

National Skin Centre (Singapore) Pte Ltd v Eutech Cybernetics Pte Ltd  
[2001] SGHC 369

**Case Number** : Suit 271/2000  
**Decision Date** : 07 December 2001  
**Tribunal/Court** : High Court  
**Coram** : Lee Seiu Kin JC  
**Counsel Name(s)** : Chan Kia Peng, Carolyn Bava and Esther Ling (Khattar Wong & Partners) for the plaintiff; Johnny Cheo (Cheo Yeoh & Associates) for the defendant  
**Parties** : National Skin Centre (Singapore) Pte Ltd — Eutech Cybernetics Pte Ltd

*Contract – Discharge – Breach – Contract to commission computer system with customised software – Time of the essence – Failure to commission system by original deadline – Election not to terminate – Subsequent notice to make time of essence again – Reasonableness of notice – Validity of termination – Whether notice of terminated required*

## Judgment

### GROUNDS OF DECISION

1 The Plaintiff ("NSC") is the company that operates the National Skin Centre, a hospital specialising in skin diseases. The National Skin Centre is one of the government hospitals that has been "restructured", i.e. its operations managed by a private company. As the government is still the main beneficial owner of NSC, its management generally complies with the directives of the Ministry of Health.

2 The Defendant ("Eutech") is a company in the business of developing computer software, especially in the field of healthcare and intelligent building infrastructure and automation.

3 Sometime in 1998, in compliance with the government policy of reviewing computer systems to ensure that they will be able to operate after 31 December 1999 ("Y2K compliance"), NSC decided to replace its existing system ("the SWi system"), which was not Y2K compliant, with a new system that would. NSC intended at the same time to incorporate the latest technology in this new system thereby getting a modern, state-of-the-art system. A closed tender was called in May 1998 and several vendors with experience in healthcare software were invited to bid. Eutech was one of them. After evaluating the proposals of the tenderers, which included a series of presentations and negotiations, NSC awarded the contract to Eutech. The parties entered into a written contract ("the Contract") on 30 December 1998 for a computer system with customised software ("the System") for the National Skin Centre. From that date Eutech began work on the Contract. The original completion date was sometime in October 1999, with the commissioning of the System to be carried out by 31 August 1999.

4 In the course of the performance of the Contract the parties encountered some differences. By a letter to Eutech dated 21 March 2000, NSC terminated the Contract. On 23 March, NSC called on the bankers guarantee procured by Eutech under the Contract. Pursuant to this, the bank paid NSC the sum of \$109,300.

5 In this action, NSC sought damages against Eutech for breaches of various terms of the Contract. The following breaches are particularised in 7 of the Statement of Claim:

(a) Failing to provide a prototype and/or design prototype in accordance with the stipulated target

date as stated in Annex 7 of the implementation plan as per the Agreement, that is, on or before 26 February 1999 or at all;

(b) Failing to install the application software on or by the stipulated target date as stated in Annex 7 of the implementation plan, that is, on or before the end of June 1999 or at all;

(c) Failing to provide a "live" System on 30 July 1999 or at any time thereafter pursuant to Annex 7 of the Agreement or at all;

(d) Failing to commission the application software by the stipulated target dates as stated in Annex 7 of the Agreement, that is, on or by 31 August 1999 or at all.

(e) Failing to complete the conversion of medical records and case notes before the end of October 1999.

6 Eutech denied it was in breach of the Contract and filed a counterclaim in which it pleaded that NSC was in breach. Eutech claimed that NSC had wrongfully terminated the Contract and claimed for the following:

(a) unpaid invoices in the sum of \$581,868.00;

(b) repayment of \$90,000 given as a discount;

(c) work done but as yet unbilled by Eutech at the time of termination;

(d) loss of profits or damages for wrongful termination; and

(e) repayment of \$109,300.00 which had been paid over to NSC when it called on the bankers guarantee.

### **The witnesses**

7 NSC called a total of seven witnesses to give evidence on its behalf, namely:

(i) Associate Professor Goh Chee Leok ("Prof. Goh") the Medical Director of the National Skin Centre and the person in charge of the project;

(ii) Loo Swee Cheng ("Loo"), the Financial Controller and Project Director;

(iii) Theresa Soon, the Executive at DSC;

(iv) Lawrence Quek, Deputy Operations Manager;

(v) Koh Yong Leng, Manager of Nursing and Clinic Operations;

(vi) Lim Lee Foon, Pharmacy Manager; and

(vii) Tan Seng Cheong, Pharmacist.

The principal witnesses were Prof Goh and Loo.

8 The witnesses for Eutech were:

- (i) Sumeet Kumar ("Sumeet"), Vice President of Eutech (at the time of the Project);
- (ii) Olaf Paul Frederik, ("Olaf") former Manager of Eutech's Healthcare Division;
- (iii) Dr Hari Gunasingham ("Dr Hari"), Eutechs Chief Executive Officer; and
- (iv) Prasad Raja ("Prasad"), Eutechs Chief Financial Officer.

### **The Plaintiffs Case**

9 The case for NSC is briefly as follows. The Contract provides for Eutech to develop and deliver the System to the National Skin Centre for use in its Specialist Outpatient Clinic. Under the Contract, the System was to be commissioned by 31 August 1999. However Eutech failed to commission the System by that date due to its own default. Several extensions of time were given by NSC. However Eutech failed to commission the System even within the extended times. Finally on 11 February 2000 NSC issued a letter to Eutech stating that the project was already in delay for more than 5 months and that NSC expected the full system to be delivered within 3 months (i.e. by 11 May).

10 5 days later, on 16 February 2000, NSC informed Eutech orally at a meeting (which was later reduced to minutes) that it would monitor Eutechs progress over the next 2 months. If Eutech were unable to commission the System by 11 May 2000, then NSC would terminate the Contract. At this meeting NSC reminded Eutech that it would not accept the System being implemented in phases. After the meeting, Eutech submitted to NSC two implementation plans for approval:

- (a) the first implementation plan, dated 20 February 2000, which showed a phased implementation with a final commissioning date of 28 July 2000; and
- (b) the second implementation plan, dated 8 March 2000, which again showed a phased implementation and a final commissioning date of 28 July 2000.

11 NSC took this to be a clear expression by Eutech that it could not deliver the System by the deadline of 11 May 2000. Accordingly, NSC decided to terminate the Contract. NSC contended that by its letter to Eutech dated 21 March 2000, NSC had terminated the Contract in accordance with its terms.

### **The Defendants Case**

12 Eutech denied that it was guilty of continuous delay or that it was in breach of any term of the Contract. Eutech claimed that the understanding of both parties was that the System would be largely based on the Copernicus system used in Changi General Hospital ("CGH") which NSC representatives had viewed before the Contract was entered into. Furthermore clause 11.3 of the Contract only entitles NSC to make minor modifications to the design and requirements during the prototyping/design stage. However Eutech was impeded by NSC from carrying out its works under the Contract in that:

- (a) NSC had insisted on a complete change, or alternatively substantial changes, to the Copernicus system demonstrated to NSC. This amounted to a change of Eutechs scope of works as it required a

re-design of the screens and a complete change in the manner in which Eutech had proposed to carry out the work.

(b) sometime in October 1999, NSC required Eutech to change the system at its sub-clinic, the Department of STD Control ("DSC") from a satellite site connected to the central server by leased line, as provided under the Contract, to a stand-alone site.

As a result of these changes, the time for completion of the works under the Contract was set at large and Eutech was entitled to a reasonable time to complete the Works.

13 Furthermore, Eutech alleged that the termination of 21 March 2000 was wrongful for the following reasons:

(i) After expiry of the various stipulated target dates under the Contract, NSC had not elected to terminate the Contract but instead had, by its conduct, elected to continue with the Contract;

(ii) NSC had agreed to the revised schedules, or alternatively had induced Eutech to work in accordance with these revised schedules; and

(iii) NSC had issued a letter to Eutech on 11 February 2000 giving Eutech a period of three months to "deliver" the System. Despite this, the letter of termination of 21 March 2000 was issued only one and a half months after the 11 February letter.

14 Additionally, clause 49.2 of the Contract gives Eutech 14 days after the termination notice to effect a remedy. In terminating the Contract immediately on 21 March 2001, NSC was in breach of this clause. Accordingly this wrongful termination, in itself, constitutes a repudiation which Eutech accepted on 23 March 2000.

15 In breach of the Contract, NSC had refused to make progress payments to Eutech and this had caused a serious cash flow problem for Eutech as Eutech had to pay third party contractors and suppliers.

16 NSC had refused to accept or commission the System at DSC although this was implemented and had been in use since 31 December 1999.

## **The Issues**

17 The following are the issues to be considered:

(i) What is the proper construction of various terms of the Contract with regard to the scope of works of Eutech;

(ii) Whether there were changes made to the scope of works after the Contract was made;

(iii) Whether Eutech had breached the terms of the Contract by failing to keep to the Stipulated Target Dates;

(iv) If Eutech had been in breach of the Contract, whether NSC had nonetheless lost the right to terminate because:

(a) NSC had agreed to the revised schedules; and

(b) NSC had induced Eutech to carry on work in reliance on the revised schedules,

(v) Whether NSC had validly terminated the Contract in giving the proper notice by its letter of 21 March 2000;

(vi) Whether NSC had breached the Contract by: -

(a) failing to accept or commission the System which was implemented and in use at DSC from 31 December 1999; and

(b) failing to make progress payments to Eutech,

(vii) The following miscellaneous issues:

(a) whether NSC is liable to repay Eutech the discount given on account of the sale of the Copernicus system to the Singapore National Eye Centre ("SNEC");

(b) whether Eutech is liable to NSC for the costs of the Y2K upgrade to the SWi system; and

(c) whether Eutech is entitled to repayment of the costs of a visit by NSC personnel to the Memorial Sloan Kettering Cancer Centre ("MSKCC") in New York.

(i) Construction of the Contract terms

18 The first issue is the proper construction of the relevant terms of the Contract with regard to the scope of works. First of all I should point out that there is an entire agreement term in clause 55 which provides as follows:

This General Terms and Conditions of Contract supercedes all prior agreement, arrangements and undertakings between the parties and constitutes the entire Contract between the parties relating to the subject matter hereof but includes all correspondence attached in the Annex 9. No addition or modification of any provision of the contract shall be binding on the parties unless made by a written instrument signed by a duly authorized representative of each of the parties.

Accordingly, any purported addition or modification to any provision of the contract by one party is not binding on the other party unless it is in writing and agreed upon by the authorised representatives of both parties. It follows that any oral agreement is not binding notwithstanding that the authorised representatives of both sides have agreed to it. This is of course subject to any estoppel that might have arisen in the course of the dealings between the parties. In addition, clause 54 provides that the annexes to the Contract shall form an integral part of it with the General Terms and Conditions of Contract prevailing in the event of any inconsistency.

19 As with many contracts of this nature, it began with a proposal by Eutech to NSC, followed by a demonstration of the Copernicus system in use at CGH. Thereafter a flurry of activity ensued in which the parties sought and obtained clarifications relating to the terms of the Contract. Finally the

Contract was signed by their representatives on 30 December 1998. An integral part of the Contract is Annex 9 which comprises the correspondence between the parties leading up to the signing of the Contract and which the parties agree would form part of its terms. In view of clauses 54 and 55, it is not necessary to go into a detailed account of the events leading to signing of the Contract and all the provisions must be determined from the documents comprising the Contract.

20 The Contract is divided into the following parts:

- (a) the General Terms and Conditions;
- (b) Annex 1 - the Workflow;
- (c) Annex 2 - Eutechs Proposal including the Gap Analysis Document;
- (d) Annex 3 - Backfile Conversion;
- (e) Annex 4 - Payment Schedule;
- (f) Annex 5 - Contract Price;
- (g) Annex 6 - Items Under Maintenance;
- (h) Annex 7 - Implementation Plan;
- (i) Annex 8 - Form of Bankers Guarantee; and
- (j) Annex 9 - Correspondence.

21 The General Terms and Conditions contain the clauses of the Contract. The scope of work of Eutech under the Contract is set out in clause 2.1 which provides as follows:

VENDOR hereby agrees to the following in relation to the Application Software and Hardwares:

- a) Propose, develop/customize and supply the Application Software, System and Services (including hardwares) to NSC free from all encumbrances;
- b) Install the Application Software at the Location by the Stipulated Target Dates as defined in Annex 7;
- c) Acquire and install all hardware, supporting software required for operating the hardware as well as integrating them with the stipulated application software to full operational status acceptable to NSC, including integrating NSC email and network system.
- d) Develop the software required to interface Copernicus Healthcare Information System and all related softwares and other stipulated softwares with the Document Imaging system to be provided by Far East Computers to ensure full operational status of the System.
- e) provide the required documentation for Application Software, System and Services as agreed between NSC and VENDOR;
- f) provide the required training in accordance with the agreed training schedule;
- g) perform conversion and conversion related activities as Stipulated Target Dates as defined in Annex 7;
- h) provide maintenance and support for all System and Services and related deliverables free-of-charge up to the end of System Warranty Period; and during

any agreed maintenance period with agreed maintenance contract; and

i) provide all other services specified by the Agreement, upon the terms and conditions hereinafter contained.

22 Clause 2.1(a) requires Eutech to develop or customise the "Application Software". This term is defined in clause 1.6.1(b) as *"the scope defined in Annexures 1 to 3"*. Annex 1 is entitled *"Proposed NSC Specialist Outpatient System/Electronic Medical Record Imaging System (EMR)/Administrative System (referred to as the SYSTEM)"*. This annex outlines the features of the System. Annex 2 is Eutechs *"Proposal for the Specialist Outpatient Clinic (SOC)"*, which is its proposal in terms of hardware, software and price. Appendix 1 to this annex contains detailed specifications of the hardware to be supplied under the Contract. Appendix 2 contains the "Gap Analysis" which is a list of features in the existing National Skin Centre system that are not available in Eutechs Copernicus system, hence the term "gap". Clause 2.1(c) makes Eutech responsible for integrating the hardware and supporting software with the application software to full operational status acceptable to NSC.

23 Clause 7 provides that time shall be of the essence and that Eutech undertakes to supply, deliver, install and commission the System by the Stipulated Target Dates prescribed in the Implementation Plan. It also provides that NSC shall make all necessary efforts to carry out its responsibility to implement the System in accordance with the Implementation Plan. Clause 13, which deals with the programme of work, stipulates that Eutech shall deliver the System in accordance with the Implementation Plan set out in Annex 7. The Implementation Plan is in the form of a Gant chart with bars representing activities, the length of each bar signifying the period of time for that activity. An arrow leading from the end of one bar to the start of another indicates that the first activity must be completed before the other one can begin. The key dates specified in the Implementation Plan for each stage or milestone of the project are as follows:

- (a) Prototyping January/February 1999;
- (b) Design Prototype Sign-off 26 February 1999;
- (c) Customisation 26 February to May 1999;
- (d) Integration May/June 1999;
- (e) Installation end-June 1999;
- (f) Installation Tests July 1999;
- (g) Data Migration March to mid-July 1999;
- (h) Paper Conversion March to mid-October 1999;
- (i) Training June/July 1999;
- (j) System Live 30 July 1999;
- (k) System Performance Tests August 1999;
- (l) Commissioning 31 August 1999;
- (m) Performance Guarantee September/October 1999;
- (n) Acceptance and Warranty Start 21 October 1999.

24 Under the Implementation Plan, Eutech has to first complete Prototyping, thereafter proceed to Customisation, Integration and then Installation of the System. "Stage" is defined in clause 1.6.1(m) as any of the 13 stages listed there, ranging from "Prototyping stage defining user requirements" to "End of Warranty milestone". The Implementation Plan provides for "Design Prototype Sign-off" after completion of "Prototyping" and fixes the date as 26 February 1999. It is only after the sign-off that "Customisation" begins, after that "Integration" and then "Installation", and thereafter "Installation Tests". In parallel with these activities, and beginning after "Prototyping", is Data Migration, i.e. the transfer of data from the old computer system to the System. After completion of all these activities the System would go live and "System Performance Tests" would be conducted before

"Commissioning". The latter is followed by a "Performance Guarantee" period before the System is accepted by NSC.

25 The Contract anticipates the need for clarification during the prototyping and design stage. Clause 11.3 provides for NSC to issue clarifications to set out the requirements more precisely which may entail minor modification of the design requirement for which Eutech is not entitled to additional payments. Clause 11.3 states as follows:

It is anticipated that some matters of details may have to be clarified during the prototyping/design stage. In this context, NSC reserves the right to issue clarifications to the User and Technical design documents to set out the Requirements more precisely. Some minor modifications of the design and requirements may occur during the design stage. VENDOR shall make such minor modification at no additional cost to NSC.

26 However for major changes, Eutech is entitled to additional payments. Clause 47 provides for reasonable variations to be made by NSC to the scope of works or at any time during the Contract. NSC may also revise the Implementation Plan. However this must be by way of a formal request. Eutech is entitled to make a claim for additional payment and extension of time within 14 days of the formal request. Clause 47 states as follows:

#### **47 VARIATION OF CONTRACT**

47.1 NSC may, at any time during the Contract, require VENDOR to revise the Implementation Plan and/or to undertake any reasonable alteration or addition to or omission from the Works or any part thereof.

47.2 In the event of such a variation being requested, NSC shall formally request VENDOR to state in writing the effect such variation will have on the Contract Price and to the Works schedule. VENDOR shall furnish such details within 14 days of receipt of NSC's request or such other period as may be agreed. VENDOR shall not vary the Works in any respect unless instructed in writing to do so by NSC.

47.3 A variation under this Clause 47 shall not invalidate the Contract but if such variation involves a substantial increase or decrease in the cost of VENDOR for carrying out the Works, an appropriate adjustment to Contract Price shall be made. Such adjustment shall be agreed between NSC and VENDOR in writing as an addendum to this Contract.

47.3.1 VENDOR shall satisfy NSC as to the reasonableness of changes to the Works schedules and of the extra costs or savings resulting from the variations.

47.3.2 Upon NSC being satisfied regarding the reasonableness of any extensions to the Works schedule by the variation, NSC shall grant such extensions of time, and inform VENDOR accordingly in writing.

#### Copernicus system

27 Eutech contended that the understanding of the parties was that the System would be largely



based on the Copernicus system already in use in CGH and that the Contract did not oblige Eutech to make substantial changes to it before installation at the National Skin Centre. However for the reasons that follow, I find that this contention is not supported by the provisions in the Contract.

28 By Clause 2.1 of the Contract, Eutech agreed, *inter alia*, to propose, develop/customise and supply the Application Software, System and Services (including hardware) to NSC, as well as to install the "Application Software" at the Location by the Stipulated Target Dates as defined in Annex 7. "System and Services" is defined in clause 1.6.1(p) to mean:

the products and services, including the Application Software, including all administrative, clinical, laboratory, imaging, interface machinery, third party softwares (including the financial and human resources/payroll system) and Hardwares both in-progress and final, that are to be supplied, delivered, installed, commissioned and supported by VENDOR.

"Application Software" means the scope defined in the Annexes 1 to 3. The 1st paragraph of Annex 1 states :

The proposed workflow assumes all features and functionality available in the current SWi Paramedic softwares running the NSC to be available in the NSC Specialist Outpatient System (the System).

From this it is clear that the software to be developed under the Contract is required to have all the features and functionality in the SWi software that was being used at the National Skin Centre.

29 Annex 2 is entitled "Proposal For The Specialist Outpatient Clinic System (SOC)" ("the Proposal"). This was a proposal put up by Eutech as part of its bid for the project. At p.4 of the Proposal is the following statement:

NSC prepared a gap analysis document after the detailed system walkthrough. This is attached in appendix 2. Eutech has studied all points in this document and is committed to deliver with these gaps closed within the scope of this proposal.

Appendix 2 to this proposal is entitled "Gap Analysis Document From NSC" ("the Gap Analysis"). This arose from a meeting between representatives of NSC and Eutech on 16 October 1998. The minutes of this meeting are incorporated into the Contract via Annex 9. According to the first paragraph of those minutes (emphasis added):

[t]his meeting was called to brief Eutech on the enhancements that are required to be incorporated into the system at no additional charge. MD highlighted that the items to be discussed today are obvious features that are not available in the Copernicus menu. He said that if Eutech is awarded the contract, we will have to work closely to make all the other necessary detailed enhancements available.

This is followed by a list of features for each of the 15 components of the System. From the words emphasised above, it is clear that the features listed in the Gap Analysis were the "*obvious features*" not available in the Copernicus system and that there were other necessary enhancements to be made. Eutech took this list and reproduced it word for word in the Gap Analysis.

30 From this it is clear that the Gap Analysis does not set out all the features and functionality of the System under the Contract. I find that under the Contract, in addition to the features in the Copernicus system, the System is to contain all the features and functionality available in the SWI system.

#### Prototype Sign off

31 Eutech claimed that in respect of the item "Design Prototype Sign off" in the Implementation Plan in Annex 7, it was not envisaged that there would be - and neither was it obliged to provide a single document containing the complete design prototype for NSC. Eutech contended that, given the nature of the project and the direction it took, it was reasonable to construe the Contract as requiring production of the design prototype in stages for NSC to sign off at each of those stages.

32 However the provisions of the Contract militate against such a construction no matter how reasonable it might seem. Annex 7 contains the Implementation Plan which sets out the Stipulated Target Dates. The material stages and target dates are those from "Prototyping" to "Commissioning". The Prototyping stage was to commence in early January 1999. It was to last 7 weeks and end on 26 February 1999. At the end of that period is a milestone called "Design Prototype Sign off" scheduled on 26 February 1999. This indicates that it was never envisaged that there would be more than one sign off.

33 I turn to the nature of the document that was to be signed-off by NSC on 26 February 1999 under "Design Prototype Sign off". At p.15 of Annex 2, under the section "Implementation Plan Implementation Approach and Strategy", the following paragraph appears (emphasis added):

Initial planning with all parties involved will lead to a detailed project schedule defining deliverables and organisational details, this will need to be signed off. An initial analysis and design phase will produce the high level design document consisting of the screens, reports, operations, data model and the database design. This will be the detailed model of the system required by NSC and will need to be signed by NSC.

It is therefore clear, and I find, that the Contract envisages that the "Design Prototype Sign off" would be done on 26 February 1999. The document that NSC would be signing-off would be a comprehensive "high level design document" consisting of "the detailed model of the system required by NSC" consisting of:

- screens;
- reports;
- operations;
- data model; and
- database design.

#### **(ii) Were there changes to the scope of works?**

34 Eutech claimed that NSC had made substantial changes to the scope of works after commencement of the Contract. However the main basis for this contention is the fact that Eutech had interpreted the Contract as obliging it only to make minor modifications to the Copernicus system and to incorporate the features in the Gap Analysis. However as I have held above, the System is

required, *inter alia*, to have all the features and functionality in the SWi system.

35 The evidence shows that after the Contract commenced, the representatives of the parties had a large number of meetings to settle the prototype. This essentially entails NSC personnel from its various departments going through the screens proposed by Eutech and giving their input as to whether such screens were acceptable, and if not, what modifications would be required in order to comply with the requirements of the Contract. Unfortunately the main feature of such meetings and this is where I think the problem began was that the NSC staff would give their input and the Eutech representatives would then go off, purportedly to work on the incorporation of such input. But at the meetings that followed, either Eutech had not incorporated the input yet or the NSC staff would give further inputs. Unfortunately there is scant documentation on this. Even more unfortunately for Eutech, the person in charge of the project, Yadavendra Balehosur ("Yadu") was not available to give evidence on its behalf. Yadu was Eutechs Vice-President and he took charge of the project from the outset until December 1999, around which time he resigned from Eutech. Most of the crucial activities took place during Yadus watch. From the contemporary written communications it would appear that Yadu was eager to please and accommodated the requests of NSC without protest. However he was not able to produce the full prototype document and the project limped along under his management.

36 The question then is, did NSC demand changes to the scope of works. Eutech claimed it did but NSC claimed that all the inputs given to Eutech were pursuant to the requirement to incorporate the features of the SWi system into the System. Eutech was unable to produce adequate documentary evidence to show that such change requests exceeded the scope of the Contract. The contemporaneous communications with Yadu show that he did not complain about those requests, even despite complaints from NSC about Eutechs repeated failure to meet deadline after deadline. It was only in one letter, dated 29 October 1999, that Yadu complained that NSC had requested work beyond the scope of the Contract. However this letter was very quickly withdrawn by Eutech. Indeed Yadu sent an e-mail to Prof Goh stating as follows:

" I had no choice but to send you a reply. Hope you understand. Will now work extra hard to make the project happen. Regards, Yadu"

About a week later, on 9 November, Yadu was in a reflective mood after a bout of flu and he sent another e-mail in which he said:

As far as NSC goes, I still own it, foul ups and all. I signed the letter but know the contents are grossly wrong. Lets see how it goes. A lot depends on development which is crawling.

37 In Sumeets affidavit evidence-in-chief, he exhibited a stack of change requests. This comprised about 25 pages of requests that NSC had asked to be made after viewing the screens shown by Eutech. When cross-examined, Sumeet said that only 2% to 5% of these requests were outside the scope of work, which meant that the remaining 95% to 98% were within the scope. However NSC maintained that they were all within the scope of the Contract.

38 One explanation for this dispute could well be that Eutech was belabouring under the impression that all they were obliged to do was to customise the Copernicus system to the extent set out in the Gap Analysis and no more. But I do not think that such was the true reason. This is because Eutech had gone along with those meetings way past the original deadline of 26 February and did not protest until October 1999.

39 I should point out that there is provision in the Contract for additional payment if NSC should

require Eutech to undertake work outside the scope of the contract. This is clause 47 which I have set out earlier. This clause is invoked by a formal request by NSC. However if Eutech felt that any of the requests by NSC were outside the scope of works, it could have requested NSC to do so under this provision. The fact that this issue was never raised is another indicator of the attitude taken by Eutech at the time towards the change requests.

40 On the evidence before me, I find that NSC had not requested any changes outside of the scope of works of the Contract.

### **(iii) Was Eutech in breach?**

41 Eutech submitted that it had not breached the terms of the Contract by failing to keep to the Stipulated Target Dates. However Eutech did not dispute that there was no single "high level design document" containing "the detailed model of the system required by NSC". I should add that neither was there a series of documents that in their entirety, could constitute such a document. Eutech alleged without much basis that there was such a document, but suffered from the disadvantage of not having Yadu around to account for matters. Yadu's successor, Sumeet, took over only in January 2000. Although he was involved in the technical aspects of the project at an early stage, he did not get involved in its management until August 1999. He offered evidence on some events before that date but obviously such evidence suffered from the fact that he was not personally involved in them. The other principal witness for Eutech was Olaf. However again in respect of communications between the parties, it was Yadu and not Olaf who participated in them on behalf of Eutech.

42 It is clear on the evidence of the contemporaneous communications between Yadu and Prof Goh, and also with Loo, that there was no high level design document for the System given to NSC for signing off. Under the Contract, Eutech was responsible for the production of this document. Of course it is subject to the condition that NSC must use all reasonable efforts to facilitate this. Such efforts must include providing the requisite personnel to attend the meetings to provide the inputs. There is evidence that a lot of meetings were held. But no evidence that NSC was holding up the prototyping work from the failure of its staff to attend such meetings. I find that the project was plagued by a singular lack of time management of the activities on the part of Eutech. The slippages to the schedule were quickly compounded and the project eventually became a gigantic mess out of which Eutech was unable to drag itself. It can be said that the Implementation Schedule did not provide for much time given such a mammoth task. However it must be borne in mind that NSC had wanted the System in order to beat the potential Y2K problem in its SWi system. It may well be that NSC ought to have started earlier than it did. But Eutech had entered into the Contract on that basis. If much more staff were needed to meet the deadlines, the onus was on Eutech to get them in order to perform the Contract in accordance with its terms.

43 The substantive deadline in the Contract is the commissioning of the System, and this was originally set at 31 August 1999. This commissioning constitutes the core of the Contract and the other stipulated dates are milestones along the way to measure progress. Clause 32, the liquidated damages provision, is based on the commissioning date. There is no dispute that the System was not commissioned on that date. Indeed Eutech did not manage to commission it at all, which led to the termination. Accordingly I find that Eutech had breached the Contract in failing to commission the System by 31 August 1999.

### **(iv) Did NSC lose the right to terminate?**

44 Eutech submitted that even if it had been in breach of the Contract, NSC had nonetheless lost the right to terminate because:

- (a) NSC had agreed to the revised schedules; and
- (b) NSC had induced Eutech to carry on work in reliance on the revised schedules.

45 The 31 August 1999 deadline came and went without the System being commissioned. Well before that date the parties were aware that it would not be met. In an attempt to deliver some part of the System without too much delay, on 26 May 1999 Yadu proposed to implement the DSC system first. Under the original plan that was to be a satellite system with the application software running from the server located at the National Skin Centre but with the DSC data stored at the DSC server and the two computers linked by a leased line. Yadu's new proposal meant that the System would first be installed and run on the DSC server where it would be more convenient to carry out testing and installation. It would subsequently be ported over to the server at the National Skin Centre. However in October 1999 Yadu proposed to install and run the application software at both the DSC and National Skin Centre servers. This would involve additional costs, i.e. in terms of extra software, installation and testing. Eutech agreed to bear such costs as this was their request. Unfortunately the work at DSC took on a life of its own and Eutech also encountered difficulties in getting the software up and running. Eventually a partial DSC system was installed on 31 December 1999 but even that was rejected by NSC because it failed to meet all the requirements.

46 There were other repairs made on the run, so to speak, so as to salvage the situation as best they could. To their credit, Yadu and his team were all the time trying to propose solutions. Unfortunately they kept failing to deliver on those proposals. Meanwhile Eutech kept revising the schedule. The first proposal by Eutech to change the completion date was from 31 August to 21 September and 21 December (in two phases). NSC told Eutech that if it should fail to deliver by 21 September, then NSC would have to go ahead and upgrade the SWi server to be Y2K compliant in order to make the Y2K transition without affecting the operations of the National Skin Centre. NSC told Eutech that it would look to Eutech for the additional costs. NSC said that Yadu replied that Eutech was agreeable to this.

47 Eutech revised the schedule again on 25 October 1999. This took the commissioning of the System (in its entirety) to 20 June 2000. At this point I should state that NSC made much about the fact that in Eutech's schedules the project was divided into phases. I do not think it is unreasonable, given a project of this nature, for the System to be commissioned in phases. But for the purposes of ascertaining performance, it is the commissioning of the last phase that would count. I will use the last commissioning dates in describing the various revisions to the schedule.

48 On 26 January 2000, the representatives for the parties held a top level meeting to review progress. Present were Dr Hari, the CEO of Eutech and Prasad, the CFO. NSC told Eutech that the project was already five months late and reserved the right to impose liquidated damages in accordance with the Contract. Eutech was asked to submit a fresh implementation schedule by 2<sup>nd</sup> or 3<sup>rd</sup> February.

49 On 31 January 2000, Eutech submitted a new schedule. This one put the commissioning date at 8 August 2000, almost one year from the original commissioning date. NSC decided that it could no longer tolerate the delays. On behalf of NSC, Prof Goh wrote a letter dated 11 February 2000 to Eutech on these terms:

## **NSC CONTRACT IMPLEMENTATION PLAN**

I refer to your third revision of the implementation plan dated 31 January 2000.

I regret to say that the implementation plan is not acceptable to NSC. The contract signed between Eutech and NSC was for a full system i.e. the specialist outpatient system, electronic medical record imaging system and the administrative system. As stated in the contract we require that the full system be commissioned by 31<sup>st</sup> August 1999, not in piecemeal modules. The implementation has been delayed for more than 5 months now. We therefore expect the full system to be delivered within this 3 months.

Please also be reminded of the penalty clause, as agreed in the contract, regarding late delivery of the system applies.

50 Eutech submitted that this letter is unclear as to its intent. Eutech contended that the term "delivered" is not defined in the Contract and therefore cannot mean "commissioned". The short answer to this is that the only reasonable interpretation that can be given to this letter is that "delivered" means "commissioned". It is quite difficult to see how anyone can see it as otherwise.

51 Three months from the date of the letter would be 11 May 2000. Back to the proverbial drawing board went the Eutech staff. On 20 February, they proposed yet another schedule, this time proposing to commission the System by 28 July 2000. Shortly after that, on 8 March, Eutech revised the schedule by shifting some internal activities but kept the commissioning at 28 July 2000.

52 After these two revisions of the implementation schedule, on 21 March 2000, NSC wrote to terminate the Contract. The question of the validity of this termination will be dealt with below. Eutech submitted that in the circumstances NSC had, notwithstanding the breach, lost its right to terminate because:

- (a) NSC had agreed to the revised schedules; and
- (b) NSC had induced Eutech to carry on working in reliance on the revised schedules.

53 In respect of submission (a), I do not find on the evidence before me that NSC had agreed to the revised schedule. The only evidence that NSC had agreed to the revised schedules come from the oral evidence of Eutechs witnesses. NSCs witnesses denied this and this is corroborated in the contemporaneous documents such as minutes of meetings, e-mail and the occasional letter. But the most telling evidence is the fact that Eutech was submitting revised schedules. In the 31 January revision, the commissioning date was 8 August. Then in its 20 February and 8 March revisions it was moved back to 28 July. This is consistent with the evidence of NSC that the schedules were not accepted and that NSC had continued to press for an earlier completion, and I so find.

54 In relation to submission (b), I think the true question is whether NSC is estopped from demanding completion within 3 months. The picture that emerges from the evidence is one in which the vendor has failed to meet the original deadline. It is an express term of the contract that time is of the essence. But the purchaser does not elect to terminate the contract at the time of breach but chooses to continue with it. Indeed, well before the deadline, the vendor and purchaser get together to see how they can salvage the situation or minimise the disruption to the purchasers operations (particular with respect to the Y2K issues). The vendor continues to limp along but does not appear to make much progress. By 11 February 2000, the project is already delayed by more than five months. The purchaser is faced with a promise by the vendor that he would complete it by 8 August (the 31 January revision), which would mean a delay of more than 11 months from the original contract period of eight months. The purchaser decides that enough is enough and tells the vendor

that he expects completion within 3 months.

55 This set of facts is probably a common occurrence in the world of business and commerce for it is on all squares with the facts in *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616. That was a decision of the English Court of Appeal and it involved the purchase of a motorcar. The plaintiffs there had promised delivery within seven months, viz. by 20 March 1948, but failed to fulfil that promise on account of difficulties in relation to labour and materials. Time was of the essence but the defendant chose not to terminate the contract. Instead he permitted the plaintiffs to continue working on it. However after three months of further delay, the defendant gave notice on 29 June that he would terminate the contract if it was not completed by 25 July. On 8 July the plaintiffs informed the defendant that the car would not be ready by 25 July. The defendant promptly bought another car and claimed from the plaintiffs the refund of the part payment he had made for the car.

56 In relation to the election by the defendant to continue with the contract after the plaintiffs failure to deliver the car within the seven-month deadline, Denning LJ held that the defendant was estopped from relying on that breach as he had induced the plaintiffs to continue working on the car. The judge said as follows (at p.623):

I agree that that initial time was waived by reason of the requests that the defendant made after March, 1948, for delivery; and that, if delivery had been tendered in compliance with those requests, the defendant could not have refused to accept the coach-body. Suppose, for instance, that delivery had been tendered in April, May, or June, 1948: the defendant would have had no answer. It would be true that the plaintiffs could not aver and prove they were ready and willing to deliver in accordance with the original contract. They would have had, in effect, to rely on the waiver almost as a cause of action. At one time there would have been theoretical difficulties about their doing that. It would have been said that there was no consideration; or, if the contract was for the sale of goods, that there was nothing in writing to support the variation. There is the well-known case of *Plevins v. Downing* (1876) 1 CPD 220, coupled with what was said in *Bessler, Waechter, Glover & Co. v. South Derwent Coal Co. Ltd.*[1938] 1 KB 408, which gave rise to a good deal of difficulty on that score; but all those difficulties are swept away now. If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

57 However there was still no delivery after another three months. Denning LJ said that if delivery had been made before the defendants notice, then the defendant would have been obliged to accept the car. However it was not delivered and Denning LJ held that the defendant was entitled to put matters to an end by giving notice to the plaintiffs that the car should be delivered within a reasonable time. Denning LJ said (at p.623):

So, if the matter had stopped there, the plaintiffs could have said, notwithstanding that more than seven months had elapsed, that the defendant

was bound to accept; but the matter did not stop there, because delivery was not given in compliance with the requests of the defendant. Time and time again the defendant pressed for delivery, time and time again he was assured he would have early delivery; but he never got satisfaction; and eventually at the end of June he gave notice saying that, unless the car were delivered by July 25, 1948, he would not accept it.

58 The plaintiffs counsel there had submitted that the right to give a notice making time of the essence was only available in a contract for the sale of goods but not in a contract for work or labour. Denning LJ held that it applied equally in the latter case. He said (at p. 624):

in my view it is unnecessary to determine whether it was a contract for the sale of goods or a contract for work and labour, because, whatever it was, the defendant was entitled to give a notice bringing the matter to a head. It would be most unreasonable if the defendant, having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment he was entitled to give a reasonable notice making time of the essence of the matter. Adequate protection to the suppliers is given by the requirement that the notice should be reasonable.

59 Denning LJ then considered what constituted reasonable notice. He quoted Lord Parker in *Stickney v Keeble* [1915] AC 386 at 419:

in considering whether the time so limited is a reasonable time the court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts.

Denning LJ added that the case before him presented one additional factor, i.e. the fact that the original contract made time of the essence of the contract. He also said that the reasonableness of the time fixed by the notice must be judged at the time at which it was given. Denning LJ said at p.624:

not only did the defendant press continually for delivery, not only was he given promises of speedy delivery, but on the very day before he gave this notice he was told by the works manager in charge of the work that it would be ready within two weeks. Then he gave a four weeks' notice. The judge found that it was a reasonable notice, and, in my judgment, there is no ground on which this court could in any way differ from that finding. The reasonableness of the time fixed by the notice must, of course, be judged at the time at which it is given. It cannot be held to be a bad notice because, after it is given, the suppliers find themselves in unanticipated difficulties in making delivery.

60 Applying the law to the present case, when NSC elected not to terminate the Contract after Eutech was in breach by its failure to commission the System on 31 August 1999, but chose to continue with it, time was set at large and was no longer a condition. However NSC was entitled thereafter to make time of the essence again by giving reasonable notice to Eutech. In *Etablissements Chainbaux S.A.R.L. v Harbourmaster, Ltd* [1955] 1 Ll.LR 303, Devlin J said at p. 312:



Now, the position of a party who has started out with a contract where time is of the essence and has allowed the time to go by is, I think, quite clearly laid down in the authorities. He has got to make time of the essence of the contract again in the normal case, and that means that he has to give a notice giving the other side what is a reasonable time in all the circumstances to comply with their obligations, and it is only after they fail to do that that he is entitled to cancel the contract.

I find that the letter of 11 February 2000 constituted such notice. The remaining question is whether the three months given by NSC to Eutech in that letter is a reasonable time period. This must be considered in the context of the original contract period of eight months and the fact that by 11 February 2000, Eutech had been working on the project for more than thirteen months. In my view, the three-month notice is reasonable and I so find.

### **(v) Did NSC validly terminate the Contract on 21 March 2000?**

61 After the 11 February notice was given, Eutech submitted a revised schedule on 20 February. But this schedule put the commissioning at 28 July 2000, which is more than two months after the 20 May deadline given in the notice. Shortly after that, on 8 March, Eutech revised the schedule by shifting some internal activities but kept the commissioning at 28 July 2000. NSC construed this as an indication by Eutech that it would not be able to comply with the new deadline. Therefore on 21 March 2000, NSC wrote to terminate the Contract.

62 The first question is whether NSC was entitled to terminate the Contract before the 20 May deadline it had set. NSC submitted that Eutech had evinced an intention not to comply with the deadline by submitting the revised schedules in which the commissioning date was way beyond that deadline. Therefore NSC was entitled to accept this as an anticipatory breach and terminate the Contract.

63 In *Etablissements Chainbaux S.A.R.L. v Harbourmaster, Ltd* [1955] 1 Ll.LR 303 the sellers terminated a contract for sale of marine engines to the buyers. One of the grounds relates to the buyers obligation to establish a letter of credit. Devlin J found it was a term of the contract that the buyers should open a letter of credit within a reasonable time. However they encountered some problems in obtaining the credit due to currency controls in force at the time. The judge found that the buyers had failed to establish the credit within the time for performance. But the sellers gave the buyers more time to procure it. The buyers subsequently made promises of imminent delivery on a number of occasions but failed to meet their own deadlines each time. They also proposed an alternative means of securing payment but the sellers did not agree to it. So the buyers continued their efforts to procure the letter of credit and up to 11 October 1951, the sellers confirmed that they were prepared to accept the credit when the buyers could deliver it. However the sellers terminated the contract on 22 October. Devlin J held that the sellers were entitled to terminate notwithstanding that a reasonable time had not elapsed after the sellers' confirmation of 11 October because it turned out that the buyers would have been unable to perform within that time. He said at p. 313:

What is the position here? Supposing Mr. Wall had disclosed to the defendants on the morning of Oct. 22 what we now know to be the true facts of the position; supposing he had said: "I know I promised to give the letter of credit by Sept. 28, but I have not done so; what is more, I cannot, I have not the sterling; it is not just a question of the bank arranging the letter of credit or just a question of the import licence or anything of that sort; I have not the sterling

and, what is more, there is no reasonable prospect of my getting the sterling until the end of the year; I cannot say definitely that I shall get it at the end of the year, but I hope to get it, or some of it, by January; until then, however, my position is quite plain, I cannot provide the sterling and I cannot provide the letter of credit" that was in truth his position. If he had said that, it is plain that the sellers could have rejoined: "Well, then, it may be that we would be obliged to allow you a reasonable time, 14 days or something of that sort, fixed in relation to the original month and the delays and so forth; it may be that we would be obliged to allow you a whole month, another month, to start all over again; but we certainly are not obliged to wait until January, and in those circumstances there is not the least advantage in our saying, 'Do it within 14 days,' because you have made the matter plain to us that you cannot do it within 14 days." In those circumstances, there can be little doubt that the letter of Oct. 22 would have been properly written.

64 It should be noted that in *Etablissements Chainbaux*, the sellers had no knowledge when they terminated the contract that the buyers would not have been able to perform within the reasonable time. In the present case Eutech had, by twice submitting revisions which set the commissioning date beyond the time given by NSC, represented that it would not be able to comply with the new deadline. In the circumstances I would hold that NSC was entitled to terminate the Contract on 21 March 2000.

65 I now turn to Eutech's submission that the termination letter of 21 March 2000 did not give adequate notice. The letter states as follows:

We refer to the above matter and our letter dated 11<sup>th</sup> February 2000.

We regret to inform you that by reason of your continuous delay and failure to comply with the implementation schedule as listed in Annex VII of the Agreement dated 31 December 1998, you are in continuous breach of the Agreement.

Pursuant to clause 49.1(a) and clause 7 of the Agreement, we hereby treat your continuous breach as repudiation of the Agreement.

As such, we will be proceeding to engage a new vendor to supply us with our required software and will be looking towards you for any damages or loss arising out of your repudiation.

In the meantime, all our rights against you are expressly reserved.

66 Eutech submitted that this letter was not one written pursuant to clause 49 of the Contract. The relevant parts of that clause state as follows:

49.1 NSC will have a right to terminate the Contract by notice in writing as from the date specified in the notice prior to the Acceptance date, if:

- a) At any time VENDOR is in breach of any of its obligation under the Contract,

49.2 In the event of termination of the Contract as provided in Clause 49.1 (a) and upon receipt of the notice to terminate, VENDOR shall have 14 days to

effect a remedy or show to NSC's satisfaction the cause of such breach of its obligations and VENDOR's intended remedy, in which case, VENDOR shall have such reasonable period as is authorized in writing by NSC to effect the remedy.

67 Eutech submitted that NSC had not complied with clause 49.2. Eutech contended that NSC had failed to give it 14 days period of notice to either remedy the breach, or show to NSCs satisfaction the cause of such breach, before terminating the Agreement. However in my view, Eutech has misconstrued those provisions. On a proper construction of the clause, as soon as Eutech is in breach of its obligations under the Contract the failure to commission on 31 August 1999 as well as the continuing failure as at 21 March 2000 would constitute such breaches NSC acquired the right pursuant to clause 49.1(a) to terminate the Contract by notice in writing. What clause 49.2 does is to provide a rather curious mechanism by which Eutech can resuscitate the Contract notwithstanding that it has been terminated. Eutech can revive it within 14 days by either (i) effecting a remedy; or (ii) satisfying NSC as regards the cause of such breach and Eutechs intended remedy. In the latter case, if NSC can be satisfied as to the proposed remedy, Eutech would be entitled to a reasonable period to effect that remedy.

68 However instead of exercising its right to resuscitate under clause 49.2, Eutech chose to treat the action as a repudiation of the Contract by NSC which it accepted. This was how Eutech, through its solicitors, replied to NSC on 23 March 2000:

We act for Eutech and have been handed your letter of 21 March 2000

At the outset, our clients deny that they have been guilty of continuous delay and/or failed to comply with the implementation schedule or that they are in continuous breach of the agreement as alleged by you.

Our clients carrying out of the works under the Agreement has been seriously impeded by your conduct and actions. Moreover, in breach of the Agreement, you have also failed to make the necessary payments to our clients although part of the system has been used by you for several months.

Unless you inform us otherwise, our clients construe your letter of 21 March 2000 as notice of termination purportedly pursuant to Clauses 7 and 49.1 of the Agreement. Such a termination is wrongful and amounts to a wrongful repudiation which our clients accept and thereby terminating the Agreement. Our clients expressly reserve all their rights to claim against you for all loss and damage which they have sustained by result of your wrongful termination.

69 In the circumstances it is not a question of whether NSC "gave" Eutech 14 days' notice of termination. There is no requirement to "give" notice. What Eutech was entitled to do was to revive the contract within 14 days in the manner provided in clause 49.2. In the event, Eutech did not avail itself of that right. Accordingly, I hold that the termination by way of the letter of 21 March 2000 was valid.

70 I should add that this resuscitation element of clause 49.2 reinforces the reasonableness of NSCs action in terminating the contract. If Eutech had been minded to effect performance by the deadline given, it could have taken advantage of the opportunity presented in clause 49.2 to preserve the Contract. For example if Eutech had within 14 days informed NSC that it was prepared to revise its schedule so as to bring forward the commissioning to 11 May 2000 and had persuaded NSC that they were able to meet the new deadline, then NSC might not have been entitled to terminate until after

11 May 2000. As it was, Eutech chose not to do so which by itself is an indication that it was unable to meet the deadline given by NSC.

**(vi) Was NSC in breach of Contract?**

71 Eutech submitted that NSC had breached the Contract by: -

- (a) failing to accept or commission the System which was implemented and in use at DSC from 31 December 1999; and
- (b) failing to make progress payments to Eutech.

72 In respect of the DSC system, the evidence clearly shows that it was incomplete. In any event, NSC was not obliged to accept part commissioning under the Contract. The obligation of Eutech was to deliver the System in its entirety by 31 August 1999. If NSC chose not to terminate the Contract thereafter, it was obliged to accept the System commissioned at a later date subject to liquidated damages from that date or any subsequent date as may be agreed or as the law would hold Eutech liable for. Therefore NSC did not breach the Contract in not accepting the DSC system on 31 December 1999.

73 In respect of progress payments, it is necessary to look at the payment clause, clause 3, the relevant parts of which provide as follows:

**3. TERMS OF PAYMENT**

3.1 Subject to the provisions of this Contract, NSC shall pay to VENDOR the Contract Price in the manner prescribed in Annex 4.

3.2 In accordance with Annex 4, VENDOR shall submit such invoices or other reasonable documents as NSC may require for the purposes of making payment.

74 Annex 4 contains the following schedule:

	Hardware Operating Software	Application Software
Signing of Contract		5%
Delivery of Hardware and System Software	50%	
Acceptance of System Design (Prototype/Pilot Test)		20%

Commissioning of Hardware	45%	
Commissioning of SYSTEM		30%
Acceptance of SYSTEM	5%	35%
Warranty Completion		10%

75 Eutechs claim for payment appears to be in connection with the DSC system. As I have found that it was incomplete, the claim for payment is not valid. In any event, Annex 4 only envisages payment upon commissioning of the System and does not provide for partial payment.

**(vii) Miscellaneous issues**

76 The miscellaneous issues are:

- (a) whether NSC is liable to repay Eutech for the SNEC discount;
- (b) whether Eutech is liable to NSC for the costs of the Y2K upgrade to the SWi system; and
- (c) whether Eutech is entitled to repayment of the costs of a visit to MSKCC by NSC personnel.

77 Item (a) relates to the agreement between the parties that Eutech would give a discount of S\$90,000 to NSC if the SNEC purchased the Copernicus system from Eutech. It depends on a finding whether the \$90,000 discount had been incorporated in the contract price of \$2,186,000. In view of my findings on the substantive claims, it is not necessary for me to answer this question. However for completeness, I shall do so. The relevant part of the Contract to look at is an e-mail from Prof Goh to Yadu dated 20 December 1998 which is part of Annex 9 of the Contract. That e-mail states:

Please also include the clause where a one off \$90,000 discount be given to NSC (coupled with 6 months warranty period) if SNEC purchase the Copernicus software from Eutech.

If SNEC fails to purchase the system from Eutech, then this one off \$90,000 discount will be waived, but the warranty period will be reinstated to 12 months after acceptance date.

Eutech claimed that the \$90,000 discount was incorporated in the contract price of \$2,186,000. But if the provisions of this aspect of the agreement have been incorporated it must follow that the warranty period in the Contract would be stated as 6 months instead of 12. However clause 30.1 states that the warranty period is 12 calendar months. Therefore this must mean that the \$90,000 discount had not yet been incorporated in the contract price and I so find.

78 Item (b) concerns upgrading work done to the existing system at the National Skin Centre, i.e. the SWi system, to enable it to make the Y2K transition. This was necessitated by the failure of Eutech to deliver the System by 31 August 1999 or any date before 31 December of that year. Had Eutech

managed to deliver the System within that time, the upgrade would not have been necessary. NSC gave evidence of an e-mail from Yadu dated 26 July 1999 in which he confirmed that he had agreed to pay \$40,000.00 for the Y2K upgrade. Eutech agreed to this in order to buy them more time to complete the System. In the premises, Eutech is liable to NSC for the \$40,000. However NSC is claiming \$100,031.17, being the sum that was actually expended. NSC also produced minutes of meetings, letters and e-mail showing that it had told Eutech that it would be held liable for such costs. However this claim is based on an agreement and the evidence only shows that Eutech had agreed to pay \$40,000. There is no evidence of an indemnity given by Eutech. I accept that NSC had been in communication with Eutech on this question and that Eutech had remained silent, apart from the commitment on \$40,000. However I do not think that it is reasonable in the circumstances for NSC to take this silence as an agreement by Eutech to indemnify NSC for the costs of the upgrade, in particular when no upper limit has been set. It would necessarily mean that had the cost of the upgrade amounted to a quantum that is of the order of the Contract sum itself, Eutech would have committed itself to pay that amount.

79 Item (c) relates to the cost of two business class tickets to the United States by NSC personnel to view the Filenet Imaging System. NSCs position is that Yadu had agreed to pay for the first trip in March 1999 as well as the second trip in June 1999 because the first one in March 1999 was unsuccessful. Eutech contended that it had not agreed to pay for the second trip which was to MSKCC. In my view, it is not necessary for me to determine whether there was such an agreement. Even if these trips were made pursuant to the Contract, with its termination NSC would have gained a benefit in having sent its personnel on those two trips. There is no evidence adduced that NSC would not retain the benefit of its personnel acquiring the knowledge and information derived from those visits and I have no difficulty in inferring that it would. As it would be unjust for NSC to retain this benefit, it would be appropriate to order NSC to repay Eutech the cost of these air tickets.

## **Conclusion**

80 In the premises, I find Eutech in breach of the Contract and liable to NSC for damages. NSC has claimed the following damages:

- (a) A refund of the sum of \$340,672.50 paid by NSC to Eutech pursuant to the terms of the Contract;
- (b) In respect of the Y2K upgrade, the sum of \$100,031.17;
- (c) Under 11 of the Statement of Claim, damages to be assessed;
- (d) Further or in the alternative, under 15 of the Statement of Claim, a declaration that the Defendant is liable to the Plaintiff for any increased cost arising from the Plaintiff procuring the services of a new vendor to install an equivalent software system pursuant to clause 32. 1 (b) of the Agreement.

81 In respect of claim (a), with the termination, it follows that all payments made by NSC to Eutech under the Contract must be refunded. Eutech does not dispute that the sum of \$340,672.50 was paid. I therefore order Eutech to refund this sum but against this the following are to be set off:

- (i) The cost of the two business class air tickets to the USA which amount is to be assessed if not agreed upon by the parties.
- (ii) The sum of \$109,300 paid to NSC pursuant to the call on the banker's guarantee.

82 In respect of claim (b), as I have found earlier, Eutech is liable to NSC for the sum of \$40,000 and I order such payment to be made by Eutech to NSC.

83 Claim (c) relates to loss of profits and this is pleaded in 11 of the Statement of Claim in the following manner:

11. By reason of the matters aforesaid, the Plaintiffs has suffered loss and damage.

Particulars of Loss and Damage

(a) The Plaintiffs loss of profits in having to use the original SWi system at the National Skin Centre (Singapore ) Pte Ltd from the agreed commissioning date up to the date when an equivalent software system supplied by a new vendor is commissioned; and

(b) The Plaintiffs loss of profits in having no computer system at their satellite clinic, Department of S.T.D. Control ( referred to as "the DSC" in the Agreement) from the agreed commissioning date up to the date when an equivalent software system supplied by a new vendor is commissioned.

84 In principle I can see no reason why NSC is not entitled to such damages. Indeed counsel for Eutech did not submit otherwise. There is the problem of proving such damages but that is for another day. However as NSC was prepared to extend the commissioning date to 11 May 2000, the loss of profit must be computed from that date and not the original commissioning date of 31 August 1999 which NSC had waived. Accordingly there will be a declaration that NSC is entitled to any loss of profit that it is able to prove arising from Eutechs failure to commission the System by 11 May 2000 and for such period from that date as is reasonably necessary for NSC to procure an equivalent system. I should emphasise that the key words are "equivalent system". If NSC eventually installs a system that takes a longer period to commission than would the "equivalent system", then Eutech would not be liable for the loss of profits over the additional time taken.

85 In respect of claim (d), 15 of the Statement of Claim pleads the following facts:

15. At present, the Plaintiff is still in the process of calling for tenders from various vendors to install an equivalent software system. Accordingly, the Plaintiff is therefore not able to quantify the increased cost (if any) which would arise from procuring the services of a new vendor. When a new vendor is engaged to install an equivalent software system and the Plaintiff is then able to determine the increased cost (if any), and the Plaintiff claims the same from the Defendant.

As any loss suffered by NSC would be the result of Eutechs breach, it would follow that Eutech would be liable for any increased cost arising from the procurement of an equivalent system from another vendor and I so declare.

86 As for the remaining items in the Defendant's counterclaim, in view of my findings it follows that they would be, and are, dismissed.

87 Finally, NSC would be entitled to interest at the usual rate on the sums that it is entitled to under this judgment from the date of the writ. I will hear counsel on the question of costs.

Sgd:

LEE SEIU KIN  
JUDICIAL COMMISSIONER

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