case had relied on the FCA and s 2 in particular which states:

(1) Where a contract has become impossible of performance or been otherwise frustrated, and the parties to the contract have for that reason been discharged from the further performance of the contract, this section shall, subject to section 3, have effect in relation to that contract.

(2) Subject to subsection (3), all sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (referred to in this Act as the time of discharge) shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable.

(3) If the party to whom the sums were so paid or payable under subsection (2) incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

184 It bears noting that JustCo repeatedly insisted that the Membership Agreement was not frustrated as Dathena asserted.²¹⁸ However, the doctrine of frustration of contracts and the operation of the FCA is not dependant on parties’ agreement. It is the law that determines that a contract is frustrated if it is, regardless of the parties’ views. Once a supervening event occurs after the formation of the contract without the default of either party which renders the contractual obligation radically fundamentally different from what was agreed or, a contract becomes impossible to perform (as set out under s 2(1) of the FCA

²¹⁸ JustCo’s Closing Submissions at paras 195–198.

at [183]), a contract is frustrated. The result is that both parties are automatically discharged from their contract by operation of law (*Allied Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857). It is *not* JustCo's prerogative to decide that the Membership Agreement was not frustrated if indeed it was.

185 Under s 2(2) of the FCA, sums paid under the frustrated contract must be refunded, which was what Dathena claimed.

186 Did JustCo's four month's delay in delivering the OCBC Premises to Dathena and its inability to provide alternative comparable premises during that period render the Lease and the Membership Agreement frustrated? Was JustCo's contractual obligation radically fundamentally different from what was agreed to?

187 Looking at the facts, it is this court's finding that the answers must be in the affirmative to the foregoing two questions. Nothing could be more telling of the termination (whether via operation of law or by the Notice of Termination) of the Membership Agreement than JustCo's own attempts to persuade Dathena to sign a new agreement to replace the Membership Agreement. Despite Sian-Tzu's valiant attempts (as elaborated at [117]) and disagreement when questioned by the court, the court is not persuaded that the new agreement was only to *amend* the existing contract – it was a fresh agreement altogether for entirely different premises (*ie*, the Bras Basah Premises) being the subject of the new lease. It was meant to supersede the Membership Agreement dated 16 January 2020. JustCo's own conduct thus indicated that at the material time, it was aware that it could not perform its contractual obligations as previously agreed to in the Membership Agreement.

188 Consequently, JustCo's repeated attempts to replace the Lease of the OCBC Premises with a new lease first of the Verizon Premises and subsequently, of the Bras Basah Premises amounted to a fundamentally different contract than what the parties bargained for. This is especially so in the circumstances where it was not disputed that the sizes of the alleged alternative premises were not comparable to the OCBC Premises and other factors (such as location and exclusivity to use the premises) also clearly distinguished the alternative premises from the OCBC Premises. In short, the Verizon Premises, the Bras Basah Premises, additional moving costs incurred, and significantly delayed commencement dates were simply not what parties had agreed to.

Additional findings

189 A related and disputed issue was JustCo's allegation of Dathena's change of business plans and its intended reduction of workforce and workspace. The court notes that as early as 15 November 2019,²¹⁹ JustCo's own email from Sian-Tzu to Aida clearly stated that the latter required an open plan office for 120 persons. Consequently, it was an exercise in futility for JustCo's counsel to suggest to Muffat repeatedly that the requirement to accommodate 120 staff was an afterthought on his part used to reject the Bras Basah Premises. It therefore also did not matter what Dathena's headcount in Singapore was, between the execution of the Membership Agreement (*ie*, 16 January 2020) and the Notice of Termination (*ie*, 29 May 2020). Further, it is undisputed that Dathena rented larger space at No 43 Niven Road and No 11 Blair Road than what it contracted at the OCBC Premises.

²¹⁹ AB21.

190 There was no basis for JustCo to surmise that during and after, the imposition of CB Measures, Dathena’s priority shifted from wanting an office space to wanting a server space. What the court does note from the evidence is, how quick JustCo was, first in pressing Dathena to execute the Membership Agreement and subsequently in invoicing Dathena for payments under the Membership Agreement even when those payments were not yet due (*eg*, the June 2020 rent mentioned at [33]–[34]). In this regard, Song’s surmise in para 4(d) of JustCo’s letter dated 27 July 2020 that “business considerations” motivated Dathena’s change of heart on renting the OCBC Premises (as mentioned at [45]) is unfounded, in the light of Dathena’s lease of alternative and larger premises at No 43 Niven Road and No 11 Blair Road after the Notice of Termination was issued.

191 As an aside, JustCo’s letter of 27 July 2020 as set out at [130] had relied on s 16 of the Covid-19 (Amendment) Act. Section 16 therein actually refers to an insertion of s 36 into the main legislation, namely the Covid-19 (Temporary Measures) Act (the “Covid-19 Act”).

192 The entire s 36 (which is under Part 8) of the Covid-19 Act is headed “Contracts affected by delay in the performance or breach of a construction contract, supply contract or related contract”. It applies where certain requirements are met, such that under s 36(1)(a)(iii) as parties entering into a contract that:

(iii) is, on or after 1 February 2020 and before the expiry of the prescribed period, affected in the prescribed manner by a delay in the performance by a party to a construction (or construction-related) contract ..., or a breach of such contract, where such delay or breach (A) occurs on or after 1 February 2020 and before the expiry of the prescribed period; and (B) is to a material extent caused by a COVID-19 event.

193 Under Schedule 2 Part 2(2) of the Covid-19 Act. “Essential Services” include services related to (a) fixed telephony services; (b) mobile telephony services; (c) broadband internet access services; and (d) national domain name registry services.

194 Based on Sian-Tzu’s testimony as mentioned at [117], the court finds that JustCo could have but failed to take steps (as the tenant of OCBC CE) to assist M1 to activate Dathena’s internet connection at the OCBC Premises.

195 JustCo’s repeated refrain in its closing submissions that it was never given an opportunity to address Dathena’s concerns (regarding KDDI, the Verizon and Bras Basah Premises) does not sit well with the evidence that was adduced. Aida had WhatsApp²²⁰ to JustCo that the Verizon Premises were unsuitable while Muffat’s email of 7 July 2020²²¹ said the same of the Bras Basah Premises, as stated earlier at [37] and [39]. As JustCo was not knowledgeable of IT, the court does not see why Dathena was obliged to update JustCo on KDDI’s unsuitability (as explained at [95]), bearing in mind that by mid-May 2020, Dathena was forced to contract with Vodien to host its servers as it had vacated its previous premises at OGS by early May 2020 (of which Sian-Tzu was informed much earlier on 10 April 2020, at [20]).

196 In the light of the above findings, the court rules in favour of Dathena on its claim.

²²⁰ AB750.

²²¹ AB792.

Does JustCo have a valid counterclaim?

197 Sheena’s testimony on when JustCo stated looking for tenants to take over the space leased to Dathena was highly unsatisfactory. Taking into consideration that the date of the Notice of Termination was 29 May 2020, JustCo could have done more earlier to find a replacement tenant. Her explanation during re-examination did not improve the court’s opinion of JustCo.²²² Sheena testified that even if JustCo wanted to look for a replacement tenant, it “would not have been easy”, given that “office was actually especially customised for the Dathena size”. The court also notes that JustCo intended to charge Dathena for reinstatement costs to reinstate a certain wall at the OCBC Premises *in any case* so the fact that the office was customised for Dathena’s use is a lame and unacceptable excuse for failing to be more proactive in looking for replacement tenants. JustCo’s lack of effort in this regard adversely affects its Counterclaim.

198 JustCo’s reliance on cl 8(c)(i) to claim the full balance of the Membership Fee for the 24 months’ duration of the Lease²²³ in its Counterclaim is in complete disregard of a contracting party’s duty at law to take reasonable steps to mitigate its loss (see, *eg*, *The “Asia Star”* [2010] 2 SLR 1154). The court finds that JustCo failed to take more pro-active steps to mitigate its loss for the reasons expounded at [197]. However, nothing more needs to be said in this regard as, following upon the court’s earlier findings in favour of Dathena, JustCo’s Counterclaim is dismissed.

²²² Transcripts dated 29 January 2021 at p 780.

²²³ JustCo’s Closing Submissions at paras 204–205.

Costs

199 Prior to release of this judgment, the court was informed that the parties had made Offers to Settle (“OTS”) to one another pursuant to O 22A of the Rules of Court (2014 Rev Ed) (“the Rules”).

200 On 7 January 2020, Dathena filed its OTS as follows:

- (a) it would accept payment of \$250,000 from JustCo within four weeks of JustCo’s acceptance of its OTS in full and final settlement of this suit and the Membership Agreement; and
- (b) after receipt by Dathena of JustCo’s payment of \$250,000, the parties would file Notice of Discontinuance of the Claim and Counterclaim with no orders as to costs.

Dathena’s OTS did not refer to JustCo’s Counterclaim.

201 On 13 January 2020, JustCo filed its OTS offering to settle this suit on the following terms:

- (a) JustCo would retain all the monies Dathena had paid to JustCo pursuant to the Membership Agreement;
- (b) Dathena would pay JustCo an additional two months’ membership fee amounting to \$186,900;
- (c) The parties would file Notice of Discontinuance with no orders as to costs within five working days from the date of receipt by JustCo of the sum of \$186,900.

202 Dathena did not accept JustCo's OTS nor did JustCo accept Dathena's OTS. As the court has found in favour of Dathena's claim which is for \$286,891.50, the court's judgment is more favourable than Dathena's OTS which was to accept \$250,000 from JustCo. Under O 22A r 9(1)(b) of the Rules, Dathena is therefore entitled to costs on a standard basis to the date of its OTS and costs on an indemnity basis thereafter.

203 As the court has dismissed JustCo's Counterclaim, its OTS need not be considered. Since Dathena's OTS did not include JustCo's Counterclaim, costs of the Counterclaim to Dathena will be on a standard basis.

Conclusion

204 Accordingly, the court grants Dathena the declaration requested in its SOC, namely that the Membership Agreement was terminated with effect from 29 May 2020 and awards Dathena judgment in the sum of \$286,891.50 together with interest at 5.33% per annum from 4 September 2020 until payment, Dathena is entitled to costs for its claim on a standard basis until 7 January 2020 and costs on an indemnity basis from 8 January 2020. Conversely, JustCo's Counterclaim is dismissed with costs to Dathena on a standard basis.

Lai Siu Chiu
Senior Judge

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