DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
[GUAMAN NO: 22NCVC-691-12/2015]

ANTARA

HEALTH PLAN SYSTEMS (M) SDN BHD
(No. Syarikat: 693922-U) **... PLAINTIF**

DAN

UNIVERSITI KEBANGSAAN MALAYSIA ... DEFENDAN

GROUNDS OF JUDGMENT

Parties and background facts

1. Plaintiff had filed a claim against Defendant for the sum of RM104,610,000.00 for losses arising from the use by unlicensed users of its licensed product at Defendant's subsidiary Hospital Universiti Kebangsaan Malaysia (HUKM).

2. The following agreements are not disputed:-

(a) Novation Agreement dated 15-12-2006 between Defendant, ABDA Computers and Electronics Sdn Bhd (ABDACOM) and Plaintiff whereby the Training, Technical Services and Support Agreement dated 1-1-2006 and supplementary Agreement dated 14-2-2005 between ABDACOM and Defendant to provide training, technical services and support for 70 user licenses of the licensed product to HUKM was novated to Plaintiff (exhibit "MI-2"). The effective date of Novation Agreement was 1-1-2007; and

(b) Training, Technical Services and Support Agreement dated 15-12-2006 between Plaintiff and Defendant (agreement, exhibit "MI-5").

A. Plaintiff's application for summary judgment

3. Enclosure 4 is Plaintiff's application for summary judgment for the full claimed amount of RM104,610,000.00 on the ground that Defendant has no defense to its claim.

(i) Plaintiff's affidavit in support

4. In its affidavit in support in enclosure 5 Plaintiff refers to Licensed Product Agency Agreement dated 21-9-2006 between Integrated Medical Systems Ltd (IMS) and Plaintiff (exhibit "MI-1") wherein Plaintiff was granted non exclusive right to market the licensed product which is Integrated Medical Information System (IMIS), Integrated Laboratory Management Systems (ILMS), Labtalk, IIRT, Integrated Blood Bank Information System (IBIS), Integrated Radiology Information Systems (IRIS), Integrated Scheduling Information System (ISIS) and Order Management System (OMS), HL7 Message Adapter and Occupational Health and Safety Information System (OHASIS).

5. Pursuant to the agreement with Defendant, Plaintiff was to supply training, technical support and services, updates and upgrades to Defendant/HUKM on the agreed computer system and subject to payment as set out in Schedule 1 of the agreement. Defendant was granted a non exclusive license to use the licensed product for 1 server and 70 users. Defendant/HUKM was to pay Plaintiff for the licensed product training, technical services and support applicable to the additional number of license users from the time of use.

6. Plaintiff essentially states Defendant had contravened the agreement by having more than 70 licensed users. When Plaintiff discovered this in 2012 it was made known to Defendant. Subsequently Defendant terminated the agreement on 14-2-2013 with 6 months notice (exhibit "MI-6").

7. By letter dated 11-3-2013 (exhibit "MI-7") Plaintiff suggested a meeting to resolve the matter amicably. Plaintiff states a meeting was held on 24-10-2013 where Defendant had agreed to extend the agreement subject to review of terms and conditions, duration and rates (as documentated in exhibit "MI-9"). Plaintiff's lawyer also wrote a letter dated 27-11-2013 the meeting had agreed to resolve the issue of licensed users exceeding 70. The next meeting was held on 3-12-2013 wherein Defendant then wrote to Plaintiff's lawyer stating the agreement would be extended and *inter alia* 70 users be amended to unlimited user (exhibit "MI-10").

8. Another meeting was held on 12-3-2014 and the minutes of meeting were sent by Defendant to Plaintiff's lawyer *via* letter dated 25-4-2014 (exhibit "MI-11"). As much turns on this minutes which Plaintiff says formed part of a global settlement and which Defendant says were on a without prejudice basis, the relevant portions are reproduced:-

"2.1. "Extra Users License"

a) *Mesyuarat dimaklumkan bahawa :-*

i. *PPUKM telah menggunakan "license" melebihi had sebenar yang dibenarkan iaitu 70 pengguna sahaja. Ketua JTM memaklumkan pengguna telah mencapai sehingga 450 pengguna. Walau bagaimanapun, mengikut rekod syarikat dan rekod carta penggunaan, didapati jumlah pengguna kini telah mencapai sehingga 1,100.*

ii. *Di dalam kontrak yang ditandatangani antara ANSI, UKM dan IMS dinyatakan bahawa "user license" bergantung kepada bilangan PC yang ada telah "install" dengan software. Server adalah merupakan "client server".*

iii. *Had "license" bagi 450 pengguna adalah ditetapkan oleh Oracle dan bukannya IMS*

b) *Syarikat bersetuju untuk menawarkan harga seperti berikut:*

i) *Berdasarkan kepada bilangan pengguna iaitu 1,100 pengguna*

Bilangan Pengguna	*Harga IMS / Bagi Setiap Pengguna (AUD $)*	*Jumlah Harga (AUD $)*	*Harga (RM)*
1,100	*8,000.00*	*8,800,000.00*	*26,640,000.00*
	IMS/HPS "Goodwill"	*Diskaun*	*13,320,000.00*
		JUMLAH	***13,320,000.00***

ii) *syarikat juga menawarkan kepada UKM:*

i) "Unlimited User"

ii) "Servers - Primary, Secondary, backup, offline server (For Stats)"

c) Mesyuarat bersetuju dengan tawaran yang dikemukakan oleh Syarikat HPS (M) Sdn Bhd dan perkara ini akan dibincangkan dalam mesyuarat rundingan harga.

Tindakan: UKM dan HPS.".

9. Plaintiff's lawyer wrote to Defendant via letter dated 4-4-2014 (exhibit "MI-12") stating *inter alia:-*

"…our client hereby instructs us to inform you the final offer as follows:

" I.EXTRA USER LIC

i. As per the Original S&P Contract signed between ANSI, UKM and IMS in 1997/1999 user license is defined as named or clients (PC)

ii. As HUKM has got more than 1100 clients using IMIS Client Software - Means that user LIC is 1100

iii. ILMS licensing is also server based

HENCE, THE PRICING IS AS FOLLOWS:

NO. OF USERS	IMS PRICE PER USER (AUD $)	TOTAL PRICE (AUD $)	PRICE (RM)
1100	8,000.00	8,800,000.00	26,640,000.00
	IMS/HPS GOODWILL DISCOUNT		13,320,000.00
			13,320,000.00

OUR NETT OFFER FOR UKM:

A. UNLIMITED USERS

B. SERVERS - PRIMARY, SECONDARY, BACKUP, OFFLINE SERVER (FOR STATS)

…

Please let us have your reply on the abovesaid offer as this offer is valid for thirty days (30) from the date of this letter and in the event we did not receive any written reply on or before 3rd May 2014, our client reserve its right thereafter to change the terms and conditions of the offer or proceed with any action without given any further written notice to you.".

10. By letter dated 26-5-2014 (exhibit "MI-13") Defendant replied *"Pihak UKM bersetuju dengan harga RM13,320,000.00 yang ditawarkan oleh pihak HPS (M) Sdn Bhd termasuklah untuk* 'unlimited users, servers-primary, secondary, backup, offline server (for statistics)".

11. Next comes Plaintiff's lawyer dated 23-6-2014 (exhibit "MI-14") enclosing the supplementary agreement. In Schedule 1B was inserted the provision:-

"SCHEDULE 1B
UNLIMITED USER LICENSES

> The parties hereby agree that upon execution of this Agreement, UKM shall pay to HPS the sum of RM13,320,00.00 being the fees for the unlimited user license.".

12. By letter dated 19-12-2014 (exhibit "MI-15") Defendant replied attaching its amendments to the supplementary agreement stating *"Kadar RM13,320,000.00 untuk bayaran "unlimited user license" tidak dipersetujui kerana tidak ada basis dan tidak dinyatakan dalam* "Principal Agreement" and proposing "kos untuk "unlimited user licenses" RM5,000,000.00 sahaja.".

13. This was followed by Plaintiff's lawyer's letter dated 13-1-2015 (exhibit "MI-16") objecting to the proposed amendments.

14. Subsequently Plaintiff did an audit and discovered the number of unlicensed users as at 15-2-2016 was not 1,100 but 2,383. A letter of demand dated 9-3-2015 in exhibit "MI-17" was issued to Defendant.

(ii) Defendant's affidavit in reply

15. In enclosure 8, Defendant denies having breached the agreement and states the issue of exceeding 70 licensed users only arose when Plaintiff was given the notice of termination and that the termination was due to unsatisfactory service. Defendant further affirms that Plaintiff had in its letter dated 11-3-2013 stated the number of unlicensed user was 950+ and "we do not wish to be forced into resorting to take a legal recourse to resolve the issue" which meant parties had started discussions on a without prejudice basis such that the meetings and communications referred to were privileged. The charges were not dependent on number of users and were lump sum. Plaintiff was put to proof as to the how it derived the number of unlicensed users of 2,383 and the calculation of RM26,400.00 per user. This figure also departed from an earlier rate of RM24,000.00. If indeed users exceeded 70 this had not been reflected in Plaintiff's invoices in exhibit "AM-3". Further the change of unlicensed users from 1,100 to 2,283 rendered a trial necessary.

(iii) Plaintiff's affidavit in response

16. In enclosure 9 Plaintiff denies it raised the issue of unlicensed users only after the notice of termination and this had been explained in its exhibit "MI-7". The issue of unsatisfactory service was only raised by Defendant through its lawyer's letter dated 27-3-2015 (exhibit "MI-18") in response to Plaintiff's letter of demand of 9-3-2015. The issue of privilege was refuted and Defendant had admitted to the licensed users. Charges under the agreement were on the basis of users as the agreement had stipulated 70 licensed users. On the change in number of unlicensed users this would go towards quantum. IMS's software price list had been attached in its lawyer's letter dated 6-7-2015 as in exhibit "AM-2". The change in rates are pursuant to the revision entitlement period every 3 years from 2008. The unlicensed users were not reflected in the invoices as there were ongoing discussions and further it could not have been raised in the invoices from 2010 to 2012 as this issue was discovered in 2012.

(iv) Further affidavits

17. Defendant raised in its further affidavit in enclosure 10 that an audit conducted by Ernst & Young had shown the same password to the ILMS system was being shared by Plaintiff and Defendant. It exhibited "AM-4" which is a letter dated 11-2-2016 from Defendant's lawyer to Plaintiff's lawyer. It was further stated Plaintiff had been attending meetings as seen in exhibit "AM-5" and had never raised the issue of unlicensed user. This was refuted by Plaintiff in enclosure 13 there was no document to support the finding of Ernst & Young. As to not having been raised in the meetings, Plaintiff reiterated the admission by Defendant.

(v) Analysis and finding

18. Plaintiff had referred to the minutes of meeting on 12-3-2014 between the parties, Plaintiff's lawyer letter dated 4-4-2014 and Defendant's reply dated 26-5-2014 to show there had been an admission by Defendant on unlicensed users and the amount Defendant would pay.

19. With reference to the minutes of meeting held on 12-3-2014 it was clearly recorded:-

> *"a) Mesyuarat dimaklumkan bahawa :-*
>
> *i) PPUKM telah menggunakan "license" melebihi had sebenar yang dibenarkan iaitu 70 pengguna sahaja. Ketua JTM memaklumkan pengguna telah mencapai sehingga 450 pengguna. Walau bagaimanapun, mengikut rekod syarikat dan rekod carta penggunaan, didapati jumlah pengguna kini telah mencapai sehingga 1,100",;*

"b) Syarikat bersetuju untuk menawarkan harga seperti berikut:

i) Berdasarkan kepada bilangan pengguna iaitu 1,100 pengguna"; and

Bilangan Pengguna	*Harga IMS / Bagi Setiap Pengguna (AUD $)*	*Jumlah Harga (AUD $)*	*Harga (RM)*
1,100	*8,000.00*	*8,800,000.00*	*26,640,000.00*
	IMS/HPS "Goodwill"	*Diskaun*	*13,320,000.00*
		JUMLAH	***13,320,000.00***

"; and

"c) Mesyuarat bersetuju dengan tawaran yang dikemukakan oleh Syarikat HPS (M) Sdn Bhd dan perkara ini akan dibincangkan dalam mesyuarat rundingan harga.".

20. Plaintiff's lawyer then followed by letter dated 4-4-2014 to make the final offer of *inter alia* RM13,320,000.00 based on 1,100 number of users at the price of RM26,640.00. It further stated the offer was valid for 30 days from the date of letter.

21. Defendant in its letter dated 26-5-2015 replied that *"Pihak UKM bersetuju dengan harga RM13,320,000.00 yang ditawarkan oleh pihak HPS (M) Sdn Bhd."*.

22. Having perused the above documents there can be no doubt that Defendant had agreed it had exceeded the number of users of 70 for which the number of was 1,100 and that it had agreed to pay Plaintiff the sum of RM13,320,000.00 calculated at RM26,640.00 x 1100. The minutes of meeting was prepared by UKM itself, having been vetted and approved by its representatives. The minutes were sent to Plaintiff who responded with its offer and Defendant in turn by letter dated 26-5-2015 confirmed its agreement. It was categorical and left no room for doubt that Defendant had accepted the offer. All that remained was for Defendant to sign the supplemental agreement prepared by Plaintiff.

23. The discussion culminating in Plaintiff's offer and Defendant's acceptance was a global settlement as it dealt with other issues on copyright and new executables.

24. These documents can thus be used in the proceedings before the Court despite the attempt by Defendant to say they were made on a without prejudice basis. The general rule is without prejudice letters and communications cannot be admitted as evidence. This is amply made clear in *Halsbury's Laws of England*, (4^{th} Ed) at para 212 where it is stated that:-

> "Letter written and oral communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute, and which are expressed or otherwise proved to have been made 'without prejudice', cannot generally be admitted in evidence".

25. However In the Federal Court case of *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 it was stated at page 18:-

> "It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letter become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.".

26. This then means letters and communications including minutes of meeting made in course of negotiations can be admitted as evidence where there was a settlement. In this instant case there was a settlement where Defendant had admitted to unlicensed users and agreed to Plaintiff's offer for it to pay RM13,320,000.00 calculated at the rate of RM26,640.00 x 1100 (users).

27. *Rush & Tompkin Ltd v. GLC* [1988] 3 All ER 737 was referred to in *Lim Tjoen Kong v. A-B Chew Investments Pte Ltd* [1991] 4 CLJ (Rep) 550 where it was held in page 552:-

> "[8] The objective of the rule in Rush & Tompkins v GLC is to encourage litigants to settle their differences, without fear of negotiations being admitted in evidence if no settlement is reached. But the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it.".

28. Here the justice of the case requires that the settlement reached be disclosed more so when Defendant had agreed at least twice in minutes of meeting and letter dated 26-5-2015 of unlicensed users, the rate and the amount it would pay. It cannot now turn behind the without prejudice rule. Further it cannot say it was not legally represented during those negotiations when compared to Plaintiff who had its lawyer. In any event this was not raised in its affidavits but in the course of submissions.

29. Once the admission and settlement by Defendant for the amount of RM13,320,000.00 at RM26,640.00 x 1100 is admitted as evidence the application by Plaintiff for summary judgment for the sum of RM13,320.000.00 is allowed with the balance of the claim to proceed for trial.

30. The issue of 2383 unlicensed users is not relevant at this time when there has been admission of 1100 unlicensed users. The same goes for the calculation of RM26,640.000.00 which in any event was disclosed in the software price list and Plaintiff's reliance on the revision entitlement period for every 3 years starting from 2008. As to unlicensed users only been raised after the notice of termination Plaintiff's letter of 11-3-2013 shows the issue had indeed been raised as evident from the words "we have written numerous letters and reminders to HUKM pertaining this issues " in page 2 and "…PPUKM must pay us for the addition number of user licenses. We have written many times to PPUKM on this issue…" in page 6. On payment premised on lump sum as alleged, clause 6 of agreement provides Defendant has to pay an addition fee if the licensed product is redesigned with more users. On the audit of Ernst & Young wherein the same ILMS password was used by Plaintiff and Defendant, there was no evidence on this audit to this effect. All that was produced was a letter from Defendant's lawyer dated 11-2-2016.

31. As per *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ (Rep) 14 there were no triable issues and this coupled with the admission and settlement by parties meant Plaintiff's application for summary judgment for a partial amount of RM13,320,000.00 was allowed.

B. Defendants application to strike out certain paragraphs of Plaintiff's statement of claim

32. Enclosure 6 is Defendant's application to strike out paragraphs 14-21 of Plaintiff's statement of claim on the ground they refer to communications on a without prejudice basis and to strike out part of paragraph 24 as being time barred.

33. As the Court had ruled the communications pertaining to minutes of meeting, correspondence between parties made in course of negotiations resulting in settlement can be disclosed it follows that the application to strike out paragraphs 14-17 which referred to these matters ought to be dismissed. Paragraph 18 on the supplemental agreement to give effect to the settlement and paragraph 19 on Defendant's amendments are but what happened subsequently. The same goes for paragraphs 20 and 21. Hence these paragraphs ought to be struck out too.

34. With regard to paragraph 24 it had set out claims from 2005 to 2015 which Defendant states some are time barred and in the alternative the claim for 2005 to 2006 is caught by the Novation Agreement under which any claim ought to be made by ABDACOM. The issue of limitation can be answered by referring to Plaintiff's assertion it only discovered the issue of unlicensed users in 2012. On ABDACOM having the right to pursue the 2005 and 2006 claims the Novation Agreement was an assignment of all rights, duties and obligations of ABDACOM to Plaintiff which would include the right to make this claim.

35. Accordingly Defendant's application to strike out was dismissed.

C. Conclusion

36. For the above reasons Plaintiff's application in enclosure 4 for summary judgment for the sum of RM13,320,000.00 was allowed and Defendant's application in enclosure 6 to strike out certain paragraphs in Plaintiff's statement of claim was dismissed.

Dated: 24 JUNE 2016

(SEE MEE CHUN)
Hakim Mahkamah Tinggi
Shah Alam

Counsel:

For the plaintiff - Habizan Rahman & Frank Wong; M/s Rahman Rohaida
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For the defendant - Philip Teoh & Ahmad Syimir; M/s Azmi & Associates
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Case(s) referred to:

Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17

Rush & Tompkin Ltd v. GLC [1988] 3 All ER 737

Lim Tjoen Kong v. A-B Chew Investments Pte Ltd [1991] 4 CLJ (Rep) 550

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ (Rep) 14

Other source(s) referred to:

Halsbury's Laws of England, (4th Ed)