

CSAT/8(No.2)

In the matter of

THE ARBITRAL TRIBUNAL

OF THE COMMONWEALTH SECRETARIAT

SUMUKAN LTD

Applicant

AND

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Professor Duncan Chappell, President Dame Joan Sawyer, DBE, PC, Member Miss Anesta Weekes QC,
Member

JUDGMENT

1. APPLICATION AND PLEAS

1.1 This is an application brought by Sumukan Ltd (the Applicant), alleging a breach of a contract with the Commonwealth Secretariat (the Respondent). The contract in question, signed on 6th July 2001 with Asset Management Shop Ltd, Sumukan's corporate predecessor, arose in respect of a short-term consultancy with the Respondent, under the auspices of the Commonwealth Fund for Technical Co-operation (CFTC), for services procured on behalf of the Government of Namibia and for their benefit [see I: 001-006]¹ The consultancy involved assistance to the Government of Namibia in establishing a group purchasing scheme (GPS) and also creating databases for sources of raw materials and technologies for small and medium enterprises (SMEs) in Namibia. Specifically, the applicant was given an assignment to develop a prototype website to demonstrate the application of technology for a GPS. The duration of the contract was sixteen person weeks over a period of six months. A fee of £15,000 was payable, together with certain subsistence and travel expenses. The location of the contract was specified to be Windhoek, Namibia and the United Kingdom.

1.2 In its initial pleading the Applicant sought the following relief:

"Relief Sought

23. General Damages

(a) For the delayed payment of contractual fees owed to the Applicant and Applicant's staffing costs in recovering payments

(i) Late payment fees of £1500 applied in July 2002.

(ii) Re-imburement of senior consultants, legal and administrative time

spent in corresponding with the respondent in order to obtain payment of the withheld payments. The applicants costs in terms of senior management and legal advisors time spent up to January 2003 in resolving outstanding payments is estimated at £34,200.

(b) For the Respondent's breach of contract in undermining the basis of the initial contract:

Reimbursement of expenses incurred on the basis of the contract

[References throughout this judgment are to the agreed bundles of documents provided by the parties].

(i) Web site hosting charges of £80,400 incurred over a period of 17 months

(ii) Software development expenses of £85,000 (estimated at \$150 000 in email12/July/02)

(c) For the Respondent's slander and neqligent misrepresentations made against the Applicant's causing financial loss and damage to reputation"

The applicant seeks compensation for reputational and business damages

incurred due to the misrepresentation made above to be assessed by the Tribunal.

Reputational damage lead to:

"a. The loss of £250,000 which is the value of phase 1 of a tender project with the University of Warwick which the applicant lost due to bad references being provided by Mr Ram Venuprasad

b. The loss of estimated value of £500,000 which is the value of the remaining phases of the tender project lost above.

c. Value of other business with the consortium partner in the tender project (PTC) lost due to the bad reference mentioned above.

24. Declaration

That the ownership of software and website and all intellectual property rights therein belong to the Applicant;

25. Specific Performance:

That the Respondent returns the copyright materials belonging to the Applicant.

That the Respondent provides an official reference from the respondent addressed "To whom it may concern", confirming that the Applicant has satisfactorily completed its obligations under the contract and that this reference is substantively the same as the official reference provided by Mr Ravichandira Rao to Mr Ian Loftus in December 2002.

Any other remedy as the Tribunal shall see fit." [A:0-11]

1.3 In supplementary pleadings the Applicant sought additional relief in the following terms:

"Additional Relief Sought

For The Secretariat's Wrongful Claim of Ownership Of Web Site, Software & Intellectual Property

At the time of drafting the initial application the applicant's representatives were not aware the Secretariat would refuse to return the applicant's materials or that it would continue right up to the present day to dispute the declaration of ownership sought.

The Secretariat has refused to return the applicant's materials and property over 2.5 years on the basis that it believes it owns the software and material related to it, as well as the related intellectual property rights. By claiming ownership of the software and intellectual property, and disputing the applicant's right to license these as originally agreed, the Secretariat has also prevented the applicant earning commercial revenues through licensing of software which rightfully belongs to the applicant. Given the applicant's position that the Secretariat has at no point purchased or otherwise paid for these, the applicant requests an order by the tribunal that the Secretariat either:

(i) pay the full commercial price of the web site and all related software and purchase it or alternatively
(ii) pay for three and a half years use or license of it and return all the applicant's materials and property promptly. The number of years to be calculated from December 2001 (the termination date of the applicant's contract) to the date of the tribunal hearing/order.

For The Stress Caused By The Secretariat's Unreasonable Delay And Evasiveness in Resolving The Dispute Sumukan seeks an order for compensation for the enormous amounts of stress and damage to health caused to Ms Jananayagam, (the firm's representative in the contract and its proprietor) by the Secretariat's unreasonable delay and evasiveness in resolving the matter prior to its being brought to tribunal and by the untruthful and reckless claims made by the Secretariat and in particular the predatory claim on the firm's primary asset, its software and intellectual property.

The Secretariat could at any point have readily verified the intent of the parties that agreed to the contract, the true ownership of the web site and underlying marketplace software prior to the matter being brought to tribunal by consulting its representative and Deputy Director who was responsible for the contract negotiations with Sumukan and for subsequent liaison on the consultancy assignment. This person has confirmed that he was not consulted by the Secretariat's legal department or by any other colleague involved in the preparation of the Secretariat's defense statement." [A:59 - 60]

1.4 The Tribunal's jurisdiction to consider this matter is to be found in Article II 1.c of the Statute of the Arbitral Tribunal of the Commonwealth Secretariat (the Statute). This Article provides, in part, that the Tribunal shall hear and pass judgment upon any Application brought by any person who enters into a contract in writing with the Commonwealth Secretariat which alleges the non-observance of the contract.

1.5 In a separate ruling made in November 2003, the Tribunal determined that the Application also complied with Article II 2 of the Statute [CCSAT/B. Ruling of the Arbitral Tribunal of the Commonwealth Secretariat. 25 November 2003]. The Tribunal subsequently determined that it would also grant an Application for an oral hearing of the matter. Prior to that hearing, which took place in London on 8, 9, 10 and 11 February 2005, the Applicant withdrew its claim for general damages relating to negligent misrepresentation and slander. At the hearing the applicant also withdrew its claim for compensation for stress, and its claim for the return of copyright materials belonging to the Applicant.

1.6 At the hearing the Tribunal had regard to the agreed bundle of documents submitted by the parties. The Tribunal ruled that it would not consider certain documents filed on behalf of the Applicant in the

week preceding the hearing [see Volume 3 (continued)] nor a witness statement of Balaji Raghavan. Apart from the late filing of these documents the Tribunal was of the view that they, together with the witness statement, related primarily to issues associated with quantum rather than liability. These documents could be considered at a later point should the Tribunal find liability for breach of contract.

1.7 The Tribunal received oral testimony from the following witnesses:

Ms Jan Jananayagam

Mr Krishnasamy Vijayakumar Mr B J Ravichandhira Rao Mr Ram Venuprasad

Mr George Saibel

Mr Balaji Raghavan

2. THE ISSUES

2.1 The Tribunal will deal with the following issues:

- Contract and ownership of software, website and all intellectual property therein.
- Damages claim for breach of contract in undermining basis of initial contract
- Damages claim for delayed payment of contractual fees and related costs of recovery
- Other redress sought:
- Costs

3. THE CONTRACT AND OWNERSHIP OF THE WEBSITE

The applicable law

3.1 Article XIV of the Tribunal's Statute gives guidance as to the law which is to be applied by the Tribunal. Article XIV states:

"1 In dealing with all cases before it relating to contracts of service, the

Tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries.

2 For the purposes of this Article, contracts with Applicants referred to in Article 11.4(a)(v) and 11.4(a)(vi) shall be treated as contracts of service.

3 In all other cases, the Tribunal shall apply the law specified in the contract. Failing that, it shall apply the law most closely connected with the contract in question." [Statute: Article XIV]

3.2 The provisions of the contract entered into between the parties will be reviewed in detail shortly.

However, at this stage, it is relevant that the contract was for a short-term consultancy involving the provision of services by the consultant company, then known as Asset Management Shop Limited, and its employees including Ms Jan Jananayagam [see 1 :1-3 and in particular Clause 11]. Under the Standard Terms and Conditions for Short-Term Consultancies, which formed a part of the contract, the term "Consultant" is used

"to refer to both an individual contracted directly by the Secretariat as well as to a company which contracts with the Secretariat to provide the services of its employees/consultants and to the employees of that company". [1 :005]

3.3 As a contract for services, rather than a contract of service, it is Article XIV 3 which is relevant to this matter. The contract entered into between the parties does not specify the law that shall apply to it. Failing this specification it is for the Tribunal to "apply the law most closely connected with the contract in question", On this issue the parties were in agreement that this was United Kingdom law.

3.4 It should also be mentioned at this juncture that the contract contains a specific provision relating to the referral of disputes between the parties to the Tribunal. Clause 9 of the contract reads as follows:

"The Secretariat and the Consultant shall endeavour to settle by negotiation and agreement any dispute which arises in connection with this contract. Failing such agreement the dispute should be referred to the Commonwealth Secretariat Arbitral Tribunal for settlement by arbitration in accordance with its Statute which forms part of this contract and is available on request" [1 :003].

Interpretation of relevant contractual clauses:

3.5 In the course of both their written pleadings and oral submissions the parties referred to Chitty on Contracts as an authoritative text dealing with the law of contracts in the United Kingdom. The Tribunal has also had regard to this text (the 29th edition published in 2004) as well as to a number of the leading legal authorities dealing with issues of relevance to this matter. A central issue, as will be seen below, is the approach which the Tribunal should take to the interpretation of the contractual documents in this

case. The preferred approach is that set out in the following general remarks about the principles by which contractual documents are to be construed, stated by Lord Hoffmann in *Investors Compensation Scheme Limited v the West Bromwich Building Society and others* [1998] 1WLR 896 at 912-913.

"I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 W.L.R 1381, 1384-1386 and *Rearden Smith Line Ltd. V Yngvar Hansen-Tangen* [1976] 1 W.L.R 989, is always sufficiently appreciated. The result has been subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would be understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declaration of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd. V Eagle Star Life Assurance Co. Ltd* [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Campania Naviera S.A. v Salen Rederierna A.B* [1985] A.C. 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense".

3.6 It is clear from both the pleadings in the present matter, and from the evidence led at the hearing, that the parties are at odds about the construction of the contract entered into between them on 6 July 2001. A core disagreement which exists between them concerns the ownership of a "prototype website" produced under the terms of the contract. In order to understand the nature of this dispute, and to seek a resolution of it through a construction of the contractual documents, It is necessary to consider the "admissible background" in the manner referred to by Lord Hoffmann.

The "Matrix of Fact"

3.7 The genesis of the contract entered into between the parties is to be found in a project (the Namibia project) involving the provision of technical assistance by the Commonwealth Secretariat, through its Export and Industrial Development Division (EIDD) to the Government of Namibia (GN). This project was under the management of Mr 8 J Ravichandhira Rao, Chief Programme Officer in EIDD [see 8:48-49]. To further the work on the project, three consultants were engaged in July 2000 - Mr Lome Dyke; Dr Nadadur Janardhanan; and Mrs Rachna Gupta. [B:49 at para. 8].

3.8 The broad objective of the Namibia project proposed by EIDD to GN can be found in the following statement:

"The project takes into account the major problem that of identifying sources of raw materials and technology that will change the manufacturing competitiveness of industries in Namibia. The project thus lends itself to aggregating the raw material requirements of more than 278 establishments and consolidating their requirements into common raw materials that can be ordered in economic quantities As the number of establishments are quite large and the sources are also likely to exceed the number of establishments, a data base approach will not only enable quick solution but also create a base that will prove suitable to other SMEs in the Commonwealth. The medium of access to the databases plays a crucial role in that the access needs to be quick and least expensive. EIDD's project, the Commonwealth Business Network (COMBINET), with its development objective notwithstanding its private sector role, lends itself ideally to the needs. Providing access to the sources through COMBINET can create a dynamic environment that will not only solve the problems of raw material and technologies but also enable business development through increased market access." [1: 112]

3.9 The three consultants commenced work on the project under Mr Rao's supervision. A crucial part of the project work, preparing a database of Namibian enterprises to form the online group purchasing scheme, was Ms Gupta's responsibility. After making a field visit to Namibia and submitting a draft report on these databases, Ms Gupta then decided that she did not wish to continue work on the project. This resulted in a delay. [B:49, at para. 8]

3.10 In about March 2001, the GN wrote the Commonwealth Secretariat expressing concern about delay with the project. At about the same time, Mr Rao was promoted from his position in EIDD to that of Deputy Director in the Science and Technology Division (STD) of the Commonwealth Secretariat. Despite this promotion Mr Rao continued to have responsibility for managing the Namibia project from his new Division because no other members of staff were available to deal with the project. This arrangement had the support of Mr Rao's Director in the EIDD, Mr Richard Gold. [B:49 at paras 4 and 10]

3.11 Following Ms Gupta's departure from the project, Mr Rao began to search for a new consultant who could assist with the development of an online group purchasing scheme for the Namibia project. A broad description of this project had already been provided in a report prepared by one of the consultants, Dr Janardhanan. [see 1 :95-97]

In Dr Janardhanan's view, the feasibility of an online project needed to be explored through a pilot study which could be conducted using standard rather than custom made software. Dr Janardhanan estimated that if the software chosen was appropriate

"the total cost for the pilot, which will prove feasibility of the wider GPS scheme should be in the order of GBP £100,000" [see 1 :97]

3.12 Mr Rao did not have a budget which in any way approached that suggested by Dr Janardhanan. Accordingly, he set out to identify a consultant who could undertake work on the Namibia project within a small budget and within a narrow timeframe. The person he eventually identified was Ms Jan Jananayagam of Asset Management Shop, now known as Sumukan Limited. Mr Rao, who had previously met Ms Jananayagam in a personal capacity, was aware of two of the Applicant's recent projects - Smallfolk.com which was created for Great Ormond Street Hospital, and Spotcomex which was an E market place [8:49-50, para.11-12]. Mr Rao knew that the Applicant had access to software programmes associated with these projects and he formed the view that they had the ability to complete the project in the time required. Accordingly, he approached the Applicant and asked it to submit a proposal for an online group purchasing scheme. At the time of this request Mr Rao provided the Applicant with documentation relating to the Namibia project, including the Consultant Report submitted by Dr Janardhanan.

3.13 Negotiations then took place between Mr Rao and Ms Jananayagam in regard to the project, including the fee to be paid and the nature of the work to be performed. Each of the parties expressed their subjective views about the implication..of these negotiations upon the subsequent terms of the contract. The Tribunal concludes that these negotiations and expressions of intent are not part of the admissible background which should be now considered in construing the meaning of the ultimate

contractual documents. It is, however, relevant that the Applicant presented a proposal on 7 May 2001 to the Respondent in regard to its participation in the proposed project. [see 1 :007-015]. The proposal was titled the "COMBINETGPS Namibia Prototype. Scope, definition and prototype specification". The author of this proposal was Ms Jananayagam.

3.14 In both her written statement and in her oral testimony, Ms Jananayagam described her introduction to Mr Rao and her discussions with Mr Rao about becoming involved in the Namibia project. In April 2001 she provided Mr Rao with a demonstration of the Spotcomex website that had been produced by Asset Management Shop Limited. Spotcomex was seen as a good fit as it was a digital market place designed specifically for African commodity markets. [8:6-7] On about 24 April 2001, Ms Jananayagam said that Mr Rao asked the Applicant to submit a proposal based on the documentation with which she had been provided. [1:98-109; B: 7, para. 22] This proposal was sent, as already noted, on 7 May 2001, and resent on 14 June 2001.

3.15 The Terms of Reference were also the subject of discussion between Mr Rao and Ms Jananayagam. Ms Jananayagam said that on 27 June 2001 she was sent a formal letter of appointment in respect of a short-term consultancy for the project. This letter was sent on behalf of the Respondent by Mr Winston Cox, Deputy Secretary-General. Ms Jananayagam signed the letter on 6 July 2001 in her role as the Managing Director of the Applicant. [1 :003].

Ownership of the website

3.16 With this background information, which was available to the parties at the time of their entering into the contract, attention is now turned to the ascertainment of the meaning which the contract document would convey to a reasonable person in possession of this "matrix of fact". The dominant dispute between the parties relates to their conflicting understanding of what the contract has to say about ownership of a prototype website created during the course of the short-term consultancy. The prototype website is referred to in the Terms of Reference, which comprise Annex 1 of the Short-Term Consultancy Agreement. The Terms of Reference read as follows:

- "1. The Asset Management Shop Ltd will create a prototype website with functionality specified in their proposal for the purpose of demonstration.
2. The website owned by AMS will be built using underlying software components such as the Conjoint Market Place server which is proprietary to the Asset Management Shop Ltd. This website will be linked to the COMBINETGPS domain name.
3. Prepare suitable data based on raw materials and technology for use on PCs and on the Internet as an add on feature to COMBINETGPS
4. Prepare an on-line Group Purchase Scheme incorporating necessary forms, checks and balances and with necessary linkages to sources of technology and raw materials.
5. Advise on a communication strategy for linking the manufacturing sector using computers and COMBINETGPS taking into account the geographical features of Namibia and the present communication infrastructure.
6. Conduct workshops at places in Namibia advised by the COMSEC to train the staff from the manufacturing sector in the access and use of databases and group purchasing scheme.
7. Advise Micro & Small Enterprises on recent advances on the Internet with specific reference to Trade and Business related networks and suggest methodology for conducting business on the Internet.
8. Prepare a report jointly with other experts.

Common to all

Attend meetings jointly with other specialists and consolidate recommendations to achieve synergistic results.

Assist in the preparation of final report by giving full details of work carried out and the recommendations made in the area of expertise concerned." [1 :004]

3.17 It will be observed that the Terms of Reference refer in Clause 1 to a website functionality specified in the Applicant's proposal. The proposal referred to is the one submitted initially on 7 May 2001. [1 :007-015]. A further reference is made to this proposal in the following terms at the

outset of the formal letter sent by Deputy Secretary-General Cox on 27 June 2001:

"Assignment

Modus operandi

"As detailed in your proposal of 7 May 2001". [1 :001]

3.18 In the proposal itself, the objective of the project is discussed in Clause 1. Mention is made of the prototyping of a model site that demonstrates the potential behind the concept of Combinet GPS. It is further stated that

"the model site will be created, hosted and owned by the Asset Management Shop Limited (AMS). Should the Government of Namibia wish to proceed further with the project, and build a fully functional website, it may enter into a separate licensing and software development agreement with AMS." [1 :009, Clause 1]

3.19 In a separate part of the proposal, titled Contract Terms, it is further stated as a governing term that:

"1 The Asset Management Shop Limited will create a prototype with the functionality specified in Section 3 for the purpose of demonstration only. All intellectual property rights to the prototype will remain with the AMS.

2. The website will be built using underlying software components such as the Conjoint Market Place server which are proprietary to the Asset Management Shop Limited.

3. Payment and delivery terms are specified on the letter of appointment." [1 :0014-015]

3.20 It is the contention of the Applicant, based upon the provisions of the proposal which have just been outlined, together with the very modest fee paid for the consultancy services provided by the Applicant, that the prototype website created under the provisions of the contract is hosted and owned by the Applicant, and that all intellectual property rights to this prototype website remain vested in the Applicant. It is also contended that this prototype website has been built using underlying software components, such as the Conjoint Market Place server, which are proprietary to the Applicant. The Applicant further contends, or in the alternative, that a true and proper interpretation of the contract documents leads to the same conclusion. The Applicant also submits that through the period during which it carried out its activities upon the instructions of the project manager, Mr Rao, there was never any suggestion to the contrary by anyone at the Commonwealth Secretariat. [Outline final submissions on behalf of the Applicant: 3].

3.21 It is the Respondent's contention that under the express terms of the contract, and particularly Clause 3 of Annex 2 [Standard Terms and Conditions of Service for Short- Term Consultancy] the title rights and copyright in any material, including the prototype website, produced under the provisions of the consultancy, vest exclusively in the Respondent. Clause 3 of the Standard Terms and Conditions states the following:

"The title rights, copyrights and all other rights of whatsoever nature in any material produced under the provisions of this assignment which do not otherwise vest in any receiving government/organization, shall be vested exclusively in the Secretariat and the Consultant shall seek the approval of the Secretariat for any publication which the Consultant may wish to undertake, if it relates in any way to such material." [1 :005]

The Standard Terms and Conditions also contain the following preliminary statement:

"The Secretariat commissions a variety of short-term assignments. Some involve little or no travel (for example, conducting a piece of research and/or writing papers), while others will require the consultant to travel from his/her place of residence to another country or countries to carry out the terms of the contract. For this reason, the standard terms below are divided into two sections. The "general" section applies to all contracts, while the second section will only apply if the accompanying letter indicates a requirement to travel." [1 :005]

3.22 The Respondent submitted that the assignment output was a prototype website for which payment had been made to the Applicant, under the provisions of the contract, of £15,000. Although the underlying software was provided by the Applicant, the Applicant acknowledged by its signing of the contract that the title rights, copyrights and all other rights of the product produced under the assignment vested exclusively with the Respondent, as it was not otherwise vested in any receiving

government/organization. There was therefore an implied assignment of the Applicant's rights in the underlying software to the Respondent who also owned the website's address <http://www.combinetgps.com/> [precis of submissions for the Respondent: 3-4].

3.23 The "rule" that words should be given their "natural and ordinary meaning", in the situation which has just been described is of little immediate assistance in reaching a conclusion about which party is correct in its assertion of ownership over the prototype website. Specifically, the express term of the Standard Terms and Conditions applicable to all short-term consultancy appears in direct conflict with the provisions of the proposal referred to in the contract. From the stated background it cannot be concluded that this was intended by the parties and something must have gone wrong with the language. What is now required is a search for the intention of the parties which, in the words of Lord Diplock in *Antaios Campania Naviera S:A. v Salen Rederierna A.B.* [1985] A C 191 at 201 "must be made to yield to business commonsense".

3.24 The Tribunal concludes the problem has arisen as a result of a poorly drafted reference to the proposal in the context of the "modus operandi" of the project, as well as in Clause 2 of the Terms of Reference which make mention of "the website owned by AMS". The reference to the "modus operandi" contained in the proposal is in fact to the method of operation, as this term is commonly understood and used, that is to the way in which it is intended to give effect to the agreement, rather than to its objectives and contractual terms. Thus a review of the proposal shows that it is in Part II, titled Industry Sectors and Structure, and Part III, titled Deliverable Functionality, that reference is made to matters associated with the modus operandi of the project. These are not matters which are set out elsewhere in any detail in the contractual documents. On the other hand, the objective of the Namibia project, and also the expressed terms of the contract, are delineated in the formal letter and its annexes.

3.25 It is also clear when reviewing the sections in the proposal titled Objective and Contract Terms, that they detail prospective issues associated with the project, including the development of a fully functional website with separate licensing, software and other developmental agreements entered into with other entities. In contrast, the Short-Term Consultancy Agreement is for a very specific and finite period - sixteen person weeks over a period of six months. [1 :001]

3.26 In regard to the drafting of Clause 2 of the Terms of Reference, the Tribunal concludes that this is a poorly phrased provision which recognizes that when constructing the prototype website referred to in Clause 1, it will be necessary to utilize underlying software components which are owned by the Applicant. However, these Terms of Reference still remain subject to the general provisions of Clause 3 of the Standard Terms and Conditions. The Tribunal does not accept a contention made on behalf of the Applicant that this clause should be read to apply solely to documentary material. It applies to "any material produced under the provisions of this assignment which do not otherwise vest in any receiving government/organization". Nor does the Tribunal accept that because the Respondent took no action to assert its ownership of the prototype website until at earliest May 2002, this affected the situation. If the Respondent owned the website it did so, under the provisions of the contract, from the moment that the prototype was established. The time of this establishment was certainly by the date of the "launch" of the website performed at the workshops in Namibia in August 2001. [See B:16 - 17]].

Claims for relief

3.27 As noted earlier, among the principal heads of relief sought by the Applicant is a claim for a declaration "that the ownership of software and website and all intellectual property rights therein belong to the Applicant" [See A" 1 0]

3.28 During the course of oral submissions made by the parties at the conclusion of the hearing the Tribunal sought clarification as to the interpretation to be given to the phrase "intellectual property rights". Counsel for the Applicant agreed that no list existed of these rights. Counsel for the Applicant also submitted, initially, that all of the intellectual property to which the Applicant laid claim was in the website, <http://www.combinetgps.com/>. The website belonged to the Applicant, and everything encapsulated within it.

3.29 Questioned further about this issue Counsel for the Applicant modified this contention agreeing that publicly available information which appeared on the website, such as names and addresses of people, did

not form a part of the intellectual property rights claimed by the Applicant. What did form part of these rights, and was owned by the Applicant, was data which had been formatted and processed in order to be displayed on the website. It was the formatting process which created the intellectual property rights.

3.30 The development of the software and other elements of the prototype website is discussed in detail later in the judgment under the head "Other Redress Sought". The Tribunal does not find it necessary to make a definitive ruling in regard to the individual intellectual property rights which were created as a part of this process. For the reasons already provided above the Tribunal concludes that the collective ownership of the software and website and all intellectual property rights therein belong not to the Applicant but to the Respondent. As such the relief claimed by the Applicant in the form of a declaration is denied. Also denied is the additional relief sought by the Applicant for the Respondent's wrongful claim of ownership of the website, software and intellectual property. This claim of ownership was not wrongful but based on a correct interpretation of the terms of the contract.

4. DAMAGES CLAIM FOR BREACH OF CONTRACT

4.1 The nature of the claim made by the Applicant under this particular head would seem to relate principally to the consequences of a refusal by the Respondent to accept that the Applicant has fulfilled its contractual obligations. The Applicant contended that this refusal, coupled with the wrongful assertion of ownership over the intellectual property comprising the website, had resulted in lost opportunities to obtain licensing revenues, and especially those from the Namibian government. [See outline final submissions on behalf of the Applicant: 2]

4.2 The question of liability under this head rests in essence upon whether the Respondent is correct in contending that the Applicant failed to fulfill its contractual obligations. To answer this question consideration must be given to the evidence before the Tribunal and in particular to a series of reports that were produced at different stages of the project.

4.3 The first written assertion by the Respondent of any contractual failures on the part of the Applicant would appear to be contained in a letter written on 26 April 2002 by Mr Ram Venuprasad to Ms Jananayagam. The letter stated

"You have asked that I write to you about the Namibia project before we meet, hence this letter.

I hope you agree that the terms outlined in your contract of consultancy with the Secretariat are clear about your role in the project. Our reckoning is that Items 3, 5 and 8 in the terms of reference remain incomplete. I need your advice on when we might expect these to be completed. I note that we have paid four of the five instalments of fees that were agreed under the contract,

I must clarify that the COMBINETGPS domain name and logo are the properties of the Commonwealth Secretariat. The Secretariat does not lend its name and style for commercial purposes. Therefore the Asset Management Shop is not permitted use of the domain name and logo outside of the terms of reference outlined in the consultancy contract.

Do please let us meet soon so that we can resolve the outstanding issues. I look forward to your response."
[2:619]

4.4 The evidence before the Tribunal indicated that prior to writing the letter of 26th April 2002, Mr Venuprasad had been seeking to arrange a meeting with Ms Jananayagam to discuss a range of issues associated with the project, including those outlined in the letter. According to Mr Venuprasad, Ms Jananayagam had been uncooperative and had imposed preconditions for any meeting, which included the presence of Mr Rao. [see B:74]

4.5 Ms Jananayagam disputed these contentions, and also rejected the Applicant's alleged failure to complete the terms of the contract period. This rejection was contained in a letter from Ms Jananayagam to Venuprasad dated 26 April 2002. The response stated, in part, the following:

"You state in your fax: "Our reckoning is that items 3, 5 and 8 in the terms of reference remain incomplete". I am sure you are mistaken. Your statement is of grave concern given that it is damaging to our professional reputation.

As you are aware our consultancy as per the terms of reference ended in December 2001. It is now the end of April 2002 (please see attached contract and the modus operandi document of 7 May 2001, relevant sections highlighted).

As you are also aware, our contact on this project during its 6 month term was Mr Rao. We did not receive any correspondence from him during the consultancy indicating these items were outstanding. It is therefore highly surprising that this statement is made today, five months after the end of the consultancy and by a person other than the project manager at the time. Can you please state the source and basis of your statement?

The consultancy term, which began in June 2001, was for a period of 16 man weeks the bulk of which were completed by September 2001 (a team of 6 staff were involved in the implementation of the prototype). The full elapsed period of 6 months stated on page 1 of the contract expired in December 2001. You will see from page 2 (item 7) of the contract that the consultancy period can only be extended by written agreement by the Commonwealth Secretariat. We have not received any request for extension, written or otherwise, from the Import and Export Division of the Commonwealth Secretariat and I understand that this is since all parties agreed that the contract had been implemented in full during the 6-month period.

In any event I have responded below to your unfortunate allegations of incomplete implementation: '

Item 3 refers to an add-on feature currently present on the website. The website was completed, approved and demonstrated in September 2001. The invoice for this segment of the work has been paid. Why have you waited till April 2002 to raise this query?

Item 5 was addressed in our workshop presentations, again in September 2001. A written report was neither specified in the terms of reference nor requested at any point.

Item 8 (final report) was submitted on the 12th December 2001. Revised on the 7th January to incorporate the amendments suggested by the Commonwealth Secretariat's representative, even though our obligations under our consultancy had ended by that date." [See 2:623-625 at 624]

4.6 In 'his oral testimony Mr Venuprasad denied having received copy of this correspondence. He also indicated that he had sought to obtain an email version of the letter but this too had not been transmitted successfully.

4.7 On 29 April 2002, Ms Jananayagam sent a further email to Mr Venuprasad in which she stated that she had

"just confirmed verbally with the project manager of the COMBINETGPS project that there are no outstanding items with respect to our contract of 30th June 2001.

As stated previously, the comments in your fax dated 26th April, to the effect that our firm has not completed its obligations are damaging to our professional reputation.

Will you please, in view of the facts, retract your statement and honour all invoices as a matter of urgency." [See 2:626]

4.8 The project manager to whom Ms Jananayagam was referring in her email was Mr Rao. It was noted earlier in this Decision that Mr Rao had retained the role as project manager, even though he had transferred to another Division within the Commonwealth Secretariat. However, from October 2001 onwards, there seems to have been some uncertainty within the Commonwealth Secretariat about the respective responsibilities of Mr Rao and Mr Venuprasad in relation to the project.

4.9 Mr Venuprasad joined the Respondent as a temporary Programme Officer with the EIDD, as it was then known, on 1 November 2001. Mr Venuprasad's job description was said to include all the duties and the projects that were undertaken by the former Chief Programme Officer in EIDD, Mr Ravi Rao. The Director of EIDD at that time was Mr Richard Gold. The Division subsequently became known as the Special Advisory Services Division (SASD). One of the projects that Mr Venuprasad said that he had been tasked with was the Namibia project, the overall objectives of which were to establish an effective procurement mechanism for small and medium enterprises in Namibia. [B:72]

4.10 Mr Venuprasad further stated that prior to his appointment, a meeting had been held in Mr Gold's office during October 2001 at which Mr Rao had been informed of Mr Venuprasad's pending new role in EIDD. Mr Rao was also asked at that meeting to hand over the files and all relevant documentation relating to projects that he had handled while at EIDD [see B: 72].

4.11 Despite this purported change in management responsibilities Mr Rao continued to act in the capacity of project manager and engaged in a series of meetings both with the Applicant and with representatives of the Namibian government who visited London between 12 and 14 November 2001. Mr Rao stated that the purpose of the visit was to discuss the draft final report on the project as well as the modalities of implementation of a second phase of the project with Sumukan. Mr Rao said that Mr Venuprasad had been present at one of the meetings with the Namibian officials. While Mr Venuprasad had recently joined the EIDD, Mr Rao said that he still viewed him as a consultant [see B:51]. Mr Rao further stated that the Namibian government officials were very eager to receive a copy of the final report on the project from the Respondent.

4.12 According to the Applicant's evidence it was agreed with Mr Rao that once the Namibian visit was over the only item left to complete was the final report. The Applicant's section of this report was submitted by email on 12 December 2001. [1: 278-290]. Following some further minor modifications a final version of the Applicant's report was provided to Mr Rao on about 7 January 2002 [see 1 :299.03-299.15 and 307.01-307.14]. Ms Jananayagam indicated that the Respondent accepted this report as being satisfactory and it was incorporated by Mr Rao, with minor changes, into a draft report to the Government of Namibia that was compiled in February 2002 [1 :316-518].

4.13 Ms Jananayagam said that she confirmed verbally with Mr Rao that the Applicant was now in a position to submit their final invoice. This was forwarded on 9 January 2002. A sum of £3,000 was due in payment of the final invoice and an advance had also been provided of £1,500 for travel expenses. Ms Jananayagam said that Mr Rao agreed that the consultancy assignment was complete for the submission of the final invoice on 9 January 2002, and that this would constitute the termination date of the consultancy agreement [see in general B:24].

4.14 Following this series of events Mr Rao eventually submitted a draft of the project's final report to the Government of Namibia in early February. Chapter 6 of this report, titled COMBINETGPS, contained virtually verbatim the material that had been supplied earlier by the Applicant as its contribution to this report. [see 1 :389-408] The chapter, advancing a rationale for an E market place approach, also contained an action plan and costings for a set up phase of a new project which followed proposals already discussed in preceding months by the Applicant with Namibian government officials. According to the Applicant this was in keeping with an original understanding they had when undertaking the project that the technology solution that they had developed would be recommended to the Namibian and other governments. [B: 26 at paragraph 122]

4.15 A variety of feedback was received in regard to the draft report which, in addition to being sent to the Namibian government, was also provided to Mr Gold and other colleagues of Mr Rao's within the Commonwealth Secretariat. On 14 February 2002 Mr Venuprasad offered a number of quite detailed comments about the report which he stated "lacks coherence and clarity". He said that it appeared to be a "cut and paste job of a group of subjects without anything plausible". [see 2: 527]

4.16 In regard to the recommendations contained in the draft report Mr Venuprasad said that they were an example of "running before even walking". No institutional framework was given and the information provided in Chapter 6 (that contributed by the Applicant) only talked of basic costs which at US\$220,000 for set up expenses "seems a rip off! Not relevant in a developing country context". [2: 527]

4.17 In regard to the COMBINETGPS website, developed as part of the project, Mr Venuprasad said that it did not fit in with what had been recommended or concluded in the draft report, though references had been made to it in the report. It was also just a website that had a long way to go before it could be called a market place. Mr Venuprasad also said that the fact that the report had been sent arbitrarily to the Government of Namibia without any concurrence by SASD but under its name was something that could only bring unnecessary problems [2:527]. Mr Venuprasad went on to make more comprehensive comments about various aspects of the report. He concluded by attaching comments from Dr Dr Nadadur Janardhanan and Mr Lome Dyke, the consultants engaged originally on the project, which he suggested had not been reflected in the draft final report even though they were available in October-November 2001 [2:529]

4.18 Mr Venuprasad's comments prompted a meeting with Mr Rao to discuss the draft report. This meeting took place on 18 February 2002. Mr Rao was asked at the time to indicate a date by which all files relating to the project would be returned to SASD [see 2:536-537].

4.19 On 4 February 2002 further comments about the draft report had been received from the Namibian government [see 2:578-579]. These comments contained a query about the "sweeping generalization" that "Namibia is ready for an electronic market place". It was suggested that this statement needed to be moderated since it assumed the existence of a sophisticated technology infrastructure and a sound regulatory framework for conducting web-based transactions which was not the case in Namibia. A more tempered approach of launching initiatives for the commencement of an electronic market place on an experimental basis was said to be more appropriate. It was also indicated that proposals for the establishment of a legislative regime to deal with E commerce created significant dilemmas. The comments concluded with the expression of the view that the draft report, while fully covering the issues of the rationale and the needs of the project and the approach to be adopted, required further essential elaboration in relation to a detailed action plan for the whole project and for a related timeframe and total project investment costs and financing [see 2: 579].

4.20 On 16 April 2002, Mr Gold wrote an urgent memorandum to Mr Rao, which was copied to Deputy Secretary-General Cox and Dr K Lum, raising a number of concerns about SASD's E commerce projects. In regard to COMBINETGPS - project No X/NAM/16, Mr Gold said that

" we are anxious that this project has still not been closed. I have been informed that three of the consultants had submitted their reports to you before November 01. A lack of coordination with the Division on the conduct of this project is causing us increased embarrassment with one of the consultants based on some of your assurances. I urge you to close this project by 30 April 02 and return all the project files and other documentation by 15 May 02". [see 2:598]

4.21 As already described, this memorandum from Mr Gold was followed by the correspondence between Mr Venuprasad and the Applicant on 26 April 2002. On 1 May 2002, a meeting was held in the office of Mr Pierre Bertholot, the Deputy Director of SASD, to discuss the Namibia project. Mr Rao was present at this meeting as well as Mr John Knowles, Mr Venuprasad and Ms Nellie Nsemwa. Mr Rao was asked to clarify who was the project manager and why he had continued communicating with the Applicant. Mr Rao indicated that he remained the project manager. He also said that the Applicant had carried out the work according to the Terms of Reference with the exception of item No 3 - preparation of a database on raw materials and technology. This database had been prepared by other consultants on the project - Mr Dyke and Dr Janardhanan. Mr Rao further stated that the Applicant had submitted a satisfactory report.

4.22 The file note of this meeting, which had been prepared by Ms Nsemwa, then indicated that Mr Rao was asked why the Applicant had not been paid the final instalment of their fees if the report had been deemed satisfactory by him. Mr Rao explained that they had submitted a satisfactory report but had not provided all of the required accounting on the expenses they had been given in advance. Therefore as a precaution he had withheld final payment of the fee balance even though there was not a link between the contract's Terms of Reference and the making of this payment. [see 2:761-762]

4.23 On 2 May 2002 Mr Gold sent an email to Mr Rao with copies to Mr Bertholot and Mr Venuprasad. The email read

"Thanks for dropping by this morning. Good to see you back in your old haunts. I had a follow up meeting with Pierre and Ram both of whom would also like to see a conclusion to this valuable programme. I am now proposing that you be given an opportunity to complete the report in the timeframe that we discussed, (i.e. two weeks - but I am willing to give you an extra two days till May 17). As a compromise to our discussion, we (SASD) would like to receive the report from you and send it out as an SASD report. We would reserve the right "tweak" the report as required and undertake some editing etc. if we felt the report would benefit. I hope this is agreeable to you. Thanks for all the effort you have put into this project. Cheers. Dick." [2:758]

4.24 On 5 May 2002 Mr Gold, in his capacity of the Director of SASD, wrote to the Permanent Secretary of the Ministry of Trade and Industry of the Government of Namibia advising him of the plans to complete

the project in a timely fashion. Mr Gold said that a regrouping had occurred to ensure that the approach and methodology being adopted was fully responsive to Namibia's needs. In order to ensure that a final report would be delivered within a reasonable timeframe Mr Venuprasad had been entrusted with the responsibility of project manager while Mr Lorne Dyke had been re-engaged to assist him. Mr Gold said that both of these persons were "fully committed to the Secretariat's undertaking to provide your Ministry with a report and recommendations that could lead to the establishment of a viable GPS for the benefit of the country's small business sector." [2:764]

4.25 On 6 May 2002, Mr Rao also wrote to the Permanent Secretary of the Namibian Government's Ministry of Trade and Industry. Mr Rao's letter, which was addressed to the attention of Mr I Kamati Mutilitha, indicated that the comments that Mr Mutilitha had provided about the draft final report on the project had been considered carefully and where possible taken on board and incorporated. The only matter which now required further consideration was a detailed financial plan and implementation details. Mr Rao said that he had

"spoken to Ms Jan Jananayagam who is the expert in this field and she is willing to do a detailed financial plan and I will revert to you on that later. In the meanwhile, the updated final report is placed below along with a CD-Rom containing the file that your office could format and print it in colour. This would also enable any minor corrections that you may need to make to make the report suit your Ministry's requirements." [2:765]

4.26 Chapter 7 of the report sent by Mr Rao to the Namibian government on 6 May 2002 was titled COMBINETGPS. [2:715]. With the exception of some additional information relating to the cost of setting up a pilot phase of COMBINETGPS, and the rationale of the potential benefits of this scheme, the contents of Chapter 7 appear identical to those of Chapter 6 in the draft report sent by Mr Rao to the Namibian government in February 2002. [see 2:725 and 727 for additional information] The report sent on 6 May 2002 was not labeled as a draft.

4.27 Mr Rao did not provide copy of this report to Mr Gold until about 6 June 2002. On 13 June 2002 Mr Gold acknowledged receipt of the "final (draft) report" of the COMBINETGPS project. Mr Gold also reminded Mr Rao of the email he had sent on 2 May 2002 indicating that SASD would reserve the right to tweak the report and to undertake editing as required. Mr Gold therefore said that

"I request you not to disseminate this report or contact the Government of Namibia on this project until you have heard from Ram Venuprasad, the project manager.

Kindly send us by email the "soft" version of this report. besides handing over all other project documents in your possession." [2:836]

4.28 It would appear that at the time of writing this memorandum to Mr Rao, Mr Gold was unaware that the report had already been sent by Mr Rao to the Namibian government. In his evidence, Mr Venuprasad stated that he had first become aware of this situation when undertaking a joint mission with Mr Lorne Dyke after his re-engagement to work on the project. During the course of a mission to Namibia in June 2002, they were informed by the Government of Namibia that the final report had already been sent by Mr Rao in May 2002 and they were given a copy of it. Mr Venuprasad said that he was taken completely by surprise as the final report had been sent without first referring it to SASD. However he made no comment about the matter because to do so would reflect poorly on the Commonwealth Secretariat. [see B: 76 at paragraphs 13 and 14]

4.29 Following this mission to Namibia, Mr Lorne Dyke prepared and submitted to the SASD a new draft of a final report on the Namibia project. [see 2:842-949] The report, which made a case for developing an effective procurement solution for Namibian SMEs which was not purely technology driven, was ultimately accepted by the Namibian government and a pilot project was subsequently requested by the Government for implementation. [see B: 76-77, at paragraphs 17 and 18]

The Tribunal's Conclusions

4.30 Having reviewed in substantial detail the interactions between the parties as well as the internal assessment made by the Respondent's officials of the Applicant's performance under the terms of the contract, the Tribunal is satisfied that there were genuine and appropriate concerns expressed as to whether the Applicant had fulfilled its contractual obligations. The evidence is clear that shortly after

demonstrating the prototype website at a workshop in Namibia, the Applicant was determined to proceed with what it termed the second phase of the project which called for the implementation of an E commerce system based on the prototype that had been developed. The Applicant hoped to benefit financially from this new phase of the project through the generation of licence fees and allied arrangements. [See in general 2:538 - 554]

4.31 Mr Rao was fully aware of these objectives and would seem to have done all he could to facilitate their implementation. [See in general 2:562 - 568]. This facilitation included arranging meetings between Namibian government officials and the Applicant during the course of a visit made to London in November 2001. Following this visit Ms Jananayagam, on behalf of the Applicant, engaged in a series of interactions with Namibian government officials designed to secure their agreement to proceed with the second phase of the project independent of the Respondent and before the Respondent had submitted a final report on the project to the Namibian government. [See in general 2:559 - 565] Ms Jananayagam also provided copy of her contribution to the project's final report to the Namibian government before it had been approved by Mr Rao or discussed with any of the other expert consultants employed on the project. [B:24] These actions of the Applicant were not in accord with Clause 8 of the Terms of Reference which required the applicant to "prepare a report jointly with other experts".

4.32 Mr Rao received and accepted the Applicant's report on 7 January 2002 and, as noted, it was incorporated into the draft report which was then sent by Mr Rao to the Government of Namibia in February 2002. Mr Rao was, by this time, satisfied that the Applicant had completed all of the terms of the consultancy assignment and an invoice had already been submitted for payment of the remaining fees as well as travel expenses. However, when Mr Rao's colleagues in the Commonwealth Secretariat became aware of the existence of the draft report, after it had been sent to the Namibian government, they voiced a number of legitimate concerns about its content and recommendations. The main comments about the draft report within the Commonwealth Secretariat were prepared by Mr Venuprasad but they were adopted by his superiors, Mr Bertholot and Mr Gold in further interactions with Mr Rao.

4.33 By the time of the correspondence which was sent by Mr Venuprasad on 26 April 2002 to the Applicant, advice had also been received from the Namibian government about their reactions to the draft report. These concerns included comments about the lack of consideration given in the proposal for an E market place approach to the realities of the situation in Namibia which lacked the infrastructure and technology support required to implement such a proposal. These concerns related directly to Clause 5 of the Terms of Reference in the consulting assignment, namely, the provision of advice "on a communication strategy for linking the manufacturing sector using computers and COMBINETGPS, taking into account the geographical features of Namibia and the present communication infrastructure." [1 :004]

4.34 Mr Venuprasad's letter of 26 April 2002 also referred to concern about the Applicant's fulfillment of Clause 3 of the Terms of Reference which required the preparation of suitable databases on raw materials and technology for use on PCs and on the Internet as an add-on feature to COMBINETGPS. The Applicant disputed the non-completion of this clause of the Terms of Reference, as it did in regard to the other two clauses. Mr Rao suggested that this particular clause had been fulfilled by provision of the databases referred to by the other consultants on the project. Whether this was a correct assessment of the situation remains unclear from the evidence before the Tribunal.

4.35 The Tribunal concludes, given the situation that they were confronted by in regard to the Draft Report of February 2002, that none of the actions which have been described and which were taken by members of SASD within the Commonwealth Secretariat were inappropriate or could be labeled as "undermining" the terms of the contract entered into between the Applicant and the Respondent. Mr Gold and his colleagues were not bound by the decision taken by Mr Rao in January that the Applicant had satisfied all of the requirements of its consultancy assignment. That decision was taken without any consultation by Mr Rao with his superiors and before any feedback had been obtained about the draft report to which the Applicant had contributed. The Respondent's officials had a clear obligation to the Namibian government to ensure that any final report sent to them about the project did address their needs and took account of the realities on the ground. By the time that Mr Venuprasad wrote the letter of

26 April 2002, he and his colleagues in SASD were convinced that the Draft Report did not meet these objectives and that it was a failure on the part of the Applicant to fulfil its obligations under the Terms of Reference specified, even though the purported project manager, Mr Rao, disagreed with this assessment.

4.36 The evidence shows that the Namibian government was not advised of any change in the project management until the letter written by Mr Gold on 5 May 2002. In that letter Mr Gold made it clear that the preparation of the final report had been entrusted to the new project manager, Mr Venuprasad, assisted by Mr Lorne Dyke who had been re-engaged as a consultant. The evidence also shows that the very next day Mr Rao, in an action which he admitted in his oral testimony was in direct contravention of the instruction he had received from Mr Gold, sent a copy of the Final Report to the Namibian government.

4.37 During the course of his oral testimony, Mr Rao was questioned by the Respondent's counsel about his actions around this time. Mr Rao was referred to a chatroom conversation that it was alleged he had with the Applicant's Managing Director, Ms Jananayagam on about 2 May 2002, after the letter written by Mr Venuprasad of 26 April 2002. In this conversation, Mr Rao, who used the chatroom name Namibiaravi, said that he was "sorry about the developments". Questioned by Ms Jananayagam about what the status was "on all of this at the moment", Mr Rao indicated that he wished to "evaluate various options in a cool and calculated manner". Mr Rao said that:

"the website is with you ...with all contents ... report is with me ...it is only the business plan that is a problem ... but if GOV can do it as part of their pilot....funding it themselves it will keep the wolf at bay ... But in case they need my report ...so the project is still under control. That is my assessment." [see 2:759]

4.38 Mr Rao queried the accuracy of the chatroom message and suggested that it could have been manipulated. He also denied that the conversation implied that he had been seeking to withhold from Mr Venuprasad the project files and other information in his possession about the project. [see transcript 33-34]

4.39 The Tribunal did not find Mr Rao to be a convincing witness so far as his recollection of the details of any personal communications he had with Ms Jananayagam on this and other occasions. Rather than acting in a neutral and objective capacity as a project manager, this and other chatroom conversations suggest that Mr Rao was in fact acting as an advocate for the Applicant's E market place approach and for an outcome from the project which would ensure that the Applicant derived financial benefits through the licensing of their products developed in the course of the project. The project did remain under Mr Rao's control, at least until the interventions made by other officials within the Commonwealth Secretariat in late April and early May 2002. After that time, as indicated by the evidence, he was formally relieved of his role as project manager and a new approach was adopted for the preparation of a final report which was acceptable to the Namibian government and its needs.

4.40 The dispute between the Respondent and the Applicant in regard to the fulfillment of the Applicant's obligations under the Terms of Reference remained unresolved for a number of months. In September 2002, Mr George Saibel was appointed as the new Director of the SASD. Shortly after joining the Secretariat on 30 September 2002 Mr Saibel reviewed the Namibia project file and discussed it with his officers. On the basis of his review he determined that there were funds outstanding to the Applicants but that they were being properly withheld because of a failure by the Applicant to complete all of the relevant obligations under the contract. Further discussions and correspondence then took place between the Applicant and the Respondent. Certain allegations were also made about the conduct of one of Mr Saibel's staff members, Mr Venuprasad.

4.41 Mr Saibel indicated that he conducted an investigation into the allegations. This investigation determined that the allegations were entirely unfounded. Ultimately, after further internal discussions, a decision was taken that despite the lack of completion of the contractual obligations the Respondent could not justify the continued drain on resources that was arising from the dispute. To put an end to the matter without any further expenditure of time and resources, and without acknowledgement or acceptance of any of the claims that had been made by the Applicant, it was agreed that the Respondent

would make final contract payments for the fees and outstanding expenses. This payment, amounting to £3394.53 was made on 31 December 2002. [3:1243]

4.42 It should be noted that during the course of the oral testimony provided by Mr Venuprasad, counsel for the Applicant questioned him about alleged misconduct on his part during the performance of his duties as an official of the Commonwealth Secretariat. Nothing arose from this questioning which placed in any doubt the finding made earlier by the Respondent's own investigation that all of the allegations were without foundation.

4.43 It is also to be noted that the evidence before the Tribunal in regard to the exercise of the discretionary powers of the Respondent to seek to end the dispute in the manner described was conducted in a lawful manner against the relevant background facts set out. The Tribunal's approach to this issue is based upon the principles, which it has espoused in earlier decisions, drawn from *In Re Ballo*, Judgment No 191 ILOAT. As was stated in *In Re Ballo*:

"Discretionary authority must not, however, be confused with arbitrary power. It must, among other things, always be exercised lawfully, and the Tribunal, which has put before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the organisation's own rules, whether the administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false had been drawn from the documents in the dossier or, finally, whether there has been a misuse of authority."

Claims for Relief

4.44 In its pleadings the Applicant has sought reimbursement of certain expenses and damages as a result of "the Respondent's breach of contract in undermining the basis of the initial contract". As a result of the Tribunal's conclusion that no such breach occurred, and that a legitimate dispute existed between the parties concerning the completion of the contractual obligations, this claim for relief is denied.

4.45 The Applicant also seeks relief, in the form of specific performance, for the Respondent to:

"Provide an official reference from the Respondent addressed 'To Whom It May Concern' confirming that the Applicant has satisfactorily completed its obligations under the contract." [A: 1 0]

4.46 The Tribunal can find no basis upon which it can make such an order for specific performance. No requirement, express or implied, is to be found within the terms of the contract between the parties for any referenc- to be given. The evidence also indicates that from the Respondent's perspective the Applicant did not complete its obligations

under the contract in a satisfactorily ma-ner. Nonetheless, a decision was taken to make payment of the final installment of professional fees and outstanding express in order to bring closure to the matter.

5. DAMAGES CLAIM FOR DELAYED PAYMENT OF FEES AND COSTS IN RECOVERING PAYMENTS.

5.1 A further head of relief sought by the Applicant is for general damages for the delayed payment of contractual fees owed to the Applicant, and the Applicant's staffing costs in recovering payment. [A:9 - 10]. The Applicant contended that the project manager who replaced Mr Rao, Mr Venuprasad, through a series of actions, effectively repudiated and undermined the express and implied terms of the contract. These actions

comprised:

"18(a) Unreasonably withheld payment of the Applicant's final invoice for consultancy fees submitted in January 2002 for 1 year, payment being made only after over numerous letters and several telephone calls from the Applicant. [Exhibits 3.1 - 3.19, pages 42-46, pages 199, pages 60-65, pages 83-85, pages 94-112, page 173, pages149-151]

(b) Unreasonably withheld payment of the Applicant's travel expenses claim pertaining to the consultancy, submitted in July 2002 for a period of six months. [Exhibits]

(c) Mr Venuprasad failed to respond diligently and/or at all to the Applicant's correspondence in relation to the unpaid invoices.

(d) Mr Saibel claimed that the Applicant has not infact submitted the travel expenses and that the travel expenses claim documents were not in the Respondent's files. This claim was shown to be false and that the Respondent would have been aware it was false. [Exhibit 3.18 pages 114, 113-136]. The Applicant

resubmitted the claims nevertheless they remained unpaid for a further 3 months and several letters later.

(e) Mr Venuprasad without reasonable cause and/or authority with disputed the Applicant's satisfactory completion of the consultancy project [Exhibit] in direct contradiction of his predecessor. The Applicant brought to the Respondent's attention on numerous occasions that there was written confirmation of satisfactory completion of the consultancy. [pages 103-109].

(f) Mr Venuprasad unreasonably and without valid reasoning disputed the Applicant's ownership of the Applicant's website and software despite the explicit statements to the contrary in Annex 1 of the contract [Exhibit 1.1, Annex 1] and other contract documents [pages 99, 137].

(g) The Respondent failed to return copyright materials to the Applicant and failed to take any steps to protect the Applicant's intellectual property rights. [Exhibit 1.5 page 21].

(h) Mr Venuprasad further frustrated and undermined the whole ethos of the project as represented to, and envisaged by the Applicant prior to the entering the consultancy by the following actions. It is the Applicant's case that the actions of Mr Venuprasad were motivated by malice and/or personal gain:-

a. Withdrawing the final report submitted to the government of Namibia by the former project manager, Mr Rao [Exhibit 1.5, pages 21-23]

b. Seeking to source alternative software providers for the provision of the e-marketplace IT service

c. Refused to allow the Applicant to link its web site with the Internet domain name owned by the Respondent. [Exhibit 4.4, pages 150J]

d. In order to ensure continuity of the web site owned by the Applicant and launched by the Government of Namibia, the Applicant was forced to

i Move the web site to a different internet domain name

ii Rename the web site from Combinet GPS to Namibia GPS

iii Recreate all graphics on the web site to comply with the Respondent's letter dated the 26th April (Exhibit) which denied the Applicant continuing use of the name CombinetGPS or the Respondent's logo [pages 21-23]" {A:7-8}

5.2 Contractual fees comprising the final instalment due on the contract, and outstanding travel expenses, were ultimately paid by the Respondent, as noted above, on 31 December 2002. [3:1243]. The payment included £3000 as a final instalment of professional fees, and £394.53 of expenses incurred on a site visit to Namibia and South Africa in August 2001.

5.3 Many of the contentions made by the Applicant in regard to this particular claim have already been addressed by the Tribunal earlier in this judgment. In his role as project manager Mr Venuprasad did query, with reasonable cause, whether the Applicant had completed the contractual obligations in a satisfactory manner [Paragraph 18(e) above]. Mr Venuprasad and other officials employed by the Respondent also queried, properly, the Applicant's claim of ownership of the website and software [paragraph 18(f) above]. There is also no evidence to support the contentions that in performing his role as a project manager Mr Venuprasad was motivated "by malice and/or personal gain", in acting in the way described in paragraph 18(h) above. Mr Venuprasad's action and those of the Respondent in general, were appropriate in the circumstances.

5.4 The claim that the Respondent failed to return copyright materials [paragraph 18(g) above] was withdrawn by the Applicant during the hearing, while as a result of the ruling made concerning ownership of the website the claim that the Respondent also failed to "protect the Applicant's intellectual property rights" must also lapse.

5.5 In relation to the withholding of the Applicant's final invoice for consultancy fees submitted in January 2002 until year end [paragraph 18(a) above] the Tribunal concludes that this action on the part of the Respondent was not unreasonable, given the concerns which have been detailed at length above regarding the Applicant's satisfactory completion of the terms of its consultancy. These concerns resulted in an extended series of phone calls, emails and other correspondence between the parties before Mr George Saibel finally resolved to conclude the protracted dispute by making the payment described.

5.6 The situation regarding the withholding of the Applicant's travel claim for the recovery of expenses incurred on the project is more problematic [paragraphs (b), (c) and (d) above]. The expenses dated back

to August 2001. Documentary evidence indicates that the Applicant sent details of the travel claim by registered mail to the Respondent in July 2002 [3:1082-1096]. +J:Hs The Respondent claimed subsequently that it had no record of this mailing and the materials were submitted again in October 2002 [see 3:1066-1076]. The claim itself was not for a large sum yet it was still not paid until the end of December 2002, even though no further queries appear to have been raised by the Respondent regarding its validity.

5.7 In these circumstances the Tribunal finds that the Respondent did not respond diligently or appropriately to the Applicant's legitimate request for the reimbursement of its travel expenses under the terms of the consultancy. The consultancy provided for such payment, although there was no mandate to pay by a specific date, or provide for any penalties arising from late payment. Even so an obligation can be implied in the terms of the contract that payment would not be unreasonably withheld. The Tribunal concludes that in failing to pay the Applicant's travel claim for a period of more than five months the Respondent was in breach in this implied term, and the Applicant is entitled to be compensated for this breach. The Tribunal defers making any decision about the quantum of this compensation until it has received further submissions on this issue from the parties.

6. OTHER REDRESS SOUGHT

Development, launching and hosting of website

6.1 The Applicant's pleadings contain a general claim for relief under the head "25. Any other remedy as the Tribunal shall see fit". The Tribunal chooses to deal with the further claim for compensation under this head, namely, whether the Applicant is entitled to receive sums in respect of additional work done and services rendered at the request of the Respondent. The sums relate principally to development costs associated with the software for the prototype website specified in the contract, and for those occurred in hosting this prototype website. It is to be noted that no specific plea is made for such damages by the Applicant but in both her written statement and oral testimony Ms Jananayagam claimed that she did extra work for which she was not paid.

6.2 Clause 1 of the Terms of Reference of the contract required the Applicant to "create a prototype website with the functionality specified in their proposal for the purpose of demonstration". [1 :004]

6.3 This prototype website was to be built, according to Clause 2 of the Terms of Reference, utilising underlying software components which were proprietary to the Applicant. The website was to be linked to the COMBINETGPS domain name. There was also to be an add-on feature to the website comprising suitable databases on raw materials and technology for use on PCs and on the Internet. [Clause 3] An on-line group purchase scheme incorporating necessary forms, checks and balances and with necessary linkages to sources of technology and raw materials was also to be prepared. [Clause 4]

6.4 On behalf of the Applicant, Ms Jananayagam explained her understanding of what amounted to a prototype website with a functionality limited to that of the purpose of the demonstration. She said that for the purposes of demonstration, it was normal to develop a "mockup" or series of linked screens that could be walked through for the purpose of a demonstration. However, if someone wished to launch the prototype website it would have to be fully functioning and that there was a big difference in the cost and value of a "functioning live website as opposed to a prototype". [B:13 at paragraph 53]

6.5 Ms Jananayagam indicated that in order to build the model website the existing data structures and programme codes had to be modified and where new functionality was required this was added to the existing body of code. The project work included taking the data provided and owned by various parties, including the Respondent and the Government of Namibia, and storing and converting it into formats which were readable by the Applicant's programmes.

6.6 Ms Jananayagam said that by early August, before the commencement of the workshops that were to be given in Namibia, it became clear to her that what Mr Rao wanted was more than a prototype website for the purposes of demonstration. This was communicated to her verbally by Mr Rao and also through a document, dated 10 May 2001 in which Mr Gold, then Director of EIDD, advised the officials of the Ministry of Trade and Industry of the Government of Namibia about the plans for the workshop and associated demonstration . [see 1: 124-126]

6.7 Ms Jananayagam said that the new functionality being requested was much more in keeping with a full fledged website development than a prototype model. Following this request Ms Jananayagam said

that a great deal of additional programming work was required between 2 July 2001 and 24 August 2001. [see B:14 at paragraphs 56-61]

6.8 On or about 19 August 2001 Ms Jananayagam said that she was advised by Mr Rao that the Namibian Minister of Trade and Industry would officially open the workshops. On that same day Ms Jananayagam said that she discussed with Mr Rao how the prototype would actually be demonstrated. She explained it could be demonstrated on a laptop, but Mr Rao asked that the website should be linked initially to the domain name COMBINET which had been registered and was owned by the Respondent. For the website to be linked in such a way, Ms Jananayagam said it would also need to be housed and supported by someone. She indicated that the Applicant agreed to do this at the request of the Respondent on the understanding that if the Government of Namibia was happy to proceed to a later phase of the project, then Sumukan would recoup its costs.

6.9 On 30 August 2001, the website was demonstrated to the Ministry of Trade and Industry on the Government of Namibia. Following this demonstration, Ms Jananayagam said that the Minister asked for the website to be launched. At this point, according to Ms Jananayagam, it became much more than just a prototype for demonstration purposes.

It was actually an operating website. She said that Mr Rao felt that it would be unacceptable to then close it down, even though the launch as such related only to a "content" and "daily news" section rather than any transactional section. Ms Jananayagam said that this decision to maintain the website meant incurring hosting and maintenance costs which were not covered by the consultancy agreement. She said

"however, the understanding at the time was that the Government of Namibia had accepted the website, Phase 2 of the project was imminent and Sumukan would be chosen for it. On this basis we were willing to incur the extra cost involved in supporting and maintaining the site". [8:16-17 at paragraph 73]

6.10 Ms Jananayagam said that in order to have the website linked to the domain name the Applicant had already bought server space in bulk from a third party. The server space was very cheap. However, once the website "actually went live" on 30 August 2001, Sumukan was providing much more than server space. This service included a daily news and market report on the website, which had to be kept up to date, and general support and working operational processes. Ms Jananayagam said that through Mr Rao the Respondent was aware of these developments and Mr Rao also said that they might be remunerated for the provision of the daily news if budget was available.

[see B: 17 at paragraph 75]

6.11 The evidence shows that the Applicant did in fact continue to host and support the website, linked to the COMBINET domain name until late April 2002. [3:1235.01- 1235.02] At that time, following a dispute as to the use of the COMBINET domain name and also the Commonwealth Secretariat logo on the site, the Applicant decided to establish a new domain name, NAMIBIAGPS, and linked that name to the website rather than that of COMBINETGPS. [3:1000-1001]. As has already been indicated, the dispute about the use of the COMBINETGPS domain name and Commonwealth logo subsequently broadened into a general dispute about the ownership of the prototype website.

The Tribunal's Conclusions

6.12 Now that it has been determined that the prototype website is owned by the Respondent rather than the Applicant, is there any liability upon the Respondent to meet the hosting and support fees previously paid by the Applicant? Further, was there in fact additional expense incurred in the development of the prototype website, over and beyond that provided for in the consultancy assignment, for which the Applicant is entitled to be compensated for by the Respondent?

6.13 In their submissions the Respondent contended that there was no responsibility upon them to compensate the Applicant for any additional expenses incurred under either of these claimed headings- In advancing this contention the Respondent relied principally upon the provisions of Clause 7 of the formal letter in respect of the short-term consultancy with the Applicant which provides:

"you will not expand or vary the Terms of Reference and any agreed workplan, whether at the request of the Government of Namibia or otherwise, in any way so as either to extend the duration of the consultancy or to increase the fee without prior written agreement of the Secretariat first having been obtained." [B: 002]

The Respondent also denied any claim for extra work done based on quantum.

6.14 Having regard to the evidence in this matter the Tribunal is satisfied that there is no basis upon which the Applicant can base a claim for the recovery of expenses. The Tribunal can find no prior written agreement of the Secretariat to expand or vary the Terms of Reference in the manner indicated by the Applicant. The Tribunal is further strengthened in this view by the substance of a request made via an email dated 8 August 2001 by Mr Rao to one of the Applicant's employees, Mr Vijay Krishnasamy. [see 1 :197] Mr Rao asked that as part of the demonstration at the workshop in Namibia of the prototype website it should

"work on a small scale that would illustrate aggregation, show sources of supply of raw materials and technologies with membership procedure and rules of syndication ."

Mr Krishnasamy asked Mr Rao for assurance that he was not expecting anything more than a "demo version". Mr Rao assured him that he was not and that it was all there in the Terms of Reference. Mr Krishnasamy said that he would advise Ms Jananayagam of this request.

6.15 The nature of this request would seem to be very much in accord with the provisions of Clause 3 of the Terms of Reference of the consultancy assignment [see 104].

Whatever the case, there is no basis for an assertion that there was a request in writing by Mr Rao for the creation of what Ms Jananayagam described as a live website. It is also significant that in oral testimony provided to the Tribunal by one of the Applicant's former employees, Mr Balaji Raghavan, it was stated that the website utilized at the Namibia workshops in August 2001 was a prototype website and not a live and functional website. Mr Raghavan, a software engineer, was responsible for writing the programming code for the prototype website for COMBINETGPS.

6.16 Mr Raghavan was asked to describe his understanding of the difference between a prototype website and a live and functional website. Mr Raghavan offered an explanation which relied upon an example of building a prototype house. He stated that at the commencement of the project they had in mind the construction of a demonstration website which meant that they were being asked to build a typical prototype home which was not meant for people to live in. For example, what they were to build might look like a home but it was not really a functioning home - there would be a tap fixed in the house but there would not be any water supply. There would also not be any good foundations for the house so it could not be used as a residence. This is what he called a demonstration website. The home was for a workshop only. That meant that you could take twenty people in there, have a tour around the home, but you could not ask them to live in that home. If you did make a home separately for people to live in that could be a fully functional website, then that home would need to have a tap with water supply, an electricity supply and all the safety regulations and standards in building codes would need to be followed. That would be a fully functional home, or website. COMBINETGPS was a prototype website only, not a fully functional website, as was NAMIBIAGPS.com which was built subsequently.

6.17 On the basis of Mr Raghavan's evidence, as well as on the request made by Mr Rao to Mr Krishnasamy, the Tribunal can find no justification for Ms Jananayagam's assertion that there had been a variation in the Terms of Reference in August 2001 which amounted to a new requirement for the construction, support and maintenance of a live rather than a prototype website. The website that was "launched" at the Namibia workshop was still not a fully functional website since it lacked, among other things, any ability to perform transactions which were at the core of the E market commerce approach that was being espoused by the Applicant. Additionally, the Tribunal is of the view that the decision made by the Applicant to continue to maintain and support the website which had been created was based upon its desire to persuade the Government of Namibia, and other governments in the region, to adopt its E commerce approach and to gain the consequent financial benefits of licensing agreements.

6.18 In her testimony, Ms Jananayagam admitted, under questioning by the Tribunal, that the Applicant's entering into the agreement with the Respondent was based on an element of business risk. The Applicant was prepared to assume this risk and to perform the Terms of Reference for a very low fee in order to promote itself for the preferred supplier of the software and technology required to develop an E commerce system in Namibia and elsewhere. This was the "pot of gold at the end of the rainbow" that was identified in the proposal as Phase 2 of the project. It was, of course, a pot of gold which could only be recovered if the Government of Namibia agreed to the second phase of the project and contracted for it

accordingly. There was nothing in the existing contract which would justify any recouping of these expenses from the Respondent, even if they were additional to the requirements of the Terms of Reference. The claim for any damages as a remedy under this head is therefore denied.

7. COSTS

7.1 The Tribunal makes no ruling on costs at this stage but seeks submissions from the parties on this issue, these submissions together with those relating to the quantum of compensation for delayed payment of travel expenses, to be filed within 14 days of the publication of this judgment.

Given on this 25th day of April, 2005 in London

Signed

Professor Duncan Chappell

Dame Joan Sawyer DBE, PC

Anesta Weekes QC