

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBC 273 of 2006

BETWEEN:

COMPUTECH IT SOLUTIONS LIMITED

Plaintiff

AND:

FIJIAN TEACHERS ASSOCIATION

Defendant

Coram: Hickie, J

Counsel: Mr I. Roche with Mr B. Prasad for the Plaintiff
Mr J. Raikadroka for the Defendant

Dates of Hearing: 5 September 2008

Dates of Submissions: 19 September 2008 (Plaintiff)
13 October 2008 (Defendant)
20 October 2008 (Plaintiff in Reply)

Date of Judgment: 31 March 2009

JUDGMENT

A. BACKGROUND

1. The Claim

[1] The Plaintiff, **COMPUTECH IT SOLUTIONS**, filed a Writ of Summons and Statement of Claim on 29 June 2006 seeking the sum of \$55,984.00 (as well as interest on the said sum at 9% plus indemnity costs) which it says is for outstanding fees for computer services it provided to the Defendant the **FIJIAN TEACHERS ASSOCIATION**.

2. The essential agreed facts

[3] On 7 September 2005, the Plaintiff and the Defendant entered into an agreement whereby the Plaintiff would supply computer services and equipment specified and agreed and that the Defendant would purchase the same for an agreed sum.

[4] The Defendant then paid the Plaintiff a deposit of \$10,000.

[5] The Plaintiff has made a demand of the Defendant to pay the sums owed.

4. The Plaintiff's claim

[6] The Plaintiff claims:

(a) That a sum of \$33,000.00 is outstanding as the balance for "*Credit Union Software*" which the Plaintiff provided pursuant to the agreement dated 7 September 2005; and

(b) That there is an additional sum of \$22,984.00 outstanding (reduced at hearing to \$17,994.00) as a result of the Plaintiff being asked to "reinstate" an accounting software solution system known as "*ACCPAC*" into the "*Credit Union Software*". That is, the Plaintiff was asked by the Defendant to -

(i) organise the renewal and upgrade of a license for the *ACCPAC accounting software* which had been previously installed on the Defendant's system in 2003 by another company known as **DATEC** but it had allegedly never worked and was out-of-date;

(ii) arrange for integration of *ACCPAC software* with the new "*Credit Union Software*".

[7] The "*design, installation and implementation of a state-of-the-art Savings and Loan Scheme Management system*" (*the Credit Union Software*) was outlined in the agreement. Data transfers involving FTA's existing software (*the ACCPAC accounting software*) was foreshadowed in the agreement but not license renewal and upgrade.

B. THE ISSUES

1. The agreed issues

[8] According to the "agreed issues" from the minutes of the pre-trial conference held on 8 April 2008, there were five issues to be determined:

- “1. Whether the Defendant had breached the 7th of September 2005 agreement?
 2. Whether the above mentioned agreement was lawfully rescinded by the Defendant due to the Plaintiff in not installing the ACCPAC accounting solution system?
 3. Whether as a result of the Defendant’s breach, the Defendant owes the Plaintiff the sum of \$55,984.00 ... particulars of which are ...
 (i) Balance of a credit union software \$33,000.00
 (ii) ACCPAC reinstatement - \$22,984.00
 4. Whether the Plaintiff is entitled to judgment in the sum of \$55,984.00 with interests [sic] in the sum of 9%
 5. Whether the Plaintiff is entitled to costs against the Defendant on an indemnity basis?”

2. The Court’s view as to the agreed facts and issues

[9] It is significant that one of the agreed facts was that “*the Plaintiff and the Defendant entered into an agreement*” and that of the five agreed issues, not one of them asked for the Court to determine whether the agreement was valid. Indeed, Counsel for the Defendant in his written closing submissions stated “*that the main issue before this Honorable Court is whether the ACCPAC solution was reinstated or not?*”

[10] In light of the above, it was troubling for the Court to then read in the submissions made by Counsel for the Defendant after stating at paragraph 8 that the “*main issue*” concerned “*whether the ACCPAC solution was reinstated or not?*” to then submit in the very next paragraph that “***The FTA says there was no contract and the deposit of \$10,000 was mistakenly paid on the basis there was a contract.***”

[My emphasis]

[11] Further confusing the position of the Defendant is that their written closing submissions then go on to state (at paragraph 9) that “*even if we were to consider the proposal as a contract, the general rule as far as contracts are concerned is that each party must precisely perform all terms of the contract in order to discharge their obligation.*”

The argument of the Defendant is that as per paragraph 6(b) of their *Statement of Defence*, “the FTA state they did not have access or use of the ACCPAC solution reinstalled by Computech and had to hire Software Factory Limited to provided [sic] such services”.

[12] Thus the real issue for the Defendant is not whether or not there was a valid contract but whether the Defendant received all they had bargained for pursuant to the contract.

[13] Unsurprisingly, Counsel for the Plaintiff in his written closing Submissions in Reply has argued at paragraph 2:

“While it is asserted ... [by the Defendant] that the matter at trial is not straight forward, the following points may be made:

(a) Nowhere does the Defendant attack the case brought by the plaintiff in relation to the credit union management software part of the contract. This means that the plaintiff succeeds on this part of the claim, and is entitled to a verdict accordingly.

(b) This conclusion is supported by the submission [par.8] as to the identification of the ‘main issue’. So far as the defendant is concerned, it is conceded that such is the case. And the expression ‘reinstatement’ is unclear. The Plaintiff’s work included the supply of upgrade ACCPAC, not reinstatement as such.” [My emphasis]

[14] Although the Court is in general agreement with Counsel for the Plaintiff on this issue (upon the basis of the agreed facts, issues and submissions outlined above), so that there can be no confusion, it is best that the Court also formally determine this issue.

C. THE PLAINTIFF’S CLAIMS

1. The proposal of 7 September 2005 to provide the “Credit Union Software”

[15] On 22 August 2005, **Mr MAIKA NAMUDU**, General Secretary of the Fijian Teachers Association, wrote on behalf of the Defendant to **Mr SOLOMONE MATAU**, Manager Engineering and Support for the Plaintiff as follows:

“We are pleased to inform you that the Fijian Teachers Association Executives have decided to offer you the Contract for the design, installation and state-of-the-art Savings and Management system together with the specifications as contained in your Proposal dated 25th July 2005 for Fijian Teachers Association Welfare Society.

We want to discuss the matter of Program price with you before entering into the deal.

Along with the specifications given we would also like you to consider accepting application through phone for outer island members with a program field to indicate that the next loan will be shelved until an application is received via mail from the member.

We shall contact you in due course to have the agreement signed and for the work to begin.”

[16] Following the above, a five page “proposal” was provided by the Plaintiff to the Defendant. This proposal was signed on behalf of the parties on 7 September 2005 with **Mr JOHN MOYER**, Managing Director, signing on behalf of the Plaintiff and **Mr MAIKA NAMUDU** signing on behalf of the Defendant (**Doc.2**).

[17] Specifically, the “proposal” sets out on page 2 that the “*FTA requires the immediate design, installation and implementation of a state-of-the-art Savings and Loan Scheme Management system*”. This is later referred to as the “*Credit Union Software*”.

[18] In addition, on page 5 of the proposal which was signed by **Mr JOHN MOYER** and **Mr MAIKA NAMUDU**, the payments were to be as follows:

“Total Price, VAT inclusive: \$43,000.00. For complete Welfare Module

<i>Payable:</i>	<i>\$10,000.00 upon execution of the agreement</i>
	<i>\$25,000.00 upon installation of the program</i>
	<i>\$5,000.00 upon final configuration and testing</i>
	<i>\$3,000.00 upon completion of user training”</i>

[19] It was agreed that \$10,000.00 was paid on the execution of the agreement for which a receipt was issued by the Plaintiff (Tax Invoice No. 3027) to the Defendant on 17 October 2005 (**Doc.4**).

[20] On 13 September 2005, the Defendant sent a request (Order No.2086) to the Plaintiff (**Doc.3**) as follows:

*“Financial Management Software
Amt - \$43,000”*

- [21] Apart from the initial payment of \$10,000, no further payments have been made by the Defendant. The Plaintiff is claiming, therefore, the balance of \$33,000 as the amount outstanding under the agreement of 7 September 2005 for the installation of the credit union management software.
- [22] Much of the initial cross-examination of **Mr MOYER** as Managing Director of the Plaintiff concentrated upon Counsel for the Defendant attempting to have **Mr MOYER** agree with him that in relation to the proposal signed between the parties on 7 September 2005 *“it wasn’t really an agreement it was simply an evaluation”* to which **Mr MOYER** responded *“this was a proposal which the FTA signed, then this document became a contract upon their signature”*.
- [23] After a dispute arose in cross-examination as to whether **Mr MOYER** as the Managing Director actually knew that the agreement was fulfilled, a **Mr AVINESH PATEL**, a Software Developer, with the Plaintiff company was called as a witness who confirmed that he *“actually wrote the program and deployed it”* at the Defendant’s premises during one afternoon prior to Christmas 2005 which he clarified in cross-examination to be that *“the membership portion was done before Christmas”*.
- [24] **Mr PATEL** further confirmed in cross-examination that his portion of the system for this job was the *“Credit Union Management system”* and that he *“had nothing to do with the ACCPAC side of things”*. He also confirmed that a demonstration of the entire system took place in the new year of 2006 and though he *“demonstrated only my part of the System which was Credit Union Management System”*. Further, he stated that he made verbal update reports to **Mr MOYER** on the Credit Union Management System.
- [25] The Defendant’s only witness was a **Mr EREMASI TAMANISAU Jnr**, a Senior Lecturer at the Fiji Institute of Technology (FIT) and who also sits on the Board of the Defendant. In his evidence-in-chief he stated that the first time he saw the agreement of 7 September 2005 was when legal proceedings had been instituted against

the Defendant though he “ascertained that the software wasn’t working prior to becoming aware of the instituting of the proceedings”. He also confirmed this in cross-examination but provided no precise details.

2. The proposal to “re-instigate the ACCPAC software system”

[26] The Plaintiff is also claiming as per Tax Invoice 3509 dated 19 December 2005 (**Doc.6**) for **five items totalling \$17,994.00** associated with the work performed in relation to the “re-instatement” of an accounting software system known as “ACCPAC” (other than the server) as follows:

<i>Qty</i>	<i>Description</i>	<i>Unit Price</i>	<i>Amount</i>
1 Each	ACCPAC Software Assurance, AAS CE AS, GL, AR, AP, Optional Fields April 19 th 2003-Nov 30 th 2006	\$6,145.00	\$6,145.00
1 Each	ACCPAC Advantage Lanpack Upgrade For MS-SQL 5 user	\$7,888.00	\$7,888.00
1 Year	Software Assurance on 5 user Lanpack Dec 21 st 2005-Dec 21 st 2006	\$2,217.00	\$2,217.00
1 each	ACCPAC Support Plus Reneging Fee	\$934.00	\$934.00
1 Each	SQL Server 2000 Standard Edition 5 users	\$2,000.00	\$2,000.00
1 Day	Installation of upgrades on server	\$760.00	\$760.00
2 Day	Requirements Gathering on FTA Business	\$760.00	\$1,520.00
2 Days	Staff retraining	\$760.00	\$1,520.00

[27] In his opening at the commencement of the defended hearing of this matter, Counsel for the Plaintiff noted that the server which had been supplied had been taken back.

[28] In addition, **Mr MOYER** as Managing Director of the Plaintiff confirmed in his evidence that the amount sought for the “ACCPAC reinstatement - \$22,984.00” was now reduced to **\$17,994.00** as three of the items had not been supplied.

[29] It was anticipated in the proposal signed on 7 September 2005 that the *Credit Union Software* would be integrated with an existing accounting software system (known as “ACCPAC”) which had been purchased in 2003 when a previous company (known as **DATEC**) had been engaged by the Defendant . On this issue, it was stated at page 2 of the proposal:

“NOTE: The ability of Computech’s solution as herein described will be extremely cost-effective for FTA given the fact that the ACCPAC accounting solution has already been installed and paid for and it will work fine following the coding of appropriate export functionality. No new or additional accounting software will be required.”

[30] The implication in the proposal was that there were problems with the ACCPAC system. ACCPAC had been previously installed on the FTA system in 2003 by **DATEC**, however, it was no longer active and working. What was not clear was that to integrate the *Credit Union Software* with the existing ACCPAC accounting software extra work would need to be done by the Plaintiff including acquiring a new licence for the ACCPAC software (quoted at \$15,000).

[31] On 16 November 2005, ACCPAC Australia Pacific Inc sent an invoice to the Defendant (**Doc.5**) addressed as follows:

*“Client ID: 1411775
Bill To: FTA Welfare Society
Moape Qiolevu
66 MacGregor Street
Suva, 679
Fiji
Tel: 6793303661”*

A copy was also sent to the Plaintiff addressed as follows:

*“Business Partner of Record:
Computech IT Solutions
John Moyer
41 Gordon Street
Suva,
Fiji
Tel: 67 93303661 Fax: 67 9330 1766
Email: jmoyer@comoutech.com.fj”*

- [32] The abovementioned invoice from ACCPAC Australia Pacific Inc also stated:
- (a) That the “Offer Expires: December 17, 2005”;
 - (b) That it was for five items of software with the service period being “Apr 19, 04-Nov 30, 06”;
 - (c) That there was a late fee being charged on the annual fee of \$1,517.5;
 - (d) That the “1 Year Renewal Balance Due” of “AUD 4,596.00”.
- [33] A “Change of Business Partner of Record Designation Form” for ACCPAC (**Doc.7**) was completed and signed on 20 December 2005 by REMESIO ROGOVAKALALI, Interim Administrator, on behalf of the Defendant, Email: reme_116@hotmail.com, (including the stamp of the “FTA Welfare Society”) naming the Plaintiff as its “Business Partner of Record” for ACCPAC.
- [34] On an undated order form (Order No.4124), the Defendant sent a request to the Plaintiff (**Doc.23**) as follows:
- “ACCPAC Reinstatement
Upgrade Plan &
Support
From
April 2002 to
April 2006”
Amt - \$43,000”*
- [35] In his evidence-in-chief, Mr JOHN MOYER, Managing Director for the Plaintiff, confirmed that the undated order form sent by the Defendant to the Plaintiff “*would have been on the same day that we got the change of the business partner record designation*”, that is, 20 December 2005.
- [36] The following day, 21 December 2005, a “Picking Slip” (**Doc.8**) was issued by SAGE ACCPAC to the Defendant for two items of software:
- (a) “AAS CE 5 USER MS_SQL LANKPACK v 5.3 – Up/ADD”; and
 - (b) A+ CORP ED. MS SQL LANPAK 4 USER”.

- [37] On 22 December 2005, SAGE ACCPAC issued a Tax Invoice to the Plaintiff (**Doc.9**) for the two software items sold by ACCPAC to the Plaintiff the previous day. That document also includes a copy of a “duplicate receipt” for \$4,261.00 Australian dollars.
- [38] On 17 January 2006, SOLO MATAU, Manager - Engineering from the Plaintiff, sent a letter by facsimile transmission (**Doc.10**) to Mr TEVITA KOROI, President of the Defendant, as follows:

“We wish to update the Trustees and Management of the status of the Financial Management Computerization Project of the FTA Welfare Society.

There have been some delays in rolling out the system as our team needed to have the FTA WS for the 2004/2005 Auditors finalized reports to enable us to properly set up the ACCPAC Accounting system. As for the Membership system, we are waiting for the individual member balances to be taken up.

We understand that members’ balances from the year 2004 audit, needed to be reconciled with the past two years loans issued and payments received. The members’ audited balances for September 2004 were only supplied last week on the 9th January 2006. The implementation of the Membership system depended on these opening balances. Since we have not been provided with the closing balances for September 2005, we have been unable to properly set up the accounting program. I believe the balances are currently being reconciled and hopefully by the end of this month we should have these opening balances and can then install and configure the system.

We would like to show you a demo which will outline the progress with the project and would like to set up a suitable time to meet with you, the Trustees and Management. Would Thursday 5:00pm in your board room be workable for you and your staff or can you suggest another day where it will be suitable for you?

We look forward to a good solution and continued support for your organization.”

- [39] Approximately five weeks later, on 24 February 2006, Mr PENI DELAIBATI, Acting General Secretary for the Defendant, wrote to “The Director” of the Plaintiff (**Doc.11**) that they had only submitted a “proposal for providence of latest computer technology”:

“Our summation of the proposal is that it only provides FTA with detailed specifications of the computer technology it offers and what will be included with the program if Computech is awarded a Contract for the supply of the same.

“Please be advised that we hereby respectfully inform you of our desire to rescind the proposal signed by the President of the FTA and do not intend to proceed any further with it. In the meantime we would be most grateful if you could kindly refund any monies that maybe [sic] due to us and regret any inconvenience caused.”

[40] On 1 March 2206, **Mr JOHN MOYER**, Managing Director for the Plaintiff, wrote to the General Secretary of the Defendant (**Doc.12**), responding to the letter of 24 February 2006 wherein he highlighted the history of the business arrangements between the parties and how they had formally entered in to a legal relationship noting:

“The Proposal subsequently presented to your organization represented an offer of services, clearly defined by contractual arrangements and detailed payment terms for a specific program. This Proposal was signed on September 7, 2005 by your General Secretary and the initial payment of \$10,000 paid to us. When your General Secretary signed this, on behalf of FTA, and the initial payment was made under its terms, the document became a binding agreement between our organizations and no longer a proposal.

As you may know, we have been working on this project since the time shortly after being requested to do so by the FTA. Furthermore, your staff are currently using the program we have developed for FTA in their work.

Specifically in relation to the ACCPAC software, the letter noted:

“Additionally, the FTA decided it would [be] very cost effective to renew the support arrangements for the ACCPAC accounting software it had purchased some time ago as it would save the \$150,000 already spent for this product and enable it to simply be re-activated and used along with our database program.

We have already created a custom link between the Credit Union Software and the ACCPAC accounting software to facilitate proper accounting of the FTA’s accounts in the Welfare section.

The ACCPAC reinstatement was authorized by means of an official, signed FTA purchase order number 4124. Based on this we ordered and paid for the ACCPAC software and have installed it on the server which you also ordered and this has all been delivered and is on your premises ...

*Given the time and money we have put into this project, the fact that **the program is complete and the accounting software purchased and the fact that there is a legally binding agreement in place, it is fair to say that we have delivered on our end and are owed payment in full ...**” [My emphasis]*

- [41] The Defendant did not respond to the above letter causing the Plaintiff’s Solicitor to write on 21 March 2006 to the General Secretary of the Defendant seeking payment **(Doc.14)**.
- [42] On 28 March 2006, the Defendant had their Solicitor write to the Plaintiff’s Solicitor acknowledging receipt of the demand notice for payment but confirmed that “*our clients rescinded the Agreement as they were not satisfied with the IT Services provided*” and it was the Plaintiff’s “*prerogative to instigate legal action without further notice*”**(Doc.16)**.
- [43] What also transpired at that time (as revealed through the Agreed Bundle of Documents) was that a meeting was held on 1 March 2006 between three representatives of the Defendant and three representatives of another software firm “**SOFTWARE FACTORY LIMITED**” to take over the project, the details of which were confirmed in a letter of the same date **(Doc.13)** from SEMI TUKANA. Managing Director of **SOFTWARE** to the Executive Committee of the Defendant.
- [44] This was soon followed by a further meeting on 22 March 2006 between representatives of the Defendant and representatives of **SOFTWARE FACTORY LIMITED** to advise on three accounting systems including ACCPAC, the details of which were confirmed in a letter of the same date **(Doc.15)** from SEMI TUKANA. Managing Director of **SOFTWARE** to the Executive Committee of the Defendant. In the letter, four options were canvassed. Two of the options included the use of the ACCPAC accounting system installed by **DATEC** who “*was responsible for the initial implementation of Accpac in 2003*” and the accounting package “revived” by the Plaintiff. That letter also revealed it would cost \$25,000 to revive and implement

ACCPAC by the Plaintiff as well as an estimated \$15,000 annual license fee. The following advice was then given in relation to this option:

“Cost is too high for an Accounting System. The Annual License Fee is also too high. Computech’s experience in Accpac may be lacking because they have just taken over the product recently. In addition Computech has been involved with FTA for a few years and they have yet to bring the accounts up to date.”

[45] By contrast the advice in relation to involving **DATEC** again was that apart from the previous purchase price of \$100,000 incurred in 2003, it would still cost an additional \$7,500 to revive and implement the ACCPAC accounting system as well as an estimated \$15,000 annual license fee. The following advice was then given in relation to this option:

“... it has never worked. They[DATEC] got \$100,000 for it and left FTA with a system that never worked. There is no guarantee that it will work this time around. Besides the Annual Software License Fee is too high.”

[46] As for the other two options, the MYOB although **SOFTWARE** advised that the “price is reasonable” (with a \$2,000 purchase price, an estimated cost of \$3,000 to revive and implement and an estimated \$800 annual license fee), it cautioned that *“the expertise for this system are [sic] not readily available as it is an Australian product”*. This then left the fourth option, to purchase the WINBIZ accounting package “upgrade” to the current system. Again, **SOFTWARE** advised that the “price is reasonable” (with a \$4,000 purchase price, an estimated cost of \$3,000 to revive and implement and a \$600 estimated annual license fee) with the following favourable advice:

“FTA Parent is currently using ProBIZ which can easily be upgraded to WinBiz. Consultants for WinBiz are available locally. The system is already integrated with the Software Factory Limited’s Credit finance System.”

[47] **SOFTWARE** recommended *“that the Fijian Teachers Association purchase the WINBIZ upgrade to your current PROBIZ”*.

[48] On 29 March 2006, a week after the above advice was furnished, the Defendant entered into an agreement with **SOFTWARE FACTORY LIMITED** *“to provide the Services for the installation of the Credit Finance System” (Doc.17)*.

[49] Part of the cross-examination of **Mr MOYER**, as Managing Director for the Plaintiff, asked for his explanation as to why he could not produce a written internal report from staff within his company that the ACCPAC Software System had been installed on the site of the premises of the Defendant to which **Mr MOYER** explained as follows:

“Q: ... there was no link you could know whether the ACCPAC system has been installed. Is that correct?”

A: It’s incorrect, I have already answered this question 3 times, we’ve had weekly briefings I myself sighted the machine, I sighted the people loading the software as I would walk around the building, I’ve received reports that it’s been delivered and reports on the usage of it, I felt confident that the machine was there. I saw the space where it was when it was being loaded was empty and accepted the reports of employees I considered reliable, they have been doing, delivered and machine usage with FTA.

Q: Sir, if I may, you saw these employees moving stuffs, these employees were making reports but yet you don’t know who specifically from your firm did the installation?”

A: I’m sorry Counsellor we had a software staff and other staff that worked there. I cannot remember who specifically worked on this project 3 years ago.

Q: You cannot remember this?”

A: I cannot remember.”

[50] The cross-examination then moved to the fact that if the Plaintiff was not given the account balances by the Defendant as set out in a letter of 17 January 2006 from **Mr SOLO MATAU**, Manager Engineering for the Plaintiff, to **Mr TEVITA KOROI**, President of the Defendant Association, (**Doc.10**), then the Plaintiff “*couldn’t have configured the system and it would have been useless*”. This was clarified by **Mr MOYER** as follows:

“Q: Sir, can I just take you to the 3rd paragraph of this letter, on the 3rd last line, from the beginning of 2005, Solo Matau from your office, “we have been unable to properly set up the Accounts program”. You are telling this Court that you never received this Audit Report and therefore I put it to you Sir again, that without these accounts you could not have implemented this system, because they were important to the verification of the process of the loan scheme system, isn’t that correct?”

- A: No that's not correct, the letter was simply referring to the balances for the Accounting system and we couldn't, according to the letter properly set the final ending balances until they gave us the reconcile accounts otherwise the system was all up and working.*
- Q: But you weren't given the accounts, so my question is without the accounts you couldn't have configured the system and it would have been useless?*
- A: All the data had been put in the accounts and the system was operating, what we were talking about was setting up final configuration which in a way reflects reconciliation.*
- Q: Sir, I ask you to be bear with me in this regard I'm trying to get this; I'm not a person who is very familiar with computers. My understanding is this that the whole proposal was based on Computech setting up a system which needed input by FTA. Without this input Solo is saying in his letter that they cannot install and configure the system and I am putting it to you that, that is basically what happened, you weren't given the accounts so you couldn't install and configure the system so therefore the server that you put in was useless?*
- A: Yes that's incorrect Counsellor, the reflects of your understanding the overall process that happened here again the letter refers to the Accounting system, the server, the credit union management system as well as the accounting upgrades of balance installed and were working properly the letter speaks only of the closing balances that were required for configuration.*
- Q: Sir, if I can go back again to the 3rd line there, I'm looking at the term 'the Accounting program' would it be correct to infer that this was the ACCPAC system that has been referred to?*
- A: Yes this is the Accounting package that was originally installed by Datec some years back and then upgraded by us and **is entirely separate from the credit union management system which is the primary basis of this litigation.**" [My emphasis]*

[51] Despite this clarification, the cross-examination continued on this point with the suggestion being put to **Mr MOYER** that the Plaintiff needed input from the Defendant before completing the project and as this was never supplied, the project as never completed and thus the Plaintiff's letter of was not correct:

- Q: Do you think you needed the FTA's input in terms of the audited accounts to get the system up and running?*

A: We needed the audited accounts to finalize the Accounting system to bring it up to standards following a lot of process that was an update purpose.

Q: Sir what I'm trying to say, how is it possible if you got a system without any input from those who need it from their loans and savings to pick it up today unless Computech knew everything beforehand?

A: Let me explain to you Counsellor. When the server was installed we used the current data in the shape it was in and we put in the system in the new ACCPAC upgrade and the credit union management system was loaded with the existing FTA accounts data. In order to complete and update the system in the final stage they wanted the audited or most recent data included and that's why there was a delay in the final configuration or otherwise working system with the data. Does that clarify it?

Q: Thank you Mr Moyer. My Lord I don't have any more questions."

[52] The re-examination of Mr MOYER was brief and simply focused on this point:

"Q: You said in response to a question from my friend that you were given twice weekly reports on the progress of the upgrading and loading in relation to the system. Can you tell us how that happened, did you or was it by way of a meeting or was it on the phone or was it some other fashion?

A: Yeah we would have weekly staff meetings also people would just regularly report on issues as we met on other matters which is one reason I couldn't remember those specific persons who worked on this because at times we were doing a lot of projects at once and I wasn't sure who that person was."

[53] As noted above, after a dispute arose in cross-examination as to whether **Mr MOYER** actually knew that the agreement was fulfilled, a **Mr AVINESH PATEL**, a Software Developer with the Plaintiff company, was called as a witness. **Mr PATEL** thought that the member of staff who worked on the ACCPAC accounting program was a **Mr REGIS** "*who is in America right now*" though in cross-examination he retracted that assertion as follows:

"Q: You said there was a meeting I believe sometimes after Christmas - January, February and you said that in this meeting you were present with Mr John Moyer?

A: Yes.

- Q: *And in this meeting you demonstrated the ACCPAC system?*
 A: *No I demonstrated only my part of the System which was Credit Union Management System.*
- Q: *To your knowledge did anyone else in your team demonstrate the ACCPAC system?*
 A: *Yes*
- Q: *And who was this person?*
 A: ***I think it was Mr Regis***
 Q: *Mr Regis was the one that did. **Please think about it carefully, you didn't state his name; you said it was yourself.** Now my question is if you didn't demonstrate the ACCPAC system **then who did?***
 A: ***I think I'll say I got no idea, I cannot recall.***
- Q: *Are you sure My Moyer was part of this meeting?*
 A: *Yes."*

[54] In any event, **Mr PATEL** also confirmed in cross-examination:

- (a) That he concentrated “*on the Credit Union Management system. I had nothing to do with the ACCPAC side of things*”;
- (b) That the letter sent by **Mr SOLO MATAU** of 17 January 2006 referring to an accounting program was referring to the ACCPAC system;
- (c) That “*the historical data*” which “*had to be imported into the system before it started working or to make sense to the users*”, was in relation to the audited accounts “*to be set up with ACCPAC*” not the Credit Union Management system;
- (d) That he also clarified that the system they had installed “*could have functioned without that as well*”;
- (e) That there was a meeting in early 2006 when the entire system was demonstrated, with him demonstrating the Credit Union Management system and another person demonstrate the ACCPAC system, though he could not recall exactly who it was;
- (f) That at the demonstration, the ACCPAC system was demonstrated and talked about.

[55] As also noted above, the Defendant’s only witness was a **Mr EREMASI TAMANISAU Jnr**, a Senior Lecturer at the Fiji Institute of Technology (FIT) and who also sits on the Board of the Defendant. In his evidence-in-chief he stated that in

relation to ACCPAC, “*I was involved in verifying whether it was working or not*” and that “*my findings was [sic] that the ACCPAC was not working*” which he clarified as:

Q: How did you know it wasn't working?

A: Sorry, it's a window based software so all it had to do was run and all it did it showed basically what it was like the front page and nothing else, it wasn't functional.”

[56] In cross-examination, when pressed to indicate when he discovered the ACCPAC system was not working, **Mr TAMANISAU** could not recall as follows:

Q: You had indicated to the Court that at some point you checked the ACCPAC system and discovered that it was not working, what I'm trying to get to is can you tell us when it was that occurred, was it last year, was it 2007?

A: I think I've answered that question already.

Judge: Can I just explain to you, we had someone else here today giving a similar answer. You must answer the question. He can keep asking the question he's just asking you, and if you can't recall, you can't recall. But in terms of your best estimation or whatever if you can't recall, you can't recall.

A: I can't recall.”

[57] Counsel for the Plaintiff then further clarified this issue as follows:

Q: Would it have been your function to have had it reported to you anomalies in relation to software on the IT system in the Association?

A: Yes that is correct.

Q: Did you receive any such report before, or did you receive any such report on anomaly at any time in relation to the ACCPAC Software?

A: Yes.

Q: From whom?

A: It came through from the General Secretary who tabled this at the meeting of Executive Committee because of the concerns ...

Q: Who was that?

A: Mr Namudu.

Q: And do you now recall when that meeting was?

A: No.

- Q: How many limbs or arms of the Association exist in the sense that there would be different computing systems for each such arm or limb?*
- A: There was no integrated system in place and the various arms, the main body FTA running its own thing, the FTA welfare running its own thing, the FTA housing assistance scheme running its own and FTA credit union.*
- Q: So at least 4, and were you responsible for the IT for each of those 4 arms.*
- A: No I was, as I said all these were running in a sort of semi autonomous fashion, I was only responsible for something that comes directly under FTA main and since FTA main took over the running of FTA welfare after the mess they were in I then came to be involved directly with the functions of the Welfare.*
- Q: Thank you but as I understand you can't now tell us when it was that the mess was discovered or created. Correct me if my understanding is wrong please but that's my understanding of the position is that right.*
- A: Not now, I cannot recall the date."*

There was no re-examination.

D. FINDINGS

1. Whether there was a contract?

[58] The Defendant has claimed that there was no contract. The facts would suggest otherwise, in particular, the following:

- (a) The Defendant sent a letter to the Plaintiff saying, in effect, that we are going to offer you a contract;
- (b) The Plaintiff then prepared a proposal with a detailed outline of what they could offer and a price which was to be paid in instalments including a requirement that a \$10,000 deposit be paid upon execution of the agreement;
- (c) A representative of the Defendant then signed the proposal on its behalf on 7 September 2005;
- (d) The \$10,000 deposit was paid;
- (e) The proposal is a contract which foreshadows further contracts and negotiations. It talked about the immediate product that was to be provided (for consideration of \$43,000), and then about future products that may be provided "easily".

[59] The Defendant's submissions infer that they were under the impression that the Plaintiff was hired to re-instate the ACCPAC accounting system. They have barely mentioned in their submissions the *Credit Union Software*, the proposal which the Plaintiff had submitted and which had been signed on the Defendant's behalf.

[60] **Thus, the findings of this Court are:**

(a) That there was an offer – the Plaintiff's proposal;

(b) That there was acceptance – the signature of Mr MAIKA NAMUDU on page 5 of the proposal dated 7 September 2005;

(c) That there was consideration – a fee of \$43,000 to be paid by instalments with a \$10,000 deposit being paid on 21 October 2005 such that it became a binding agreement;

(d) Accordingly, there was an agreement.

2. Is the Plaintiff entitled to the balance of \$33,000 for supplying the *Credit Union Software*?

[61] As noted above, **Mr AVINESH PATEL**, a Software Developer with the Plaintiff company, was called as a witness who confirmed that he “*actually wrote the program and deployed it*” at the Defendant's premises during one afternoon prior to Christmas 2005. He also confirmed that he made verbal update reports to **Mr MOYER** on the Credit Union Management System and a demonstration had taken place in early 2006 at the Defendant's premises with members of the Board and that “it was deployed to about 4 or 5 computers”. He also confirmed that prior training had taken place with the Defendant's staff.

[62] The Defendant's only witness **Mr EREMASI TAMANISAU Jnr.**, a Senior Lecturer at the Fiji Institute of Technology (FIT) and who also sits on the Board of the Defendant, was not asked in his evidence-in-chief on this specific task, that is, the Credit Union Management System. Instead, his evidence concentrated on the fact that the ACCPAC software was allegedly not working and therefore the entire system was not working.

- [63] Counsel for the Defendant in his cross-examination of **Mr MOYER** and **Mr PATEL**, was critical that the Plaintiff relied upon oral reports to prove that the work had been completed in relation to the supplying of the *Credit Union Software*. It was a point which was also made in his written closing submissions.
- [64] Although the Court has noted that no memoranda, diary notes, emails or the like were produced by the Plaintiff to support the evidence of **Mr MOYER** and **Mr PATEL**, having observed them closely under cross-examination, I found them to be witnesses of truth, even if they could not produce documents to corroborate their evidence as to the delivery of the software to the Defendant's premises and the demonstration in early 2006. The only documentation tendered on this point was a letter of 17 January 2006 (**Doc.10**) from **Mr SOLO MATU**, Manager – Engineering with the Plaintiff, to **Mr TEVITA KOROI**, President of the Defendant, proposing that “a demo” be held in the Defendant's board room “*to meet with you, the Trustees and Management*” at 5.00pm on the Thursday after the date of that letter. As **Mr SOLO MATAU** was not called on behalf of the Plaintiff to explain what happened and whether the “demo” took place, the Court can only draw a *Jones v Dunkel* (1959) 101 CLR 298 inference, that is, that the uncalled evidence of **Mr MATAU** on this point would not have assisted the Plaintiff's case.
- [65] Balanced against this inference, however, was:
- (a) the evidence of **Mr MOYER** that “*Solo did not do the software installation. He is a hardware technician. He dealt with the server*”;
 - (b) the evidence of **Mr PATEL** that there was a meeting in early 2006 when the entire system was demonstrated, with him demonstrating the Credit Union Management system and another person demonstrating the ACCPAC system, though he could not recall exactly who it was;
 - (c) the letter of 1 March 2006 from **Mr MOYER** to the General Secretary of the Defendant (**Doc.12**) responding to the Defendant's letter of 24 February 2006 highlighting the history of the business arrangements between the parties and how they formally entered in to a legal relationship and, in particular, on the supplying of the

Credit Union Software that “we have been working on this project since the time shortly after being requested to do so by the FTA. **Furthermore, your staff are currently using the program we have developed for FTA in their work**”;

(d) the fact that there was no written response from the Defendant to the letter of 1 March 2006 from **Mr MOYER** denying his claims that the *Credit Union Software* had been supplied and the Defendant’s staff were using it.

[66] Thus, despite the absence of **Mr MATAU**, I am satisfied that the Plaintiff satisfied the evidential burden on this part of its claim. Accordingly, the evidential burden then shifted to the Defendant to prove that the work or part thereof on the *Credit Union Software* was not performed.

[67] As noted above, **Mr EREMASI TAMANISAU Jnr**, was the sole witness called for the Defendant. His evidence concentrated on the other part of the claim, the ACCPAC Software, though it was his belief (as I understood his evidence) that as it was not working, therefore the entire system was not working including the *Credit Union Software*.

[68] No documentary evidence, however, was led by the Defendant for the period from 7 September 2005 until it attempted to rescind the contract on 24 February 2006, that there was a problem and/or complaints had been made by them to the Plaintiff concerning the supply of the *Credit Union Software*. Although **Mr TAMANISAU** was called, his evidence was in relation to the ACCPAC Software and by implication the entire system was not working. No person was called as a witness, however, to testify specifically in relation to the supply of the *Credit Union Software*. Thus, a **Jones v Dunkel** (supra) type inference can be drawn that the uncalled evidence would not have assisted the Defendant’s case.

[69] Thus, it is clear from the evidence that the *Credit Union Software* was installed and the Plaintiff should be paid the second instalment of \$25,000.00 which was due as per the agreement of 7 September 2005 “upon installation of the program”.

- [70] As for the third instalment payment, this was due “*upon final configuration and testing*” of the *Credit Union Software*. For the reasons given above in relation to the second instalment, I am of the view that the same evidence is applicable. I am also of the view that the Plaintiff satisfied the evidential burden on this part of its claim. That is, it is clear that the *Credit Union Software* was configured and tested at the Defendant’s premises by **Mr PATEL**.
- [71] Accordingly, the evidential burden then shifted to the Defendant to prove that the final configuration and testing on the *Credit Union Software* was not performed. Significantly, no witness was called on behalf of the Defendant to say that **Mr PATEL** did not attend the Defendant’s premises in early 2006 and do “a demo” before the Board or that he was incorrect in his evidence to claim that the program was “*demonstrated to the members as well*” and “*deployed to about 4 or 5 computers*”.
- [72] Thus, it is clear from the evidence that there was a final configuration and testing of the *Credit Union Software* and the Plaintiff should be paid the third instalment of \$5,000.00 which was due as per the agreement of 7 September 2005 “*upon final configuration and testing*”.
- [73] As for the fourth and final instalment payment, this was due “*upon completion of user training*” of the *Credit Union Software*. Again, for the reasons given above in relation to the second instalment, I am of the view that the same evidence is applicable. I am also of the view that the Plaintiff satisfied the evidential burden on this part of its claim. That is, it is clear that there was user training in relation to the *Credit Union Software* by Mr PATEL.
- [74] Accordingly, the evidential burden then shifted to the Defendant to prove that the completion of user training on the *Credit Union Software* was not performed. Significantly, again, no witness was called on behalf of the Defendant to dispute the evidence of **Mr PATEL** that the teaching of the users “*was done in 2005*”.

[75] Thus, it is clear from the evidence that there was “*completion of user training*” of the *Credit Union Software* and the Plaintiff should be paid the fourth and final instalment of \$3,000.00 which was due as per the agreement of 7 September 2005 “*upon completion of user training*”.

[76] **Thus, in relation to the *Credit Union Software*, I am satisfied on the balance of probabilities that despite the work having been completed by the Plaintiff, the final three instalment payments were never made by the Defendant. Therefore, the Defendant had breached the agreement of 7 September 2005 and the sum of \$33,000.00 remains outstanding to be paid by the Defendant to the Plaintiff as follows:**

- (a) \$25,000 which was due upon installation of the program;
- (b) \$5,000.00 which was due upon final configuration and testing; and
- (c) \$3,000.00 which was due upon completion of user training.

3. Is the Plaintiff entitled to an additional sum of \$17,994.00 for the ACCPAC software?

[77] This item was at the crux of the Defendant’s case arguing that it lawfully rescinded the entire agreement due to the ACCPAC accounting solution software not being installed.

[78] The problem in relation to this part of the Plaintiff’s claim is that whilst it was foreshadowed in the proposal which was signed as a formal legally binding agreement on 7 September 2000, it was not part formally of that agreement. Rather, it was outlined as a task that was to be completed “*following the coding of appropriate export functionality*” and that “*no new or additional accounting software will be required*”.

[79] It is clear from the overwhelming documentary evidence tendered, however, that the Plaintiff ordered updates to the ACCPAC program software on the instructions of the Defendant as follows:

- (a) On 16 November 2005, ACCPAC Australia Pacific Inc sent an invoice to the Defendant (**Doc.5**) with a copy to the Plaintiff as the Defendant’s “*Business Partner of*

Record” for five items of software with the service period being “Apr 19, 04-Nov 30, 06”, a late fee and a “1 Year Renewal Balance”;

(b) On 20 December 2005, a “Change of Business Partner of Record Designation Form” for ACCPAC (**Doc.7**) was completed and signed on 20 December 2005 by **REMESIO ROGOVAKALALI**, Interim Administrator, on behalf of the Defendant, naming the Plaintiff as its “*Business Partner of Record*” for ACCPAC;

(c) An undated order form (Order No.4124), whereby the Defendant sent a request to the Plaintiff (**Doc.23**) for “*ACCPAC Reinstatement, Upgrade Plan & Support From April 2002 to April 2006 Amt - \$43,000*”;

(d) On 21 December 2005, a “Picking Slip” (**Doc.8**) was issued by SAGE ACCPAC to the Plaintiff for two items of software;

(e) On 22 December 2005, SAGE ACCPAC issued a Tax Invoice to the Plaintiff (**Doc.9**) for the two software items sold by ACCPAC to the Plaintiff the previous day and the copy of that document includes a “duplicate receipt” for \$4,261.00 Australian dollars.

[80] No evidence was led by the Defendant disputing the authenticity of the above documents.

[81] In view of the above, I am satisfied on the balance of probabilities that the Plaintiff is entitled to the first four parts of the claim relating to the purchase of the ACCPAC software as set out in their letter of 19 December 2005, that is:

<i>Qty</i>	<i>Description</i>	<i>Unit Price</i>	<i>Amount</i>
<i>1 Each</i>	<i>ACCPAC Software Assurance, AAS CE AS, GL, AR, AP, Optional Fields April 19th 2003-Nov 30th 2006</i>	<i>\$6,145.00</i>	<i>\$6,145.00</i>
<i>1 Each</i>	<i>ACCPAC Advantage Lanpack Upgrade For MS-SQL 5 user</i>	<i>\$7,888.00</i>	<i>\$7,888.00</i>
<i>1 Year</i>	<i>Software Assurance on 5 user Lanpack Dec 21st 2005-Dec 21st 2006</i>	<i>\$2,217.00</i>	<i>\$2,217.00</i>
<i>1 each</i>	<i>ACCPAC Support Plus Reneging Fee</i>	<i>\$934.00</i>	<i>\$934.00”</i>

- [82] Of the item claimed for the installation of the ACCPAC upgrades on the Defendant's server, the Plaintiff did not call as a witness the person who worked on the ACCPAC accounting program to confirm that they installed the program (as had been the case with **Mr PATEL** who gave evidence that he had worked on and installed the Credit Union Software). Indeed, neither **Mr MOYER** nor **Mr PATEL** could recall exactly who was the member of staff who had worked on the ACCPAC program, though, as noted above, **Mr PATEL** thought in examination-in-chief that it was a **Mr REGIS** "*who is now in America*", a statement which, however, he retracted in cross-examination.
- [83] Having later checked the Court record post-hearing, it is clear that **Mr PATEL** never said that he was the person who worked on the ACCPAC program either in his evidence-in-chief or under cross-examination. This incorrect assertion in the form of a question made by Counsel for the Defendant during his cross-examination of **Mr PATEL** may have quite innocently created, in whole or in part, confusion in the mind of **Mr PATEL** and hence his preparedness to then say "*I think I'll say I got no idea, I cannot recall*".
- [84] In any event, the Plaintiff did not clarify either through **Mr MOYER** or another member of staff who actually worked on the ACCPAC accounting system. Even though **Mr MOYER** explained in his evidence that this was a minor claim compared with an \$800,000 account they have with another client, it was still a flaw in the Plaintiff's case that they did not produce as a witness either the person who worked on the ACCPAC system and installed it at the Defendant's premises or a copy of their notes. If it was indeed, **Mr REGIS**, who was now in America, and he could have been located, he could either have been brought to Fiji by the Plaintiff or arranged for his evidence to have been given through tele-conferencing or as the *Civil Evidence Act* allows, if sufficient notice had been given, another member of staff could have given evidence from any notes/record still on the Plaintiff's system. This then was a ***Jones v Dunkel*** (supra) type situation, that is, that an inference could be drawn that the uncalled

evidence of the person from the staff of the Plaintiff who worked on the ACCPAC system and installed it at the Defendant's premises would not have assisted the Plaintiff's case.

[85] Balanced against this inference, however, was:

- (a) The evidence of **Mr MOYER** who was present at the testing in 2006;
- (b) The evidence of **Mr PATEL** who was also present at the testing in 2006 when he demonstrated the Credit Union Software and saw that the ACCPAC was also demonstrated at that time by a fellow member of staff.

[86] Thus, despite the absence of **Mr REGIS** or the member of the Plaintiff's staff who actually worked on and installed the ACCPAC accounting package on the Defendant's server, I am of the view that the Plaintiff satisfied the evidential burden on this part of its claim. Accordingly, the evidential burden then shifted to the Defendant to prove that the ACCPAC was not installed.

[87] As noted above, **Mr EREMASI TAMANISAU Jnr**, was the sole witness called for the Defendant. **His evidence was not that the ACCPAC accounting package was not installed on the Defendant's server but that it was not working**. He provided no precise details as to the alleged problem other than saying that "*it's a window based software so all it had to do was run and all it did it showed basically what it was like the front page and nothing else, it wasn't functional*".

[88] Unsurprisingly, Counsel for the Plaintiff in cross-examination, pressed for **Mr TAMANISAU** to indicate when he discovered that the ACCPAC system was not working, to which **Mr TAMANISAU** replied:

- (a) That he could not recall (even the approximate year) when he *checked the ACCPAC system and discovered that it was not working*;
- (b) That he was the person in the Defendant Association to whom that it would have been reported anomalies in relation to software on the IT system;

- (c) That he did receive such a report on an anomaly in relation to the ACCPAC Software from the General Secretary, **Mr NAMUDU**, who tabled this at the meeting of Executive Committee;
- (d) That he could not recall when that meeting occurred.
- [89] It is significant:
- (a) That there was no re-examination by Counsel for the Defendant on this point;
- (b) That **Mr NAMUDU** was not called as a witness by the Defendant and, as such, it was another *Jones v Dunkel* (supra) type situation, that is, that an inference could be drawn that the uncalled evidence of **Mr NAMUDU** would not have assisted the Plaintiff's case;
- (c) That it was **Mr NAMUDU** who also signed the proposal on behalf of the Defendant on 7 September 2005 with **Mr JOHN MOYER**, Managing Director of the Plaintiff, and thus must have been involved in the ongoing discussions in relation to the ACCPAC accounting system;
- (d) That no documentary evidence was tendered by the Defendant for the period from 7 September 2005 until it attempted to rescind the contract on 24 February 2006, that there was a problem concerning the ACCPAC accounting system, that is, internal memoranda, reports, emails and the like of any such problem;
- (e) That the Defendant did not tender either a copy of the alleged report on an anomaly in relation to the ACCPAC Software from the General Secretary, **Mr NAMUDU**, tabled at the alleged meeting of Executive Committee or even a copy of the minutes from the alleged meeting of Executive Committee;
- (f) That no documentary evidence was tendered by the Defendant for the period from 7 September 2005 until it attempted to rescind the contract on 24 February 2006, of any complaints which had made by the Defendant to the Plaintiff concerning the ACCPAC accounting system.
- [90] In addition, no expert witness was called on behalf of the Defendant to substantiate any of the claims in relation to the ACCPAC system not working.

- [91] It is also significant that in the letter dated 22 March 2006 from **SEMI TUKANA** of **SOFTWARE FACTORY LIMITED** to the Executive Committee of the Defendant, it did not state that the ACCPAC “revived” by the Plaintiff did not work which by contrast was claimed to have been the case (in the same report) in relation to the original ACCPAC accounting system installed in 2003 by **DATEC**.
- [92] The Plaintiff had relied upon the Defendant providing the final configuration and then arranging with them the staff retraining. As **Mr MOYER** explained in his evidence in relation to the letter of 17 January 2006 from **Mr SOLO MATAU**, Manager Engineering for the Plaintiff, to **Mr TEVITA KOROI**, President of the Defendant Association, (**Doc.10**),
- “the letter was simply referring to the balances for the Accounting system and we couldn’t, according to the letter properly set the final ending balances until they gave us the reconciled accounts otherwise the system was all up and working.”*
- [94] The Plaintiff did not call **Mr MATAU** as a witness. This then was another ***Jones v Dunkel*** (supra) type situation, that is, that an inference could be drawn that the uncalled evidence of that person would not have assisted the Plaintiff’s case.
- [95] It is clear, however, that sometime before 1 March 2006, the Defendant had no intention of ever fulfilling these tasks so the final configuration could be completed by the Plaintiff and “2 Days Staff Retraining” take place. This was because that sometime prior to that date the Defendant was in discussions with a new software company, **SOFTWARE FACTORY LIMITED**, to take over the project using entirely different software as discussed above (see **Doc.13**).
- [96] Although **Mr MOYER** conceded “*we couldn’t ... properly set the final ending balances until they gave us the reconciled accounts*”, this does not mean, however, that the Plaintiff should not be paid for the work they had done in stalling eth upgrades on the Defendant’s server. The reason that the project was not completed was not because of any evidence as to a failure on the part of the staff of the Plaintiff. Rather, the

Defendant, by not supplying the data, rescinding the contract and engaging a new software company, made it impossible for the Plaintiff to complete the project.

Therefore, the Court does not see why the Plaintiff should not be allowed the claim and, accordingly, it shall be allowed.

- [97] In view of the above, I am satisfied on the balance of probabilities that the Plaintiff did install the ACCPAC upgrades on the Defendant's server and is entitled to this part of the ACCPAC claim, as set out in their letter of 19 December 2005, that is:

<i>Qty</i>	<i>Description</i>	<i>Unit Price</i>	<i>Amount</i>
1 Day	Installation of upgrades on server	\$760.00	\$760.00

- [98] In relation to the final two items of the ACCPAC claim, that is "2 Day requirements gathering on FTA Business" followed by "2 Days Staff Retraining", the Plaintiff abandoned this claim at the hearing through the evidence of **Mr MOYER** and thus it is disallowed.

- [99] **Thus, in relation to the ACCPAC accounting system, I am satisfied on the balance of probabilities that five of the items claimed were completed by the Plaintiff and that despite such work having been completed the payments for such items were never made by the Defendant. Therefore, as per Tax Invoice 3509 dated 19 December 2005 (Doc.6) for work performed in relation to the "re-instatement" of the ACCPAC software system, the sum of \$17,994.00 remains outstanding to be paid by the Defendant to the Plaintiff comprised as follows:**

<i>Qty</i>	<i>Description</i>	<i>Unit Price</i>	<i>Amount</i>
1 Each	ACCPAC Software Assurance, AAS CE AS, GL, AR, AP, Optional Fields April 19 th 2003-Nov 30 th 2006	\$6,145.00	\$6,145.00
1 Each	ACCPAC Advantage Lanpack Upgrade For MS-SQL 5 user	\$7,888.00	\$7,888.00
1 Year	Software Assurance on 5 user Lanpack Dec 21 st 2005-Dec 21 st 2006	\$2,217.00	\$2,217.00
1 each	ACCPAC Support Plus Reneging Fee	\$934.00	\$934.00

<i>1 Day Installation of upgrades on server</i>	\$760.00	\$760.00
	Total	<u>\$17,994.00</u>
	VAT Inclusive	

E. THE LAW

1. Whether the Plaintiff's claim falls foul of the *Sale of Goods Act*?

[100] In his written closing submissions, Counsel for the Defendant has raised the issue a paragraphs 9-10 that:

“Even if we were to consider the proposal as a contract, the general rule as far as contracts are concerned is that each party must precisely perform all terms of the contract in order to discharge their obligation.

*Under Section 15 of the **Sale of Goods Act Cap 230** there is an implied condition that the goods must correspond exactly with that description in a contract for the sale of goods by description ... In this regard it is submitted that the reinstated CCPAC [sic] solution system would fall under this definition of a good under the Sale of Goods Act.”*

[101] Counsel for the Plaintiff 's rebuttal at paragraph 4.0 in his written closing submissions “In Reply”, is that the Defendant “*tries to sneak in a Sale of Goods count when none is pleaded*”.

[102] The Court notes that in their *Statement of Defence*, the Defendant did not specifically plead the ***Sale of Goods Act*** nor did the Defendant seek to amend their pleadings either during the trial or after the evidence in the trial had closed. In any event, it is clear from the positive findings already made by this Court in relation to the ACCPAC accounting system in favour of the Plaintiff, that the five items claimed were completed by the Plaintiff, such that even if the Court were to allow this defence to be considered it must fail.

2. Whether the Plaintiff's claim must fail because the ACCPAC system was defective?

[103] In his written closing submissions, Counsel for the Defendant has raised the issue a paragraphs 13-14 that:

“The Defendant admits the Plaintiff did some work towards the reinstallation of the ACCPAC system yet they were not able to use or have access to such

*system. Whatever work the Plaintiff did was defective as they were not able to implement the system. In **Bolton v Mahadeva** (1972) 1 WLR 1009, the Plaintiff contracted to install a central heating system in the Defendant's house for 800 pounds. He did so but it was inefficient and the Defendant refused to pay. The Court of Appeal held that the Plaintiff could not recover anything.*

In the case at hand the same should apply even though the product involved is different since the reinstatement was not efficiently done."

[104] Counsel for the Plaintiff's rebuttal at paragraph 4.0 in his written closing submissions "In Reply", notes that not only did the Defendant rely upon the evidence of **Mr TAMANISAU** to support their defence that the Plaintiff's work was defective, but also there was no evidence tendered by the company which took over the project to support this assertion:

"Mr. Tamanisau did not bring any clarity to this assertion and was not able to relay to the Court why as he claimed the software was not working. No relevant evidence was tendered by Software Factory Limited".

[105] On this issue, the Court agrees with the submissions of Counsel for the Plaintiff. Again, it is clear from the positive findings already made by this Court in relation to the ACCPAC accounting system in favour of the Plaintiff that the five items claimed were completed by the Plaintiff and, as such, this defence must fail.

[106] The reason that the ACCPAC's accounting system was not able to be implemented was the failure of the Defendant. Indeed, by the Defendant not supplying the final data, rescinding the contract and engaging a new software company, they made it impossible for the Plaintiff to "*set the final ending balances ... otherwise the system was all up and working*".

[107] Although there was no claim by the Plaintiff in its *Statement of Claim* for unjust enrichment by the Defendant or a claim in *quantum meruit*, it is clear from the evidence that the Plaintiff did the work claimed and, therefore, is entitled to payment as sought for the ACCPAC claim, as set out in their letter of 19 December 2005, that is, for the sum of \$17,994.00.

F. INTEREST

1. Interest

[108] The Plaintiff claims interest at the rate of 9 per cent per annum. Despite this item being pleaded, it was not addressed by the Defendant either in their *Statement of Defence* (other than the total claim being dismissed) nor in their written closing submissions.

[109] According to Section 3 of the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act* [Cap 71]:

“... ***the court may***, if it thinks fit, order that there shall be included in the sum for which judgment is given ***interest at such rate as it thinks fit on the whole or any part of the debt*** or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment”

[110] I note that the Credit Union Software part of this claim should have been paid as at 24 February 2006 when the Defendant decided to unilaterally rescind the contract rather than the Plaintiff having to wait over three years for the matter to be determined by the Court. I see no basis as to why I should not allow interest at least on the sum of \$33,000 outstanding on the Credit Union Software.

[111] As for the ACCPAC part of the claim, I note that the Plaintiff abandoned part of the claim at the hearing just seeking payment for the five items completed. This has meant that the Plaintiff succeeded on those five items and the Defendant’s debt was reduced from \$22,984.00 to \$17,994.00.

[112] I have found that the reason that the ACCPAC accounting system was not able to be implemented was the failure on the part of the Defendant in not supplying the data, rescinding the contract and engaging a new software company, such that they made it impossible for the Plaintiff to “*set the final ending balances ... otherwise the system was all up and working*”. In such circumstances, I see no reason why I should not allow interest on the sum of \$17,994.00 outstanding on the ACCPAC accounting system.

[113] In relation to the percentage of interest, neither party in its submissions has addressed how that should be determined. I have taken the view, therefore, that a fair and reasonable percentage to be applied would be 6 per cent per annum.

[114] **Therefore, it is the finding of the Court that it is fair and reasonable to award interest at the rate of 6% per annum from the time of the breach of the said agreement on 24 February 2006 until the date of judgment on 31 March 2009, comprised as follows:**

(a) 6% per annum on the sum of \$33,000 outstanding on the Credit Union Software for 3 years and one month (161 weeks) = \$6,130.39;

(b) 6% per annum on the sum of \$17,994.00 outstanding on the ACCPAC Accounting Software for 3 years and one month (161 weeks) = \$3,342.73;

(c) Making a combined total of \$9,473.12.

G. COSTS

[115] In relation to the costs of the current proceedings, I note that in their *Statement of Claim* filed on 29 June 2006, the Plaintiff is seeking indemnity costs. In his written closing submissions Counsel for the Plaintiff has stated:

“There should be judgment for the sum claimed with costs in a proper amount. There was never any serious doubt about this matter, and this Court should reflect that by ordering proper costs.”

[116] The issue has not been not dealt with this issue by Counsel for the Defendant in his submissions in response.

[117] In his submissions in reply, Counsel for the Plaintiff has confirmed that he is seeking a special costs order:

“This is a case in respect of which it may be said that the Defendant’s case at the outset had no merit. No point of substance has been established at trial. In those circumstances it is submitted a special cost order is warranted and is respectfully sought.”

[118] It is my view that for indemnity costs to be awarded it would need to be shown that the Defendant “*had acted wholly unreasonably in connection with the hearing*”, that is,

“*reprehensible conduct*” to signify the Court’s condemnation as to the way in which the Defendant has conducted the litigation: see *Singh v Naupoto* (Unreported, High Court of Fiji at Suva, Civil Action No: HBC199 of 2008, 8 August 2008, Hickie J – costs; Paclii [2008] FJHC 193, <http://www.paclii.org/fj/cases/FJHC/2008/193.html>); and *Rokotuiviwa v Seveci*, (Unreported, High Court of Fiji at Suva, Civil Action No: HC374 of 2007, 12 September 2008, Hickie J; Paclii: [2008] FJHC 221; <http://www.paclii.org/fj/cases/FJHC/2008/221.html>) citing *Police Service Commission v Naiveli* (1995) HBJ 029 of 1994, 4 September 1995, Scott J; and Civil Appeal No. ABU0052 of 1995S, 16 August 1995, Casey, Ward and Handley JJA); see also *Heffernan v Byrne & Ors*, (Unreported, HBM 105 of 2007, 24 October 2007, Pathik J - Application for Recusal dismissed for want of prosecution) (Paclii: [2007] FJHC 138, <http://www.paclii.org/fj/cases/FJHC/2007/138.html>); and 11 April 2008 (Application to Strike Out Motion for Constitutional Redress granted) (Paclii: <http://www.paclii.org/fj/cases/FJHC/2008/154.html>); and *Heffernan v Byrne & Ors*, Civil Appeal No.ABU0027 of 2008, Hickie JA, 29 May 2008 (Application for Leave to Appeal withdrawn) (Paclii: [2008] FJCA, <http://www.paclii.org/fj/cases/FJCA/2008/7.html>).

[119] I will make no decision at this stage on the question of costs (including indemnity costs) and will allow the parties time to file further brief submissions on this issue. The Plaintiff may wish to include in those submissions whether Order 62 rule 7(4)(b) of the High Court Rules should apply and a gross sum awarded pursuant to that Rule.

H. ORDERS

[120] In view of the findings which the Court has made, the formal Orders of the Court are:

- 1. That judgment is awarded to the Plaintiff.**
- 2. That the Defendants are liable to the Plaintiff for the following amounts inclusive of interest up to and including to the date of judgment today, 31 March 2009, that is:**
 - (a) \$33,000.00 outstanding for the *Credit Union Software*;**
 - (b) \$17,994.00 outstanding on the *ACCPAC accounting software*;**

(c) Interest at the rate of 6% per annum on the combined total sum of \$50,994.00 outstanding since 26 February 2006 totalling \$9,473.12;

(d) Making a combined total judgment sum of \$60,467.12.

2. Liberty to either party to re-list on 48 hours notice if either of them are of the view that the above calculations are incorrect.

3. That the Defendants are to pay the Plaintiff the judgment sum of \$60,467.12 within 28 days.

I will now hear the parties as to a timetable to file and serve submissions as to costs.

Thomas V. Hicke

Judge

Solicitors:

Fa & Company, Barristers & Solicitors, Suva, for the Plaintiff

Raikadroka Law, Barristers & Solicitors, Suva, for the Defendant