its specification. The maintenance service does not normally include:

- defects or errors resulting from modifications made by the customer or third parties;
- any version of the licence programme other than the current release;
- incorrect use of the current release;
- operator error;
- equipment fault;
- defects or errors caused by the use of the current release on equipment other than that specified in the Agreement or approved by the software house;
- the software house has an option of correcting such errors at additional expense.

Secondly, the maintenance service includes enhancements or new releases. It is difficult to oblige the software house to so continue to improve the software except where it is an operating system and the equipment manufacturer is substantial and maintaining a competitive position in the marketplace. An enhancement may provide a host of additional facilities and functions (none or all of which may be required by the customer). It may also effect memory capacity or response times which will result in a degradation in performance criteria that might outweigh the other advantages. Additionally the customer may be contractually bound to accept new releases particularly of operating software as the software house does not wish to maintain staff familiar with many different releases. These new releases become confused with surprising results!

Part three of the series ,to be printed in the next issue, examines the main areas of risk, with warranties, exemption clauses, acceptance test clauses, proprietary rights and source code provisions examined in detail.

The Perils of Litigation: The Westsub Case

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Westsub Discounts Pty Limited v Idaps Australia Limited was a decision of Mr Justice Woodward handed down in the Federal Court of Australia on 9 April 1990. The case was an action for damages for breach of contract, breach of warranty, negligence and breaches of ss52 and 53 of the Trade Practices Act 1974. The claims arose out of a proposal for the supply of a hardware and software solution to Westsub by companies later acquired by Idaps.

Brief Facts

Westsub was the proprietor of a business engaged in the rental of video cassettes, based in Melbourne. The Westsub business was growing rapidly and in mid-1983 the applicant had just embarked upon a very successful extension of its business of renting video cassettes "wholesale" to convenience stores, and had plans to move to larger premises in Melbourne. The principals of Westsub were toying with the idea of extending the business to Sydney. At this time, Westsub approached a number of companies seeking a computer system to record the hiring and return of video cassettes, as well as to perform stock control and certain accounting functions at the several Melbourne stores comprising the business.

There were no such computer systems suitable for Westsub's business, but Idaps later offered to modify existing software, called "Technocrat", designed for use by small libraries, and to supply the computer equipment necessary for its use. In so doing, Idaps stated that it was "confident that the installation will be a highly successful one".

There followed some discussions as to Westsub's requirements, and negotiations

as to price, during which Westsub raised an issue as to its use of more than 8, and up to 15, terminals on the computer to be supplied, with a maximum response time of 5 seconds on each. Westsub wrote a letter to Idaps dated 4 October 1983 seeking assurances on these, and other, requirements, to which Idaps deputed a junior and inexperienced employee, Ms Rosemarie Gubser, to respond orally, negativing these requirements, although Westsub disputed that she had done so.

In due course a purchase agreement was submitted to Westsub for execution, which included a clause excluding representations and warranties not expressly included in the agreement. Westsub queried the agreement as it did not refer to matters raised by Westsub in the pre-contractual discussions, but the contract was not modified prior to its execution in November 1983. The total purchase price for the computer system, including services to customise the Technocrat software to Westsub's requirements, was $116,000.

The computer equipment and basic software was supplied and installed, and work commenced on the modification of the software and other services to be supplied in accordance with the contract and Westsub's requirements. Progress in this development was slow. Westsub increased and altered its requirements and delayed payment for a considerable period of time. At the same time, the size of Westsub's business grew dramatically.

"the computer system was regularly failing and losing information"

At all relevant times, Westsub maintained a manual system of records in parallel with the computer system.

There were from the beginning persistent difficulties with the system. The computer system was regularly failing and losing information. It was very slow, and was not capable of operating with 15 terminals or response times less than 5 seconds. The principle cause of these difficulties was a fundamental design flaw in the Technocrat software. There was no fault in the computer equipment itself.

Idaps made strenuous efforts and went to considerable expense to overcome the problems caused by the use of the Technocrat software in the Westsub environment, including the supply to Westsub on loan for a period of 90 days of a significantly bigger and more costly computer system, the MV8000, to run the Technocrat software, while Idaps was undertaking certain investigations and correctional efforts.

Eventually Idaps realised that it would be impossible to achieve Westsub's expectations, and proposed a compromise whereby it would do further work to achieve workable response times, but not the 5 seconds or less demanded by Westsub, provided Westsub would drop all further claims. Westsub refused to consider any compromise and proceedings were commenced.

Idaps raised a number of issues in its defence which are worth examining further because they relate to very common problems with implementations of all kinds, and which are rarely adequately explained to users. Each of these issues were raised by Idaps in an attempt to avoid liability under s52:

1. The first argument raised by Idaps was that the representations alleged by Westsub were not false representations because they were based upon information about the nature of Westsub's business given to Idaps officers by representatives of Westsub. In particular, it was argued that Idaps could not have guessed that the wholesale business of Westsub would grow so quickly between the date the contract was signed in November 1983 to July 1984 when there was almost a ten-fold increase. While Idaps conceded that the computer system became overloaded, Idaps argued that the system would have worked adequately had it not been for the unexpected growth in Westsub's wholesale business.
2. Idaps also claimed that Westsub was akin to a "moving target", in that it failed to understand and express adequately what its own requirements

for a computer system were.

3. Idaps argued that user error contributed to the poor performance of the computer system.

4. Finally, Idaps argued that the protracted negotiations and half started attempts to correct problems in the installation alleviated its responsibility, if any, by introducing new contracts, waivers of past liability or "breaking the chain of causation" from the original misrepresentation.

Sections 52 and 53 of the Trade Practices Act

His Honour Justice Woodward found that Idaps had made an express representation that the Technocrat software would fulfil the specific requirements of Westsub's business, and it was highly likely that Idaps' employees, who honestly believed that the Technocrat software would meet Westsub's requirements, expressed that belief in the course of further negotiations thereafter.

In addition, the Court found that Westsub had made it clear to Idaps that it wanted a computer system with a maximum response time of not more than 5 seconds. While acknowledging that Ms Gubser did make some qualification concerning the ability of the system to maintain a 5 second response time, the Judge decided that any such qualification was nothing more than "a muted reservation", unlikely to be "sufficiently clear or emphatic to raise doubts" in Westsub as to whether it would get substantially what it wanted.

"His Honour obviously thought so little of the argument relating to user error that he did not even refer to it in his judgment"

The Court did not accept the defences of Idaps based upon claims that Westsub had misled it as to its rate of growth or requirements, or that Westsub had contributed to the failed implementation by its own error. The Court found that Westsub had made it clear from the outset that it had expected to expand, and that Idaps' own witnesses had admitted that they had the same expectation. The Court took the view that Idaps personnel had an obligation to elicit the necessary information which would normally be found in the specification from Westsub staff.

His Honour obviously thought so little of the argument relating to user error that he did not even refer to it in his judgment.

In view of the Court's finding that Idaps had engaged in conduct that was misleading or deceptive, Woodward J did not find it necessary to deal with the allegations concerning breach of s53 of the Trade Practices Act. To the effect that there was said to be false representations of the goods or services to be provided were of a particular standard, quality or grade. the only comment offered by His Honour was that this description of the representations appeared to be inappropriate.

An area of concern for vendors, and of some comfort to users here is that the decision appears to extend almost strict liability to the supplier.

There was no suggestion that the representations alleged to have been made were dishonest. The employees of the vendor in this case honestly believed in the product they were selling, and not surprisingly regularly repeated the style of vague laudatory comments which are so common in proposals and other documents relating to computer hardware and software: "We are confident that the installation will be a highly successful one" and "We are convinced that the system can meet your requirements." Who would not make statements such as these? The law once dealt with such as "mere puffs", and was very cautious in giving them the status of binding representations, or contractual warranties. A question to be answered in the current legal environment is whether the law should for the same reasons be equally cautious in dealing with such statements under ss52 and 53 of the Trade Practices Act.

Furthermore, the Court seems to have thrown upon the vendor an obligation in every case to positively go into the user and find out the user's requirements before offering for sale its own product. This is surely to impose a duty of

professional adviser upon those who are nothing more than salespeople who, although required to be honest, do not have a fiduciary duty at law.

Bearing in mind the ease with which the respondents in *Parkdale Custombuilt Furniture v Puxu* (1982) 149 CLR 191 were able to inform the public at large of their disclaimer, a small tag on the back of a cushion, it would have appeared to many that, in conjunction with the express disclaimer in the contract ultimately executed by Westsub, conscious of the disclaimer, Idaps had done enough to displace the self induced misapprehension of Westsub.

Finally, one must question the extent to which the Court has found wrongful statements as to the future. Here the Court found that the representations made in relation to the performance of Technocrat were false and misleading because of the basic flaw in the Technocrat software, not appreciated by any of the Idaps' employees, which made it quite unsuitable for the requirements of Westsub. The representations, although honestly made and in the form of promises or predictions, were held to involve implied statements of present fact about Technocrat's capabilities and its suitability for the Westsub's purposes. Now, 251A of the Trade Practices Act, introduced in 1986, has application to these circumstances.

However, the Court also found misleading the statements regarding the future delivery and implementation of a debtor's interface and pricing matrix. It wasfound to be implicit in all the discussions and written communications between the parties that the debtor's interface and the pricing matrix would only require a few weeks at most to be written into Technocrat. Thus, these tasks of modification or customisation were considered to be relatively minor although, in fact, they turned out to be major problems. The Judge's view in this regard was reinforced by the quotation provided by Idaps to the effect that the writing

of the code for these customisations would incur a charge of only $4,500. It is questionable in light of the provisions of s51A of the Trade Practices Act which purport to clarify and extend the pre-existing law, whether this type of representation should be characterised as a misrepresentation as to present facts, or an honest representation based upon reasonable grounds, within the meaning of s51A(1).

Contract

Clause 16 of the Westsub contract of 18 November 1983 read as follows:

"Libramatic [Idaps' predecessor] makes no representations or warranty other than that set forth in this agreement ... in no event shall Libramatic be liable for incidental, special or consequential damages of any kind whether or not Libramatic has notice of the likelihood of such damages."

Idaps argued that the clause should have effect in accordance with its terms. The Judge refused to allow this disclaimer to have any effect in overcoming or modifying the misrepresentations that were found to have been made prior to the entry into of the contract. His Honour found that the exclusion clauses in the contract did not have the effect of reducing the significance of the representations made. Here the representations were made and repeated over several weeks of discussions and correspondence. The disclaimer came in the formal wording of the contractual document where, although it was printed in capital letters, it was incorporated in a paragraph which clearly dealt for the most part with contractual warranties.

"His Honour found that the exclusion clauses in the contract did not have the effect of reducing the significance of the representations made"

On the other hand, it was found that the representations did not form part of the contract. Westsub was anxious to tie Idaps down to as precise a commitment as it could get, while it was equally clear that Idaps was unwilling to commit itself to binding provisions in the nature of guarantees of performance. There was no common intention therefore to make any particular assurances given by Idaps part of the contractual arrangements between the parties. It was in seeking to reassure Westsub on the issues it raised, while being careful to avoid any contractual commitment, that Idaps unwittingly involved itself in misleading conduct. The contract clauses were not in any way uncertain or ambiguous so as to be read against Idaps.

The significance of this may be found in the assessment of damages, considered further below, although it is unlikely to have made any difference in this case because of the Westsub's very poor evidence of damage. The measure of damages for breach of the Trade Practices Act is a tortious one, whereas the measure of damages in breach of contract cases is as described in Hadley v Baxendale, which in cases such as these may well lead to a different, possibly significantly higher award, depending on foreseeability and causation issues.

Damages

The particulars of damage filed by Westsub were complex and difficult to understand. Idaps attacked Westsub's damages case vigorously and His Honour's judgment is most instructive in its analysis of the potential liability for a vendor responsible for a failed implementation such as this.

The appropriate measure of damages for breach of Part V of the Trade Practices Act is, generally speaking, the same as in the case of deceit. The aim is, so far as possible, to put the applicant back in the position it would have been in if the misleading conduct had not occurred, or had not induced the applicant to act to its detriment. The applicant is therefore entitled to compensation for any reasonably foreseeable losses which it incurred:

(a) directly by reason of its having entered into the contract with the respondent;

(b) indirectly suffered as a result of its entering into the contract, such as interest on borrowings, or earnings which might have been made from other sources if its capital or borrowings had not been invested in the comparatively unproductive computer system.

This does not mean however that the applicant is entitled to damages for lost expectations. It is not entitled to damages to compensate it for the profits which it might have made if the representations had turned out to be accurate.

In assessing damages, allowances must also be made for any benefit which the user received from the contract, although these may be very much reduced by the need to keep parallel manual records in case the computer system breaks down.

The Judge allowed Westsub the following damages:

(a) maintenance and support charges in relation to the hardware, incurred during the time of its use, in a total sum of approximately $18,000.00;

(b) the cost of software support and peripherals - payments made to Idaps of $5,685.00;

(c) the purchase price and borrowing costs for the system in the sum of approximately $153,000; Westsub had financed its purchase of the computer system by virtue of a hire purchase agreement and it was held that it was entirely foreseeable that Westsub would borrow to pay for the equipment; and

(d) Telecom charges for dedicated line between two branches of Westsub's business in the sum of approximately $16,000.

"in assessing damages, allowances must also be made for any benefit which the user received from the contract"

Interestingly, it was also ordered that the hardware and software be returned to Idaps.

However, the Court refused to allow the following damages claimed by Westsub:

(a) accountancy fees paid to a director who was also the company's accountant, in the sum of approximately $78,000, claimed as fees for supervision and problem solving in relation to the computer system - the Court noted that these payments were totally unrelated to the work performed by the director in connection with the computer system and amounted to nothing more than an arbitrary figure by way of director's remuneration;

(b) stationery and repairs in the sum of $16,000; which happened to be the entire cost of all stationery over the entire period, whether related to the computer system or not;

(c) additional cost of staff in the sum of $520,000; without going into the intricacies and imaginativeness of this claim, the Judge held that none of the time wasted by staff on Technocrat and its problems was sufficiently identifiable to be made the subject of a special claim for damages; in any event, there would have to have been an offsetting of any such costs against any benefit received by the applicant from the system, which Westsub undoubtedly did receive, as it refused to return the MV8000;

(d) loss of profits which Westsub alleged it would have made had it been in a position to expand to Sydney, in the sum of $820,000; the Court found this a fictional claim.

It is clear that His Honour felt constrained to allow Westsub what basically amounted to out-of-pocket expenses incurred by virtue of the failure of the computer system. Because Westsub did not prove any breach of contract, there was a legal basis for denying Westsub many different heads of damages claimed. Additionally, by virtue of Westsub's failure to factually prove that losses were incurred, there were no grounds for the award of any such damages,

even if a legal basis had existed.

Finally, as to Idaps defences, the questions of causation and mitigation of damage were raised fairly and squarely in the Westsub case. Even though there had been substantial evidence from Westsub witnesses to the effect that they had decided that the Idaps computer system was "a bum system" as early as July 1984, the Court found that continued reassurances of Idaps that the system could be salvaged satisfactorily were sufficient to maintain the chain of causation at least until August 1985 when a technical expert from Data General informed both Idaps and Westsub that Technocrat was not capable of doing the task required of it. Westsub subsequently installed an AWA system in July 1986 (and subsequently litigated with AWA as well!) and it was held that Westsub moved with sufficient speed so as not to fail to mitigate its damages.

What does this Judgment mean to a User?

So there is now a judgment which users can rely upon to ensure thatvendors deal with them professionally, provided, of course, that the user can prove their damage.

"there is now a judgment which users can rely upon to ensure that vendors deal with them professionally"

This is great for users, but potential litigants should keep fixed firmly in their minds the fact that while litigation may sometimes be necessary, it is to be avoided if at all possible. The Westsub case is particularly illustrative of the pitfalls. There is no doubt that Idaps had delivered to them a system which was not really usable. At this stage Westsub had a $100,000 problem - they had paid that amount for the system they could not use. Doubtless they also invested a large amount of executive time in trying to correct the problems. but in the end the problem became one of much greater magnitude.

It seems that Westsub could not get away from a feeling that Idaps was certainly in breach of its duties and therefore they were entitled to some very substantial damages. Perhaps they had been watching too many American TV shows. They seemed to feel that Idaps should sign a blank cheque to recompense them. According to Westsub, they had only to find a suitable building in Sydney, hand out their shingle and wait for profits to the tune of $800,000.00 to roll in. If only it were so easy in business to make a profit. Even more fundamentally, if a computer system worth $100,000 is standing in the way of a profit of that magnitude then a wise businessperson will always decide to find a way around the lack of proper system to ensure that the profit is in the bank rather than in theory. The vagaries of litigation are such that one should never depend upon being recompensed by the courts. Much better to spend the extra money needed to overcome the problem and put the profit in the bank. The litigation, if it is necessary will then be over the extra costs incurred in earning the profit, not the lost profit itself. These costs have the twin advantages of being both smaller and easier to quantify.

Fundamentally Westsub failed to make a realistic assessment of the likely outcome of the litigation. Having claimed $1.78 million they were awarded a total, after a deduction for the successful cross-claim by Idaps, of only $108,000, a figure remarkably close to the initial cost of the system. It is not impossible that a one hundred thousand dollar system could cause damage worth nearly two million dollars, but it is extremely unlikely.

The costs of litigation are enormous. QC's now routinely charge more than $3000.00 per day (or about the same as most consultant analysts in the computer industry). Your day in court with a QC, junior counsel and solicitor will therefore cost you well over $5000.00 per day.

Award of costs

It is usual in litigation for a judge in this country to exercise his or her discretion and order the losing party to pay the costs of the victorious party. The snag is that

that never (or as good as never) means that the victorious party simply sends copies of the bills rendered by it solicitors and barristers and receives a cheque by return. There are court scales for the amount which is actually payable and a good rule of thumb is that you will get back approximately two thirds of what you pay your legal advisers. The theory is that the courts will recompense the victorious party as if it carried out the minimum necessary to win its case, followed no blind alleys and did only what it had to do to win. In practice it is not advisable for legal advisers to follow such a policy and hence the "missing third".

As a result of a cross-claim filed by Idaps being allowed, the final verdict in Westsub's favour of $108,000.00 was less than the amount of $150,000.00 paid into Court by Idaps, in its final attempt to settle the matter to Westsub's satisfaction. The procedure of paying money into court requires the defendant to lodge whatever sum it chooses with the court and to serve notice on the defendant that it has done so. It is then available for the plaintiff at any time to abandon its claim and instead take the amount paid into court. It is an important part of the procedure that the judge who is hearing the case is unaware of the fact that any money has been paid into Court, so his or her decision will not be influenced in any way. The (very) general rule is that the defendant will be ordered to pay the costs incurred by the plaintiff up until the date of the payment in, and if the defendant chooses to take the amount paid into Court, or is awarded by the court a sum less than that paid in then the plaintiff pays the costs of the defendant incurred after the date of the payment in.

"Westsub were ordered to pay Idaps costs of the five weeks of hearing time"

As a result, in this case Westsub were ordered to pay Idaps costs of the five weeks of hearing time. Westsub received nothing from the judgment - even the money paid into Court was ordered to be returned to Idaps to defray its legal costs thrown away because of Westsub's intransigence in settling its inflated claim.

The award of costs in any court action is a very important part of the proceedings. When, as in Westsub, the plaintiff wins an award of damages but is ordered to pay the costs of the defendant the defendant, can rightly claim overall victory in the proceedings. The costs in this case easily outstripped the amount of damages.

Westsub had the additional problem of having changed the nature of its claim before an earlier attempt to hear the case and ti was ordered to pay the costs associated with the abandoned attempt. (Westsub initially claimed it had lost $500,000 in its Melbourne operation and then the day that the case was to be heard it advised the court that it was abandoning that claim and instead was claiming a loss of $800,000 from its Sydney operation). Overall, Westsub have been ordered to pay by far the greater part of Idap's costs.

As a final point in the analysis of costs, the extent of the miscalculation by Westsub should be pointed out. Given that the best result they could possibly hope for on the issue of costs was that Idaps would pay two thirds of their costs of the five week hearing and all the executive time which would be thrown away, Westsub probably needed to get at least twice what Idaps paid into Court before they would be better off financially. (There is a general point here that in any form of litigation a payment of $X before the trial may be worth more than an award of damages of $2X after the trial).

In the end the disaster for Westsub of having an impractical computer system installed was minor when compared to the major disaster of losing the litigation. The decision, both the damages question and the costs question have been appealed by Westsub, but the more they spend chasing their victory the more they need to win just to break even. Of course, the exercise was not one which Idaps will remember fondly either, it has cost them a considerable amount of both time and money. However, it was, for them, unavoidable; when you are the defendant you can only choose between paying the plaintiff what it asks or defending yourself to the maximum extent possible.