

**IN THE HIGH COURT OF FIJI AT SUVA**

**CIVIL JURISDICTION**

CIVIL ACTION NO. 186 of 2017

**BETWEEN**

**MECHANICAL SERVICES PTE LIMITED** a limited liability company having

Its registered office at 18 Matua Street, Walubay, Suva, Fiji

**PLAINTIFF**

**AND**

**SHALENDRA NILESH CHAND T/A GO IT SERVICES** having its principal place of business

at 20,

Senibuadromo Road, Fletcher Road, Vatuwaqa, Fiji

**DEFENDANT**

|                  |   |  |
|------------------|---|--|
| Counsel          | : | Mr. A. Chand for the Plaintiff.<br>Mr. K. Skiba of Legal Aid Commission for the Defendant. |
| Date of Hearing  | : | 15 <sup>th</sup> & 16 <sup>th</sup> August 2022  |
| Date of Judgment | : | 09 <sup>th</sup> March 2023  |

## JUDGMENT

- [1] The Plaintiff initiated this writ of summons against the Defendant to claim \$41,076.06, damages, aggravated damages, interest at the rate of 6% until the final payment is received and costs of this action.
- [2] The Plaintiff is a limited liability company providing air conditioning, refrigeration, sheet metal and ventilation works, stainless steel works, building management systems and auto air conditioning.
- [3] The Defendant is a sole trader business specializing in general ICT solutions, Networking Server setup and providing IT services.
- [4] Both parties agreed on the following facts.
  - 4.1 That the Defendant is a sole trader business specializing in General ICT Solutions, Networking Server Setup and providing IT services.
  - 4.2 The Plaintiff and the Defendant entered into a service agreement.
  - 4.3 The Defendant commenced its work on the network system.
  - 4.4 That apart from IT services, the Defendant also commenced to repair and maintain CCTV cameras and install the antivirus.
  - 4.5 The Plaintiff on good faith and having trust on the Defendant, expecting that the Defendant is honest with its work continued to release the payment for the extra work carried out by the Plaintiff and that the release of payment to the Defendant was done with prior approval from the Plaintiff's directors.
  - 4.6 The Plaintiff paid the Defendant for Kaspersky licence in the sum of \$1,272.55.
  - 4.7 The Defendant was to provide the Acronis Backup. The Defendant did not provide the license to the Plaintiff for Acronis backup. The Defendant did not provide any documentation or training or handover/hand book to the Plaintiff. This backup software license was never supplied due to deteriorated business

relations between the Parties but the Defendant is ready and willing to refund the sum paid by the Defendant.

- 4.8 Defendant never showed the Plaintiff Company where the 4 Tetra Bite (TB) Hard Drive has been connected to. There was no connection made to the Domain Controller Server. The Plaintiff was at risk to lose all Data from the Server, if the server crashed as there is no back up working. Due to deteriorated business relations, the Defendant discontinued setting up the 4 Tera Byte Hard Drive to the Domain Controller Server.
- 4.9 The Plaintiff has paid the Defendant in the sum of \$4,000.00 for Acronis backup and 4TB hard drive which the Defendant agrees and admits to refund the Plaintiff the said sum of \$4,000.00.
- 4.10 Plaintiff has paid the Defendant in the sum of \$4,780.75 for Mail Server software M-Daemon.
- 4.11 Plaintiff has paid the Defendant in the sum of \$3,071.09 for DC Server.
- 4.12 The Plaintiff has paid the Defendant in the sum of \$4,015.94 for Wirbiz Server.
- 4.13 Plaintiff has paid the Defendant in the sum of \$2,189.04 for Labasa branch server.
- 4.14 Defendant was to supply the 3 KVA High Voltage UPS to the Plaintiff for which the Plaintiff paid the sum of \$2,650.00, which the Defendant agrees and admits to refund the Plaintiff.
- 4.15 Defendant used a faulty UPS of different specification compared to what was quoted and invoiced for and agreed to provide a refund, which has until to date not been received by the Plaintiff. The Defendant agrees and admits to refund the Plaintiff.
- [5] At the Trial the Plaintiff called four witnesses and the Defendant himself gave evidence. Both parties tendered several exhibits during the trial and subsequently filed written submissions.
- [6] Plaintiff's first witness Mr. Shonal Sharma testified as the General Manager and a Director of the Plaintiff Company. He stated that he has been with the company for the last 18 years

as it has been their family business. The company operates from three main divisions of Fiji and it looks after air conditioning related issues of most hotels, banks, the Airport and other places of similar nature. The Company has approximate staff capacity of 180 Fiji wide.

- [7] In 2017 the company had been awarded a contract to maintain the air-conditioning services of Nadi International Airport. According to the witness that was the time they hired the Defendant as they wanted to have an IT link between Nadi and Suva servers. The Plaintiff has reviewed the Defendant's profile and hired him. However during the proceedings it was revealed that the Defendant is related to Mr. Sharma.
- [8] The witness in his evidence provided the written contract between the parties.
- [9] The Defendant was expected to provide email hosting and any IT related solution as per this contract. The practice has been, when there was an issue the Defendant examines it and issues an invoice to the Plaintiff and upon approval of the same, the work will be carried out. The witness stated that they did not have any IT expert at the time of this incident and worked on the trust between him and the Defendant.
- [10] According to the witness the Defendant used to block the emails if there has been any payments delays. The Plaintiff Company did not expect the Defendant to access the server remotely. However the company has found out that the Defendant was continuing with this practice despite the warnings. The witness said that there was an incident where some inside information had been published on a public internet site. However he was not sure whether it was the Defendant. There had been a suspicion due to the fact that the Defendant had all of company information.
- [11] The Company went in to upgrading of their servers with the assistance of the Defendant. According to the witness there was no time frame for this. The Defendant's work was not up to the standard and it was performed in a trial and error practice. The witness said on one occasion the Defendant provided a gaming personal computer as a server. Further said the Defendant quoted for 3M cables for networking and provided some other type of cables. According to witness, every item the Defendant provided failed. The witness states that there was no IT expert to get an audit on the quality and specifications of equipment provided by the Defendant.
- [12] According to witness the Kaspersky Security Licence were not under Plaintiff's Company name. It was a subsequent change done by the Defendant. Witness stated that once they

had an issue where IT services were down for three days and the Defendant did not provide a satisfactory solution.

- [13] The witness did not give any account of the payments they have made to the Defendant. When he was asked about the damage the Defendant's actions caused to his company, he said that they had to change the email hosting and they had a down time during this exercise. Due to that they have lost some information/data and working hours of the business. The staff did not perform in their capacity as the IT system was down. This has lasted 3-5 working days. The witness stated that they have lost productive hours of work from the staff. Nevertheless they had to pay the usual weekly wages to the staff total of \$52,000.
- [14] Witness stated that their relationship ended when the Defendant took away a hard drive of the company. The witness during his evidence referred to the expressed terms of the service agreement [Exhibit 1]. That is to provide the following,
- Two hour response time (Monday to Friday 8am to 4pm)
  - Eight hours labor per month (unused hours shall not be carried forward to following month, additional hours can be purchased at \$45.00 per hour)
  - Domain Server management and maintenance, including backup.
  - File server management maintenance, including backup.
  - Anti-virus update and maintenance.
  - System support-service and maintenance of server only
  - Network support-service and maintenance of routers, switches, printers and faxes.
  - Monthly back up of domain/mail/file servers.
- [15] During cross examination the Defendant's counsel pointed out clause 5 of the contract where it states "GITS will provide full time remote support for minor issues which can be resolved remotely to reduce downtime for MSL and increase productivity". But the witness stated that the Defendant did not have approval for full time remote support. Further he stated that it was on mutual agreement and he has not vetted the agreement signed. Witness said he never said that the Defendant leaked any company information. All what he said was that he 'could have' done it. Further witness stated that him and his wife who had been involved in the business used to approve the quotations given by the Defendant. The witness further stated that whenever the Defendant provided a software they have found out later that it was a trial version and not the proper purchased product.

- [16] During his re-examination the witness stated that the Defendant shouldn't have remote access through the server. He further stated that whatever product he supplied it was below the specifications of the quoted product.
- [17] Plaintiff's second witness Mr. Kaushal Anand Pal, Manager IT was called to give evidence next. The witness has been with the Plaintiff company over 8 years. He was away overseas during the time Defendant was engaged. He said when he came back, he found that most of their IT related areas were down. It took him a week to have an audit to find out issues relating to IT system. He had assistance from Plaintiff's third witness. Witness stated that the Defendant has not provided a UPS to date, the Kaspersky licence was never handed over and later found out that it was not registered under Plaintiff's company. The witness provided the following payment vouchers and stated that he did not receive the licences and products.
- I. Payment Voucher of \$4000 for Acronics backup software [exhibit 5] - licence not received.
  - II. Payment voucher worth of \$2974.27 for remote desktop licencing [exhibit 6] - licence not received.
  - III. Payment voucher of \$4780.75 for MSL Mail server [exhibit 7] - licence not received.
  - IV. Payment voucher of \$3255.55 for MSL DC server [exhibit 8] - licence not received.
  - V. Payment voucher of \$4015.94 for MSL WinBiz server [exhibit 9] - server not received
  - VI. Invoice of \$2189.04 for Labasa server [exhibit 10] - it was a PC and the witness had to configure the same.
  - VII. Invoice of \$2650 for 3KV UPS [exhibit 12] - not supplied
- [18] Witness further stated that the Defendant failed to provide 3M Cat 6 cables for networking and has given generic cables which will cause data connectivity issues.
- [19] According to the witness he has found the MSL server that was previously provided by everything IT was on the floor with parts missing and with only two Hard-drives. The witness stated that the Defendant has cloned machines after removing the earlier server. He further produced a payment voucher that was made to everything IT for a value of \$18,888.89 for the purchasing of the server used before Defendant's engagement.
- [20] During cross examination he stated that he never said that the Kaspersky licence was not genuine. It was not under Plaintiff Company name. When the witness questioned he

stated that the life span of a server depends on how you maintain it and it may last 10-15 years. The witness was asked whether the MSL mail server problem caused by the internet connection issue and he stated that it was due to the invalid licence and not an internet problem. He further said that the Defendant did not provide any solution when it was reported.

- [21] Plaintiff's next witness was Mr. Sanjay Kumar who has provided IT support to the Plaintiff Company from the inception. He still provides advice whenever there is a need. He stated that he was called back to check the IT issues in the company. According to him there were lot of issues. The structured cabling had problems, the Kaspersky licence was not registered under Plaintiff company name. Witness provided [exhibit 15] an email correspondence where he found out on the Kaspersky licence. His view is that exhibit 14 server could have continued for 10 years. He has seen the server parts were missing which had second hand market value. Though it was not conclusive, during cross examination he explained on the Winbiz server error the Plaintiff experienced.
- [22] Mr. A. Sharma who is also the Company's group accountant called next by the Plaintiff. He stated that there was a drop in company profit during 2017 and the company invested approximately \$150,000 for IT infrastructure upgrade due to the issues the company experienced in IT front. Witness further stated that the IT downtime created loss of productive hours and it could have been equal to \$150,000.
- [23] Mr. Shalendra Nilesh Chand testified during the Defendant's case. He has been in the business of providing IT related solutions, networking and CCTV to his clients. He has entered in to an agreement with the Plaintiff in 2015 for a duration of one year to maintain the IT servers of the Plaintiff. He was paid \$120 VEP per month and had no issues with that agreement. Defendant stated that at the time there were two other companies used by the Plaintiff. The Plaintiff has issues with user end. Then the Director of MSL has asked the Defendant to look after both user and back ends of IT. He stated that this contract was never signed. However the Defendant was paid \$520 VEP per month as per the unsigned agreement.
- [24] The Defendant provided this agreement as exhibit D- 1 and referred to scope at clause 2. The difference in scope between this unsigned agreement and the 2015 agreement has been the inclusion of other branch offices. According to the Defendant though this was not signed, parties acted according to this agreement. The Defendant stated that he followed up on signing of this agreement. He provided an email sent by Ashley Sharma which was addressed to the Defendant and Shonal to go through the contract as she has

made some changes. This email was marked during the hearing as exhibit D- 2. Subsequently parties had a meeting on 14<sup>th</sup> April 2016 and the meeting minutes taken down by the Plaintiff Company was marked as exhibit D- 3.

- [25] Defendant stated that previously the Plaintiff was using trial and free versions of software applications. He stated that they provided Kaspersky anti-virus full version. However the licence of this product was under his company as they were the service provider.
- [26] Defendant has set up a server at the Plaintiff's GM's home and in this process he had asked the personal assistant of the Company to send out an email to all staff to save all their office data into the Acrinics Backup server. The email sent to this effect had been marked as exhibit D-5. The data loss of Chief Estimator was due to the crash in his own personal computer and it could have avoided if he had transferred his data to the server as advised.
- [27] The Defendant further stated that installation of Winbiz server was done under his supervision and had no issues except for a system problem. Mdeamon email exchange server was part of Defendant's scope it worked until they had a problem due to the change of internet provider done by the Plaintiff. The change in static IP address was the cause for this issue and he provided emails sent to the internet provider-TFL to establish that the delay was caused by them.
- [28] With regards to the Labasa server, the Defendant stated that the Company only had two staff members and therefore they provided a PC which has been used as a server by the Plaintiff without complaint. He also explained that the 3M cables were out of stock and they provided similar reputed cables from TP link brand as they had to recreate the networking due to the fact that the earlier provider's failure to label the network wires. He stated that upon installation they gained faster access.
- [29] About the MSL server witness stated that this was not part of their scope. However they did this after Kaushal showed them the server which had problems. According to him any server has about 3-5 years of life circle and every company changes their servers in every 5 years. He said that the server Plaintiff has stated was never operational and the server room was opened to any person. He denied taking any hard drives from this server.
- [30] Witness also explained how the invoice approval process happened during this period. He said lot of work was facilitated on verbal communication. There had been delays in getting approvals for their invoices and due to this, they provided what was available in



the market at the time of purchasing. This was done on verbal agreement between him and the Plaintiff. They kept the invoice and the prices as stated in the invoice as they provided items of near match.

- [31] He further stated that the plaintiff paid them on monthly and some instances the monthly payments were delayed for more than two months. An email exchange sent by the Defendant to the Human Resources to inform about the delays was marked by the Defendant as exhibit D- 7.
- [32] Witness stated that he did have a knowledge of the Plaintiff's IT issues before he took over their IT services. He admitted that the Acronics backup was not delivered and therefore he is willing to refund that to the Plaintiff. Further he stated that the UPS bought was a secondhand item which was provided by the company they ordered from and therefore Defendant was willing to refund this amount. However he said the payment for the UPS was short of \$800.
- [33] During cross examination the Plaintiff's counsel questioned on the unsigned agreement. The witness maintained his position as explained in his examination in chief and stated if this was not valid then why did the Plaintiff paid him \$520 as agreed in the unsigned agreement. On the Kaspersky licence, the witness stated that he explained why they purchased it that way to Kaushal and later the name was changed upon request by the Plaintiff. The Defendant did not purchase this under the Plaintiff's name because the Defendant was responsible for providing the IT services and he treated that as a service. He explained why he took the chief estimator's hard drive home as it was purchased by them and the item was under warranty. If not for this, there was no reason for him to take a working hard drive. However the Defendant failed to recovery the data.
- [34] Witness also mentioned that some of the licenscs were fed in to the servers and he could show them the same provided he is given permission to access the same now. Witness further explained how and why some licenscs were under their name as they need to provide and communicate with the vendors if the Plaintiff experience any issues with the said software. He further emphasized that there were no emails produced during the trial by the Plaintiff if they have experienced such difficulties with their services.

## Analysis

### Validity of Agreements

- [35] There are two written agreements before the Court. One is signed by both Plaintiff's General Manager Shonal Sharma and the Defendant on 19.06.2015 and the other one is unsigned and provided by the Defendant during the Defendant's case. As per the agreed facts both parties were in agreement of the existence of the signed agreement. Therefore all dealings taken place before the expiry of the signed agreement must be determined according to the terms and conditions of the said agreement.
- [36] The Plaintiff did not agree that the unsigned agreement was in operation. On the other hand the Defendant questioned if that was the case, then why did the Plaintiff pay him the monthly agreed sum as stated in the unsigned agreement. When an agreement is reduced to writing and sealed by the parties, then it can be considered as signed formal agreement. However there can be contracts expressed orally or terms applied impliedly.
- [37] In clause 10(a) of the 19.06.2015 agreement it states that "Duration- this Service Agreement is for a fixed period of 12 months commencing from the date of this Agreement".
- [38] Clause 10(c) states "Renewal - The Provider shall exercise its discretion to renew this Agreement upon expiration".
- [39] It is clear that according to the terms of this agreement the Defendant's services should have come to an end on 18.06.2016. The Court observed that some of the transactions produced during the trial by the Plaintiff was post 18.06.2016. Which means the Defendant continued to provide services to the Plaintiff. This may be due to the negotiations of the parties on the unsigned agreement as stated by the Defendant. The Defendant provided an email correspondence and meeting minutes of 14.04.16 on the discussion parties had on the unsigned agreement. However the plaintiff did not agree that they the unsigned agreement was in force. Upon perusal of quotation 105 dated 16.10.16 (post contract expiry) issued by the Defendant for the purchasing of Acronics backup softweare and 4 tera byte HDD, it is clear that under the heading of Labour, it states "100% off, installation, setup, programming and testing- Charge to the Service Contract (Reg. price FJ\$ 520.00)". This payment has been processed by the Plaintiff on 06.12.16 without highlighting any contents in the quotation. According to the Defendant the amount agreed for Labour in the unsigned agreement was \$520.

[40] Similar observations were made on the invoice and the payment voucher issued 23.06.2016 and 26.06.2016 for providing networking of the Plaintiff's Company. Another argument brought in by the Plaintiff in opposing the unsigned agreement was that the cover page of the written agreement refers as "Between Mechanical Services Limited (MSL); & Refrigeration Electrical Services Ltd (RESL) and Go It Services (GIST)". The signed agreement was between Mechanical Services Limited (MSL); & and Go It Services (GIST). And there was no Refrigeration Electrical Services Ltd (RESL). However the payment voucher Plaintiff issued for the works carried out by the Defendant for networking states "INV#QUOTE#QOT-082-SYPLY & INSTALL OF GENERAL NETWORK CABLES FOR MSL/RESAL".

[41] Form the meeting minutes on 14.04.2016 attended by the Plaintiff and the Defendant, and the email correspondence on 08.04.2016 Court is satisfied that the Plaintiff were well aware of the new contract prior to the expiry of the contract signed on 19.06.2015. However the email dated 08.04.2016 suggests that Ashley Sharma has made some changes to the contract. The Defendant did not provide evidence of those changes. Therefore I decline to accept all terms and conditions of the unsigned agreement except for those mutually agreed. The Court concludes that by conduct of both Plaintiff and the Defendant subsequent to the expiry of the 19.06.2015 agreement, parties effected to continue the conditions of the signed agreement with an increased service fee as proposed in the unsigned agreement.

#### Admissions

[42] Before I consider the disputed transactions and the work carried out by the Defendant, it is important to note that the Defendant did not dispute two transactions. Acronics backup server and the second hand UPS delivered to the Plaintiff. The Defendant agrees to refund the amount of \$4000 Plaintiff paid for the Acronics Server. He also said that the UPS that was shipped to him from the overseas supplier was a secondhand item and therefore he agrees to refund the amount. The Plaintiff's payment voucher confirms that the Defendant was only paid 80% (\$2120) of the invoice amount \$2650.

#### Scope of Services

[43] The Plaintiff's evidence narrated the Defendant's scope of services according to the agreement.

#### SCOPE OF SERVICES (Labour Support Only)

- 2 (two) hour response time (Monday to Friday 8am to 5pm, Saturday 9am to 4pm)
- 8(eight) hours of labour per month (unused hours shall not be carried forward to following month, additional hours can be purchased at \$45.00 per hour)
- Domain Server Management and Maintenance, including back up.
- File Server Management and Maintenance, including Backup.
- Anti-virus Update and Maintenance.
- System Support – Service and maintenance of Server only.
- Network Support – Service and Maintenance of Routers, switches, Printers and Faxes.
- Monthly Backup of Domain/mail/File Servers.

Note: All Servers listed above will be backed up Monthly.

- [44] Under the heading 'Support – Labour and Part Replacement' it states,  
LABOUR SUPPORT – Consist of all items listed in the scope of services.  
PARTS REPLACEMENT – MSL shall be liable for all parts required for any maintenance.  
GITS shall be liable for all labour costs under this Agreement. MSL shall have the choice of purchasing parts from GITS or elsewhere as per the list provided by GITS to resolve critical issues for reestablishment of system.
- [45] According to the evidence it is clear that the Plaintiff has chosen to purchase parts and software from the Defendant. There was no specific terms in the agreement as to what parts to be supplied and under which specifications. It is a settled position that in common law that some standard terms will be implied for certain categories of contracts unless the parties have expressly excluded them. It was decided in **Helicopter Sales (Australia) Pty Ltd v Rotor Work Pty Ltd** (1974) 132 CLR 1 that in a contract for work and materials, there is an implied term that the materials are of good quality and fit for their intended purpose. Therefore in the present case I am of the view that the Defendant had been liable for the quality and performance of the items he provided to the Plaintiff.

#### Disputed Transactions

- [46] There were issues with regards to three licences provided by the Defendant. The Plaintiff's evidence states that the Defendant did not provide them the Kaspersky Anti-Virus Licence which was purchased at \$1272, Remote Desktop Licence purchased at \$3096.69 and the MSL mail server licence purchased at \$4780.75. Further the Plaintiff has found out that the Kaspersky Anti-Virus Licence was under some other customer name which was later transferred to MSL by the Defendant.

[47] There is an agreed term in the Agreement between parties that "Upon termination of this Agreement the provider shall return to the Client, all records, notes, documentation and other items that were used, created or controlled by the client during the term of this Agreement". The Defendant states that the Kaspersky licence was one of them. Also during his evidence he explained that some information were kept under his name in order to provide swift service and easy communication with the vendors.

[48] I am not convinced by that argument. It would have been different if the Defendant created these items. He was only an intermediate person. The practice he has adopted was to get a partly payment from the Plaintiff company on his invoice and then to provide the items required through a third party vendor. Further items like software licences, are intangible by nature. There was no agreement between the parties to hold such licences under Defendant's name once it has been purchased by the Plaintiff. Thus he is obligated to deliver it to the Plaintiff Company. Therefore the Defendant's conduct to hold those licences under his name and not under the Plaintiff's Company is a breach of an obligation.

[49] Other than the failure to provide the licences of Kaspersky Anti-Virus License and Remote Desktop Licence there is no evidence before the Court to establish that the Plaintiff was unable to use these two services. However the MSL Mail Server is different. In addition to failure to provide the licence, the Plaintiff established that the MDaemon software startup could not operate.

[50] Plaintiff states MSL DC Server specifications were lower than the one invoiced by the Defendant. Invoice CINV 021 was to provide the Server with following specifications.

|                  |  |
|------------------|--|
| Processor        | - Intel Core i5-4440 3.1 GHz 6MB Cache |
| Memory (RAM)     | - 8GB                                  |
| Storage (HDD)    | - 2 X 4TB                              |
| Raid Controller  | - Supplied                             |
| Network          | - Dual NIC Card                        |
| Power Supply     | -1000 Watts                            |
| Operating System | - Windows server 2008                  |

[51] However the specifications provided by the Defendant were,

|           |  |
|-----------|--|
| Processor | - Intel Core i5-330S 2.7 GHz 6MB Cache |
|-----------|--|

|                  |                                   |
|------------------|-----------------------------------|
| Memory (RAM)     | - 8GB used from MSL Winbiz Server |
| Storage (HDD)    | - 1X 1TB, 1 X 3TB, 1 X 4TB        |
| Raid Controller  | - Not Supplied                    |
| Network          | - Not Supplied                    |
| Power Supply     | -500 Watts                        |
| Operating System | - License not supplied to MSL     |

[52] The quotation provided by the Defendant for the MSL WinBiz Server has following specifications.

|                  |  |
|------------------|--|
| Processor        | - Intel Core i5-4690 3.5 GHz 6MB Cache |
| Memory (RAM)     | - 4GB                                  |
| Storage (HDD)    | - 2 X Samsung Evo SSD 850 256GB        |
| Operating System | - Windows 7 Professional               |

[53] However the actual item provided by the Defendant was.

|                  |  |
|------------------|--|
| Processor        | - Intel Core i5-4690 3.5 GHz 6MB Cache                     |
| Memory (RAM)     | - 8GB Ram used from MSL Winbiz Server                      |
| Storage (HDD)    | - 1 X Samsung 250GB SSD 840 Evo used for MSL Winbiz Server |
| Operating System | - licence not supplied                                     |

[54] MSL Labasa Server specifications provided in the invoice had following,

|                  |  |
|------------------|--|
| Processor        | - Intel Core i3-4160 3.6 GHz 3MB Cache |
| Memory (RAM)     | - 4GB                                  |
| Storage (HDD)    | - 1 X 2TB                              |
| Optical Drive    | - DVD Drive                            |
| Operating System | - Windows server 2008                  |

[55] The actual item provided has the following specifications.

|                  |  |
|------------------|--|
| Processor        | - Intel Pentium J2900 2.41 GHz 2MB Cache |
| Memory (RAM)     | - 4GB                                    |
| Storage (HDD)    | - 1 X 500GB                              |
| Optical Drive    | - Not supplied                           |
| Operating System | - Licence not supplied to MSL            |

[56] The quotation for networking has the following specifications,

Network Cable - 3M CAT6 Cable  
Network Switch - 24 Port Gigabit managed  
Patch panel - 2 X 48 Port patch Panel

[57] The supplied items were,

Network Cable - TP Link Cable  
Network Switch - 24 Port Gigabit unmanaged  
Patch panel - 1 X 48 Port patch Panel

[58] Further to above, the Plaintiff says that the IT Server provided by the Everything IT in 2009 for a consideration of \$18,080.88 was damaged by the Defendant. However on balance of probabilities the Plaintiff was unable to prove that the Defendant caused said damages to this Server. The Server had been in a place accessible to everyone in the office.

[59] It is clear from the above paragraphs that on four occasions the Defendant failed to provide the specifications agreed by the parties based on the acceptance of individual invoices provided to the Plaintiff Company. The Defendant's explanation to this was that he always had verbal consultations with the Plaintiff when he could not find the specifications upon approval of the invoices. He has always attempted to provide 'near matched' items to the Plaintiff. The Court is unable to accept this proposition as there is no evidence provided by the Defendant that he made genuine attempts with the vendors to find the exact specifications provided in his invoices. If he had genuinely failed in such attempts then what was the difficulty he faced in providing a fresh quote or amending the quote to reflect the specifications and the prices. I do not see a reason. From the evidence it is clear to the Court that the actual item provided had less specifications than the quotation or the invoice. Hence the Defendant is liable for those breaches.

[60] On the other hand the Plaintiff has not established the actual loss per equipment he suffered due to the purchasing of items with lesser specifications. The right to claim damages does not depend on proof of loss or damage. However such proof is necessary for the recovery of more than nominal damages **Ruxley Electronics and Constructions Ltd v Forsyth** [1996] AC 366, **Owners of SS Mediana v Owners of Lightship Comet** [1900] AC 116.

- [61] Plaintiff's General Manager Mr. Shonal Sharma in his evidence stated that the Defendant's delay in changing the Company's email hosting caused loss of working hours of their staff and most of the staff members couldn't perform their daily duties due to this downtime. Once the issue has been rectified, the staff had to work overtime to catchup their work. The witness stated that this issue disrupted almost a week's work of their staff as they became idle during that period. The witness did not provide the exact number of hours lost. However he stated that in general the Company's weekly payout comes to about \$52,000.
- [62] The Defendant stated that this happened due to a delay caused by the internet provider. He produced several email exchanges between him and the internet service provider company as exhibit D6. The delay in getting the static IP address from the Telecom Fiji Limited has caused this delay in switchover.
- [63] The Defendant provided a professional service. The onus of establishing that he lacked care in extending his professional services is with the Plaintiff. On the other hand the Defendant may convince the Court that he took reasonable efforts to fulfil his obligation. The Court notes that there was no separate agreement between the parties for the time frame of this switchover. Therefore by perusing the email correspondence between the Defendant and the service provider I am satisfied that there were reasonable efforts made by the Defendant to provide the service to the Plaintiff Company which had depended on the third party service provider. There was no evidence of negligence by the Defendant.

#### Remote Access

- [64] Plaintiff stated that they did not want the Defendant to access their Servers remotely. Mr. Sharma stated during his evidence that the Defendant was able to access Company's emails, HR documents, Quotations, Passwords, Tender documents and financial documents. However the witness did not provide any conclusive evidence on whether the Defendant was responsible for any confidential information breaches.
- [65] During cross examination of the witness the Defendant's counsel pointed out Clause 5 of the signed agreement. In paragraph 2 it states "GITS will provide full time remote support for minor issues which can be resolved remotely to reduce downtime for MSL and increase productivity". In answering the Plaintiff stated that they did not want the Defendant to have remote access of the Servers.



[66] However the Court's view is that there was no such condition stated in the signed agreement. Technically both parties have completed the initially agreed period in the agreement. There was no evidence before the Court to believe that the plaintiff made any attempts to amend the earlier clause by including the condition that he stated in Court. Therefore I do not find any merit in this argument.

### Data Loss

[67] Mr. Sharma stated that there was an issue of data loss due to the actions of the Defendant. The parties admitted that there was a data loss. Whether the Defendant is liable for the loss is for the Court to determine.

[68] File Server management and Backup had been an agreed condition of the written agreement. However the Court needs to find out about the process and the responsibility of getting the data from individual personal computers to the File Server. The Defendant provided an email written by Ms. Subashni Lal informing about Director Mr. Shonal Sharma's strict advice to all staff to save all their work files in to the MSL Server. The network location pathway and a deadline had been provided in this email sent on 07.04.2016.

[69] The Plaintiff did not provide exact information about the data loss that he is complaining about. This information is important to conclude whether the data loss occurred before or after the deadline. Nevertheless it is clear that uploading individual data into the server has been the Plaintiff's staff responsibility as the Plaintiff possess the knowledge of the importance of their files. There was evidence during the trial to suggest that there were so much unwanted material in personal nature were in the Plaintiff's computers. The Defendant further explained that there was an incident in the Chief Estimator's computer. He stated that it crashed and as a result they could not recover the data in the hard drive. He has removed the hard drive as it was under warranty. However he could not recover the same. The Court has no evidence to the date of this incident, whether it happened before or after the email sent by Ms. Lal on 07.04.2016. Therefore I am of the view that the Plaintiff has not established the liability or negligence of the Defendant caused the data loss.

[70] In conclusion I am of the view that the Defendant is liable for MDaemon software startup failure, providing items on four occasions with lesser specifications to the quotations and not transferring three product licenses to the Plaintiff including MDaemon software.

## Damages

- [71] In a case of claiming damages the claimant needs to prove his case. In **Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd** [1999] 2 Lloyd's Rep 423 it was held that to justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages. This situation is illustrated by **Dixon v Deveridge** [1825] 2 C&P 109.
- [72] On the other hand where it is clear that some substantial loss has been incurred the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Williams L.J put it in **Chaplin v Hicks** [1911] 2 KB 786 'the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages'. Devlin J in **Biggin v Permanite** [1951] 1 KB 422 stated 'where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can'.
- [73] A pecuniary loss may itself occasionally be difficult to assess although it is clear that it has been incurred. In **Biggin** the action was brought against a seller for delivering defective goods. Devlin J held that the claimant was entitled to claim damages in respect of the diminution in the market value of the goods, he further held that it was no bar to awarding substantial damages to the claimant that it was impossible to measure precisely the amount of the market diminution.
- [74] In the present case I have noted the Plaintiff's difficulty to provide an exact amount of loss in the instances where liability has been established during trial. Out of three licences the Defendant failed to provide, Plaintiff's evidence was that MDaemon software startup did not function. According to the payment details the Plaintiff paid \$4780.75 for this service. The Plaintiff did not provide any evidence of loss incurred due to Defendant's decision to retain the other two licences. The four occurrences where the Defendant provided items with less specification the Plaintiff paid \$3071.09, \$4015.94, \$2189.04, and \$6000 to the Defendant respectively. However there is no evidence on the actual cost of the items provided. Therefore I am inclined to consider general damages for the loss caused to the Plaintiff by the Defendant.
- [75] The Defendant has not satisfied this Court of any counterclaim against the Plaintiff.

[76] Accordingly I make the following orders.

ORDERS

1. Judgment in favor of the Plaintiff and the Defendant to pay \$ 20,000 (twenty thousand dollars) to the Plaintiff as damages.
2. As agreed, the Defendant to pay \$6650 (six thousand six hundred and fifty dollars) to the Plaintiff for the cost of Acronics Server and the UPS.
3. Defendant to pay cost of \$ 3000 (three thousand dollars) to the Plaintiff as cost of this action.
4. All orders must be complied within 28 days of this judgment.



Yohan Liyanage

JUDGE

At Suva on 09<sup>th</sup> March 2023

