IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-423
[2023] NZHC 3598

BETWEEN	HIS MAJESTY THE KING IN RIGHT OF NEW ZEALAND ACTING BY AND THROUGH THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Plaintiff
AND	FUJITSU NEW ZEALAND LIMITED Defendant
AND	DASSAULT SYSTÈMES AUSTRALIA PTY LIMITED Third Party

Hearing: 11 September – 5 October 2023

Appearances: M G Colson KC, K J Dobbs and M R M Gale for Plaintiff
C L Elliott KC, M B Wigley and J Kohu-Morris for Defendant
C F Finlayson KC, A J Horne, H M Jaques and C Hoeft for Third Party

Judgment: 8 December 2023

JUDGMENT OF COOKE J

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[1] The Department of Corrections (the Department) manages a significant workforce in order to operate the prison system over approximately 18 prisons throughout New Zealand. In December 2018 it entered a contract with Fujitsu New Zealand Ltd (Fujitsu) under which Fujitsu was to provide new software for the Department to manage the rostering of its staff in a more efficient way. Fujitsu's proposal involved software provided by its sub-contractor, Dassault Systèmes Australia Pty Ltd (Dassault) and a Dassault product called "Quintiq". The Department purchased the licence for the Quintiq software in December at a cost of $1.8 million. The contract with Fujitsu involved the analysis and design phase for the implementation of Quintiq as the rostering solution. The contracts were entered following an earlier Request For Proposal (RFP) issued by the Department in March 2018. In its RFP response Fujitsu had stated that the Department's requirements could be met "out of the box" by Quintiq without the need for customisation, that it could be implemented seamlessly with the Department's existing payroll systems in accordance with the Department's timeframes, and for the approximate total cost of $716,000 over and above the licence costs.

[2] In June 2019, following a period of substantial work by all parties under the analysis and design phase, the Department brought this contractual arrangement with Fujitsu to an end. This followed Fujitsu supplying a revised pricing proposal that put the cost of the total project at closer to $7 million in addition to the licence cost. The Department subsequently contracted with another company to provide a rostering solution.

[3] The Department now sues Fujitsu for breach of contractual warranty and other contractual terms, for misrepresentation under the Contract and Commercial Law Act 2017, and for misleading and/or deceptive conduct under the Fair Trading Act 1986. It says that Fujitsu's warranties and representations about Quintiq were untrue. Fujitsu in turn sues Dassault under the Fair Trading Act and the equivalent Australian legislation (the Competition and Consumer Act 2010), and for misrepresentation under the Contract and Commercial Law Act, for any liability arising by virtue of the Department's claims on the basis that any untrue or misleading statements about the Quintiq product originated from Dassault.

[4] The Department sues Fujitsu for a total of approximately $4.3 million for the wasted expenditure it says it incurred on the project. This involves approximately $640,000 that it paid Fujitsu for work before the contract was ended, $1.8 million which it paid for the Quintiq licence, and approximately $1.9 million for other costs that the Department says it incurred as part of the project.

Factual background

[5] I begin by outlining the facts. This will include making factual findings, although it will also be necessary to make additional findings when addressing the particular claims.

[6] I observe from the outset that the primary source for making findings is the contemporaneous documentary record. Whilst some of the oral evidence has been of assistance I found the contemporaneous records to be the most reliable source of evidence. The events occurred some years ago, before the COVID-19 pandemic, and I generally considered that much of the oral evidence involved an attempted reconstruction of events, albeit based on the contemporaneous documents, rather than true recollection.

The Registrations of Interest phase

[7] The new rostering system was intended to be implemented by the Department as part of a wider project for reforming the Department's approach to the rostering of prison staff which it initiated in 2016. This was called the "Making Shifts Work" project. An important aspect of this project was a desire to allocate staff more efficiently, and in a way that it was hoped would improve the rehabilitation of prisoners. Steps were taken in late 2017 to identify firms who might be able to provide a new software for rostering as part of that project.

[8] Fujitsu was already a contractual partner with the Department. Pursuant to a Master Services Agreement dated 22 December 2015 (the MSA) a contractual relationship had been established. The MSA had been entered so that Fujitsu could provide development and maintenance support associated with the use of applications by Department staff (such as those associated with mobile devices and Microsoft

products) but the MSA contemplated that other services could be brought within the terms of the MSA.

[9] On 10 November 2017 the Department called for Registrations of Interest (RoI) for the rostering solution through the New Zealand Government's Electronic Tender Service. The RoI explained that the Department needed a new rostering system for 6,000 staff across 18 operational prison facilities and other sites which changed its current shift patterns so it could more effectively operate the prison system in a manner that would better rehabilitate offenders. In it it said:

> **What we do not want**
>
> The Department is not looking for a solution that is onerous to the business, places current operations under strain, and does not integrate with existing systems. The aim here is for the Department to implement a solution that increases operational efficiency, is flexible, scalable and can be adapted further in future.

[10] It also said:

> **Integration Requirements**
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> Any rostering solution should seamlessly integrate with our current SAP Payroll system. Considering the complex requirements of shift patterns and significant data exchange occurring between systems, it is critical that any solution can facilitate improved operational performance rather than being a burden on the business.
>
> We are interested to hear how Respondents interface patterns can integrate with existing systems to enable a more integrated end-to-end solution.

[11] The SAP system was used for the Department's payroll. So the rostering solution needed to integrate with SAP, which was a commonly used payroll system, and deal with the complex requirements the Department said were involved.

[12] Dassault saw the RoI and gave its own consideration to seeking to contract directly for the project. But its assessment was that it appeared a small project, and that it would be better to engage in the work as a sub-contractor to Fujitsu who had an existing relationship with the Department. Dassault and Fujitsu had been involved in other tender bids in New Zealand. For its part Fujitsu also wanted to be the contractor with Dassault as its sub-contractor.

[13] Even at this early stage Dassault foresaw that the project would only be a profitable one for it if there was greater complexity. In emails in November 2017 from Ms Kate Gayner (a manager at Dassault who subsequently supervised the pre-sales team) to Mr Nigel Deans (who became the lead-manager for the project) and others Ms Gayner advised that what was being sought was "cheap" and "basic" and she asked "how are we going to extend the complexity to make this worthwhile responding to?" In any event Dassault and Fujitsu agreed that Fujitsu would respond to the RoI, and the subsequent RFP, and Dassault would be Fujitsu's sub-contractor.

[14] The Department received eight responses to the RoI. Fujitsu's response was dated 29 November 2017. Under its response Fujitsu would be the Department's contracting party, and Fujitsu would sub-contract Dassault to provide Dassault's Quintiq product, which came to be known as the "Quintiq solution". On 13 March 2018 Fujitsu and Dassault entered a "Teaming Agreement" to record the terms of their arrangement.[1]

[15] Fujitsu said to the Department in the RoI response that contracting with it using the Quintiq product supplied by Dassault would mean that it could "deliver an off-the-shelf, integrated solution that can support all of [the] Department['s] requirements". It also said that amongst the key points were that the solution could meet the Department's "core functionality out of the box" with "minimal requirements [for] customisation" and "seamless integration" with the Department's SAP payroll system. At trial there was debate about what some of these expressions meant. I will address this debate in greater detail below. But in essence these statements conveyed that the Quintiq software could easily integrate with the Department's existing SAP payroll system in order to provide the Department's core requirements, and that limited changes would need to be made to the Quintiq standard product to do this.

[16] The Department was using the services of the accounting and consultancy firm Deloitte throughout the wider Making Shifts Work project. Deliotte evaluated the RoI responses on the Department's behalf, and Fujitsu was assessed as being one of the

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[1] Fujitsu and Dassault later signed another agreement dated 10 April, called a "System Integrator Alliance Agreement" which also appears to regulate the agreement between them, but which was not specific to this project.

top four potential vendors. Deliotte then recommended, and the Department approved, a "lean" RFP process. Under this approach the Department would not have fully documented business requirements which it would issue to the market as part of the RFP, but it would describe its requirements in more general terms, and then work together with the proposed vendors it would choose through the RFP process. The expert witness called by Dassault, Dr Kenneth Tan, was critical of this approach. In his view it almost guaranteed that there would be changes in scope and increases in cost. He referred to examples of such projects he had been involved in in Australia which had ended badly. But he accepted that he had no experience of the New Zealand market. I accept the evidence of the other witnesses, including the expert evidence from Mr Mark Peach called by the Department, that a lean RFP is a standard approach in New Zealand and that it does not necessarily lead to greater cost in delivering a solution.

Provision of information

[17] Two vendors, including Fujitsu, were identified by the Department as the top contenders after evaluation of the RoI responses. On 18 January 2018 the Department advised Fujitsu that it had been short-listed, and was invited to proceed to the next stage. On 9 February the Department's sent 30 "use cases" to Fujitsu as a part of the lean RFP process. These were 30 scenarios where Fujitsu was invited to demonstrate how the Quintiq product would be used to address the scenarios. On 26 February the Department then issued its Solution Requirements, and the RFP itself was released on 1 March 2018.

[18] It is important to record an issue about the Department's requirements at this stage. As had been indicated in the RoI there were complications with the way the Department undertook rostering. The roster had more simple requirements — prison officers being scheduled to work shifts reporting to senior officers within a particular prison. But there were also complexities. Such officers could also work some of their time at other prisons in the same region reporting to different senior officers. Moreover within each prison there were separate "units", such as a high security unit,

or a part of the prison used only for remand prisoners.[2] Units needed to be able to be separately managed. Prison officers could also be required to move prisoners between prisons, or to participate in other tasks such as bringing prisoners to court for hearings. This kind of activity could also be allocated to different "cost centres" — that is, some staff activities needed to be managed and recorded to different budgets. Sometimes officers would be allocated tasks normally performed by more senior officers, and entitled to higher pay. Information needed to be sent to the payroll system to record such activities. For example prison officers might be required to take a prisoner currently on remand in a prison van to a court for a hearing, and then transport that prisoner back at the end of the day to a different prison to a unit for sentenced prisoners. Such a scenario might involve the prison officers being under the authority of different more senior prison officers at different times, and their activities required to be allocated to different cost centres and/or at higher rates. This might all occur during a single shift for the prison officer. These kind of features created more complex rostering requirements.

[19] This means that the information provided about the Department's operations, and what was said about Quintiq's capabilities is important. As indicated, the RoI referred to the "complex requirements of shift patterns and significant data exchange occurring between systems". On 28 February, two days after the Department had released its Solution Requirements Fujitsu/Dassault then attended a meeting in New Zealand to gather more information about these requirements. Ms Nicola Horwood the manager at Fujitsu who had lead responsibility for the tender made a note of the meeting. There was no other substantial note made of the meeting available from Dassault or the Department, although Ms Horwood sent her note to Messrs Deans and Moran of Dassault for comment (with no response received). Ms Horwood's note confirms the evidence that some of the complexities of the Department's rostering requirements were either identified, or greater potential complexity was at least foreshadowed when the Department explained its operations. This included the following explanations:

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[2] Remand prisoners are those in custody yet to face trial who are kept separate from sentenced prisoners and subject to different conditions (such as limited rehabilitation programmes).

(a) That the Department's roster requirements operated at the prison level, but it could also have regional rostering requirements. For example in the Auckland region staff could move around prisons in the same region under the control of different senior officers. In addition staff could be moved across regions.

(b) Each of the prisons had a number of separate units which involved different compositions of officers. There were three main categories of officer, a Principal Corrections Officer (PCO), a Senior Corrections Officer (SCO) and a Corrections Officer (CO). Even when an officer worked in a single unit for an eight hour shift they could do various tasks in that unit which needed to be allocated to different cost centres in the Department's system. The Department also wanted the capability to "cross-charge" costs to other units.

(c) There were various other rostering complexities, including an officer being paid at a higher rate when fulfilling a more senior role (that is, a CO doing the job of a SCO), and situations where shifts were "gifted" from one officer to another.

[20] Mr Moran of Dassault attended this meeting. He subsequently had a significant role in demonstrating the Quintiq product to the Department representatives at subsequent meetings in New Zealand. His role was essentially in sales. He attended to obtain information for the purpose of these demonstrations. He gave evidence that the information received at this meeting was of some assistance for his demonstrations of Quintiq, but that it "went beyond the level of detail that would typically be incorporated into a product demonstration in the sales cycle".

[21] The Department's Roster Solution Requirements issued on 26 February did not include details of all the complications discussed at the meeting two days later. For example the Requirements did not identify the need to allocate activities to cost centres based on particular tasks. But the purpose of the meeting was to provide further information, and I accept that Fujitsu/Dassault were put on notice of the potential complexities. For example, the Requirements referred to there being different cost

centres associated with the rostering, and it had been explained at the meeting that the tasks officers were to undertake on particular shifts were to be allocated to different cost centres.

[22] Various other steps were taken before the RFP responses were required. In addition to the release of the Roster Solution Reports on 26 February, and the meeting on 28 February, Dassault conducted its first product demonstration on 7 March, and there was an implementation workshop on 9 March. The Department also issued clarifications on 5 March to enable all tenderers to obtain further information about the Department's requirements. These included clarifications issued to Fujitsu on 14 March.

Fujitsu's RFP response

[23] Fujitsu submitted its RFP response to the Department on 16 March. This document is of central significance to the Department's claims as it is largely the basis for the Department's claims of misrepresentation and breach of contractual warranties, and it is also a key aspect of the alleged misleading and deceptive conduct. In addition Fujitsu's claim against Dassault is based upon the information Dassault provided to Fujitsu for the purposes of this RFP response.

[24] The document is lengthy and includes a number of statements about the Quintiq solution, including by addressing the listed requirements set out in the document issued by the Department on 26 February. I accept the arguments for Fujitsu and Dassault that the RFP response needs to be read as a whole, and that it is important not to read individual statements without understanding the full context of what was being said about the Quintiq solution, including in the context of more precise statements in the main body of the document. But a key element of the claims advanced by the Department arises from statements made in the executive summary. This stated:

> **Summary**
>
> The Department can be confident that in selecting your existing partner Fujitsu, and our advanced technology partner Quintiq, you will be provided with a solution that is designed to:
>
> - meet all of the Department's core functionality requirements;

- require no customisation and is 'out of the box';
- be delivered with a trouble free implementation;
- meet the Department's tight timeframe for delivery of a fully-functional solution that is ready for internal testing by 15 February 2019;
- integrate well with SAP;

…

[25] Earlier in that summary Fujitsu also stated that the Quintiq solution would involve "seamless implementation".

[26] The RFP response also addressed 97 more detailed requirements. These were broken into functional requirements, and non-functional requirements, identified those which were "must have" requirements and those that were not, and also cross-referenced the use cases that had been issued. The response indicated that Fujitsu could meet the listed functional and non-functional requirements in full with the exception of three non-functional requirements which it indicated it "partially met". For example functional requirement number 11 contemplated information being provided to the SAP payroll system involving a number of details, including that the costs of an allocated work could be allocated to a different unit, and an ability to make changes to this retrospectively. When responding that this requirement was "fully met" the response stated:

> Quintiq has a wealth of experience in integrating Time & Attendance data from the rostering system to payroll systems such as SAP. A number of those experiences involving integrating with SAP Payroll (via Substitutions and Attendances) include the fully costed pay data. Additionally, Quintiq Time & Attendance [provides] a means to retrospectively change time entries. Some configuration may be required depending on the payroll period and period in which changes can be made.

[27] The last sentence is the kind of more particular statement that is a reflection of what was said in the executive summary. Some configuration (or changes) might have been needed to allow Quintiq to make retrospective changes to time entries if the changes related to longer periods of time, or needed to be made at some later date. But otherwise the product could meet the Department's needs "out of the box" — that is, it could be met by Quintiq's standard functionality.

[28] There are other similar statements in relation to the more particular requirements. Read as a whole I accept that the executive summary was an accurate summary of what the body of the document also represented about the Quintiq solution. Put another way, a reader of the document would not understand the subsequent more particular content provided in relation to each of the functional and non-functional requirements to materially qualify what was said in the executive summary in a substantive way. The only qualifications, or assumptions, were those that were expressly set out in the RFP response. I address those below.

[29] Representations were also made in relation to the price. For that purpose the response indicated what the Department's core requirements were by reference to the following table:

Release 1 – Core Capability (MVP)

	STRATEGIC	TACTICAL	PRE-OPERATIVE	OPERATIVE (COMMAND CENTRE)
COMMAND & CONTROL	Strategic command analysis	Tactical scenario planning	Pre-Operative scheduling	Situational awareness
ROSTERING	Demand generation	Shift generation	Roster generation	Day of operations Activity Scheduling
				Time & Attendance
STAFF FATIGUE (Psychological Risk)	Fatigue consulting	Long term fatigue risk management	Short term fatigue risk management	Fatigue risk mitigation & compliance
STAFF LEAVE	Leave demand planning	Long term leave planning	Short term leave planning	Leave allocation
STAFF TRAINING	Strategic training forecasting	Training planning	Training scheduling	Training delivery
EQUIPMENT	Equipment demand planning	Equipment planning	Equipment allocation	Equipment monitoring
INVENTORY	Inventory demand planning	Inventory ordering	Inventory allocation	Inventory consumption monitoring

Release Strategy

Release 1
Rostering
Time & Attendance
Leave allocation
Training allocation
Mobility – ESS Portal

[30] The price provided was for "release 1", being the core requirements, encompassing those tasks shaded in green in the middle of this table and summarised on the right hand side. The pricing schedule provided with the response identified a price on a time and attendance basis estimated at $716,000.

[31] As indicated the RFP response also set out assumptions, including those associated with this price. It was said to remain valid up until 26 September 2018, and that it was based on the "high level" requirements provided by the Department with the final scope of the project to be agreed as part of the statement of work.

[32] Other assumptions were expressly set out including that:

> All business requirements, process mapping and rostering rules have been documented prior to commencement of the project.

[33] It is of significance that the RFP response did not state that what Fujitsu said about Quintiq depended on the business requirements not being more complicated than what Fujitsu/Dassault assumed for the purpose of the RFP response. Neither did it include any other qualification of that kind — for example an assumption that the Department sought only Quintiq's out of the box functionality. Rather, it proceeded on the basis that all the Department's requirements could be met by the Quintiq solution. The only relevant assumption was that the detailed business requirements would be provided before the work started — it was only an assumption relating to the *timing* of their provision. The RFP had expressly required that responses included "all assumptions and qualifications made about delivery of the Requirements". Fujitsu's RFP response also stated that it was provided based on "all … information provided by the Department of Corrections … to Fujitsu regarding the Rostering Programme 2017 requirements" which includes the information provided at additional meetings as well as the formal information provided in the Rostering Solution Requirements.

[34] There was, however, one significant and overriding qualification in the RFP response. It was made clear that the response was not an offer capable of acceptance, that it was based on what the Department had disclosed, and only so that the Department could form a view on whether Fujitsu would be invited to participate further in the process. It stated:

> In the event that the Department amends its requirements in the Rostering Programme 2017 or otherwise as they apply to the Response, Fujitsu reserves the right to amend the Response accordingly, including scope, pricing and other related information or requirements.
>
> Any pricing that has been submitted by Fujitsu is only indicative. Fujitsu will provide to the Department clear and binding pricing and other detail once Fujitsu responds to a more specific document containing the relevant information needed to provide such pricing.

[35] Given this qualification and other statements to the same effect much depends on what happened after the RFP response was sent and the contracts were later entered.

Even if the RFP response contained misrepresentations — which for reasons I address below I consider that it did — these might only give rise to legal liability because of what happened after the RFP response was sent. That is because it was expressly premised on Fujitsu's ability to confirm the position for the purposes of entering contractual arrangements at a subsequent point.

[36] The RFP response was evaluated by a panel selected by the Department. Clarifications were sought by that panel in March and April. Reference checks were also undertaken. A due diligence report was provided in June leading up to Fujitsu being appointed preferred vendor in July.

[37] I accept the point emphasised by both Fujitsu and Dassault that the Department's requirements as provided in the RFP were very high level. The response to those high level requirements also made it clear that the legally binding obligations could change with further information. I also see force in Dassault's point that well-resourced and sophisticated commercial parties cannot reasonably rely on general impressions that may be given in pre-contractual documents. But these points only take Fujitsu and Dassault so far. The nature of their response to the high level requirements nevertheless included a clear representation — that Fujitsu/Dassault had an out of the box solution which could meet these requirements without the need for significant changes to it. That representation was not qualified — for example by saying it could do so provided that the Department's detailed business procedures did not reveal complexities. So the high level request for a proposal was met by a high level representation of what Fujitsu/Dassault could provide. If Fujitsu/Dassault were to qualify that representation they needed to do so squarely before any contracts were entered. For the reasons addressed below I consider that the representations were confirmed rather than qualified by Fujitsu and Dassault's statements and conduct through to the entry of the contracts, including the main contracts entered in December 2018.

Demonstrations of Quintiq

[38] A key aspect of the reiteration of the statements made in the RFP arose from the product demonstrations given by Dassault. These were primarily provided by Mr Moran. The first of these presentations was on 7 March shortly before Fujitsu's

RFP response, and there was a further presentation on 20–21 August at a roster technology workshop after the RFP response.

[39] Evidence was given by the Dassault personnel involved in the demonstrations, the Departmental personnel to whom they presented, and the Fujitsu personnel who were also present. These demonstrations were either undertaken "live" — where the Quintiq product would be displayed and the rostering tasks it could undertake demonstrated — or they were pre-recorded and then spoken to at a presentation. One of the recordings of the demonstrations was produced in evidence, and the Court was provided with a series of screenshots from it as well as having the presentation played.

[40] The demonstrations were intended to show the Quintiq product in operation. They involved a projection of a computer screen showing how the Quintiq rostering solution would be portrayed to a user making rostering decisions. The roster was presented in the form of a table on the screen. The table would have prison sites/units down the left hand side and staffing requirements for time periods across the top. The user could drag and click listed employees into the roster for the site/unit to meet the rostering requirements. This included allocating employees to particular shifts at particular places for particular times. It took into account complications such as split-shifts and when an employee was working in a higher duty capacity. The demonstration also dealt with more complex tasks, such as the allocation of equipment to the employees for those tasks, again by a drag and click process.

[41] These demonstrations were very effective from a sales perspective. Mr Moran said he took pride in his demonstrations, and I consider that they played a significant role in the Department confirming that it would contract with Fujitsu for the supply of Dassault's product. I generally accept the evidence of the Department witnesses, which was not significantly disputed by the Dassault witnesses and confirmed by the Fujitsu witnesses, that the demonstrations suggested that the Quintiq solution could meet the Department's requirements with its existing functionality, and that it could integrate with the Department's existing payroll system. It portrayed the Quintiq solution as a highly attractive product that would meet the Department's needs. It is apparent that the Department (and indeed Fujitsu) was very impressed by the demonstrations.

[42] The evidence also establishes, however, that the Quintiq product as presented had been worked on by Dassault for the purpose of the demonstrations and did not simply involve its standard (or "out of the box") functionality. Mr Moran gave evidence that for ten of the use cases he was demonstrating Quintiq needed to be configured so that it could address what was required. He explained that doing such work on the Quintiq product prior to the demonstration cost time and money. So he had addressed the nature and extent of this work with Ms Gayner. She supervised the pre-sales team, including Mr Moran. They dealt with this issue before the demonstration in March. They agreed to Mr Moran making changes so that the Quintiq product could deal with features that could not be met with out of the box functionality. An example was the higher duties allowance — when an officer was to be paid more for acting in a more senior role. This was addressed by entering additional data into the demonstration as it was a feature that the standard functionality did not address. In her internal communication with Mr Moran about this change Ms Gayner referred to this as doing something "dodgy with the data". She said in cross-examination that this was simply a poor use of words. Other more complex tasks also required the demonstration to be altered as the standard Quintiq functionality could not achieve the tasks.

[43] Mr Moran said under cross-examination that he would have told the Department's representatives that the Quintiq product had been configured for the purposes of the demonstrations, and that he was not simply demonstrating standard functionality. That is not consistent with the evidence of the Department witnesses and I do not accept that he provided a qualification in those terms. I agree that it would have been apparent that information had been entered into Quintiq in order to produce the demonstration — for example, the demonstrations listed particular New Zealand prisons and involved the Department's categories of prison officer. So the demonstration was obviously not the Quintiq product without any customer specific inputs — it was apparent that information would have been entered into it in order that Dassault would demonstrate how it would work for the Department. But it was nevertheless reasonably understood to be portraying Quintiq's standard functionality.

[44] Mr Kathiresan, Fujitsu's project manager, attended the presentation on 20–21 August. He gave evidence that everyone was amazed by how Quintiq performed, and

that he understood that what was being demonstrated was its "out of the box" functionality. He also said that the fact that this turned out not to be so was a major issue as it fundamentally changed the principles that the parties were working on. I accept his evidence in this respect. If Mr Moran did say anything of the kind he suggested in cross-examination it was not, and would not reasonably have been understood to be a qualification upon the attributes of Quintiq that he was demonstrating. Mr Moran struck me as a polished and effective salesman, and any comment he made did not qualify, or diminish the capabilities of the standard Quintiq solution that he had the goal of selling. Mr Moran also explained that the purpose of the presentations, including those on 20 and 21 August was to get the Department's team "… excited about upcoming changes to their rostering, as this would help the Programme to be a success" — that is, to achieve the sale. This accurately captures Dassault's approach to the demonstrations.

[45] I accept the Department's argument that the demonstrations reiterated the RFP representations, and they then suggested that the Quintiq standard functionality could do the tasks shown at the demonstrations (such as addressing the high duties allowance) with standard functionality.

Further information

[46] Further information was provided to the Department in the RFP process which also confirmed the representations.

[47] On 28 March the Department issued a list of clarification questions which included, in relation to one of the non-functional requirements, whether "during discussions and review of our Requirements, did you note the need for any customisations?" The response dated 3 April stated:

> During discussions and review of your Requirements, we have not identified the need for any customisations.
>
> Fujitsu has provided a solution that leverages out of the box product capability. In certain cases, configuration may be required to meet specific requirements.

[48] This effectively repeated what was said in the RFP response. It conveyed that changes to the Quintiq product might be required in relation to particular matters, but

what the Department was being provided was a solution based on Quintiq's standard functionality. The reference to "discussions" made it apparent that this assessment was based on what had been addressed at meetings with the Department and was not limited to the formal documentation.

[49] Customisation was something the Department wished to avoid. In July 2018 the Department's Technical Advisory Council approved the Reference Architecture for adoption of the Quintiq solution. In doing so it recorded "customisations in a sense of system modification must be avoided at all costs and some customisations might need to be approved …". This is clumsily worded, but meant that customisation was to be avoided, and may need to be approved by this body if proposed.

[50] There were two related reasons why the Department wished to avoid customisation. The first was that it was likely to be more expensive — the more changes that are made to a standard product the more work and time it would take. Secondly such changes potentially compromised the ability to upgrade the product in the future. The Department wished to stay with the standard product so that it would remain upgradeable.

[51] I accept that through the further processes the Department became aware that changes would be needed for implementing the Quintiq solution particularly for integrating the solution with the Department's SAP system before it entered the contracts in December 2018, however. Integration with SAP was likely to be more complex and expensive than Fujitsu had portrayed in the RFP response. This became a material qualification on what Fujitsu had represented. I address this further below. But this was the exception. The Department otherwise understood that the Quintiq solution could be implemented without significant adjustments in the way that had been portrayed in the RFP response. The Quintiq solution would remain a standard product which was upgradeable, and which avoided the expense of a customised solution.

[52] Between April and June 2018 the Department undertook the reference checks, which were with certain New Zealand or Australian companies that had used the Quintiq product. There was no focus on the extent of any changes required to the

standard product in these checks. After doing so, however, Fujitsu was appointed as the preferred vendor on 9 July 2018. The parties then had an initial scoping workshop on 24 July. Initial drafts of the contract for the analysis and design phase were then prepared and exchanged.

Dassault's concerns

[53] During this period Ms Gayner began to look more closely at what had been stated in the RFP response, and she became concerned. On 14 May she had an email exchange with Mr Deans and Mr Moran to confirm that she understood that what was being provided in stage one was for "basic rostering only and implementing our out of the box solution" for the price indicated. But she had checked the RFP response and she realised that what was represented was not just basic rostering but also full pay code calculations — that is that it transmitted additional information to allow SAP to make the required payments — and that "that's going to be a major problem". This was the first indication of concern that the RFP response had misrepresented the standard functionality of Quintiq being provided for the indicated price.

[54] She then looked at the RFP further. On 15 July she then sent Messrs Deans and Moran a further email stating:

> I am feeling a little sick looking at the NZ Corrections tender. Based on the latest tender response there is no functional scope assumptions linked to our estimates. At this stage we will be on the hook to deliver everything for the pricing we have submitted.
>
> The timeline of 4 weeks analysis, 4 weeks modelling and 4 weeks ID looks fine for a rostering out of the box solution, but this also includes T&A, which may cause a lot of problems.
>
> I remember at the time pushing for a list of functional assumptions and I was told these would be completed and added to the RFP but I can't see them anywhere. Our only god-send is Nicola added the assumption from the MPI tender stating we are only integrating to HR and Payroll as part of the first release. Just so you know the SOW is stating they want integration to BI/Finance and a whole lot of other systems in the first release.
>
> There are also no assumptions around reporting/audit trail etc and their RFP is full of requirements around this. We need to find out who wrote this tender response as [there] has been no pricing assumptions in the individual response, just that we do everything basically.

[55] The reference to Nicola is to Nicola Horwood, and to a change to the RFP using words from another tender document involving the Ministry of Primary Industries, so that only more basic integration with SAP was required at stage one rather than full pay code calculations as proposed in the draft statement of work (although the time and attendance issue was foreseen by Ms Gayner as still likely to later cause a major problem). Ms Gayner's focus at this time was based on the price of the stage one functionality being provided — that what was being stated in the RFP response could address the core requirements described in the RFP at the price indicated. The "auditing" and "reporting" functionalities were in addition to the "pay code calculations" functionality she had initially raised. Her concern was that the Department's stage one needs would involve more than out of the box functionality, that Dassault could not provide this for the indicated price, and in addition that further work on the time and attendance issue would reveal "a lot of problems".

[56] Mr Deans responded to the email with the suggestion that they should "manage our way through it". I am satisfied that this is what Dassault decided to do. This approach involved seeking to reduce the functionality being provided to the Department for the stage one and adding it back in later as additional functionality at a greater price. For example on 19 July Ms Gayner made changes to the draft contractual documents — the Statements of Work — for the project "to try and pull back scope". This included identifying elements that were said to be out of scope.

[57] These email exchanges involved a recognition by Dassault that the RFP response had misrepresented Quintiq's standard functionality. Even the stage one functionality would require work and was not "out of the box". Dassault decided not to tell either the Department or Fujitsu that the RFP response had misrepresented Quintiq's out of the box capabilities. While Ms Gayner's focus was on what Dassault was providing for the stage one indicated pricing, the underlying issue was that the out of the box/standard functionality did not meet the needs the Department had outlined and that problems would be revealed once more detailed work was undertaken. I also accept that Dassault decided to address this problem by seeking to increase the price that would be sought on the basis that the Department had changed the scope of the project to encompass more than originally indicated, indicating that the Department was responsible for the cost increases.

[58] Further information was then provided by the Department to Fujitsu/Dassault. On 13 August 2018 the Department provided the Making Shifts Work Reference Architecture. In addition the Department's level one processes and business requirements were sent at the same time. This included further identifying some of the complications with the Department's requirements, including that officers could work across different units with different cost centres as well as the potential for different reporting officers, and complications with leave or overtime requirements.

[59] On 16 August 2018 Ms Stewart then sent Ms Gayner an email concerning the Department's organisational structure and how it would fit into Quintiq's unit structure which she said was "a gnarly requirement" and a "possible challenge". Ms Gayner responded by indicating that it could fit into Quintiq "automatically" although a configuration change would be needed if more than one person had to sign off a rostering decision. This response again effectively reiterated the RFP response that such matters could be addressed by Quintiq's standard functionality with configuration only needed for particular issues.

[60] In closing submissions counsel for Fujitsu emphasised a further exchange of information in which the Department had asked particular questions, and Dassault had provided answers. On 28 August 2018 the Department asked a list of questions including:

> For the customisation of the product, what tools are required to customise the product? OR are there tools bundled into the product itself. If so what are they?

[61] In its answer Dassault said:

> Quintiq is proposing that zero customisation be made to the Quintiq application. We are proposing that configuration shall be required of the Workforce Planner industry solution. Regarding configuration, Quintiq provides four levels of configuration …

[62] The four levels of configuration then described matters that could be regarded as significant changes, and as "customisation" in the eyes of those with technical knowledge. I consider that this answer does not greatly assist Fujitsu and Dassault, however. The answer expressly stated that there was no customisation proposed for the Department. Whilst it also said that there would be some configuration, there is

nothing in the answer that identified for the Department that significant configuration, or significant cost, was involved in providing Quintiq to the Department. That is because none of the examples of more significant "configuration" were linked to work to be done for the Department.

[63] It is also apparent that a policy decision had been made by Dassault when dealing with potential customers to use the word "customisation" in a particular way. The Quintiq solution involved three layers — the base layer, a second layer involving a Dassault standard product (in this case a product called Workforce Planner), and a third layer which involved integration with the customer. It reserved the word "customisation" for changes to the base layer. It is also apparent that Dassault never made changes to its base layer, or may only have done so on one occasion. It had a policy of referring to changes to the layers above the base layer as "configuration", even if there were substantial changes. That was so even if there were changes to its standard product — here Workforce Planner — in the second layer. By adopting this policy it was able to say that its products involved no customisation at all — the representation it made and repeated here.

[64] This policy was expressly employed when formulating the information given to the Department. By internal email dated 5 September Mr Moran commented on Dassault's answers to the long list of questions the Department had sent. In it he provided some "brief guidelines with respect to answering these customer questions as we are still operating in a sales cycle". This included the advice to "refrain from making reference to customisation" in the answers, but to refer to configuration instead. He confirmed in cross-examination that the word customisation was to be limited to the base layer, and that they would never make changes to the base layer. He also confirmed this was an instruction to be followed by the technical people who were preparing the answers.

[65] That approach had the capacity of being misleading, and was so misleading here. As Ms Gayner's email exchanges show the Department's requirements, even for stage one functionality, could not be met by the out of the box functionality and changes to the Quintiq product were required. Yet the representations were that the Quintiq product met all of the functionality requirements out of the box with no

customisation. I address further below the potential technical means of the expressions "customisation" and "configuration".[3] Whilst they have a technical meaning, I accept Dr Tan's evidence that the differences between the expressions break down when used in particular contexts, and the difference between them is ultimately a matter of degree. I accept that the representations in the RFP, and surrounding the RFP, that no customisation was required for the Quintiq solution conveyed the meaning that no substantial changes to the standard functionality of the Quintiq product was required. That is so whether or not Dassault had an internal definition of the word "customisation" that it adopted to make it seem that its product could be provided without significant changes to its functionality. When a party uses technical language when dealing with another party it is what the language means to a reasonable recipient that matters.[4]

SOW23

[66] The first contract between the parties relating to the Quintiq solution was entered on 3 September 2018. This was a contract between the Department and Fujitsu called SOW23. The pre-existing MSA between the Department and Fujitsu contemplated that particular statements of work (SOWs) could be entered into for other work, and SOW23 was one such statement of work. It was a contract for a stated price of $128,501 (plus GST). The price was on a time and attendance basis, but it was recorded that it was not expected to exceed the amount indicated. Two days later, on 5 September 2018 Fujitsu and Dassault entered DS SOW23, being an effective back-to-back contract between those parties.

[67] The purpose of SOW23 was to obtain a better understanding and elaboration of the functional requirements of the Department, and also to undertake technical workshops to determine the feasibility of integrating SAP and Quintiq. Pursuant to the arrangements, workshops were held in the week of 10 September 2018, and further technical workshops were held in October 2018. The work in SOW23 revealed there

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3 See [132]–[134] below.

4 See *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836 (HC) at [244]; *West v Quayside Trustee Ltd (in Rec and Liq)* [2012] NZCA 232, [2012] NZCCLR 16 at [30]; *Anderson v De Marco* [2020] NZHC 2979 at [84].

was some greater complexity with SAP integration. By the time of the Department's TAC meeting on 25 October it was noted that:

> Quintiq does not have an out of the box SAP integration. Due to this, some integration points will need to be built. Both SAP and Quintiq will provide the tools to complete the builds.

[68] The position had been addressed at the integration workshops. The Department became aware through these processes that the integration with SAP would involve greater complexity and cost and that the full scope of the complexity would not become apparent until the analysis and design phase of the contract was undertaken. The Department also became aware that Dassault did not have SAP specific integration tools notwithstanding that the RFP response had stated that "Quintiq has a wealth of experience regarding the integration of Rostering Master Data and Time & Attendance Data to SAP payroll". Given that SAP was a leading payroll software system and what the RFP stated, it would reasonably be expected the Quintiq solution would have a "out of the box" product to integrate with SAP. Dassault had a policy of not telling customers that it did not do so. In an email sent in January the following year one of its technical personnel, Mr Lee Ong referred to the fact that Dassault did not have an out of the box interface to SAP as "our internal fact". Mr Ong confirmed in cross-examination that this was something they knew internally but that Dassault told customers something different. I accept that this was part of the misrepresentation of Quintiq's out of the box functionality. Having said that, Dassault's integration tools, whilst more generic, would allow SAP integration to occur. And in any event, the Department became aware that Dassault did not have specific SAP integration software at this stage.

[69] In addition, and again as a consequence of greater knowledge gleaned through the work, the Department contemplated purchasing additional "modules" associated with the Quintiq product. In particular:

(a) An "equipment/asset" module. This was additional functionality that allowed equipment to be allocated to officers when they were allocated to tasks in the roster. Whilst this had been shown in the demonstrations it was not part of the first stage functionality that had been part of the RFP price for that stage.

(b) An "advanced leave management" module. This allowed the roster to be managed in light of the different types of leave entitlements held by officers.

[70] The fact that additional "modules" were identified for purchase reiterated the representations, however. That is because they further confirmed that Quintiq was an "out of the box" solution. That is because the additional modules suggested that additional out of the box functionality could be obtained by purchasing the additional modules.

Revised pricing

[71] In October 2018 Ms Stewart for the Department asked Mr Kathiresan of Fujitsu for updated pricing. She asked that this be provided by 16 October. She did so because the Department needed to know if there was any need to increase the overall MSW budget that would have to be approved at Ministerial level. This request was passed on by Fujitsu to Dassault.

[72] As Ms Gayner's earlier email exchanges show Dassault had planned to manage the expected increase in price. Mr Deans responded to the request for revised pricing in an internal email saying "we will have to justify the change in price" and asking Ms Ginevra Morgan to prepare a list of reasons why the price had increased. Ms Morgan had not been involved in the original RFP response but she then provided "a high level list of the non-out of the box functional requirements" as the price increase justification. Ms Gayner then revised the list. She stated in her emails that two kinds of additional statements needed to be made to the Department. First, she said that assumptions about the functionality needed to be added to Dassault's pricing and "this must be sent to Corrections to protect us down the track". The second was the explanation Mr Deans had suggested to justify the price increase from the original RFP.

[73] Ms Morgan's initial list included items that were not departures from the original RFP. For example it included "organisation to working unit mapping" which is a reference to the Department's use of working units in its operations. The fact that this could not be addressed by out of the box functionality is significant. But this

feature of the Department's operations had been an issue that had been identified even before the RFP, including at the meeting on 16 February.

[74] Ms Gayner's revised list was then converted into a PowerPoint presentation. This stated, when describing the suggested changes to the proposed services that the Department was seeking:

> The original RFP submission assumed an "out of the box" delivery approach with minimal configuration. After an initial kick off in recent workshops, it is now recognised that a significant amount of additional configuration has been requested in the following areas …

The list was then provided. This PowerPoint presentation was sent by Dassault to Ms Horwood and Mr Wills of Fujitsu on 17 October 2018. Ms Horwood then converted what was in the PowerPoint presentation back into a word document. The "ballpark" revised figure associated with these documents involved the new price estimate of $1,825,811.20. This increase included the two additional modules that the Department had indicated it wanted to purchase.

[75] The Department alleges it was not sent this increased price estimate or the reasons for it. There is no evidence that the PowerPoint presentation prepared by Dassault was sent by email to the Department. Neither has it been shown that any other document, such as Ms Horwood's word document, was sent. Ms Stewart gave evidence for the Department that she was not provided with any revised pricing by Fujitsu other than an estimated increase in licence costs. Ms Horwood did not give any evidence that she provided the revised pricing to the Department. Mr Kathiresan, who had been copied into Ms Horwood's email, confirmed that he did not do so. Mr Wills was not called as a witness by Fujitsu. Late in the trial Fujitsu applied for leave to call Mr Wills as a witness. I declined the application for reasons set out in my minute of 27 September.[5] Given Ms Stewart's evidence, the lack of any documentary record of revised pricing being provided, and the lack of any evidence from Ms Horwood, Mr Kathiresan or any other witness from Fujitsu that revised pricing was provided I accept Ms Stewart's evidence that the revised pricing estimate was not provided to the Department.

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5 *The Department of Corrections v Fujitsu* HC Wellington CIV-2021-485-423, 27 September 2023.

[76] There was, however, a separate PowerPoint presentation prepared by Dassault that Mr Wills sent to Ms Stewart dated 16 October in response to the request for revised pricing. This PowerPoint presentation was limited to outlining the two additional modules that the Department wished to purchase. It does not include revised pricing or explanations for increases in pricing overall. In addition by email dated 15 October Mr Wills sent Ms Stewart a list of revised prices for the Dassault licence, including a number of options. The fact that a document trail exists showing these exchanges further confirms that the revised pricing for stage one implementation that Dassault had prepared, and the explanations for it, was not passed on to the Department. In closing Fujitsu advanced a number of complicated arguments based on other contemporaneous documents to suggest that Ms Stewart's evidence should not be accepted. I do not accept these arguments in the absence of more straightforward evidence or documentation.

[77] I note that there is an internal Fujitsu email authored by Mr Wills which was put to Ms Stewart when she was recalled suggesting that an indication of an increased price was provided by Mr Wills orally. This document was not discovered until late in the trial, and I declined leave for Mr Wills to give evidence for the reasons addressed in my minute. Ms Stewart denied she had been provided with an oral update and I accept her evidence. The document alone does not show the revised pricing was so provided.[6] In any event, even if some oral advice of a price estimate increase had been given, it would have been short of what was required. Fujitsu had an obligation to provide both the increased price, and the suggested reasons for it, to the Department. Fujitsu do not suggest that Dassault's PowerPoint presentation with the increased price and the explanations for it were provided. Its only argument was that the price increase was passed on by Mr Wills to Ms Stewart over coffee — an argument I do not accept given the lack of any evidence to show this. The explanations that had been advanced for the increase in pricing were significant. Some of them could have been debated.

[78] The evidence shows that Fujitsu had its own view on how the price increases could be managed with the Department, which explains why the pricing information

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6 *Taylor v Asteron Life Ltd* [2020] NZCA 354, [2021] 2 NZLR 561 at [68].

was not provided at all at this time. So I accept that both Dassault and Fujitsu had strategies for dealing with the anticipated pricing increase.

[79] The Department was nevertheless aware that the likely costs were increasing. Ms Horwood had indicated in August 2018 that the costs were increasing from the RFP response. Ms Stewart was doing her own work on the overall budget, and she used the information she was provided by Fujitsu in that process. Her own revised pricing was set out in spreadsheets that were created and amended in October 2018. In those spreadsheets the cost attributed to installing Quintiq was increased from the approximate figure of $700,000 from the RFP response to $1 million. Her figures also included the revised licensing costs.

[80] What the Department's own assessments demonstrate is that each of the Department, Fujitsu and Dassault knew that the project would cost more than estimated in the RFP response. If the claims that are made in this proceeding hinged on the difference between the Department's estimates at this time compared with those that had been prepared by Dassault, a more detailed assessment of the differences between the assessments might be required. But, in any event, the real cost of Quintiq, as shown by the pricing estimates provided by Fujitsu/Dassault in 2019 are fundamentally higher than even Dassault's revised pricing in October 2018. So the case does not depend on such a comparison.

[81] Dassault's PowerPoint presentation with the price estimate increase accurately described the RFP response as involving an out of the box solution with minimal configuration. It said, however, that this was an assumption notwithstanding it was not recorded as an assumption in the RFP response. It then recorded the suggested complexity that had developed leading to the higher price estimate, but even this was significantly lower than what proved to be the true cost of this project.

[82] The more significant issue arising from the revised pricing estimates in October 2018 is the way in which price escalation was being managed by both Dassault and Fujitsu. Both of them were less than full and frank with the Department. Dassault's presentation was part of an attempt to justify a price increase

notwithstanding what had been represented in the RFP, and Fujitsu did not pass on the price estimate increase or the justifications for it for similar reasons.

Gap between out of the box and required functionality

[83] The key issue for Dassault was that there was a greater gap between its standard or out of the box functionality stated in the RFP response and what the Department had sought. A further emerging issue was that the Department had not yet contractually committed itself to the Quintiq solution. There had been a contract for preliminary work (SOW23) but the Department had not yet signed a contract for the implementation of the Quintiq solution, or purchased the licence for the Quintiq software. For Dassault the licence, in particular, was commercially significant. A contract for implementing the Quintiq solution involved charging on a time and materials basis for the work, but a contract for the licence involved no associated expenditure and represented a very significant element of Dassault's potential profit from the project.

[84] These two issues became related. The contract for implementation of the Quintiq solution was also a statement of work — SOW27. It was being drafted by the parties during September and October 2018. By email dated 18 September Ms Morgan suggested to the Dassault personnel, including Mr Deans and Ms Gayner that Dassault provide to the Department the Quintiq Product Description Document or "PDD". This was a detailed document that described Quintiq's product, including its out of the box functionality. It would potentially identify what was not in the standard offering, and accordingly what would need to be configured/customised. When Ms Morgan suggested it be provided to the Department she said providing it "would reduce risk and be very clear". Ms Gayner responded in the following way:

> Typically we would attach the PDD and then articulate the customer's gaps in the SOW. We would then lock down the modelling effort etc on those gaps. Once you attach a PDD they will review it and be calling out everything that is a gap that is not included in the SOW.
>
> My concern with Corrections is we do not know the gaps yet as we have not locked down all of the process and done a full review as things are still moving. Locking down anything too tight especially with government can significantly cause delay and put the project at risk. We did this at Qld Police and spent 6 months in an SOW review cycle for putting in too much detail. So given this SOW will only be for analysis (not modelling where the risk will

> rise) and it's a T&M engagement, my preference would be to not lock down the scope in too much detail in the SOW to ensure we get the license across the line which has already been extremely tough to achieve.

[85] The references to getting the licence "across the line" and to putting "the project at risk" were references to the Department committing itself to purchasing the Quintiq licence. The issue was that identifying the gap between standard functionality and the Department's requirements prior to the licence being purchased created a risk that the Department would not wish to proceed as the gap was too great and the cost of bridging it too high. In evidence Ms Gayner confirmed that the example she had referred to, Queensland Police, involved the customer withdrawing and not purchasing the licence when the position was investigated. Dassault wanted to avoid the Department also doing so.

[86] This was a further aspect of the strategy to manage the concern arising from the RFP response. Given the representations that have been made in the RFP response, and reiterated in the demonstrations and the associated materials, I accept the Department's argument that following this approach involved a conscious decision not to correct the misrepresentations by allowing the Department to identify the extent to which the Quintiq solution was not out of the box, and that it would require work of unknown scope to adapt it to meet the Department's requirements.

[87] I note that Dassault provided other technical documents concerning Quintiq during this period. They included what were described as "white papers" which were provided to the Department on 10 September. But I was not provided with evidence that explained the significance of these documents, or how they may have addressed the out of the box attributes of Quintiq.

[88] During this period the Department also asked if Dassault would be prepared to allow the Department to enter a contract to implement the Quintiq solution without first purchasing the Dassault licence, or come to some other arrangement to defer the purchase of a licence cost, or part of that cost. From the Department's perspective it was still to learn more about the Quintiq product and how it would be implemented, and it was expected that this would become clear in the analysis and design phase of

the project contemplated by the draft SOW27. Its preference was to defer committing to the substantial licence cost until such matters were clearer.

[89] The original RFP response had stated that the Dassault licence would need to be purchased prior to such implementation work, however. There was some suggestion during the discussions that Dassault might be prepared to come to some arrangement, but this ultimately came to nothing. It was generally a key aspect of Dassault's commercial operations to secure the licence payment as soon as possible. Moreover, in this particular situation, Dassault was faced with the problem of the apparent gap between what had been said in the RFP response and the true position. Exposing that gap before the licence was purchased could jeopardise the sale. In those circumstances Dassault made it clear that they were not prepared to depart from the requirement for the Department to purchase the licence before work began. Dassault also stated that its licence price would increase if a contract was not entered in December.

[90] The Department's lean RFP response had contemplated it having "off-ramps" where it could avoid contractual commitment as a consequence of what became apparent in the process, and there was an expectation all round that more detailed work would be done as part of contractual performance. But Dassault's insistence on the Department committing to the licence cost meant that contractual commitment was required, and the Department was no longer able to rely on any "off-ramps".

[91] Dassault's policy of avoiding providing information to the Department that would reveal the potential gap between its out of the box product and the Department's needs was reflected in other ways. The draft contractual documents for what became SOW27 were being worked on by the parties at this time, and Dassault's strategy of limiting the scope of the first release was reflected in the terms. In the back-to-back agreement between Fujitsu and Dassault — DS SOW27 — the clause identifying the scope of the services covered by the agreement stated:

> [Dassault] assumes the Department will be following the Workforce planner product solution out of the box. Therefore, minimal configuration will be required.

[92] Such an assumption was not recorded in SOW27 between Fujitsu and the Department, however. Ms Gayner was not able to explain why the agreements were different.

[93] Neither do I accept that the draft SOW27 documentation otherwise corrected the misrepresentations that had earlier been made. It was formulated, particularly by Ms Gayner, in an attempt to reduce the scope of the stage one product the Department was obtaining, but it did not correct or withdraw the previous incorrect representations about Quintiq's out of the box functionality. Emphasis was placed on one line included in the draft contract which stated that one of the assumptions was that "each Department correctional facilities sites will be mapped one-to-one as a working unit". That assumption had earlier been recorded in a document recording the outcome of functional workshops in September. Fujitsu and Dassault argued that this added a qualification, or assumption, on the standard functionality of the Quintiq product would provide, and that accordingly that it did not deal with the more complex issues arising from units within the prisons. I do not accept this. It is not clear enough to operate as a significant qualification in this way. If this was an intended qualification of what had been a significant element of what was previously represented it needed to be more expressly raised. Moreover SOW27 was subject to the MSA, and accordingly it was subject to the representations in the RFP response.

[94] It is apparent that the assumption was added at Mr Robertus Driessen's suggestion given that it was foreseen that complications could arise. He was the senior technical architect at Dassault. But the fact that each prison site would be "mapped" in this way did not mean that Quintiq could not also address the units within those prisons with standard functionality. An important matter of this kind could not be addressed by such an oblique reference to a key feature that the solution was to address. It is of significance that Dr Tan, Dassault's expert, gave evidence that he would have come close to "pulling the handbrake" on the project when it became apparent that the units issue was going to create complexity and greater cost.

[95] The relevant contracts were then signed in December 2018. This included:

(a) The Department and Fujitsu signing contracts varying the MSA to include the work described in the RFP response (involving Quintiq for the rostering solution for the Making Shifts Work programme) on 12 December 2018.

(b) Fujitsu and Dassault entering a "one-time reseller agreement" dated 12 December 2018 to enable Fujitsu to sell the Dassault licence, and the Department then acquiring the licence from Fujitsu.

(c) The Department signing a licence agreement with Dassault for the Quintiq licence and associated maintenance and support dated 12 December 2018.

(d) The Department and Fujitsu entering SOW27 for the analysis and design phase on 18 December 2018.

(e) Fujitsu and Dassault entering the back-to-back DS SOW27 on 20 December 2018.

(f) Fujitsu and Dassault entering a further sub-contractual agreement for the provision of application development services on 21 December 2018.

[96] It is through these contractual documents that the Department contractually committed itself to the Quintiq solution by purchasing the Dassault licence, and entering the contract for the analysis and design of implementing it in the Department's systems. Although the Department entered a licence agreement with Dassault it purchased the licence from Fujitsu at a cost of $1,596,531 (plus GST), and the contract in SOW27 involved an agreement for the Department to receive the analysis and design services on a time and attendance basis for an estimated total of $439,893 (plus GST).

Problems develop

[97] When the parties sought to implement their contractual arrangements a number of problems emerged. Attempts were made by all parties to remedy the position. Fujitsu elevated the project status to red in its status report dated 5 March 2019. An escalation meeting was held on 24 April. No formal changes were made to the contract in accordance with the change request process in the MSA, however. Such changes were contemplated by SOW27. The Department also conducted reference checks on two other Dassault customers, Spotless and Falck in May and both reported complexities with integration issues. A further meeting between the parties was held on 8 May.

[98] The extent of the problems ultimately led to the contractual arrangements being brought to an end on 21 June 2019 by the Department exercising its contractual right to remove the project as work under the MSA. There are a number of reasons why difficulties developed, but ultimately the key reason why the contract was brought to an end was the revised price estimates that Fujitsu provided on 28 May 2019.

[99] I accept that there were other contributing factors, although for reasons I elaborate upon below I do not consider these matters to be significant to the claims that are made in this proceeding. In particular:

(a) Dassault's approach, which Fujitsu was implementing, involved following what was called the Quintiq Project Life Cycle (QPLC). This was a methodology that Dassault applied to efficiently engage in the work required to implement Quintiq as required by the customer. For example it anticipated a customer representative be present at the meetings who would make the relevant decisions required for implementation. The expectations under the QPLC methodology was that the customer, here the Department, would follow the methodology. The QPLC process was referred to in the RFP response. I accept that the Department did not follow the QPLC methodology. I also conclude, however, that the methodology was destined to fail given the significant issues that had not yet been worked through by the parties, and the underlying significant gap between what the Department was expecting

and what Fujitsu intended to deliver for the estimated price that were to be confronted. The reality was that the parties were only just beginning the process of fully understanding both the Quintiq product and the Department's requirements, and what was being revealed was a significant gap.

(b) The Department sent a large number of representatives to attend the relevant meetings. This involved a larger number than the QPLC methodology contemplated, and there was a lack of a single Departmental person then able to promptly make decisions at the meetings. The Department was sending a larger number of persons with operational knowledge in order to get a fuller understanding of Quintiq, to explain how the Department operated in practice, and in order to make decisions with workforce buy-in. Many of the Department representatives who attended had not undertaken the "learning modules" which were online exercises that supplied information about the Quintiq solution, how it worked, and how it would be implemented.

(c) Fujitsu's project management, largely undertaken by Mr Kathiresan, was not as active or as solution focused as Dassault had expected. He acted more in an administrative capacity by making arrangements for the project, but as the substantial issues developed they became beyond his ability to manage. There was some criticism of him. There may be some validity in those criticisms — for example, I agree it is surprising that he had not undertaken the learning modules himself. But there were inherent problems with the project in any event. These inherent problems ultimately manifested themselves, and they were not due to a failure of project management.

(d) Work on SAP integration was delayed because the Department had failed to appoint an SAP integration contractor to address the issue from a SAP perspective. Integration with SAP required expert input by SAP specialists. During 2018 it was anticipated that this would be an

external party, but the Department was unable to find one. Ultimately it brought individuals in-house who had SAP experience to deal with SAP integration. This approach was less than ideal, and also involved delays. These were significant given the problems that SAP integration involved. In the end, however, whilst the Department can legitimately be criticised for this approach it was the underlying complexity with SAP integration that was a core problem rather than the delays in finding SAP expertise to assist in addressing them.

[100] On 28 May 2019, following requests by the Department, Fujitsu provided revised pricing estimates. These were many times more than expected, or earlier represented. This involved the following prices:

(a) a "release one" price of $5,392,263 (with $1,652,651 being fixed price, and the remainder a "high level estimate"); and

(b) a "full scope" price of $7,158,149 (with $2,064,630 being fixed, and the remainder a "high level estimate").

[101] Ms Stewart gave evidence that many of the functional elements that were excluded from release one involved functionality that was included within the RFP proposal including:

(a) the requirement for work to be allocated to different cost centres;

(b) reporting functionality; and

(c) public holiday management.

[102] Neither estimate compares precisely with the $716,000 price estimate in the RFP response. I consider the relevant comparison is significantly more than the $5,392,263 price but not as high as the $7,158,149 price, which includes functionality over and above what was said in the RFP response. It is not possible to be more precise on the evidence available. But in any event the new estimated price was well beyond what had originally been estimated in the RFP response, and it was also significantly

greater than the Department had assessed before it entered the contracts in December 2018, or even Dassault's revised pricing that it had provided to Fujitsu in October 2018 ($1,825,811.20).

[103] It is to be noted that the May 2019 price estimates involved significant Fujitsu margins. The release one price estimate from Dassault was $3,338,761 and the full scope price was $4,544,807. But a Fujitsu margin was always contemplated, including in the original $716,000 price. In any event, the prices were well in excess of the previous estimates.

[104] It was these revised prices estimates that ultimately led the Department to bring the project to an end by "de-scoping" it under the MSA by email dated 21 June 2019. Bringing such work to an end was contemplated by cl 8 of the MSA.

What went wrong?

[105] Given the significant price estimates referred to above, which resulted in the project being brought to an end, it is clear that there was a major problem with using Quintiq as the Department's rostering system. An important question is why that was so? That question is relevant to the claims of misrepresentation, false and misleading conduct, and breach of warranty.

[106] Perhaps surprisingly the precise reasons why the Quintiq product did not work well with the Department's systems and business practices, and required significant work to make it so operate, was not covered in much detail in evidence. Each of the parties called independent expert evidence. The experts had expertise in major technology projects of this kind. But none of them had expertise in the Quintiq product, or detailed knowledge of the Department's systems. They accordingly could not give expert evidence on why the Quintiq solution did not work well for the Department.

[107] Dassault called evidence from Mr Driessen the Senior Services Manager and Solution Architect at Dassault. He managed the group of approximately 30 technical and functional consultants and architects at Dassault. He was qualified to address this issue. But he did not do so in the evidence he was asked to give for Dassault. Rather

his evidence was in the nature of expert evidence directed to whether the statements in the RFP response misrepresented Quintiq. When he gave evidence, however, he was asked why Quintiq was not a good fit with the Department's systems, particularly in the context of the Department's use of working units within prisons for rostering purposes. This appeared to be a major part of the problem. He said that all he had been able to work out from the material he had analysed is that it didn't fit, but he was not able to work out why. But he agreed that his colleagues had concluded that the Quintiq solution didn't work, or couldn't work for the Department without significant configuration. That is as far as his evidence went, and he was the main witness with sufficient technical expertise to address the issue in any detail.

[108] It is plain that Quintiq required extensive work before it could operate as the Department required for its rostering needs. The increased price estimates alone evidence this. Moreover it was not seriously disputed that Quintiq's standard functionality could not meet the Department's needs. This is reflected in the 2019 revised price estimates. Doing the best I have with the evidence available it seems to me that this problem was a consequence of a combination of factors relating to the way the Department undertook rostering of its staff and what the standard Quintiq functionality was able to do. In particular:

(a) Individual prisons did not operate solely as a simple working environment. Each prison also had different units with rostering requirements, and the rostering solution needed to operate at both a prison level, and at a working unit level. There might be several working units at an individual prison with different more senior officers required to sign off rostering solutions for each unit.

(b) Prisons in the same region could also utilise officers across the region. So Mount Eden and Spring Hill prisons in Auckland, or Rimutaka and Arohata prisons in Wellington could have staff moving between the prisons. The Corrections Officers who moved between the prisons also could report to different senior officers in the roster. So the solution needed to cope with these complications.

(c) The position was further complicated by the need to manage the staff across different cost centres so that tasks undertaken on individual shifts were attributable to different budgets, potentially with different managers. For example, when two prison officers were required to escort a prisoner from Mount Eden prison to the Auckland District Court for a hearing during the day, and then back again, their work might need to be allocated to different cost centres for different tasks during a single shift.

(d) There were further complications arising from the need to keep a record of when officers were to be paid more than usual. This occurred, for example, when officers acting in higher duties (i.e. a CO doing the work of a PCO). There were also complications when shifts occurred partly over a holiday period given that officers worked 24 hours a day, and with the issue of "mondayisation" — when a public holiday fell on a weekend and needed to be recognised on the following Monday.

(e) In addition, some of the prisons had more than 600 employees which was greater than Quintiq's standard planning unit size, and complications arose from the Department's desire to operate "cyclic" rosters. These scenarios could also create complications with the information that needed to be sent to SAP for payroll purposes.

(f) The requirement that the Department keep rostering data for reporting and auditing purposes dealing with the above matters added a further layer of complication.

(g) In addition the integration of the above complex rostering requirements with SAP was accordingly much more complicated, and well beyond the standard functionality of the Quintiq product.

[109] It was a combination, or overlap of these factors that caused the issue rather than any one factor by itself.

[110] When these problems revealed themselves in 2019 they were much greater than even Dassault had earlier anticipated. In 2018 Dassault had become concerned that it had misrepresented the extent to which its out of the box functionality could meet the Department's core functionality at the price indicated. That led to the strategy that Dassault decided to employ to attempt to seek to descope what Dassault was providing for the stage one core functionality in SOW27. When doing so Dassault was aware there was a potential problem on the horizon. Ms Gayner had thought that it would be a major problem which would eventually reveal itself. Her concern focussed on the information that the Quintiq rostering solution would need to transmit to SAP for payroll purposes, and also the reporting and auditing requirements.

[111] The problems ultimately became apparent during early 2019. When it was becoming apparent that the costs of the project were much greater than had been stated in the RFP response Mr Jeff Lovell, a Dassault project manager, sent an email to Ms Ellen Venema, a Senior Services Manager, dated 26 April 2019. Ms Venema had become involved in the project in February 2019 when it became contentious. Mr Lovell said:

> NZ looks like a tough one – they want out of the box, while being fit for purpose. And that RFA response "some configuration required" is one that ALWAYS comes back to bite us. They put it in there to give the customer the impression that it's not much even if we know it's huge. See it all the time.

[112] The reference to "they put it in there" is to the Dassault employees responsible for the RFP response. Mr Lovell was referring to the representations in the RFP response when Dassault/Fujitsu were seeking to secure the contract. Mr Lovell did not give evidence but Ms Venema did. When this document was put to her in cross-examination she indicated that Mr Lovell was expressing a level of frustration. She did not agree with this being an issue that "always" occurred. But she accepted it was a common problem. In any event I accept that the email correctly identified the problem that had arisen in this case.

Breach of contractual warranties

[113] The Department's first claim against Fujitsu is for breach of contract. On 22 December 2015 the Department and Fujitsu had entered the MSA which was an overarching contractual arrangement that regulated the nature of the relationship

between those two parties. On 12 December 2018, in the context of the other contractual arrangements then entered between the parties at this time, the Department and Fujitsu entered into a variation of the MSA to bring the implementation of the Quintiq solution with the Department's systems under the MSA. The Department's claim for breach of contract is based on the terms of the MSA so varied. There are essentially two key categories of claim:

(a) a claim for a breach of contractual warranties; and

(b) a claim for a breach of other contractual terms of the MSA.

The warranties

[114] Included within the representations and warranties set out in the MSA was the following:

> 18.2 [Fujitsu] also represents and warrants:
>
> …
>
> (c) the information given in the Proposal (except as expressly amended by written agreement between the Parties during the course of the contract negotiations over the course of November 2015 to January 2016) and during any negotiation with the Department is correct, and has not changed in a materially adverse way, and is not likely to mislead the Department in assessing the Service Provider's ability to provide the Services or to perform its obligations under this Agreement, or of its financial position;
>
> …

[115] Clause 18.3 also provides:

> 18.3 Each and every warranty given under this Agreement shall be:
>
> (a) interpreted separately from the others and not limited by reference to any of the others; and
>
> (b) regarded as being given on the Effective Date and throughout the duration of this Agreement, in each case with reference to the facts then existing.

[116] As part of the variations to the MSA agreed on 12 December was a variation of the definition of "Proposal" in the following terms:

> "Proposal" means either the proposal prepared and submitted by the Service Provider in response to the Request for Proposal dated 24 August 2015 and annexed to Schedule 9, or the proposal prepared and submitted by the Service Provider in response to the Rostering Solution Request for Proposal dated 1 March 2018 and annexed to Schedule 11, whichever is relevant to the Statement of Work or Schedule.

[117] The parties also agreed to vary the MSA so that it stated:[7]

> The Parties acknowledge that, during the course of the contract negotiations for the Rostering Solution (December 2018), a decision was made by the Department to purchase Software (including associated maintenance) based on [Fujitsu's] response to the RFP and its Response to Department of Corrections Contract Follow up Questions provided by [Fujitsu] and included in schedule 11.

[118] As a consequence Fujitsu was warranting that the information given in the RFP response was correct, had not changed in a materially adverse way and continued to be true. It also warranted that any information provided during negotiations with the Department was correct and not changed in a materially adverse way. There were then further warranties that this information was not likely to mislead the Department in assessing Fujitsu's ability to provide the services or perform the obligations.

[119] The Department alleges that the statements made in the RFP response, and then the negotiations, involved untrue statements about the ability of the Quintiq solution to meet the Department's needs.

The nature of warranties

[120] The claims for a breach of contractual warranty involve important features that distinguish it from the claims for misrepresentation or for misleading and deceptive conduct under the Fair Trading Act.

[121] The essential purpose of contractual warranties is risk allocation. Commercial contracts involve commercial risks associated with the promises that each of the parties are making to each other. Warranties are a technique which contractually shifts a risk, or alters the nature of the risk as part of the contractual bargain. As the Court of Appeal said in *Ling v YL NZ Investment Ltd*:[8]

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7 Schedule 1 Appendix A "Support and Maintenance".

8 *Ling v YL NZ Investment Ltd* [2018] NZCA 133, (2018) 20 NZCPR 830 at [34].

> The purpose of a warranty in a commercial contract is to assign risk between the parties. A party provides a warranty in respect of matters which are or can be expected to be within that party's knowledge but not within the knowledge of the other party. …

[122] The person giving the warranty binds themselves to the allocation of risk that is involved.[9] As Wylie J said in *Singh v Rutherford*:[10]

> In general, the maker of a warranty undertakes strict liability for what he or she warrants and a warrantor assumes the risk that his or her belief about the matter warranted might be mistaken. From the innocent party's perspective, the purpose in seeking a warranty is to protect against error.

[123] The further key feature of a claim for breach of warranty arises from strict liability. Unlike claims for misrepresentation there is no need to establish reliance before liability arises.[11] The overall position is summarised by John Cartwright in *Misrepresentation, Mistake and Non-disclosure* in the following way:[12]

> **Breach of contractual promise as to the truth of the statement** Where the defendant has given in the contract a warranty that his statement was true, the breach of contract is established by simply showing that the statement was false. Similarly, if the defendant gave a warranty that a statement will remain true during the performance of the contract, the breach is established by showing that the statement has become false. The claimant need not show that the defendant was fraudulent or negligent in making the statement, nor will the defendant be able to use evidence of his innocence to avoid liability. Nor, in order to establish breach of contract, is it necessary for the claimant to show that he relied on the statement and suffered loss. It is sufficient to show that the statement was a term of the contract and was broken. The obligation which the defendant has undertaken in the contract is strict; his liability flows from simple non-performance (that is, from his breach of promise that the statement was true).

What was warranted?

[124] In the plaintiff's second amended statement of claim dated 11 September 2023 the plaintiff identifies the matters it says that Fujitsu warranted as a consequence of cl 18.2(c). It is first appropriate to clearly identify the specific matters that Fujitsu warranted were true.

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9 *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 at 327–328.

10 *Singh v Rutherford* [2012] NZHC 380, [2012] NZAR 323 at [32] (footnote excluded).

11 *Turner v Anquetil* [1953] NZLR 952 at 957.

12 John Cartwright *Misrepresentation, Mistake and Non-disclosure* (5th ed, Sweet & Maxwell, London, 2019) at [8–23] (footnotes excluded).

[125] In paragraph [42] of the second amended statement of claim the Department relies on statements in Fujitsu's response to the Department's call for registrations of interest dated 29 November 2017. Whilst I accept that this response has relevance in understanding any representations subsequently made in the response to the RFP and in the negotiations, I do not accept that Fujitsu's response to the RoI can be the basis of the claim for breach of warranty by itself. It can be said that the RoI response involved statements made during negotiations. But the RoI response document is not referred to in the contractual warranty clause, so any statements referred to in it were not agreed to be elevated to warranties in the same way as the response to the RFP. I generally consider that the RFP response can be taken to have superseded the RoI response.

[126] In paragraph [43]–[46] of the second amended statement of claim the Department identifies the relevant statements that arise from Fujitsu's RFP response. Not all of those were pressed by the Department as part of its case. Distilling what I understand to be the Department's argument I accept that the following representations were made and formed part of the warranties:

(a) That the Quintiq solution would meet all of the Department's functionality requirements "out of the box", and that no customisation would be required.

(b) That all but two of the more detailed requirements that the Department had specified were fully met, and the two that were fully met were not partially met in the manner specified in the response.

(c) That the Quintiq solution would integrate seamlessly or well with the Department's existing SAP payroll system.

(d) That the approximate cost of implementation of stage one would be $716,000.

[127] In paragraphs [47]–[48] of the second amended statement of claim the Department further alleges that further matters were represented in the negotiations and formed part of the warranties:

(a) That the Quintiq solution leveraged Quintiq's out of the box capabilities without any need for customisation, although some configuration might be required.

(b) That Quintiq's out of the box capabilities to meet particular requirements were accurately shown in the product demonstrations.

[128] As indicated at [34]–[35] above an important feature of the RFP response when it was sent was that it was subject to significant qualifications — that it was not an offer capable of acceptance, it was based on what the Department had disclosed, and that the pricing was only indicative. The response stated that all such matters would need to be confirmed before binding contractual arrangements were entered. But the existence of the warranty essentially provided such confirmation on the entry of the binding contractual arrangements. The entry of the contract on 12 December 2018 also elevated Fujitsu's prior representations to warranties. This means that the qualifications were no longer relied upon. More particularly, by giving warranties Fujitsu must be taken to have confirmed what it had earlier represented as part of the firm contractual commitments it was giving. So the qualifications and the RFP response were no longer material. I consider this to be of significance.

[129] It is also important that the price estimate in the RFP response was only in relation to the Department's core functionality requirements to be addressed as stage one — otherwise referred to as the minimum viable product. But the no customisation and out of the box representations were not limited to the stage one product.[13]

[130] I do not accept that the assumption that the scope of the payroll interface for stage one was limited to "pay code data" is as important as argued by Fujitsu and Dassault however. This still proposed that the information would be transferred to SAP to allow the appropriate pay calculations to be undertaken within SAP. I accept

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[13] This was the subject to a specific change by Dassault – see [256]–[257].

that the full functionality in functional requirement number 11, and user case 404 would not be required at stage one, and were not within this price. But the representations were that this additional functionality could be provided with only some configuration arising from particular matters, as referred to at [26]–[28] above.

[131] There are other particular aspects of these warranties that require further analysis, however.

Customisation v configuration

[132] There was considerable evidence, including expert evidence related to the meaning of the expressions "customisation" and "configuration", and accordingly what Fujitsu was representing and warranting by the use of this language.

[133] I accept the views of Mr Peach and Dr Tan that customisation is a term that normally refers to changes made at the source computer code of a particular computer programme. This is to be contrasted with changes that are not to the source code. These other changes can be referred to as "configuration" which generally contemplate changes to the input of data to perform intended functions. Dr Tan gave examples of configuration in the present context as inputting a list of prison sites where rostering was to be performed, and specifying the rules for access by individuals in an organisation to the rostering system.

[134] But these expressions are not mutually exclusive. As Dr Tan said in evidence the distinction between them breaks down when the terms are used in particular contexts. Here, for example, Dassault had a specific computer language — called QUILL — which was used to make both configuration and customisation changes to the product. The use of QUILL could be thought to involve changing coding in the programme, and accordingly customisation in a technical sense. In the end the different expressions signify matters of degree. Customisation captures a situation where changes are made to software that are reasonably significant. Configuration refers to more minor changes more in the nature of adjustments, usually not involving the underlying code. In this particular context I conclude that the representation that no customisation was required, but there may be a need for some configuration in particular situations, was a statement that no significant changes would need to be

made to Quintiq's standard functionality for it to work in the way that the Department wanted. There would be a need for changes in relation to more particular matters, but such changes would be in the nature of adjustments, rather than any significant changes to its standard functionality.

[135] The representation about the lack of customisation is emphasised in the executive summary, but is also referred to in relation to the detailed requirements. The Department's first non-functional requirement was that standard functionality should be used in the roster, integrate with SAP, and "avoid unnecessary customisation". Fujitsu represented in its response that it fully met this requirement and that "the proposed approach is to use the standard out-of-the-box Quintiq application. No customisations have been identified or proposed." It also referred to "configuration" in the response in a manner consistent with the need to make adjustments in some circumstances. For example functional requirement 11 quoted at [26] above, reiterated that adjustments — that is, configuration — would be required for some matters of detail only. Similar reference in relation to other functional requirements (such as 13 and 14) involved similar use of the term configuration.

Out of the box

[136] The representation that the Quintiq solution could meet the Department's requirements "out of the box" is closely associated and needs to be read together with the no customisation representation. I accept Dr Tan's evidence that it is an expression that is commonly used in a technical context to describe software that can perform a desired function without modification of the underlying computer code, or configuration that alters that functionality. But it has more than only a technical meaning when used in this context. The expression is drawing an analogy with consumer activity when a consumer is able to purchase an item of equipment, take it home and plug it in so that it can be operated without the need for technical assistance. It conveys a similar meaning as "off-the-shelf" which was the expression used in Fujitsu's RoI response. Here, however, the software is not a simple consumer product, so the expression is being used as an analogy. It is also not precise language, and whether something is accurately warranted as "out of the box" is a matter of degree.

Moreover the use of expression here is connected with the other statements — especially that no customisation was required.

[137] Software of the nature that the Department was acquiring is not a simple consumer product. It would obviously require technical work to install it and make it function in the Department's systems. So it is not literally "out of the box". In the context of the other statements I conclude that Fujitsu's representation was that the Department's needs could be met by Quintiq's standard functionality, and that substantial work would not be required to change that functionality for these requirements to be met.

[138] The representation concerning the ability for the Department's requirements to be met by the Quintiq solution "out of the box" was primarily made in the executive summary of the RFP response. But it was also repeated in the context of the more detailed requirements. For example, in relation to functional requirement four (which required scheduling priorities to be able to be set by the Department, at a site, or at a unit) Fujitsu said that "out of the box Quintiq Shift/Task Assignment Optimisation can be utilised to prioritise shift and task assignment … to the Department's priorities". In the response to non-functional requirement eight Fujitsu referred to use of the "standard out of the box Quintiq application without customisation". These more particular representations repeated and reiterated what was stated in the executive summary.

Seamless integration

[139] The representations made about implementation with SAP involve a series of statements in the RFP response. In the executive summary Fujitsu said that Quintiq would "integrate well with SAP". It also said it would be "delivered with a trouble free implementation". An earlier heading — "Seamless implementation that meets the required timeframe" — referred to the Department's tight timeframe, stating it could be met.

[140] The more detailed requirements also used such language. Functional requirements 18 and 19 specified a requirement that the solution "seamlessly integrate" with the existing SAP payroll systems in particular respects. Both were

mandatory requirements. Fujitsu stated that it fully met both. Fujitsu further stated it had extensive experience at this, and made other positive statements including:

> The Quintiq solution can integrate with SAP payroll, SAP leave management system and training systems in order to update staff leave schedules, completed training hours etc.

[141] When the general statements and the more particular statements are read together, I conclude that Fujitsu was representing that the Quintiq solution could integrate easily with the Department's existing SAP system in a way that met all the Department's requirements.

[142] I do not accept the argument, to the extent that it was pursued, that the representations made by Fujitsu that Quintiq would integrate seamlessly with SAP were limited to a representation about the ease with which the two systems would work together once they were installed, and that they were not about the complexity of installation. They were not representations that the systems would operate seamlessly once installed. The representations related to "implementation". This implementation was represented to be "seamless" and "trouble free". It may be that the representation that Quintiq would "integrate well with SAP" could by itself be understood to be a representation solely about how they would operate together once installed, but the other representations were not.

The price

[143] It is appropriate to address the significance that can be placed on Fujitsu's price estimate of $716,000 in the RFP response.

[144] The Department did not contend that this price estimate could be taken as a contractual commitment. It was only an estimate provided with the RFP response. But the Department claimed at paragraph [46] of the amended statement of claim that the estimate was consistent with the representations that the requirements could be met out of the box, with no customisation, and that the Quintiq solution could be configured with relative ease.

[145] I see the price estimate, when repeated in the context of the warranties when the contracts were entered in December 2018, to be significant. That is because the estimate provided further information that allowed the other representations to be understood. The representations that the Quintiq solution could seamlessly integrate with SAP, and provide what the Department required as an out of the box solution without customisation and only some configuration, was reflected by the price estimate. The estimate was based on a number of hours of work that would be required. So the overall package of representations, and the nature of the costs and expense that would be involved, was reflected in the price estimate that was then elevated to a warranty. The price estimate accordingly reiterated the meaning of the other representations. For these reasons I accept the Department's arguments.

Other matters

[146] The RFP response had other representations of relevance. For example it stated:

> Fujitsu has been working with Quintiq in New Zealand for over five years on a number of engagements and as a result we have built up significant local knowledge and expertise that will support the proposed Solution and its successful deployment for the Department.

[147] But it transpires that this was only the second time that Fujitsu and Dassault had worked together on a RFP response, and they had not worked together beyond sales activities for a rostering project. They had never worked together to implement Quintiq in New Zealand.

[148] I do not focus on this kind of representation, however, as I do not apprehend it is as material as the other representations that were the focus of the claim. I accept that this representation was untrue for these reasons, however.

Representations during negotiations

[149] In terms of the representations made during the negotiations I accept that these also reiterated the representations made in the RFP response.

[150] The written answers to the list of clarification questions provided on 3 April and then 30 August 2018 effectively repeated the representations that no customisation was required, although some configuration would be involved. The product demonstrations provided by Dassault, as Fujitsu's sub-contractor, on 7 March and then 20–21 August demonstrated how the Quintiq product would work in the Department's environment. I accept the demonstrations conveyed that Quintiq's standard out of the box functionality addressed the Department's requirements for rostering. Not all the functionality that the Department required was shown in these demonstrations, but the functionality that was shown reiterated that the standard Quintiq functionality was able to do what the Department needed, and in a user friendly way. Moreover, if there was other functionality that Quintiq could not do, which was not addressed in the demonstrations, then it would be necessary for that to have been raised given the overall impression that the demonstrations conveyed. In the context of what had been represented in the RFP response, and otherwise, the product demonstrations involved a reiteration of the capability of the standard functionality of the Quintiq solution to provide what the Department needed as the RFP response had represented.

Warranties qualified

[151] Fujitsu argued that any representations made in the RFP response were qualified by the events that occurred after it was provided and that the claim for breach of warranty could not proceed on the basis of the RFP response alone.

[152] I do not consider that this argument is open as a matter of interpretation of the MSA. Clause 18.2(c) addresses the subsequent negotiations in two material ways. First, in the first four lines it refers to an express written amendment to the Proposal as a defined exception. The RFP response was defined to be part of the Proposal. That express exception did not apply to the RFP response. So the parties turned their minds to, and agreed not to create any exception to the representations contained in what they have defined as the Proposal. Secondly, the clause addresses any such changes by the words "and has not changed in a materially adverse way" and that the warranty continued through the life of the agreement under cl 18.3(b). So if anything had happened between the RFP response and the execution of the agreement in December 2018 that altered what was represented, the clause regulated the position — Fujitsu

warranted that any such developments did not involve materially adverse changes, and the representations continued to be true. Fujitsu's argument that the subsequent developments showed that the RFP representations were materially qualified is accordingly in direct conflict with the warranties. Moreover, any waiver relevant to the contractual promises would have needed to have been in writing under cl 31 of the MSA.[14]

[153] These interpretation points can be further illustrated by Fujitsu's argument on the facts on this issue. Fujitsu can say that by the time of the execution of the contracts in December 2018 it had become apparent that integration with SAP was significantly more complex than initially expected, and that it could no longer be seen as seamless or easy. This became apparent from the work during SOW23. I accept that this is so as a matter of fact, at least to some degree. But Fujitsu nevertheless warranted that integration with SAP was easily achievable in the way represented, that that position had not changed in a materially adverse way since the RFP response, and that this continued to be true. The risk that integration was not as easy as the parties had initially thought was accordingly a risk taken by Fujitsu. I agree that it is odd that a party would be warranting something it knows may not be true, but that is the contractual bargain that Fujitsu struck.

[154] In any event, in terms of the factual position concerning SAP integration, whilst I accept that it was known by the Department that SAP integration was going to be more complicated than Fujitsu's representations had suggested, the extent of that complexity still ultimately turned out to be far greater than the Department foresaw when it entered the contract in December. The degree to which the Department understood there was greater complexity, and accordingly greater expense, arising from more work being required on SAP integration when installing Quintiq is reflected in the change to the Department's budget. Ms Stewart increased the provision in her budget to $1 million, which was higher than the $716,000 estimate that Fujitsu had provided for the project. This reflected the anticipated additional expense involved. But as it transpired the complexity was far greater than this, as reflected in the much greater 2019 price estimates.

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[14] Even apart from that clause the standards for a waiver would not have been met – see *Lykov v Wei* [2015] NZHC 3009 at [36]–[40]; *Zhou v Watson* [2023] NZHC 2328 at [174].

Were the representations untrue?

[155] The next question is whether what Fujitsu represented was untrue, and accordingly a breach of warranty. I address each of the categories of warranty I have identified as most material.

Out of the box with no customisation

[156] The representation that the Quintiq solution provided an out of the box solution meeting the Department's requirements without customisation was untrue. As I have found above, once detailed work commenced it was identified that very substantial work would be required to adapt the Quintiq solution so that it could address the manner in which the Department undertook rostering, even in relation to the core functionality within stage one. The Department's rostering needs could not be met by Quintiq's standard functionality. The changes that would have been needed were substantial, and went beyond configuration of only some elements. Substantial adaptions of the Quintiq product were required. These were in the nature of customisation. Two examples can be referred to, although the problems were more widespread:

(a) The Department's business practices involved individual prisons having separate working units, employees working between prisons and units and sometimes regions, with different officers responsible for the roster in such situations. These complexities were beyond Quintiq's standard functionality. Considerable work was required on Quintiq to address them. Quintiq's standard "tree" hierarchy was not sufficient to deal with this business structure and operating requirements. Whilst Fujitsu/Dassault had attempted to defer the problems arising from this by introducing the one to one mapping assumption in SOW27, the underlying problem always existed and led to considerable complexity, and accordingly considerable potential expense would have been involved to adapt Quintiq to deal with it. I also note that it is not SOW27 that legally regulated this issue, but cl 18.2(c) of the MSA.

(b) As Ms Gayner had contemplated, the time and attendance information that Quintiq needed to send to SAP caused considerable problems. These derived from the nature of the complexity of the Department's working practices, and the kind of information that would have to be transferred to SAP to keep correct records of information allowing calculations of what employees should be paid. Further issues such as the "mondayisation" of leave, the fact that officers worked 24 hours a day and accordingly across days where higher entitlements arose, the higher duties allowances, swapping shifts, and other such complexities were beyond Quintiq's standard functionality. That was also so when records were required to be kept for auditing purposes.

[157] The evidence did not dwell on each of these issues, and explore in detail the technical reasons why the Quintiq standard functionality could not meet the Department's requirements without extensive work. But the fact that it did require such extensive work is evidenced by the 2019 significant price estimates. Indeed it was not seriously argued that Quintiq's standard/out of the box functionality could meet the Department's needs with only some configuration.

SAP integration

[158] The representations made in relation to SAP integration — by way of summary that integration would be easy, or seamless — were also untrue.

[159] SAP integration became a major issue, and a major cause of potential cost if the Quintiq solution had proceeded. What was represented about the ability of Quintiq to integrate with SAP was untrue. Considerable work was required in order to make the two software systems operate together. In part that was due to complexities on the Department's side, and the way that SAP had been used in the Department's payroll systems. But the fact that complications arose on the Department's side does not assist Fujitsu. The point of the warranty is that it passed the risk of uncertainty about the complexity of integration to Fujitsu. Fujitsu warranted it would be easy, or seamless. The fact that this was not so establishes a liability whether or not that complexity can be attributed to the Department's side. The representation was that Quintiq could seamlessly do the job.

[160] In any event the complexities of integration were not limited to problems on the Department's side. The Quintiq standard functionality was not able to send information to SAP to enable employees to be correctly paid. Its standard functionality could not even address the complexities with the way the Department conducted business for rostering purposes, let alone for sending information to SAP for correct payment. Quintiq would need to have been developed to address these issues. These issues are inherently linked to the matters referred to at [156](a) above. For example Quintiq needed to address officers who would work a shift that began on a normal working day but moved into a public holiday at midnight. It also needed to deal with "mondayisation" where the higher pay rates for a public holiday falling on a weekend would apply on a Monday. And it also had to deal with higher duties allowances and similar complexities. It was not able to address such rostering issues with its standard functionality, let alone transfer information to SAP for that purpose. As Ms Gayner had anticipated time and attendance became a major problem. Moreover the reporting and auditing requirements that form part of SAP integration also became a significant issue as there were limitations on what Quintiq was able to do by way of saving information, or providing reports with standard functionality.

[161] Again it was not seriously argued that SAP integration was easy, trouble free, or seamless. The true position was that it was a matter of considerable complexity.

Price

[162] As indicated a separate claim for breach of warranty is not advanced by the price estimate alone, but it is alleged that the price estimate explained what was meant by the other representations (such as what was meant by the solution being out of the box, without requiring customisation, and with seamless implementation).

[163] The evidence establishes that the amount of work required to implement Quintiq for stage one, including integration with SAP, was well beyond the levels of work contemplated by the $716,000 price estimate. As the 2019 price estimates show it was multiple times more expensive. That expense reflecting the hours of additional work that was required to implement Quintiq in the Department's systems, and the extent that Quintiq's standard functionality would have to be changed to meet the Department's core requirements. I accept that the evidence about price, when

compared with the original estimate, establishes that the representations about the Quintiq solution were untrue and a breach of warranty arises. In many ways the changed price estimates speak for themselves.

[164] During the trial there was considerable focus on the fact that Dassault's revised pricing estimate of October 2018, which Dassault provided to Fujitsu, was not in turn provided to the Department. The Department did not plead that this failure gave rise to a separate breach of warranty that the representations contained in the RFP response had "not changed in a materially adverse way". For that reason I do not address this as a separate basis for a claim for breach of warranty.

Mr Driessen's analysis

[165] Dassault relied on the expert evidence provided by Mr Driessen to argue that what was said in the RFP response was not incorrect. His view was that the RFP response, read as a whole, accurately described the functionality of the Quintiq solution and its ability to meet the Department's stated requirements. He also said the responses to each of the requirements accurately described the capabilities of the Quintiq solution. Dassault says that Mr Driessen's analysis was detailed in relation to each of the requirements of the RFP, and it emphasises that his evidence was not challenged in reply evidence or in cross-examination.

[166] It is correct that not all of Mr Driessen's analysis was extensively challenged by way of cross-examination. But I do not accept Mr Driessen's opinions on the correctness of the representations made about Quintiq. Neither do I accept that his evidence establishes that the Quintiq solution did in fact meet the Department's requirements.

[167] A central aspect of Mr Driessen's analysis was that the Department's requirements as set out in the RFP were very high level and inadequate. For example he referred to the business rules which had been addressed by one line descriptions in the RFP which he said gave "almost no information". His evidence was that in his 33 years in the information technology industry he had never seen this level of unpreparedness by a procurer, including from large government departments. His

view was that Fujitsu's RFP response was itself necessarily high level and could only respond to the level of information provided in the RFP.

[168] I do not accept this starting point for his analysis. If the information the Department had provided was seriously deficient in this respect, and critical information was absent, then Fujitsu needed to say so. It would need to say it was unable to give clear indications of Quintiq's ability to meet the requirements, and the price for doing so, without more information if that was the position. Indeed if the RFP was as uniquely deficient as Mr Driessen said in the context of his long career it would be very important for the response to be qualified in this way, especially in the context of the MSA. But as I have said above both the initial RFP response, and then the statements and conduct after the response did not include qualifications of that kind. The RFP response did say that what Fujitsu had stated would need to be confirmed before binding agreements were entered given that the Department's description of its requirements were only high level. But the representations in the RFP response were then repeated rather than qualified in the period leading up to the entry of the contracts, and were then elevated into warranties. This involved a reiteration of the representations that the Quintiq solution could provide what the Department needed to meet its core requirements, that it could be implemented seamlessly, in accordance with the Department's timeframes, with minimum configuration, and for the price estimated for stage one.

[169] The difficulty with Mr Driessen's approach is further reflected in his evidence that it was reasonable for Fujitsu to have made assumptions when responding to the RFP. For example Mr Driessen gave evidence that it was reasonable to assume that the Department's organisational structure would fit into the standard "tree" structure used in Quintiq's Workforce Planner, and that it was also reasonable to assume that a site was a prison, and that a prison would be represented by a working unit or planning unit. These matters ultimately caused significant problems, and changes were needed to the Quintiq product to enable it to work effectively for the Department's systems. I do not accept Mr Driessen's evidence that it was reasonable to make these assumptions without them being clearly conveyed to the Department. More particularly the RFP response and subsequent statements about Quintiq needed to be qualified by clear communications to indicate that the ability of Quintiq/Workforce Planner to work for

the Department would depend on the complexities of Dassault's business systems once they were provided. I note that cl 5.3(a) of the MSA Fujitsu was obliged to include any assumptions or dependencies with any proposal to do work under the MSA.

[170] Mr Driessen's perspective is also influenced by his senior role in Dassault, which resulted in him advancing Dassault's arguments as part of his opinions. A witness is not disqualified from giving expert evidence because they are not independent.[15] But lack of independence can influence the value of the evidence. I consider that this is so for Mr Driessen's evidence which was coloured by Dassault's perspective. For example, when addressing whether the representations that Quintiq could seamlessly integrate with the Department's SAP systems he expressed the view that this did not mean that seamless integration would be achieved without configuration, and he noted that customisation would not be required. In expressing these views he adopted the definition of customisation involving modification to the base layer software only. That involved applying the internal marketing policy about the use of the term "customisation" that did not correspond to its reasonably well established normal meaning. The policy itself was misleading.

[171] Expert evidence about the capabilities of the Quintiq solution could have been substantially helpful to the Court. More particularly, expert evidence that explained why the Quintiq solution did not work well with the Department's existing systems, and why the substantial work involved in the revised 2019 price estimates was necessary would have assisted. That evidence could have been provided from those in Mr Driessen's team that worked on the project. Mr Driessen's evidence did not do this, however. His opinions about what was represented about the capabilities of the Quintiq solution were based on an assumption about the Department's existing systems and requirements. But the importance of the representations, and the warranties, depend on what they said about the ability of Quintiq to meet the Department's requirements. So the value of the expert opinion is lost by the assumption made.

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[15] *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750 at [99].

[172] It is clear there was a gap between what Quintiq could do with its standard functionality and the Department's requirements. There is no dispute that this was a significant gap, as reflected by the increased costs estimates in 2019. Given that Mr Driessen's evidence did not address the gap, so that the true position was better explained, and for the further reasons outlined above, I do not accept his evidence.

Conclusion

[173] For the above reason I uphold the Department's claims that the warranties given by Fujitsu were breached as the representations were untrue.

Department's other claims against Fujitsu

[174] The Department also advances claims that other terms of the MSA were breached as part of its claim for breach of contract under the third cause of action, as well as claims for misrepresentation under s 35 of the Contract and Commercial Law Act 2017 (the CCLA) as its first cause of action, and for misleading and deceptive conduct under the Fair Trading Act 1986 (the FTA) as its second cause of action. Given that I have upheld its claim for breach of contractual warranties I can address these claims more briefly.

Additional contractual obligations

[175] First, Fujitsu had additional relevant contractual obligations under the MSA which the Department contends it breached. In addition to the warranty obligations under cls 18.2 and 18.3 the Department contends Fujitsu breached of cls 3.4(a) and (g), 3.17, 3.4(l) and (o), 5.5 and 7.1. Of these additional clauses three seem to me to have significance.

[176] Under cl 3.4 Fujitsu promised to perform services in a particular manner. This included:

> [Fujitsu] agrees to provide the Services from the Commencement Date and will:
>
> …
>
> (l) act at all times on a no-surprises basis;

[177] Further under cl 5.5 Fujitsu promised:

> [Fujitsu] shall ensure that all its responses to the Department's requests or questions concerning Projects are fair, reasonable and, to the best of its knowledge having made diligent enquiries, accurate. [Fujitsu] will not decline to perform any Project unless the performance of such Project is not feasible, nor seek to impose any unreasonable conditions or charges.

[178] Finally under cl 7.1 Fujitsu and the Department agreed to the following mutual obligation:

> Each party shall keep the other party fully informed of all important issues associated with a Project and, in particular, each Party shall notify the other of any Project Issue of which it becomes aware which may affect achievement of any Project Milestone as soon as that party becomes aware of the Project Issue. The relationship between the parties is based on a 'no surprises' approach where the parties shall disclose all potential issues as soon as they become aware of them to ensure that potential issues can be addressed and resolved as early as possible. Where such problems arise [Fujitsu] shall forward proposals for consideration by the Department as to the manner in which the problems will be resolved ("Mitigation Proposal").

[179] I accept that these additional clauses set out above were breached given Fujitsu's misrepresentations. So a breach of warranty under cl 18.3 also encompassed a breach of the obligation in cl 5.5 that the information Fujitsu provided for the project was fair, reasonable and accurate. I do not apprehend that this additional breach advances the Department's case, however.

[180] The obligation to act on a no surprises basis arising from cls 3.4 and 7.1 may add an additional dimension, however. In giving particulars of its allegations the Department relied on Fujitsu's failure to pass on the pricing update provided by Dassault to Fujitsu in October 2018.[16] I accept that Fujitsu failed to pass on the pricing estimate and the reasons for it, and that the terms were breached accordingly.

[181] As to the other terms of the MSA relied upon by the Department it is possible that there may be some argument in this respect, but I make no findings of breach as I am not satisfied it materially adds to the findings that are relevant to determining the Department's claims.

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[16] Response to Notice by Defendant Requiring Further Particulars to Second Amended Statement of Claim dated 16 September 2023, para [7](c)(iii).

Misrepresentation

[182] The Department's first cause of action is for misrepresentation under the CCLA. As the Department acknowledges in its closing submissions this claim covers much of the same territory as its claim for breach of contractual warranties, and I can again address the position relatively briefly.

[183] I accept that there were misrepresentations within the meaning of s 35 of the CCLA. The representations arising from the RFP response, and made in the negotiations, involved representations of fact that the Quintiq solution had the attributes to meet the Department's requirements in the manner stated. There were also implicit representations that Fujitsu had sufficient information about the Department's business and operations to make the representations about the ability of the Quintiq software to so meet the requirements. I essentially repeat the findings I have made above in relation to the claim for breach of contractual warranties.

[184] I also accept that the Department relied on the representations when entering the MSA, and that the misrepresentations induced the entry of this contract. It is self-evident that what was said in the RFP response, and during the negotiations, was relied upon by the Department. It was following a reasonably extensive RFP process for deciding who it would enter a contract with, and the representations made were of significance for its decision to enter that contract. This was the very purpose of the RFP process, including Fujitsu's RFP response, and the Department's evaluation of it. I also accept that the representations in the RFP process, including Fujitsu's RFP response and the negotiations were relied on by the Department in deciding to enter SOW23 on 3 September 2018, and that the misrepresentations induced the entry of this contract.

[185] There is one exception to my findings in relation to reliance. By the time the contracts were entered in December 2018, including the contract that brought this project within the terms of the MSA, the Department knew that the integration of the Quintiq solution with SAP would not be as easy, or as seamless as Fujitsu had represented in the RFP response and otherwise. It accordingly did not rely on Fujitsu's representations in that respect when entering the December contracts. The Department was not aware of this before it entered SOW23 with Fujitsu, however, and it relied on

this aspect of the representations when it did so. I also accept Ms Stewart's evidence that, whilst the Department was aware that integration was more complex than Fujitsu had represented, the Department nevertheless relied on Fujitsu's representations that the Quintiq solution would otherwise be out of the box, that no customisation was required, and configuration would only be required in particular areas. So there was still reliance on the remainder of Fujitsu's representations about the ability of Quintiq's standard functionality to meet the Department's rostering needs. Moreover, even in the context of integration with SAP the issues became far greater than the Department understood in December 2018. This was because of the limitations of the Quintiq solution, which in turn made integration far more complicated.

[186] Notwithstanding these findings there is nevertheless a significant difficulty with upholding the Department's claim in the alternative under the CCLA. That arises because the MSA has detailed contractual machinery for dealing with pre-contractual representations which regulate the implications of any misrepresentations. Section 34 of the CCLA provides that whenever a contract makes express provision for misrepresentation the CCLA applies subject to the contract. Section 50 of the CCLA also provides that when a contract contains a provision purporting to prevent a court from enquiring or determining the question of whether there was a misrepresentation the court is not so prevented unless it considers that it is fair and reasonable that the provisions should be conclusive having regard to the matters specified in subs (3).[17] Fujitsu pleaded that there were such terms in the MSA in its statement of defence dated 29 September 2023. It relied on cls 28, 21(2)(b) and 18(2)(c) of the MSA. I accept that cl 28, which is an entire agreement clause, is relevant to this question. But as the Department pointed out in its closing submissions cl 11 of the MSA is also important. It provides:

> All representations or warranties (whether statutory, express, implied or otherwise) of [Fujitsu] which are not expressly set out in this agreement or agreed under this Agreement are excluded to the fullest extent permitted by law.

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[17] Subsection (3) states that the matters are all the circumstances of the case, including—(a) the subject matter and value of the transaction; and (b) the respective bargaining strengths of the parties; and (c) whether any party was represented or advised by a lawyer at the time of the negotiations or at any other relevant time.

[187] It is unclear why Fujitsu did not expressly rely on this clause of the contract as well. Moreover Fujitsu did not refer to this affirmative defence at all in its closing submissions.

[188] Had it been of significance to the findings of liability this would have been an issue of significance. On the face of it this clause, read together with the entire agreement clause, particularly in the context of the machinery elsewhere spelled out in detail in the MSA, creates a situation where the parties have decided upon how claims for misrepresentation are to be dealt with in their contract. That machinery includes other important clauses, such as the cap on total aggregate liability under the MSA of $5 million in clause 21.2(a). It seems to me that the contractual terms cover the field, and that an alternative claim for misrepresentation under the CCLA could not arise. I also consider that, on the face of it, it is fair and reasonable to apply this contractual machinery in accordance with s 50 to the extent that this provision needs to be applied.

[189] I do not accept the Department's argument that the fact that the RFP response has been expressly included as a warranty in the MSA means that the claims for misrepresentation based on the RFP response were not excluded under cl 11. The fact that the RFP response was brought within the warranties given in cl 18 means that a claim for a breach of warranty can be brought. Clause 11 means that this claim must be advanced as a claim for breach of warranty under the terms of the agreement, but cannot be advanced otherwise. The effect of the clause is that there is no alternative claim under the CCLA that could arise if the claim for contractual warranty was unsuccessful.

[190] Nevertheless, given that I have upheld the claims for breach of contractual warranty I do not uphold any alternative claims for misrepresentation under the CCLA, and neither do I dismiss those claims because the contractual terms preclude alternative liability under the CCLA for misrepresentation.

Fair Trading Act

[191] The Department's second alternative cause of action is for liability under s 9 of the FTA on the basis that Fujitsu engaged in conduct that was misleading or deceptive or likely to mislead or deceive whilst in trade.

[192] There is no dispute that Fujitsu was in trade. Further, and for the reasons outlined above, I accept that Fujitsu's conduct involved misleading and deceptive conduct while in trade given the misrepresentations it made. That is so whether the approach applied by the Supreme Court in *Red Eagle Corporation Ltd v Ellis*,[18] or the Court of Appeal in *AMP Finance NZ Ltd v Heaven*[19] is applied.

[193] I also accept that the defendant suffered loss or damage by the conduct as the Department was actually misled and there is a nexus between the losses claimed — the contractual expenditure — and the misleading and deceptive conduct. I will elaborate on that more fully below.

[194] Again Fujitsu relies, as an affirmative defence, on s 5D of the FTA in its statement of defence. This provision permits contracting out of liability under the FTA if the prerequisites in that section are satisfied. I set the section out more fully below. Once again Fujitsu relies on cls 18.2(c), 21(2)(b) and 28 of the MSA but not cl 11. I note there is a reference to an entire agreement clause in s 5D(2)(a) of the FTA.

[195] As with the claim under the CCLA I consider that there would be difficulties for the Department with this claim if, for any reason, it's claim for breach of contractual warranties had failed. The machinery of the MSA deals in detail with the same kind of subject matter as the FTA and provides remedies for the Department in relation to such conduct. In terms of s 5D of the FTA I consider that it would be fair and reasonable for Fujitsu's liability to be determined in accordance with the agreed machinery set out in the MSA. In the present case, and having regard to the considerations in subs (4), that machinery provides for a fair and just result.

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18 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.
19 *AMP Finance NZ Ltd v Heaven* (1997) 8 TCLR 144.

[196] But given that the claim under the FTA is only pursued in the alternative, and that the Department's claim for breach of contractual warranty has succeeded, I do not need to uphold the Department's second cause of action, and neither do I dismiss it because of the application of s 5D of the FTA.

Criticisms of the Department

[197] Before leaving the Department's claims against Fujitsu I briefly address the arguments advanced by both Fujitsu and Dassault which generally criticised the Department. Both contended that the Department embarked upon this project significantly underprepared (as illustrated by the lack of documented business processes) and then handled the project in a highly inefficient way (illustrated by its failure to contract a SAP provider, and the number of personnel who attended the implementation meetings). There may be validity in some of these criticisms, but I make no findings about them. As I remarked during the hearing, it is not the Court's function to conduct a commission of inquiry into this matter, but to address the legal elements of the pleaded causes of action and defences. An inefficient party is still entitled to pursue causes of action for breach of warranty, misrepresentation, and breach of the FTA. It is possible that criticisms of this kind could affect issues such as reliance, or the level of loss, and to the extent that they do I have taken them into account. But it does not mean that the warranties and representations were not untrue, or that the conduct was not misleading.

Loss

[198] I now address the Department's claims for damages. They are in four main categories:

(a) $1,836,010.65, being the amount that it paid to Fujitsu for the licence for the Quintiq software (including maintenance and service fees).

(b) $476,242.07 that the Department paid Fujitsu for the work under SOW27.

(c) $161,305.99 that the Department paid to Fujitsu for the work under SOW23.

(d) An amount of $1,925,294, being expenditure that the Department contends is other wasted expenditure it paid to third parties on the project.

[199] There is an important initial point to make about the Department's claims. The Department has elected to recover its losses based on the wasted expenditure incurred on the project. Theoretically it might have been able to recover damages on an expectation basis — that is recovering damages on the basis that would have put the Department in the position it would have been in had Fujitsu performed the contract by providing a rostering solution as warranted for the estimated cost. A party is nevertheless entitled to elect to recover wasted expenditure, rather than damages based on the loss of a bargain.[20] The Department has exercised its rights under the MSA to "de-scope" the work of this project (effectively terminating the contract for the project), and then recover its wasted expenditure. I address the disputes in relation to the claims against that background.

[200] Fujitsu admitted that the expenditure in paragraphs [198](a)–(c) above relating to the licence fees and the two SOWs was incurred by the Department. But it advanced two arguments that it was not liable for these amounts, namely:

(a) That it did not assume any responsibility for the licence fee, which was a cost that did not flow from the contract under which Fujitsu provided the warranties.

(b) That cl 21.2(b) of the MSA excluded liability for all these categories of loss.

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[20] *Anglia Television Ltd v Reed* [1972] 1 QB 60 (CA); *Soteria Insurance Ltd v IBM United Kingdom Ltd* [2022] EWCA Civ 440; James Edelman (ed), McGregor on *Damages* (21st ed, Sweet & Maxwell, London, 2021) at [4–025].

Assumption of responsibility

[201] Fujitsu argued that contractual liability must be linked to the breach of the particular contractual obligation, here the breach of warranty. It submitted that it must be objectively ascertained that the defendant would bear the risk of that loss. It says that reasonable foresight of the loss is not the sole determinant of whether consequential losses are recoverable for breach of contract, relying on the decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (the Archilleas)*,[21] the dicta of Cooke P in *McElroy Milne v Commercial Electronics Ltd*,[22] and the views of Professor David McLaughlan.[23] It argues, in particular, that Fujitsu did not assume liability for the Dassault licence fees as Fujitsu merely operated as a conduit, and that any liability should be for Dassault alone.

[202] I do not accept these arguments. It may be that reasonable foresight is not the only consideration when deciding whether consequential losses are recoverable for breach of contract. But that issue does not arise in the present case. There could be no clearer example of losses that would be contemplated to be the responsibility of a defendant than payments made directly to that defendant for performance of the particular contractual obligation that the defendant has breached. These are not indirect or consequential losses suffered by the Department. They are direct payments made to Fujitsu under the particular contract in question. Fujitsu's liability for breach of warranty must include the monies the Department paid to Fujitsu under that contract when it has been legitimately terminated because matters that were warranted were false.

[203] Fujitsu's argument may be a little stronger in relation to the costs paid to third parties. I deal with that expenditure more fully below. But if those costs are attributed to the contractual project, and that the project was legitimately terminated as a consequence of Fujitsu's breach of warranty, then the plaintiff is entitled to recover the costs as wasted expenditure. It is not an indirect or consequential loss which raises the more difficult questions. It is direct wasted expenditure under the contract.

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21 *Transfield Shipping Inc v Mercator Shipping Inc (the Archilleas)* [2008] UKHL 48, [2009] 1 AC 61.

22 *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA).

23 David McLaughlan *Some Damages Dilemmas in Private Law* (2021) 52 VUWLR 875 at 878.

[204] It is true that Fujitsu can be seen as being a conduit in relation to the licence fee and associated expenditure. But the way that the contractual arrangements between the three parties was established meant that Fujitsu acted as Dassault's agent in selling the licence, it entered the contract so selling the licence, and it billed the Department for this cost. The Department then paid Fujitsu accordingly. That was the contractual bargain that Fujitsu and the Department struck. That contract was not the MSA under which the warranties which were breached were given. But all the contracts were inextricably interlinked and the varied MSA expressly stated that the Department was relying on the representations in purchasing the licence. Fujitsu also collected its margin on the overall project under the contracts. I see no basis to exclude this amount from Fujitsu's liability for breach of warranty.

Exclusion clause

[205] Fujitsu relies on cl 21.2(b) to exclude its liability for all the wasted expenditure claimed. This provides:

> Neither party will be liable for any indirect, consequential, special, or economic loss, or loss of profits or savings, or business revenue. This clause 21.2(b) shall be subject to clause 21.2(c):

[206] Exclusion clauses are interpreted in terms of normal contractual interpretation principles, although the contention that the parties intended to limit the remedies for important contractual obligations would usually require clear contractual wording.[24] There is some debate in the authorities on the dividing line between direct, and indirect (or consequential) losses.[25] But irrespective of that debate, the exact dividing line between direct and indirect losses, and the test to be applied, I do not see that this clause assists Fujitsu. In the present case the Department's claim is not close to the dividing line.

[207] The claim by the Department against Fujitsu is not a claim for indirect, consequential, special, economic loss, loss of profits or savings, or business revenue.

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[24] See Stephen Todd and Matthew Barber Burrows, Finn and Todd on the *Law of Contract in New Zealand* (7th ed, Lexis Nexis, Wellington, 2022) at [7.3.1]; *Dorchester Finance Ltd v Deliotte* [2012] NZCA 226 at [32]–[33].

[25] See *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [140]–[154]; *Oceania Furniture Ltd v Debonaire Products Ltd* HC Wellington CIV-2008-485-1701, 27 August 2009, at [120]; *Haines v Herd* [2019] NZHC 342.

It is a claim to recover the direct expenditure that the Department paid to Fujitsu and third parties under this contract. It is simply direct expenditure that the plaintiff incurred by making payments to the defendant and third parties. It is recoverable as wasted expenditure incurred under a contractual project that has been terminated for breach of warranty.

SOW23 costs

[208] There is additional complexity with the Department's claim in relation to the contractual expenditure under SOW23. This was expenditure incurred during the three month period before this project was expressly brought within the terms of the MSA. There are three reasons why this expenditure is nevertheless recoverable under the Department's breach of warranty claims:

(a) First, cl 5.7 of the MSA provided that whenever a statement of work was agreed between the parties it was deemed to form part of the MSA. That was so here. That was the very reason why this contract was called "SOW23" — it was the 23rd item of work that had been agreed between the Department and Fujitsu after they had entered the MSA. This was further reflected in the terms of the variation agreement which the parties entered on 12 December 2018. The effective date of the variation agreement was 1 September 2018, a few days before SOW23 was entered. As a consequence SOW23 formed part of the contract the parties had agreed upon under the MSA for this project, and in which the warranties were provided.

(b) Secondly, as a matter of law, a party can recover pre-contractual expenditure in a claim for breach of warranty if they establish that the expenditure was incurred for the contract.[26] I accept that this was so here.

(c) Finally, the Department would be able to recover the expenditure incurred for SOW23 as a consequence of its claims for

[26] See authorities at fn 20 above.

misrepresentation under the CCLA or for the breach of the FTA. Those claims could be pursued if, for any reason, the expenditure under SOW23 was treated as being incurred before the entry of the contract in December 2018 and accordingly not attributable to the expenditure arising from the contract to which the warranties relate.

Third party costs

[209] The Department makes a reasonably substantial claim for expenditure associated with monies paid to third parties which it says was also wasted expenditure on this project. The amount claimed was $1,925,294.00, although in closing it reduced its claim to $1,810,352.07.

[210] The evidence relied upon by the Department to establish this head of loss was limited. In Ms Stewart's evidence she said that these third party costs were attributable to the project and provided a spreadsheet identifying the calculation of these amounts. She also put in evidence all the relevant invoices. Under cross-examination it became apparent that the amount claimed as identified in the spreadsheet did not correspond to the amount of the invoices in a number of cases.

[211] In closing submissions the Department provided a revised spreadsheet in the form of a pivot table, and it addressed the inconsistency between Ms Stewart's spreadsheet and the copies of the invoices by adopting the lower amount in any such case.

[212] Both Fujitsu and Dassault objected to the revised spreadsheet provided with closing submissions on the basis the Department was seeking to introduce new evidence to remedy its case. In those circumstances I granted leave for Fujitsu and Dassault to file supplementary submissions addressed to the spreadsheet.

[213] The disputes in relation to the Department's claims in this respect involve three issues which I will address in turn:

(a) Whether the new spreadsheet involves the attempted admission of new evidence that should be disallowed.

(b) Whether the Department has proved that the items of expenditure are recoverable as wasted expenditure in the amounts claimed.

(c) Whether these amounts should be disallowed on the basis that the relevant work of the third parties could be reused by the Department to its advantage.

Admissibility of new spreadsheet

[214] Fujitsu and Dassault objected to the new spreadsheet provided in closing submissions on the basis that it involved new evidence which had not been properly received by the Court.

[215] To the extent that the new spreadsheet introduces information that had not already been received in evidence by the Court I accept these submissions. As Dassault argued the principles are clear. Rule 9.5 of the High Court Rules 2016 relevantly provides:

> **9.5 Consequences of incorporating document in common bundle**
>
> (1) Each document contained in the common bundle is, unless the court otherwise directs, to be considered—
>
> (a) to be admissible;
>
> …
>
> (4) A document in the common bundle is automatically received into evidence (subject to the resolution of any objection to admissibility) when a witness refers to it in evidence or when counsel refers to it in submissions (made otherwise than in a closing address).
>
> (5) A document in the common bundle may not be received in evidence except under subclause (4).
>
> (6) The court may direct that this rule or any part of it is not to apply to a particular document.

[216] The document here was provided by the Department only in closing submissions. It would appear that it was also added to the common bundle during the last week of trial, although I was unaware that that had occurred. In any event r 9.5(4) is plain that such a document is only received in evidence when it is referred to by a witness, or in submissions other than closing submissions. This document was not

referred to by any witness and was only referred to in closing submissions. To the extent that it contains any new evidence that evidence is inadmissible. No application to introduce new evidence after the closure of the case was made under s 98 of the Evidence Act 2005.

[217] I also accept Dassault's argument that it would appear that this new spreadsheet contains information that was not referred to in Ms Stewart's evidence or in the earlier spreadsheet she had provided. As a pivot table it contains additional information in electronic format underneath each of the entries. Having said that, I also accept Dassault's point that the additional information it so includes has not been explained in any way that would make it helpful.

[218] I have not considered any information behind each of the entries in this table in addressing the Department's claims in those circumstances. The underlying information does not appear to be of assistance, and in any event it is inadmissible as evidence and could only be treated as a submission.

Has the Department proved the claimed loss?

[219] The second point is whether the Department has proved that the expenditure in question as a recoverable head of loss, and the amount of that loss.

[220] Ms Stewart explained that she managed the overall project and she kept a record of all the costs incurred on the project in spreadsheet form. She then produced an adapted form of that spreadsheet in evidence. She said that the amount of $1,925,294 represented the Department's payments to progress Fujitsu's rostering solution. She described four of the entries in a little more detail, and then also produced the relevant invoices.

[221] Under cross-examination the difficulty was revealed. The amounts reflected in her spreadsheet did not correspond to the invoices for some of these claims. She initially suggested that this might be due to an accruals approach that had been followed by the SAP software that generated the spreadsheet she produced. There also appeared to be a suggestion that some of the entries may have involved some provisioning for anticipated costs. But the position was not satisfactorily explained.

[222] It also emerged in cross-examination that one of the reasons for the discrepancies may have been that not all expenditure covered by invoices rendered by particular third parties had been attributed to the project. The Department had a wider programme of work associated with reforming the way it undertook rostering — this was the broader Making Shifts Work project. When individual contractors did work on that wider project it was not all attributable to the installation of the Fujitsu/Dassault software. Only some of the work covered by such invoices were allocated to this project. Ms Stewart explained this in relation to one of the contractors, Ms Jackie Clark. The original claim was for $75,249.93 (which was revised to $36,152.03 in closing) whereas her relevant invoices totalled $146,910.59.

[223] The Department suggested that it would be open to the Court to discount some of its claims if the Court continued to have concerns about them. That approach was effectively supported by Fujitsu and Dassault, who also suggested the claims needed to be discounted. But Dassault also argued that the claims should be disallowed in their entirety for these reasons.

[224] I do not accept that disallowing the claims in their entirety is the appropriate approach. In addition, whilst there is some attraction in the discounting approach, I consider it more appropriate to focus on the individual costs that are claimed.

[225] I accept that the Department has provided evidence meeting its burden to show that particular costs were incurred as part of the project. I do not accept, however, that it has provided any evidence of the apportionment it has apparently engaged in. Where there has been some apportionment applied to determine which part of the expenditure is attributable to this project no evidence was provided that explains the apportionment. Ms Stewart was not able to do so. I simply do not know, for example, whether it is accurate to say that $36,152.03 of the $146,910.59 billed by Ms Clark is properly attributable to this project. It may be that the apportionment occurred when the fees were first rendered, or it was apportioned when the invoices were paid, but the Court has no evidence of this. The Department sought to support the apportioning in closing submissions, but in the absence of evidence there is a difficulty in the Court assessing what should be allowed in relation to costs that the Department says require apportionment.

[226] I consider the Court should disallow, in their entirety, all claims where there has been unexplained apportionment. But with respect to the claims where there is no apportionment issue I consider the claims should be allowed. Ms Stewart gave evidence that these costs were incurred as part of the project, and her evidence in that respect was not challenged. Some of the persons who rendered the invoices also later gave evidence and were available to be questioned in relation to Ms Stewart's evidence. There is the calculation issue arising from the difference between the invoices and the spreadsheet, but that is adequately addressed by the Department claiming the lower of the two amounts in all such cases.

[227] That approach means that the following claims are disallowed in their entirety:

(a) Ms Jackie Clark — amount claimed $36,152.03 (amount invoiced $146,910.59).

(b) Lisa Calder — amount claimed $110,396.42 (amount invoiced $129,647.46).

(c) Rick Stewart — amount claimed $10,618.67 (amount invoiced $197,971.84).

(d) Bryce Newman — amount claimed $29,177.07 (amount invoiced $197,173.33).

[228] The following amounts are recoverable on this basis:

(a) Deliotte for SAP architecture — $258,516.79.

(b) Deloitte charges for Ms Stewart herself — $265,497.85.

(c) Rowena Humphrey — $171,334.40.

(d) Raj Kant — $248,548.35.

(e) Gilli Bates — $100,833.42.

(f) Andrew Hood — $193,532.24.

(g) Darren Lily — $61,361.07.

(h) Oxygen Business — $102,699.52.

[229] There is then a category of claims for costs that are not supported by invoices, but which are said to be supported by timesheets. These are said to relate to internal staff at the Department based on what employees have recorded for their time. The internal time of employees can be included in a claim based on wasted expenditure, but the position is different from third parties who have rendered invoices which have been paid by the Department. There is some authority for the proposition that the time of managers/employees is not recoverable because the relevant salaries would have been incurred in any event.[27] That approach fails to take into account the opportunity cost of those employees failing to engage in activities contributing to the costs of the enterprise. As a matter of principle there is a cost to the claiming party. This can be calculated on an internal charge out rate that recovers the cost of capital of the enterprise. Such a rate covers salary costs and overheads.[28] It may be more difficult to calculate the relevant amount for a government department, but a reasonable analysis can still be put forward. The Court has allowed such claims simply by assessing whether the amount claimed is reasonable, and that may be appropriate.[29] But if a party fails to provide evidence to show how the cost of internal management or employee time is reasonably calculated the claims have been disallowed.[30]

[230] Here Ms Stewart simply said that these were internal staff costs, but gave no evidence about how these costs were arrived at. More evidence would be required to support a claim for the cost of internal employees. I accordingly decline to make an award associated with these costs for a similar reason as I declined the external expenditure where apportionment issues arose — I do not have any evidence to

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27 *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] EWHC 233 (Ch), [2002] 1 WLR 2722; *Carisbrooke Shipping CV5 v Bird Port Ltd* [2005] EWHC 1974 (Comm), [2005] 2 Lloyd's Rep 626 at [159].

28 *Nationwide Building Society v Dunlop Haywards* [2009] EWHC 254 (Comm), [2010] 1 WLR 258 at [18].

29 *Detection Services v Pickering* [2020] NZHC 2705 at [16]–[25].

30 *Tate & Lyle Food and Distribution v Greater London Council* [1981] 3 All ER 716, [1982] 1 WLR 149 at 152.

consider to assess to correctness or reasonableness of the figure claimed (which totals some $72,314.90).

[231] For these reasons, and subject to the next issue, I allow the Department's claim in the amount of $1,402,323.64. Given that the above approach has required me to engage in some calculations I reserve leave for all parties to apply to amend this figure for errors.

Work reusable

[232] The final issue raised by Fujitsu and Dassault is that much of the cost related to work that the Department was able to utilise when the Department appointed a replacement supplier to address its rostering solution. Both allege that the claims should be disallowed, or discounted for that reason. This would include work undertaken by Fujitsu/Dassault. I do not accept that submission for two interrelated reasons.

[233] First I accept the Department's submissions on the legal principles that apply to this issue. If a defendant is going to resist an award in relation to expenditure that the plaintiff has incurred under the contract the defendant has a burden to show that such an award puts the plaintiff in a better position than it would have been had the contract been performed.[31] I consider that the relevant principles were correctly summarised by O'Farrell J in *Royal Devon and Exeter NHS Foundation Trust v Atos IT Services UK Ltd*. She said:[32]

> It is open to [a defendant] to defeat the claim for wasted expenditure by establishing that the expenditure exceeded any benefit to be gained from the Contract.
>
> An award of damages for breach of contract should not put the claimant in a better position than he would have been in had the contract been performed: *C&P Haulage v Middleton* [1983] 1 WLR 1461 per Ackner LJ at pp. 1467–1468.
>
> If the defendant can establish that the claimant's expenditure would have been wasted in any event, because it made a "bad bargain", the wasted expenditure

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31 *Soteria Insurance Ltd v IBM United Kingdom Ltd*, above n 20.

32 *Royal Devon and Exeter NHS Foundation Trust v Atos IT Services UK Ltd* [2017] EWHC 2197 (TCC) at [65]–[68]. This rebuttable presumption was applied by the Court of Appeal in *Ti-Leaf Productions Ltd v Baikie* (2001) 7 NZBLC 103, 464.

> will not be recoverable as damages: [*Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2062] per Teare J at paras. [44] to [47]; [*Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111] per Leggatt J at para. [186].
>
> The burden of proof lies on the defendant to show that the expenditure would not have been recouped and would have been wasted in any event: *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 per Hutchison J at p. 40; *Omak* (above) per Teare J at para. [47]; *Yam Seng* (above) per Leggatt J at para. [187]. In the case of a contract where no financial gains were expected, the recoupment in question would not be payments but alternative gains, such as use or enjoyment. To establish a bad bargain in such a case, the defendant would have to show that the value of the asset or other performance promised was less than the expenditure incurred by the claimant.

[234] The same approach applies to an argument that the expenditure was not wasted, and would have been incurred irrespective of the contract. A defendant does not defeat the plaintiff's claim simply by demonstrating that some of the things the plaintiff paid for under the failed contract could have been used in another way by the plaintiff. Neither would a plaintiff be defeated because it derives some other benefit from the failed contract, such as by ascertaining how it could go about the task of contracting such matters better in the future. In order to defeat a claim a defendant needs to establish that the plaintiff is profiting from the claim — that is that the award puts the plaintiff in a better position than it would have been had the contract been performed.

[235] Here the Department seeks to recover wasted expenditure in relation to a contract that Fujitsu warranted would cost approximately $716,000 where the true position, on Fujitsu's assessment in 2019, was that the true cost was more than $5 million.[33] In those circumstances Fujitsu has not proved the award of wasted expenditure puts the Department in a better position than it would have been had the contract been performed.

[236] The second related point is a factual one. In its closing submissions Dassault referred to some of the core documentation that had been prepared as part of this project, and contending that this core documentation would have been available to use for any alternative supplier of a rostering system. It referred to a number of documents, and areas of work which would be reused with a replacement supplier. To take but one example Dassault refers to a workshop held on 24 August 2018 to develop

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[33] I acknowledge that the additional modules were part of the revised pricing.

business rules relating to the additional hours and allowances (and time off in lieu) arising from public holidays. Dassault contends that this time was included in the project, and points out that Ms Stewart accepted in cross-examination that such business rules would have been needed for any rostering solution, not just the one provided by Quintiq.

[237] The difficulty with this, as a matter of fact, is that the Court is unable to reach conclusions on the extent of any ability to reuse such work in any subsequent project on the basis of this evidence alone. The Department may have been in a better position to deal with the project with a subsequent provider, but based on this evidence it is unclear how much of the work was reusable, or the extent to which it was still needed for a new supplier. That is so with all the other categories of documentation, and other work that Dassault relies on in closing.

[238] This is part of the reason why the burden shifts to the defendant. It needs to satisfy the Court that making the award would make the plaintiff better off than it would have been had there been no breach. The defendant does not deprive the plaintiff of an award simply by showing that work under a contract is reusable. As Leggatt J explained in relation to wasted expenditure in *Yam Seng PTE Ltd v International Trade Corporation Ltd*:[34]

> … On the one hand, the general rule that the burden lies on the claimant to prove its case applies to proof of loss just as it does to the other elements of the claimant's cause of action. But on the other hand, the attempt to estimate what benefit the claimant has lost as a result of the defendant's breach of contract or other wrong can sometimes involve considerable uncertainty; and courts will do the best they can not to allow difficulty of estimation to deprive the claimant of a remedy, particularly where that difficulty is itself the result of the defendant's wrongdoing. As Vaughan Williams LJ said in *Chaplin v Hicks* (1911] 2 KB 786 at 792: "the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract." Accordingly the court will attempt so far as it reasonably can to assess the claimant's loss even where precise calculation is impossible. The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity

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[34] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Commissioner) 1321 at [188]–[189], approved in *Soteria Insurance Ltd v IBM United Kingdom Ltd*, above n 20, at [45]. See also *Carr v Gallaway Cook Allan* [2016] NZHC 2065 at [75].

> to the claimant where it is the defendant's wrongdoing which has created those uncertainties.
>
> ...
>
> It seems to me that the (rebuttable) presumption that the claimant would have recouped expenditure incurred in reliance on the defendant's performance of the contract is an illustration of this approach. Parties in normal circumstances contract and incur expenditure in pursuance of their contract in the expectation of making a profit. Where money has been spent in that expectation but the defendant's breach of contract has prevented that expectation from being put to the test, it is fair to assume that the claimant would at least have recouped its expenditure had the contract been performed unless and to the extent that the defendant can prove otherwise.

[239] That is also so when a contract is entered to further the public benefit — the more efficient operation of the prison system — rather than a financial profit. For these reasons I do not accept Fujitsu and Dassault's arguments.

Conclusion

[240] For the above reasons I uphold the plaintiff's claims against the defendant for breach of contractual warranty for the following amounts:

(a) The licence fee costs in the amount of $1,836,010.65.

(b) $476,242.07 for the amount paid for SOW27.

(c) $161,305.99 for the amount paid under SOW23.

(d) $1,402,323.50 in relation to third party costs.

[241] This involves a total award of $3,875,882.21 I reserve leave in relation to third party costs for the reasons explained in paragraph [231] above. I also have an uncertainty about any awards of interest on the amounts awarded and leave is also reserved on the issue of interest.

Fujitsu's claims against Dassault

[242] Fujitsu alleges that, if it is liable to the Department then Dassault is liable to it, or it is required to contribute to the damages awarded to the Department. Its claims fall into three main categories:

(a) That Dassault is liable to it, or is liable to contribute to its liability to the Department under the Competition and Consumer Act 2010 (the CCA), a statute of the Commonwealth of Australia[35] (the first and second causes of action).

(b) That Dassault is liable to it, or is liable to contribute to its liability to the Department under the FTA (the third, fourth and fifth causes of action).

(c) That Dassault is liable to it for misrepresentation under the CCLA (the seventh cause of action).

[243] These claims were set out in Fujitsu's fifth amended statement of claim dated 22 September 2023 filed with leave during the course of the trial.

Does the CCA apply?

[244] Fujitsu advances claims under the CCA as well as the FTA, being the equivalent New Zealand legislation. Unlike the FTA there are no provisions in the CCA that allow parties to contract out of liability in accordance with its provisions, and as I address in greater detail below, there are provisions in the contracts between Fujitsu and Dassault that limit or exclude liability.

[245] There is a question over whether the CCA can be applied by the Court to the conduct that is the subject matter of these proceedings. Dassault is an Australian company, and some of its conduct which is the subject matter of this proceeding occurred in Australia, particularly in Victoria. The case can be characterised as a claim

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[35] The CCA consolidates a number of competition and consumer statutes in Australia, including the Australian Consumer Law, which was first enacted in the Trade Practices Act 1974 (Cth).

that includes allegations that misleading conduct took place in Australia affecting persons in New Zealand. It is also a case, however, where relevant conduct by Dassault employees also took place in New Zealand as its employees came to New Zealand as well — for example, when conducting the demonstrations which are part of the subject matter of this case.

[246] Dassault argues that the CCA cannot be applied in this proceeding. It says that the relevant conflicts of law principles effectively exclude its applicability.[36] It says that the relevant conflict principles are either those of contract, or of tort, and in either case the proper law is the law of New Zealand.[37] If it is contract it is the proper law of the contract, and if it is tort it is the country where the most significant elements of the relevant tortious conduct occurred.[38] Moreover the CCA cannot apply as under s 138 exclusive jurisdiction is conferred on the Federal Court of Australia which means that the New Zealand Court has no jurisdiction.[39] In support of its arguments about the CCA an expert report on Australian law was received by Mr Warwick Rothnie of the Victorian bar.

[247] I am not convinced that this issue is to be resolved by choice of law analysis. It is possible that both the FTA and CCA could apply to Dassault's conduct. When an Australian company engages in conduct partly in Australia, and partly in New Zealand, there is a prospect of both Australian and New Zealand legislation applying to that conduct. So it is not a matter of determining which law applies under choice of law principles. I consider that the answer to the issue concerning the applicability of the CCA is resolved as a matter of interpretation of that Act, much as it is when the Court interprets New Zealand legislation with apparent extra-territorial effect.[40] This was the approach adopted by the Supreme Court in *Brown v New Zealand Basing Ltd*.[41] As the authors of The Conflict of Laws in New Zealand

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36 See Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (Lexis Nexis NZ Ltd, Wellington, 2020) at [4.127].

37 At [6.88].

38 Private International Law (Choice of Law in Tort) Act 2017, s 8(2)(c).

39 *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033 at [17]–[19]; *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320 at [18].

40 See *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300.

41 *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245, especially at [4]–[9].

say, such apparent conflict issues can be resolved if foreign statutes are ultimately self-limiting.[42]

[248] The starting point for Fujitsu is promising. The CCA provides:

> **5 Extended application of this Act to conduct outside Australia**
>
> (1) Each of the following provisions:
>
> …
>
> (c) the Australian Consumer Law (other than Part 5-3);
>
> …
>
> extends to the engaging in conduct outside Australia by:
>
> (g) bodies corporate incorporated or carrying on business within Australia;
>
> …

[249] Mr Rothnie explains that a decision of the High Court of Australia is awaited in *Karpik v Princess Cruise Lines Ltd (the Princess Ruby)* as to whether there are implied limitations on the interpretation of this provision, but that full effect has been given to its plain meaning to date.[43] And in any event part of the conduct subject to the claims here took place in Australia — for example when Dassault's employees drafted and approved the RFP response they did so in Australia.

[250] But in my view there is an insurmountable difficulty with Fujitsu's argument that this Court should apply the CCA to Dassault's conduct. The CCA provides:

> **138 Conferring jurisdiction on the Federal Court**
>
> (1) Jurisdiction is conferred on the Federal Court in relation to any matter arising under this Part or the Australian Consumer Law in respect of which a civil proceeding has been instituted under this Part or the Australian Consumer Law.
>
> (2) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than:

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42 Hook and Wass, above n 36, at [4.128]–[4.130].

43 See *Carnival Plc v Karpik (the Ruby Princess)* [2022] FCAFC 149; *Karpik v Princess Cruise Lines Ltd (the Princess Ruby)* [2023] HCA Trans 099 (No s 25 of 2023).

> (a) the jurisdiction of the Federal Circuit and Family Court of Australia (Division 2) under section 138A; and
>
> (b) the jurisdiction of the several courts of the States and Territories under section 138B; and
>
> (c) the jurisdiction of the High Court under section 75 of the Constitution.

[251] Whilst this provision is no doubt primarily directed to the question of state and/or federal jurisdiction, it still means what it says. A foreign court has no jurisdiction. None of the exceptions in s 138(2) apply. That is the view that has been taken in Australia. In *Home Ice Cream Pty Ltd v McNabb Technologies LLC* the Federal Court went as far as granting an injunction preventing a defendant in Australian proceedings from commencing separate proceedings in the United States about the same CCA issues. The defendant argued that a choice of law clause in the relevant contract allowed it to do so. The Court did not accept this, saying:[44]

> The causes of action [the defendant] seeks to litigate and the remedies it seeks, derived from prosecuting those causes of action, are not available to it in the [United States]. An exclusive jurisdiction clause in an agreement nominating a foreign jurisdiction does not, as a matter of principle, prevail over statutory protective provisions of a valid law of the Commonwealth of Australia. The only court which is capable of determining the questions which [the defendant] seeks to litigate (other than the High Court of Australia in exercising its appellate jurisdiction) is the Federal Court of Australia …

[252] This decision was only an interlocutory one determined ex-parte, but it illustrates the reach of s 138 as interpreted by the Australian Courts. The effect of the provision is that nobody can bring proceedings under the CCA in any other Court, including any of the Courts of the States of Australia. The High Court of New Zealand is in no different position from any of the State Courts of the Commonwealth. Only the Federal Court of Australia can deal with these claims.

[253] For these reasons Fujitsu's claims based on the CCA are dismissed.

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[44] *Home Ice Cream Pty Ltd v McNabb Technologies LLC*, above n 39, at [19]. See also *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320 at [18].

Claims under the FTA

[254] Fujitsu also claims that Dassault is liable to it from breach of s 9 the FTA as a consequence of direct or accessory liability under s 43.

[255] I already addressed Dassault's conduct when making the findings in relation to the Department's claims against Fujitsu. I essentially repeat those findings. I also consider that Dassault breached s 9 in relation to its dealings with Fujitsu. In making that finding I focus on three central elements by way of summary:

(a) Dassault's responsibility for the misrepresentations in the RFP response.

(b) Its responsibility for the misrepresentations occurring afterwards, including through the product demonstrations.

(c) Its strategy, upon becoming aware that the position had been misrepresented, to withhold information so that the gap between what had been represented and the true position was not revealed.

[256] Dassault played a substantial role in either drafting or approving the RFP response, especially the sections of the response that dealt with the attributes of Quintiq's standard functionality and the ability to meet the Department requirements. The capabilities of Quintiq was not something that Fujitsu knew, and it depended on Dassault accurately identifying them. Dassault made changes to the executive summary of the RFP response. On 15 March 2018 Mr Deans sent the following marked-up changes he proposed to the executive summary to Fujitsu:

> **Summary**
>
> The Department can be confident that in selecting your existing partner Fujitsu, and our advanced technology partner Quintiq, you will be provided with a solution that:
>
> - Meets all your core functionality ~~out of the box;~~
> - Require ~~minimal~~ no customisation and is 'out of the box';
> - Delivered with a trouble free implementation
> - Meets your tight timeframe

- Integrates well with SAP
- A real time In-Memory solution
- A flexible agile solution
- Meets both todays requirements and any future needs with value adds
- A mature product with a strong developments roadmap

Fujitsu looks forward to further engagement with the Department as you progress on your selection process for the supply of the "Making Shifts Work" Rostering Solution.

[257] Two of these changes are important. First the representation about customisation was elevated to a statement that none would be required. Secondly, the out of the box representation was no longer limited to core functionality, but was made in relation to the solution more generally. Both changes were significant as they materially added to the represented qualities of Quintiq's standard functionality. Both statements were untrue, however. Fujitsu did not know that these statements were untrue. It had never been involved in a project involving Quintiq before. I accept that Dassault's express and implied representations were made to Fujitsu, that the conduct was capable of misleading a person in Fujitsu's position, that it was reasonable for Fujitsu to be misled, and that it was misled.

[258] As I have found above the statements in the RFP response were, however, subject to the overriding qualification that the position would need to be confirmed before legally binding agreements were entered. But that does not relieve Dassault of liability for two reasons:

(a) First, a party cannot engage in misleading conduct in dealings leading up to the point of sale, although there will be circumstances where customers can be expected to make further enquiries before sale to rectify misunderstandings.[45] I do not consider that any such circumstances arise here.

[45] *Trust Bank Auckland Ltd v ASB Bank Ltd* [1989] 3 NZLR 385 (CA) at 389; *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 197–199; *Allied Liquor Merchants Ltd v Independent Liquor (NZ) Ltd* (1989) 3 TCLR 328 (HC) at 336; *Tasman Insulation New Zealand Ltd v Knauf Insulation Ltd* [2015] NZCA 602, (2015) 14 TCLR 220 at 256–257.

(b) In any event, and most importantly, the misrepresentations were reiterated in the subsequent conduct by Dassault leading up to the entry of the contracts in December 2018.

[259] As to the second point, as I have already held the product demonstrations by Dassault had the effect of further misrepresenting the attributes of Quintiq's standard functionality, and reiterated what was in the RFP response. The product demonstrations had involved Dassault altering the Quintiq software when showing what it could do. As I have already noted that this came as a surprise to Mr Kathiresan because it affected the whole basis upon which the parties were proceeding.[46] I accept that the product demonstrations, occurring before and after the RFP response, conveyed the same false information about Quintiq's standard functionality and its ability to meet the Department's requirements without substantial alteration for the price estimated. This was also reiterated in the answers formulated to the Department's formal questions for which Dassault had responsibility that I dealt with at [47]–[48] and [60]–[62] above.

[260] Further, when Ms Gayner later looked more closely back at the RFP response she became aware of the misrepresentations. After she raised the problem with other Dassault personnel, including Mr Deans, a decision was made to manage the issue by seeking to reduce the scope of the first phase of the project, and not to reveal to Fujitsu or the Department the gap between Quintiq's standard functionality and the Department's requirements. Fujitsu was unaware of the gap, and unaware of Dassault's strategy.

[261] I accept that Dassault effectively qualified its misrepresentations arising in the RFP response to the extent that it made Fujitsu aware that there were greater complexities with the project than the RFP response had portrayed. This is reflected in the statements accompanying the updated price estimate provided to Fujitsu on 17 October 2018. But in this Dassault had stated that the increase was due to additional features that the Department had sought, and the increase for the resulting work led to a price estimate of $1,825.811.20. That increase included the additional modules that the Department were seeking. So this information did not correct the

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[46] At [44] above.

full extent of the untrue statements made about the standard functionality of the Quintiq solution. Indeed the formulation of this document was part of Dassault's strategy to manage its earlier representations. For these reasons I do not consider this case to be analogous to that of *Anchorage Capital Master Offshore Ltd v Sparkes* as submitted by Dassault.[47]

[262] For these reasons I conclude that Dassault engaged in misleading conduct. Fujitsu reasonably relied on Dassault providing it with accurate information about Quintiq. Fujitsu did so by agreeing to be the prime contractor with the Department. The misleading conduct was an operative and effective cause of Fujitsu's loss. This arose most directly through Fujitsu providing the contractual warranties not appreciating that they were untrue. It was reasonable for Fujitsu to rely on Dassault in this way, and Fujitsu has suffered loss as a consequence, namely the liability it now faces to the Department.

[263] I also accept that such FTA liability could arise under s 43 as accessory liability. This liability can arise on the basis that Dassault's misleading conduct misled the Department, and loss has resulted to Fujitsu on the broad approach to causation contemplated by s 43.[48] But I do not consider that potential accessory liability adds to Fujitsu's claims. Liability on an accessory basis does not improve the direct liability that arises as a consequence of the breach of s 9.

[264] Any liability depends, however, on the application of s 5D of the FTA given the extensive exclusion and limitation of liability clauses in the contracts between Fujitsu and Dassault. I address this more fully below.

Liability under the CCLA

[265] Fujitsu's sixth cause of action against Dassault is for misrepresentation under the CCLA.

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47 *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88.

48 *Red Eagle Corporation v Ellis*, above n 18, at [29]; *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17 (CA) at [31].

[266] Given my findings above there is a factual basis for finding that such liability arises. But s 34 of the CCLA provides:

> **34 Remedy provided in contract**
>
> If a contract expressly provides for a remedy for misrepresentation, repudiation, or breach of contract, or makes express provision for any of the other matters to which sections 35 to 49 relate, those sections have effect subject to that provision.

[267] In addition s 50 provides:

> **50 Statement, promise, or undertaking during negotiations**
>
> (1) This section applies if a contract, or any other document, contains a provision purporting to prevent a court from inquiring into or determining the question of—
>
> (a) whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
>
> (b) whether, if it was so made or given, it constituted a representation or a term of the contract; or
>
> (c) whether, if it was a representation, it was relied on.
>
> (2) The court is not, in any proceeding in relation to the contract, prevented by the provision from inquiring into and determining any question referred to in subsection (1) unless the court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to the matters specified in subsection (3).
>
> (3) The matters are all the circumstances of the case, including—
>
> (a) the subject matter and value of the transaction; and
>
> (b) the respective bargaining strengths of the parties; and
>
> (c) whether any party was represented or advised by a lawyer at the time of the negotiations or at any other relevant time.

[268] The provisions effectively allow parties to contract out of liability under the CCLA if they make provision for misrepresentation in the manner contemplated by s 34. A question arises in the present case whether the contractual provisions between Fujitsu and Dassault operate in this way, or whether those provisions are of a kind contemplated by s 50. In each case there is a question whether the rights under the

contract are additional to those under the legislation, or whether they preclude the party from the remedies available under it. This is ultimately a question of interpretation of the contract.[49]

[269] The primary contract between Fujitsu and Dassault is the Teaming Agreement dated 1 March 2018 and signed by the parties on 13 and 15 March. This defined this project as part of the teaming activities covered by the agreement. Clause 2.2 provided:

> If requested, Dassault Systèmes will at its own discretion submit to Partner the necessary technical and business data related to the Dassault Systèmes Products and Services, including accurate, current, complete and reasonable cost or pricing data, for use in preparation of the Proposal. Dassault Systèmes warrants that the information it provides to Partner will be true and accurate to the best of its knowledge and belief. Dassault Systems will notify Partner immediately if any representation made in any information provided to Partner is incorrect.

[270] The agreement also provided:

> 6 Limitation of Liability
>
> 6.1 Limitation of liability. EXCEPT WITH RESPECT TO EACH PARTY'S CONFIDENTIALITY OBLIGATIONS HEREUNDER, TO THE MAXIMUM EXTENT PERMITTED BY LAW, NEITHER PARTY'S LIABILITY UNDER THIS AGREEMENT SHALL EXCEED AUD 10,000.00 (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT OR BY STATUTE OR OTHERWISE) FOR ANY CLAIM IN ANY MANNER RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT.
>
> 6.2 TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY IN CONTRACT, TORT OR OTHERWISE, EVEN IF IT HAS BEEN ADVISED OF THEIR POSSIBLE EXISTENCE, FOR INDIRECT, SPECIAL OR CONSEQUENTIAL LOSSES, LOSS OF REVENUE OR PROFITS, LOSS OF BUSINESS, OPPORTUNITY OR GOODWILL, LOSS OF, DAMAGE TO OR CORRUPTION OF DATA, OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, TECHNOLOGY OR SERVICES.

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[49] *Bromley Industries v Martin and Judith Fitzsimons* [2009] NZCA 382, (2009) 19 PRNZ 850 (CA) at [35]–[36]; *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA).

[271] The agreement further provided:

> 7.8 Entire Understanding. This Agreement sets forth the entire understanding between the parties hereto and supersedes all prior agreements, arrangements and communications, whether oral or written, with respect to the subject matter hereof. No other agreements, representations, warranties or other matters, whether oral or written, shall be deemed to bind the parties hereto with respect to the subject matter hereof. Each party acknowledges that it is entering into this Agreement solely on the basis of the agreements and representations contained herein, and for its own purposes and not for the benefit of any third party.

[272] There were a series of other agreements between Fujitsu and Dassault. In addition to the Teaming Agreement they also entered a System Integrator Alliance Agreement on 10 March 2018. On the face of its terms it would also regulate the dealings between the parties on this project. But it was a more general contract. The Teaming Agreement was more specific to the activities on this project. In any event I note that it has similar terms which would also exclude Dassault's liability.[50]

[273] On 12 December 2018 Fujitsu and Dassault also entered the One Time Reseller Agreement as part of the agreements entered at that time under which Fujitsu sold the Quintiq licence to the Department. It contained the following provisions:

> 13.1. Disclaimer of Warranties. TO THE FULL EXTENT PERMITTED BY APPLICABLE LAW, ANY EXPRESS WARRANTY SET FORTH IN THE CUSTOMER AGREEMENT IS THE ONLY WARRANTY MADE BY DS WITH RESPECT TO DS OFFERINGS OR ANY SERVICES PROVIDED HEREUNDER BY DS. DS MAKES NO WARRANTY TO DISTRIBUTOR, EXPRESS OR IMPLIED OR ARISING BY CUSTOM OR TRADE USAGE, AND SPECIFICALLY MAKES NO WARRANTY OF TITLE, NONINFRINGEMENT, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE.
>
> 13.2. Limitation of Liability. NOTHWISTANDING ANYTHING TO THE CONTRARY, EACH PARTY'S MAXIMUM LIABILITY FOR DAMAGES SHALL NOT EXCEED THE LESSER OF (I) THE AMOUNT PAID BY DISTRIBUTOR TO DS DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT THAT GAVE RISE TO ANY CLAIM OR (II) ONE HUNDRED THOUSAND EUROS (€ 100.000), AS THE CASE MAY BE.
>
> NEITHER PARTY SHALL HAVE ANY LIABILITY FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES,

---

[50] Particularly cls 13, 14 and 15.8.

> INCLUDING WITHOUT LIMITATION CLAIMS FOR LOST PROFITS, BUSINESS INTERRUPTION AND LOSS OF DATA, THAT IN ANY WAY RELATE TO THIS AGREEMENT, ANY DS OFFERING OR OTHER SERVICES PROVIDED HEREUNDER, WHETHER OR NOT IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING THE FAILURE OF THE ESSENTIAL PURPOSE OF ANY REMEDY.
>
> THE LIMITATIONS STATED IN THIS SECTION SHALL APPLY REGARDLESS OF THE FORM OF ACTION, WHETHER THE ASSERTED LIABILITY OR DAMAGES ARE BASED ON CONTRACT (INCLUDING, BUT NOT LIMITED TO, BREACH OF WARRANTY), TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE), STATUTE, OR ANY OTHER LEGAL OR EQUITABLE THEORY.
>
> Distributor waives any and all claims related to this Agreement or any DS Offerings or services provided hereunder, for any direct, indirect, incidental or consequential damages, on any basis, against any DS licensors or any DS Group Company other than DS.
>
> …

[274] I consider the clauses of the Teaming Agreement is the contract that regulates the dealings between the parties leading up to the entry of the contracts in December 2018. I also consider that the terms of the Teaming Agreement fall within s 34 of the CCLA and not s 50. That is because cl 2 of the Teaming Agreement specifies that information provided by Dassault to Fujitsu was subject to a warranty, and the clauses otherwise exclude liability for misrepresentation. The contract then limits liability for breach of warranty to AUD10,000. This is a contractual code for any issues of misrepresentation. These clauses do not deal with the matters referred to in s 50(1) of the CCLA.

[275] The legislation contemplates that the parties can deal with the topic of misrepresentation as part of their contractual bargain. That is what has happened here. For these reasons I conclude that Dassault's liability to Fujitsu for misrepresentation under the CCLA is limited to the notional amount of AUD10,000.

Exclusion of FTA liability

[276] Whilst I have held that Dassault engaged in conduct contravening s 9 of the FTA giving rise to the potential for orders under s 43, Dassault argues that any liability

it has is excluded.[51] Under s 5C of the FTA there can be no contracting out of the Act. But that is subject to s 5D when the parties are in trade. This provides:

> **5D No contracting out: exception for parties in trade**
>
> (1) Despite section 5C(1) and (2), if the requirements of subsection (3) are satisfied, parties to an agreement may include a provision in their agreement that will, or may (whether directly or indirectly), allow those parties to engage in conduct, or to make representations, that would otherwise contravene section 9, 12A, 13, or 14(1); and in that case,—
>
> (a) the provision is enforceable; and
>
> (b) no proceedings may be brought by any party to the agreement for an order under section 43 in relation to such a contravention of section 9, 12A, 13, or 14(1).
>
> (2) A provision of the kind referred to in subsection (1) includes, for example,—
>
> (a) a clause commonly known as an entire agreement clause:
>
> (b) a clause that acknowledges that a party to the agreement does not rely on the representations or other conduct of another party to the agreement, whether during negotiations prior to the agreement being entered into, or at any subsequent time.
>
> (3) The requirements referred to in subsection (1) are that—
>
> (a) the agreement is in writing; and
>
> (b) the goods, services, or interest in land are both supplied and acquired in trade; and
>
> (c) all parties to the agreement—
>
> (i) are in trade; and
>
> (ii) agree to contract out of section 9, 12A, 13, or 14(1); and
>
> (d) it is fair and reasonable that the parties are bound by the provision in the agreement.
>
> (4) If, in any case, a court is required to decide what is fair and reasonable for the purposes of subsection (3)(d), the court must take account of all the circumstances of the agreement, including—
>
> (a) the subject matter of the agreement; and
>
> (b) the value of the goods, services, or interest in land; and
>
> (c) the respective bargaining power of the parties, including—

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[51] There is nothing in Fujitsu's argument that Dassault did not plead reliance on s 5D of the FTA. It pleaded reliance on the clauses of the agreement, which is sufficient.

(i) the extent to which a party was able to negotiate the terms of the agreement; and

(ii) whether a party was required to either accept or reject the agreement on the terms and conditions presented by the other party; and

(d) whether the party seeking to rely on the effectiveness of a provision of the kind referred to in subsection (1) knew that a representation made in connection with the agreement would, but for that provision, have breached section 12A, 13, or 14(1); and

(e) whether all or any of the parties received advice from, or were represented by, a lawyer, either at the time of the negotiations leading to the agreement or at any other relevant time.

…

Interpretation issues

[277] There is no dispute that the pre-requisites in s 5D(3)(a)–(c)(i) are satisfied in this case. But there are interpretation issues concerning the provision that I need to address notwithstanding that they were not raised in submissions.

[278] First the contractual clauses here include clauses that limit liability to a certain financial amount — particularly AUD10,000 in the Teaming Agreement and €100,000 (or the amount paid by Fujitsu in the 12 months prior) in the One Time Reseller Agreement. I consider such clauses to be of the kind referred to in s 5D(1). That is because they "indirectly" allow a party to engage in contravening conduct without an order being able to be made under s 43 beyond the stated amounts. They accordingly exclude the application of the Act beyond such amounts. The extent of the limit would then become one of the circumstances of the agreement to be considered under s 5D(4). This may be important if the limit is low. Here the limits arising under both agreements are low. They effectively exclude any material application of the FTA.

[279] Secondly, it seems to me that it is open for the Court to conclude that it was fair and reasonable to give effect to the clauses in excluding the FTA for some elements of a claim that is advanced, but not other elements. The section introduces a broad enquiry, and there is nothing that requires the Court to adopt an all or nothing approach. The Court is able to conclude that it is fair and reasonable for the clause to exclude the FTA in some, but not in all respects. So the circumstances of the

agreement may suggest that some elements of the claim should be protected by the exclusion clause, but there are other elements of the claim where it would not be fair and reasonable to so exclude operation of the FTA because of the circumstances.

[280] Thirdly the reference in s 5D(4)(d) to a party knowing that a representation would, but for the exclusion provided for in the agreement, be a breach of the kind identified should be interpreted purposively. I do not consider that the party would need to know that particular provisions of the FTA would otherwise be breached, or even know about FTA liability at all. In my view it is sufficient that a party would know that it has engaged in conduct that makes it potentially legally liable. I consider the sub-section is focusing on whether misrepresentations, or other misleading conduct, were knowing ones.

[281] I also agree with the view of Gault J in *Williams v Tellen Systems NZ (2013) Ltd* that the factors identified in s 5D(4) are mandatory relevant considerations.[52] The listed considerations are not exclusive, however, as the Court is required to take into account "all the circumstances of the agreement" with the listed considerations being inclusive only.

Application of s 5D

[282] I consider that the clauses in the Teaming Agreement apparently exclude the operation of the FTA beyond the limit in the manner contemplated by s 5D(1). I do not accept Fujitsu's arguments that the clauses of the Teaming Agreement are inapplicable because they were only "backward looking", and did not address future misrepresentations. Whilst that may be so of cl 7.8 — the entire agreement clause — cl 2.2 regulated the future provision of information, and cls 6.1 and 6.2 then addresses liability for misrepresentation under cl 2.2.

[283] The general approach to be applied under s 5D is relatively well settled. Although it is in the context of the similarly worded provision in s 50 of the CCLA, the Supreme Court said in *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* that "… the task of the court is to assess whether in all the circumstances, it is fair and

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52 *Williams v Tellen Systems NZ (2013) Ltd* [2021] NZHC 1199 at [117].

reasonable for an entire agreement clause to be conclusive between the parties."[53] Like the CCLA provision the overall purpose of s 5D is to allow parties to exclude liability in accordance with freedom of contract, whilst recognising that there will be some circumstances where it is unfair or unreasonable for a party to do so. The provision acts as a safety valve to ensure that the Act is not excluded when this would be unreasonable or unfair, even when parties are in trade. This may be particularly so when the other party was in a situation of greater vulnerability.[54] The factors identified to in s 5D(4) are indicative of that. But unequal bargaining power is not a pre-requisite for establishing that it is fair and reasonable that the parties be bound by their provision. It is just a mandatory consideration. The only pre-requisites are those in s 5D(3). The fairness and reasonableness of excluding the FTA will still depend on the overall circumstances. Nevertheless when there are arms-length commercial parties who are in an equally strong bargaining position the Courts have tended to give effect to the exclusion of the FTA.[55]

[284] In terms of the factors in s 5D(4) there is nothing in the subject matter or value of the services under the Teaming Agreement that are of particular note by themselves. These were significant commercial contracts concerning the delivery of services entered in the ordinary course of business. The respective bargaining position of the parties was essentially equal, and neither party was required to accept or reject the agreement in any way that suggests unfairness. The parties were both legally advised. So all these factors are generally strongly in favour of Dassault's argument that the agreement should be enforceable in its terms. Of the listed factors in s 5D(4) the only factor in Fujitsu's favour is that set out in s 5D(4)(d). That is because Dassault became aware that its conduct was misleading, and it took steps to prevent the Department or Fujitsu becoming aware of this before the entry of the agreements in December 2018 to ensure that the contracts were not put at jeopardy.

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53 *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2021] 1 NZLR 145 at [132] (footnotes excluded).

54 See *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2009) 12 TCLR 626 at [15]; *Brownlie v Shotover Mining Ltd* CA181/87, 21 February 1992 at 31–32; *Sipka Holdings Ltd v Merj Holdings Ltd* [2015] NZHC 1980 at [56].

55 *LSD 2017 Ltd v Landscaping Direct Ltd (In liq)* [2022] NZCA 657; *Williams v Tellen Systems NZ (2013) Ltd*, above n 52.

[285] Given these factors I accept Dassault's arguments that it is fair and reasonable to give full effect to the exclusion of liability clauses in relation to Fujitsu's claims arising out of its liability in relation to the amounts the Department paid to it (totalling $637,548.06) and the amounts the Department paid to third parties (totalling $1,402,323.50). Fujitsu must accept the commercial consequence of it deciding to be the prime contractor, and accordingly taking the commercial risk of this contract, including the risks reflected with the warranties it elected to give. Those risks included the liability of this kind, and there is nothing unfair or unreasonable in Fujitsu being held to the bargain that it struck with Dassault in this context. These were arms-length commercial parties, with equal bargaining strength, and there is no reason for their contract not to regulate such liability.

[286] But notwithstanding that this is a very strong starting point in relation to all of the liability that Fujitsu faces, I have concluded that it is not fair and reasonable for Dassault to exclude the FTA in one respect — that is the liability arising from the licence fee for Quintiq which forms the Department's claim against Fujitsu. That is because there are factors in relation to this potential liability, and Dassault's conduct, that are of particular significance. In particular:

(a) The licence fee was paid to Dassault, and it represents a complete windfall. The licence cannot be used by the Department. It is the fee to licence software that has not been installed in the Department's systems because the relevant installation contract has been brought to an end as a result of the misrepresentations. In effect the Department purchased a licence for nothing, and there has been a total failure of consideration in that sense. I note that in the licence agreement between the Department and Dassault the one situation where the Department could have recovered in a claim directly against Dassault is if the Quintiq product had failed to operate in the Department's systems in accordance with its documentation, in which case the Department could terminate the licence and recover what it had paid for it.[56] There is an

[56] Dassault Systèmes Customer Licence and Online Services Agreement dated 12 December 2018, cl 6.1.

analogy between that situation, and the present situation as the licence is unusable.

(b) Unlike other payments made to Dassault there was no cost to it associated with the licence. Unlike the work that it did on this project which involved the time and attendance of its executives under SOW23 and 27 the licence fee represents pure profit. The claim is simply seeking that Dassault repay an amount paid to it for a licence that it is not using, and a service that it does not provide.

(c) The licence fee was Dassault's intended gain from its misleading conduct. When Dassault appreciated that the RFP response had not accurately represented what could be provided for the price indicated, it embarked upon the strategy of not disclosing this. A primary motivation when doing so was to secure the licence payment — in Ms Gayner's email to Mr Deans and others on 18 September 2018 she suggested that Dassault not provide information that would identify the gaps "to ensure we get the licence across the line which has already been extremely tough to achieve". Dassault knew that its conduct had been misleading — a factor identified in s 5D(4)(d) — and it decided not to be open about that with either the Department or Fujitsu so that it could secure this licence fee. It would be wrong as a matter of principle, and inconsistent with the policy of the FTA, to allow Dassault to succeed with this strategy.

(d) Fujitsu is largely an innocent party in relation to the liable misrepresentations. The untrue statements in the RFP response, and the negotiations, are attributable to Dassault. Fujitsu is responsible for them as the prime contractor, and because Dassault was its chosen technology sub-contractor. I do not accept Dassault's argument that the Court should exercise its discretion to reduce any recovery because of Fujitsu's own conduct. Any discretionary reduction for such matters is already addressed by the reduction arising from the operation of the

exclusion clauses.[57] The only element of misleading conduct Fujitsu engaged in itself arises from its failure to pass on Dassault's increased price estimate and the suggested reasons for it. But liability for the claimed losses arises irrespective of that feature of the case. Fujitsu is liable in this case because of Dassault's conduct, and it is not fair and reasonable that Dassault can avoid liability altogether in the circumstances.

(e) The licence fee payment arose under separate contracts involving the One Time Reseller Agreement between Dassault and Fujitsu, and the Customer Licence Agreement between Dassault and the Department. These involve separate considerations to be addressed under s 5D(4). Indeed it may be that it is the One Time Reseller Agreement, and its exclusions, rather than the Teaming Agreement to which s 5D is applied in relation to this part of the claim. Fujitsu operated as a conduit for the licence fee under these agreements. It did not provide any services in connection with the licence, and it was simply operating as Dassault's one-off reseller. The substantive seller of the licence, and the party receiving the benefit for the licence payment, was Dassault.

[287] Fujitsu advanced an alternative argument that Dassault was directly liable to the Department under the FTA as a matter of accessory liability, and that there were no exclusion clauses between the Department and Dassault that would prevent that recovery. Whether the Court makes such orders under s 43 is a matter of discretion.[58] I do not agree to exercising the discretion in this way. That approach would be inconsistent with the contractual framework agreed between the Department and Fujitsu, and between Fujitsu and Dassault. It is more appropriate to address the contractual framework chosen by commercial parties in trade in the manner contemplated by the FTA, especially s 5D. I do not consider it appropriate to use accessory liability to make orders under s 43 in a manner that circumvents the need to confront this statutory framework for assessing liability. But, in any event, approaching the case in that way would lead to a similar outcome in my view. It is

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57 See *Shabor Ltd v Graham* [2021] NZCA 448, (2021) 16 TCLR 177.
58 At [57].

fair and reasonable that Dassault be liable for the amount of the licence fee paid to it, but not more. That is so whether applying the test under s 5D or the discretion under s 43.

[288] Nevertheless for the above reasons, in relation to this particular aspect of the claim — represented by the Department's successful claim for the licence fees in the amount of $1,836,010.65, I conclude that it is not fair and reasonable for the clauses to exclude FTA liability given these circumstances. I conclude that Fujitsu should succeed against Dassault for this amount.

[289] That finding is subject to one complication. The amount of the Department's claim may well be subject to a margin that Fujitsu included. I do not consider that Fujitsu can succeed against Dassault for the amount of its margin. The amount which represents Dassault's liability to Fujitsu should be limited to the amount that Fujitsu paid to Dassault in relation to the licence the Department acquired. That amount has not been clearly identified, and I am unsure whether it is apparent from the evidence. I accordingly reserve leave to the parties to allow them to identify the relevant amount for which judgment should be entered for Fujitsu against Dassault given the above findings.

Destruction of documents

[290] Fujitsu's final claim against Dassault involves an allegation that Dassault improperly destroyed documents associated with the project that it was obliged to keep.

[291] This allegation is based on the terms of yet another agreement entered between Fujitsu and Dassault dated 21 December 2018 under which Fujitsu appointed Dassault as its sub-contractor for the intended work on the project.[59] Amongst the terms of the contract were the following obligations:

> *Information to be maintained by the Subcontractor*
>
> 3.5 The Subcontractor shall keep full, true and up to date records and documentation relating to the Services provided under this Agreement.

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59 Sub-contract Agreement for the provision of application to development services.

> 3.6 The Subcontractor will, upon request, provide the Principal with copies of or access to, proper, accurate, auditable and up-to-date records, technical information (collectively, "records") relating to the Services. For avoidance of doubt, the Subcontractor will not be obliged to provide any records which would be deemed as commercially sensitive (e.g. human resources I staffing records with respect to Personnel providing the Services, commercial information relating to the actual costs of the Services).

[292] This aspect of the claim has two relevant elements. First Fujitsu has argued that Dassault's defence should be struck out, or that adverse inferences drawn because it has admittedly destroyed contemporaneous records that were relevant to the case in breach of r 8.3 of the High Court Rules 2016. Secondly Fujitsu alleges there has been a breach of this agreement as the seventh cause of action.

[293] As to the first matter, I dealt with Fujitsu's application to strike out Dassault's defence prior to trial.[60] I essentially repeat the findings in that judgment here. Dassault's destruction of materials was no better explained at trial. It called one further witness, Mr Michael Tohu, the litigation support manager of its New Zealand solicitors. He had no knowledge of what had happened at Dassault, and no better explanation for Dassault's document destruction, and why it was allowed to happen, was provided in evidence. But I have nevertheless not relied on drawing adverse inferences when making the findings above. I am satisfied that most, if not all relevant documentation has been retrieved in one way or another. Dassault's discovery has included adverse documents. Some have been relied upon for the purpose of making findings. I am not satisfied that there is further information that has been unavailable to the Court because of Dassault's document destruction policies and its failure to comply with the High Court Rules.

[294] As to the seventh cause of action I am not satisfied that a breach of cls 3.5 or 3.6 arises. I do not consider that materials such as email exchanges amount to documentation "relating to the services" under the agreement as contemplated by these clauses. The term "services" was defined to include services provided under specific statements of work. So the obligation does not relate to all documentation generally, but rather to documents relating to the particular services under statements of work. It relates to the work that Dassault actually did under SOW27 after the contracts were

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60 *Chief Executive of the Department of Corrections v Fujitsu New Zealand Ltd* [2023] NZHC 1900.

put into place in December 2018, not internal email exchanges within Dassault in the period leading up to the agreement, or even necessarily internal emails occurring after the entry of the agreement. The documentation would need to relate in some way to the actual performance of SOW27. Fujitsu has not proved that any missing documents are of that character.

[295] In any event there has been no loss proved to have arisen from any breach the agreement in this respect. Fujitsu appears to have recognised this in closing by suggesting the appropriate approach is to award Fujitsu indemnity costs. I am prepared to consider the relevance of this as part of the Court's discretion as to costs, but I am not prepared to award indemnity costs as a remedy for breach of contract, and do not consider there are any principles that would result in this award.

[296] For these reasons this cause of action is dismissed.

Conclusion

[297] The Department engaged in a major exercise to reform its system for rostering its officers over the prison network. In its response to the Department's RFP Fujitsu represented that the Department's rostering needs could be met by the standard, or "out of the box" functionality of a product offered by its sub-contractor, Dassault, called Quintiq. It stated that no customisation to this product would be required, although some configuration would be necessary in relation to particular matters. It represented that the Quintiq solution could provide the Department with what it needed for core functionality at an estimated price of $716,000 in addition to a licence fee.

[298] The Department had only described its rostering needs at a very high level when these representations were made, but Fujitsu did not qualify these representations by suggesting that their accuracy depended on it having more information about the Department's systems. The RFP response was subject to a very clear qualification, however, that it could not be relied on in any legally binding sense, and that all matters would need to be confirmed before contractual commitments were made. But in the period following the RFP response and the entry of the contracts in December 2018 the representations that Fujitsu and its sub-contractor Dassault had

made were reiterated, both in product demonstrations, and in other respects, and Dassault then insisted that contracts were entered. The only relevant qualification to the prior representations was that the Department became aware that the position about SAP integration was much more complicated than Fujitsu had said.

[299] During this period of time Dassault also realised that what had been said in the RFP response was inaccurate, and that there would likely be a gap between the Department's requirements and what could be provided with Quintiq's standard functionality. But it decided not to correct the misrepresentation as it did not want to put the contract, and particularly the significant licence fee that the Department would commit to on entering the contract, at risk.

[300] In any event, Fujitsu elected to provide warranties to the Department when it entered the contracts for the provision of the Quintiq solution in December 2018. Those warranties included a warranty that what had been said in the RFP response was accurate and had not changed in any materially adverse way. The qualification in the RFP response was accordingly no longer relevant.

[301] What was stated by Fujitsu and Dassault about Quintiq was untrue. Quintiq's standard functionality could not meet the Department's needs, and extensive work in the nature of customisation was required for it to do so. The contract was brought to an end when Fujitsu provided an updated estimate in 2019 that the costs of doing so were in excess of $5 million — well beyond the $716,000 indicated in the RFP response for the core functionality that had induced the entry of the contract.

[302] The Department succeeds in its claims for breach of warranty against Fujitsu, and is entitled to recover the amount it paid to Fujitsu for work to implement it, the amount it paid to Fujitsu for the Quintiq licence, and the third party costs it incurred in seeking to implement the contract.

[303] Dassault is also potentially liable under the CCLA and FTA to Fujitsu because it engaged in misrepresentations and misleading and deceptive conduct. The misrepresentations in this case originated at Dassault, and it was Dassault that adopted the strategy of knowingly misleading the Department and Fujitsu. But the contractual

terms between Fujitsu and Dassault protect Dassault from liability. Parties are entitled to contract out of liability under the CCLA and FTA however, and Fujitsu and Dassault did so here. But that finding is subject to one qualification. Dassault cannot avoid its liability under the FTA to repay the licence fee that was charged for the Quintiq product. It would be grossly unfair, notwithstanding the exclusion clauses, to allow Dassault to keep this fee, and thereby allow it to secure a windfall gain, being the very gain it sought to achieve by knowingly misleading the Department and Fujitsu.

[304] For the above reasons I uphold the Department's claim against Fujitsu in the amount of $3,875,882.35 for breach of contractual warranty, and I uphold Fujitsu's claim against Dassault under the FTA in relation to the amount of $1,836,010.65 less the amount of any margin charged by Fujitsu on that sum. I reserve leave to address the question of the margin, the appropriate calculation of the quantum, and in relation to interest. Those matters are to be addressed at the same time as costs if they cannot be agreed. Given the leave reserved this judgment is an interim judgment in accordance with r 11.2(a) of the High Court Rules.

[305] I will receive memoranda of counsel in relation to costs if these cannot be agreed. It may be that there have been settlement offers that are relevant to costs. But by way of preliminary indication it seems to me that the starting point is that the Department is entitled to recover costs against Fujitsu, and Fujitsu is entitled to recover against Dassault. In relation to Fujitsu's recovery against Dassault, however, it would only be in relation to its claim and not the full costs of trial. Whilst the Department will likely be able to recover costs for the whole trial it may be that only half the trial was attributable to Fujitsu's claims against Dassault for the purpose of Fujitsu's costs claim. If the position is not agreed I will see memoranda from the party or parties seeking costs within 30 working days of release of this judgment, and memoranda in response within 10 working days thereafter. All memoranda should be no longer than 12 pages plus a schedule. No memoranda in reply can be filed without leave (which may be sought informally by email to the Registrar).

Cooke J

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