Naughty G Pte Ltd *v* Fortune Marketing Pte Ltd
[2018] SGHC 190

Case Number : Suit No 478 of 2014

Decision Date : 03 September 2018

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Deborah Barker SC, Hewage Ushan Premaratne, Shalini d/o Mogan (KhattarWong LLP) for the plaintiff; Nedumaran Muthukrishnan (M Nedumaran & Co) for the defendant.

Parties : Naughty G Pte Ltd — Fortune Marketing Pte Ltd

Evidence – Admissibility of evidence

Contract – Contractual terms – Express terms – Oral contract

Contract – Breach

Contract – Discharge

3 September 2018 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The plaintiff is a Singapore incorporated company in the business of import, wholesale and retail of supplement drinks, energy drinks, other beverages and snack foods ("Products"). The Products include, but are not limited to, drinks which are marketed under the name "Naughty G".

2 The defendant is a Singapore incorporated company in the business of general wholesale trade and the import and export of food & beverage products.

3 This suit arises out of an oral agreement between the plaintiff and defendant. While the existence of the agreement is not in dispute, the nature and scope of the oral agreement is hotly contested between the parties. Both parties allege breaches of the oral agreement and a failure to pay various debts owed. The parties also dispute the circumstances pertaining to the termination of the oral agreement.

4 The plaintiff claims that a proper set-off and accounting of all the debts owed between the plaintiff and the defendant will show that the defendant owes the plaintiff a net amount of $141,386.02. [note: 1] The defendant disputes this and claims that it is the plaintiff that has failed to pay for invoiced sums amounting to $291,032.28. [note: 2]

5 This discrepancy arises because over the course of their relationship, the plaintiff and defendant developed a practice of issuing invoices/credit notes to the other party in respect of various debts owed and agreed to a "contra arrangement" where they would set-off their debts owed to each other as opposed to paying each other directly. Unfortunately, the parties could not agree on

the debts, and their respective invoices/credit notes reflected their difference in opinion on the correct amount that was owed. This disagreement stems partly from a disagreement as to liability for the debts and partly as to the quantification of the debts.

6 As a result, a significant portion of the trial focused on whether certain debts were correctly represented in individual invoices/credit notes issued by either the plaintiff or the defendant. The invoices and credit notes could have been properly grouped into discrete issues in the interest of clarity and to facilitate proper examination, but unfortunately, because the parties were often at cross purposes when scoping the issues, this was not done in an adequate manner.

7 The trial was heard over six days. The defendant called one witness to give evidence at trial: Mr Ramu Chidambaram ("Ramu"). Ramu is the sole director of the defendant. Initially, the plaintiff intended to call two witnesses to give evidence at trial: Mr Abraham Isaac ("Abraham") and Mr David Isaac ("David"). Abraham is David's father, and both are directors of the plaintiff. For reasons that will become apparent, Abraham eventually did not turn up at trial. I will discuss the implications of this in due course.

8 The trial has been bifurcated between liability and quantum. Therefore, this judgment will focus on issues of liability including the issue of the net amount of debt owed. The issues relating to the quantification such as the assessment of damages arising from breaches of the Agreement will be dealt with in a subsequent hearing before the Registrar.

Background Facts

The parties

9 The plaintiff has three directors and shareholders, Abraham, David and Mr Jeremy Isaac. The plaintiff also employs an accountant, Ms Chow Pooi Yen ("Pooi Yen"). Abraham, David and Pooi Yen were the three representatives of the plaintiff that dealt with the defendant.

10 The defendant has two shareholders, Ramu and his wife. Ramu is the sole director of the defendant. The defendant employs a manager, Mr Mahipal Reddy ("Mahipal"). Ramu and Mahipal were the two representatives of the defendant that dealt with the plaintiff.

Background to the dispute

11 The plaintiff's business model involves ordering the Products from overseas manufacturers. These manufacturers deliver the Products to the plaintiff in Australia or Singapore. The plaintiff then supplies the Products to retailers. [note: 3]

12 Prior to 2013, the plaintiff was engaged in supplying the Products to several major retailers in Singapore. These major retailers included supermarket chains such as NTUC Fairprice, Cold Storage, Giant and Shop N Save as well as convenience stores chains such as 7-Eleven and Cheers. The brands behind these chains are under the ownership of two companies: NTUC Co-operative Ltd ("NTUC") (which owns NTUC Fairprice and Cheers) and Dairy Farm International Holdings Limited ("Dairy Farm") (which owns Cold Storage, Giant, Shop N Save and 7-Eleven). Aside from these major retailers, the plaintiff also supplied the Products to other retailers such as Sheng Siong Supermarket Pte Ltd.

13 Sometime in January 2013, Ramu and Abraham were in discussions relating to the entry into some form of business relationship. Pursuant to this, there was an inspection of the plaintiff's

inventory in Singapore located inside a warehouse leased by the plaintiff called Ruby Warehouse Complex ("Ruby Warehouse"). [note: 4]

14 On 1 February 2013, the plaintiff and defendant entered into an oral agreement ("the Agreement"). As highlighted, the precise nature of the Agreement is hotly contested. However, certain facts were not disputed:

(a) The Agreement included a handover of all the plaintiff's stock in Singapore to the defendant and the defendant would take over the plaintiff's accounts with retailers in Singapore and sell the Products to these retailers. The defendant would also take over the operation of Ruby Warehouse and agreed to pay rent for the use of Ruby Warehouse. [note: 5]

(b) The plaintiff and defendant agreed on a handover price to be paid by the defendant to the plaintiff. The original sum was set at $440,875.25. This was to be paid in 3 instalments, with the first instalment being $200,000. I shall refer to this as the "Instalment Scheme". The defendant paid the plaintiff a sum of $200,000 on 1 February 2013. [note: 6] It is not disputed that the number of instalments to be paid was subsequently varied to four instalments.

(c) The defendant initially agreed to purchase a van with the registration number GW6982Y, a lorry with the registration number YL7388B and a forklift truck with a model number FB25EX-5 ("Three Vehicles"). [note: 7] However, the parties eventually could not agree on a price.

(d) On 6 February 2013, the parties completed a stock take of the inventory balance at Ruby Warehouse. [note: 8] The stock take generated a "stock handover list" which was signed by Mahipal on behalf of the defendant. After the stock take, the total amount due under the Instalment Scheme was mutually varied to $420,621.24. The stock handover list included 1750 cartons of a product called Naughty G Sugar Free and 1750 cartons of a product called Naughty G Jasmine Green Tea that was given free of charge. [note: 9]

(e) Sometime in February 2013, the defendant duly took over the operation of Ruby Warehouse.

15 In order for the defendant to sell the Products directly to retail chains under the control of NTUC and Dairy Farm, the defendant would need to set up accounts with these retailers and transfer certain product identification codes called Stock Keeping Units ("SKUs") from the plaintiff's account to the defendant's account. Each SKU would correspond to one particular product sold by the defendant or plaintiff to a retailer. Since it would take some time for the accounts to be set up and for the SKUs to be transferred, the plaintiff agreed to collect money from the retailers on behalf of the defendant in the interim. [note: 10] In practice, the plaintiff would receive orders and collect payment from the retailers, and the defendant would operate Ruby Warehouse and deliver the Products to the retailers.

16 Unfortunately, the parties' relationship deteriorated rapidly. By 1 April 2013, when the third instalment in the Instalment Scheme was due to be paid, the defendant refused to pay any money, on the basis that taking into account all the debts that were due on both sides, the plaintiff owed the defendant more money. [note: 11] The plaintiff took the opposite position, and was of the view that it was the defendant that owed the plaintiff more money at the point. By this time the "contra arrangement" (see [5] above) was in full force, and neither party would pay each other. This was due to a wide array of disputes, some of which I set out below for context:

(a) The defendant alleged that some of the stock it was sold was defective, either because they were unmerchantable or close to expiry.

(b) The parties could not agree on which party should bear the cost of certain rebates, allowances and promotional charges ("Promotional Charges") that the retailers imposed. The retailers would either invoice a seller directly for the Promotional Charges, or deduct the charges from the sales collection they would pay out to the seller. Since the plaintiff was the party with the SKUs for the Products for the period of February to April 2013, it was the plaintiff that was invoiced by the retailers, and the sales collections collected by the plaintiff were also correspondingly reduced by the retailers.

(c) The parties also could not agree on whether the plaintiff should pay the defendant the sales collections collected on behalf of the defendant the moment the Products were sold to the retailers, or only after the plaintiff had collected money from the retailers.

17 On 9 April 2013, plaintiff sent an email to the defendant titled "amended written agreement", which enclosed a draft written contract ("9 April Draft"). [note: 12] However, the 9 April Draft was never signed. Nevertheless, the parties do not dispute that the 9 April Draft accurately reflects the terms of the Agreement, save for the terms disputed in a letter sent by the defendant's solicitors on 12 July 2013 ("Kalamohan Letter"). [note: 13]

18 The defendant did not pay rent for the use of Ruby Warehouse for similar reasons as its refusal to pay money under the Instalment Scheme (see [16] above). The plaintiff repeatedly requested for payment of rent and the settlement of outstanding sums, but the defendant refused. Eventually, on 30 April 2013, David threatened to remove the defendant from Ruby Warehouse if the defendant did not pay the amounts owed to the plaintiff. [note: 14] The defendant did not pay, and the plaintiff removed the defendant from Ruby Warehouse.

19 After this incident, the plaintiff, in a series of emails, asked whether the defendant wanted to continue with their business arrangement and requested rectification of various alleged breaches. The defendant denied the breaches but continued communicating with the plaintiff to arrange for the transfer of stocks from Ruby Warehouse to a warehouse leased by the defendant. [note: 15]

20 While this was ongoing, the defendant managed to set up accounts with NTUC and Dairy Farm by mid-April 2013, and effected the transfer of the relevant SKUs by mid-May 2013. [note: 16]

21 The plaintiff and defendant continued to correspond throughout May 2013, but they could not resolve their differences. Eventually this escalated into lawyer's letters being exchanged. [note: 17] The plaintiff purported to terminate the Agreement via a letter sent on 5 June 2013. [note: 18] After this point, the plaintiff wanted the defendant to transfer the SKUs back to the plaintiff's account with the retailers, but the defendant refused to do so.

22 On 12 July 2013, the defendant's solicitors sent out the Kalamohan Letter, which set out numerous amendments to the 9 April Draft that the defendant alleged were part of the Agreement but were not reflected in the 9 April Draft.

23 The parties corresponded for some time, but they were unable to come to a resolution of their disputes and the plaintiff filed a suit on 7 May 2014.

24 The plaintiff applied for summary judgment in respect of part of its claim relating to the return of the SKUs linked to the Products. In SUM 3675/2014, I gave summary judgment in favour of the plaintiff.

25 About a month prior to the first day of trial, the plaintiff made an application for Abraham to give evidence by video-link from Australia, on the basis that Abraham was suffering from a medical condition that made it difficult for him to give evidence, namely, a phobia of heights. I rejected the application and instead directed that Abraham be examined by a doctor on the first day of trial itself to determine whether it was appropriate for him to give evidence on the stand in my court on the 4th floor. However, Abraham chose not to show up for trial. The plaintiff now urges the court to admit Abraham's affidavit of evidence-in-chief ("AEIC") despite his absence at trial. I will first deal with the preliminary issue of the admissibility of Abraham's AEIC before addressing the substantive claims.

Preliminary issue: Admissibility of Abraham's evidence

26 The plaintiff argues that Abraham's AEIC ought to be admitted on two alternative grounds:

(a) First, under s 32(1)(*j*)(iii) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"); and

(b) Second, under O 38 r 2(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").

27 I reject both grounds. I turn first to deal with the argument on the EA. The relevant portions of s 32 read as follows:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> **32.**—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> **or is made by person who is dead or who cannot be produced as witness;**
>
> (*j*) when the statement is made by a person in respect of whom it is shown —
>
> (iii) that he is outside Singapore and it is not practicable to secure his attendance; or
>
> …
>
> (3) A statement which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.
>
> (4) Except in the case of subsection (1)(*k*), evidence may not be given under subsection (1) on behalf of a party to the proceedings unless that party complies —
>
> …
>
> (b) in all other proceedings, with such notice requirements and other conditions as may be prescribed in the Rules of Court or the Family Justice Rules.

(5) Where a statement is admitted in evidence under subsection (1), the court shall assign such weight as it deems fit to the statement.

28 The term "statements" within s 32 of the EA is wide enough to encompass AEICs. Additionally, the court in *Wan Lai Ting v Kea Kah Lim* [2014] 4 SLR 795 ("*Wan Lai Ting*") examined s 32 of the EA and concluded that the provisions do apply to AEICs (see *Wan Lai Ting* at [13]–[15]). This position was confirmed by the Court of Appeal in *Cheo Yeoh & Associates LLC and another v AEL and others* [2015] 4 SLR 325 at [94]–[96], where the court affirmed a trial judge's decision to admit an AEIC pursuant to s 32.

29 However, an AEIC of a witness who is absent from trial is not to be admitted as a matter of course. From the wording of s 32 of the EA as set out above, it is clear that there are two requirements before such an AEIC can be admitted pursuant to s 32(1)(*j*)(iii). First the witness must be outside of Singapore, and second it must not be practicable to secure his attendance: s 32(1)(*j*)(iii). Even if these two requirements are met, the court nevertheless can exclude the AEIC if it is not in the interest of justice to admit the AEIC: s 32(3).

30 The Court of Appeal in *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 ("*Gimpex*") examined the requirements of s 32(1)(*j*)(iii) of the EA in some detail. The court highlighted that the burden of proving the requirements of s 32(1)(*j*) lies with the party seeking to rely on that provision (see *Gimpex* at [97]). The court also stated that "what is 'practicable' is open to interpretation and would depend on the circumstances" (see *Gimpex* at [98]).

31 In the present proceedings, the first requirement is not disputed: both parties agree that Abraham is currently living in Australia. However, the parties are disputing whether it is practicable to secure Abraham's attendance.

32 At the trial itself, no evidence was tendered to explain why it was not practicable to secure Abraham's attendance. However, as highlighted, prior to trial, the plaintiff had made an application for Abraham to give evidence via video-link due to his phobia of heights. It appears that the factual basis of the plaintiff's arguments on impracticability is Abraham's purported phobia of heights. [note: 19] The difficulty with the plaintiff's argument is that the assertion that Abraham suffers from this phobia appears fairly dubious given that: [note: 20]

(a) Abraham and Ramu had jointly visited the offices of various companies located at relatively high floors in the past, and yet Ramu did not observe any signs of stress or anxiety on the part of Abraham;

(b) The plaintiff's own office at Orchard Towers, which Abraham had frequented and used, was located on the 10th floor;

(c) The hearing dates were taken a year in advance, but the application to give evidence via video-link or make special provision for Abraham's condition was only made about a month prior to trial; and

(d) While the plaintiff did manage to produce a medical certificate stating that Abraham suffers from a phobia of heights, the defendant has highlighted that the medical certificate was produced by a general practitioner and not a specialist in such conditions.

33 In light of the questionable nature of the assertion made by the plaintiff, I decided to give the plaintiff an opportunity to clear all doubts on Abraham's condition by directing the parties to arrange

for a medical expert to examine Abraham in court to verify his claim, with the losing party bearing the cost of the examination. Despite this, Abraham has decided not to show up at trial. In the circumstances, the plaintiff has adduced insufficient evidence to prove that it was impracticable to secure Abraham's attendance due to his purported medical condition. On this basis, Abraham's AEIC cannot be admitted via s 32(1)(*j*)(iii) of the EA. I now turn to examine the plaintiff's argument on O 38 r 2(1) of the ROC.

34 Order 38 r 2(1) states:

> **Evidence by affidavit (O. 38, r. 2)**
>
> **2.**—(1) Without prejudice to the generality of Rule 1, and unless otherwise provided by any written law or by these Rules, at the trial of an action commenced by writ, evidence-in-chief of a witness shall be given by way of affidavit and, unless the Court otherwise orders or the parties to the action otherwise agree, such a witness shall attend trial for cross-examination and, *in default of his attendance, his affidavit shall not be received in evidence except with the leave of the Court*. [emphasis added]

35 As seen from the italicized portion set out above, the court has the discretion to grant leave under O 38 r 2(1) of the ROC. Due to the questionable nature of the reasons provided for Abraham's failure to attend trial as highlighted above at [32]–[33], I do not think it is appropriate to exercise my discretion to grant leave under O 38 r 2(1).

36 Additionally, the Court in *Wan Lai Ting* at [24] has highlighted that "s 32 of the EA and O 38 r 2(1) of the ROC should be applied consistently with each other". I agree with this view. It would require compelling reasons before a party, that has failed to admit an affidavit via s 32 of the EA, can convince the court to exercise its discretion under O 38 r 2(1) of the ROC to admit the same affidavit. The present case does not merit special consideration.

The parties' cases

The plaintiff's case

37 The plaintiff's case is that the Agreement of 1 February 2013 was in the nature of a distributorship agreement and the defendant was appointed as a distributor of the Products by the plaintiff. [note: 21] The terms of the Agreement were substantially captured in a draft contract that was printed out and shown to Ramu on 27 February 2013 ("27 February Draft"). [note: 22] The 27 February Draft was updated and became the 9 April Draft. [note: 23] According to the plaintiff, the Agreement was properly terminated by the plaintiff on 5 June 2013.

38 The plaintiff alleges that the defendant had breached its contractual obligations in several ways: [note: 24]

(a) The defendant failed to set up accounts with NTUC and Dairy Farm and transfer the relevant SKUs in a timely manner;

(b) The defendant failed to pay the remaining monies due under the Instalment Scheme;

(c) The defendant refused to pay for incoming and new stocks that had been ordered;

(d) The defendant failed to reimburse the plaintiff for certain expenses paid on the defendant's behalf; and

(e) The defendant refused to place orders to keep sufficient stock levels of the Products to keep up supply to the retailers.

39 The plaintiff further avers that the defendant is liable to pay for the use of Ruby Warehouse for the months of February, March, April and May 2013. The defendant is also liable for the rental of the Three Vehicles.

The defendant's case

40 The defendant's case is that the Agreement involved the sale and takeover of the entire distribution business of the plaintiff. [note: 25] In its view, it had become an owner of the distribution business rather than a mere distributor appointed by the plaintiff.

41 The defendant avers that it never had sight of the 27 February Draft, and only had sight of the 9 April Draft. [note: 26] The 9 April Draft did not fully capture the terms of the Agreement as the amendments highlighted in the Kalamohan Letter were not reflected in the 9 April Draft.

42 The defendant claims that it did not breach any contractual terms. In particular, the defendant was not obliged to pay the remainder of the sums due under the Instalment Scheme because the plaintiff had failed to pay several debts that totalled up to an amount larger than that which was due under the Instalment Scheme. [note: 27]

43 Instead it is the plaintiff which was in breach. This is because:

(a) The plaintiff had agreed to clear "short-term expiry stocks" within 3 months of the entry into the Agreement, but it did not; [note: 28]

(b) The plaintiff sold goods that were not merchantable to the defendant; [note: 29]

(c) The plaintiff directly sold the Products to 3rd party customers; [note: 30]

(d) The plaintiff failed to deliver products referred to collectively as "Organic Water" that was ordered by the defendant; [note: 31] and

(e) The plaintiff pressurised the defendant to purchase certain goods. [note: 32]

44 The defendant further claims that the plaintiff wrongfully terminated the Agreement by removing the defendant from Ruby Warehouse on 30 April 2013. [note: 33]

45 The defendant also asserts that a variety of miscellaneous sums were owed to it as reflected in its invoices issued to the plaintiff. [note: 34]

Issues to be determined

46 For the sake of clarity, I have grouped the issues into six broad categories and one miscellaneous category.

47 First, I will consider the nature of the Agreement, in particular, whether the defendant was "appointed a distributor" or whether the defendant had purchased the entire business and was hence an owner of the plaintiff's business of selling the Products to retailers in Singapore.

48 Second, I will consider the bulk of the defendant's allegations of the plaintiff's breaches. This includes a consideration of the following issues:

(a) Whether the plaintiff was in breach of a term prohibiting direct sale of the Products to 3rd party customers;

(b) Whether the plaintiff was in breach of an obligation to clear "short-term expiry stock"; and

(c) Whether the plaintiff was in breach of an obligation to ensure that products sold to the defendant would be merchantable.

49 Third, I will consider the alleged debts owed under the Instalment Scheme and the reasons given for the defendant's refusal to pay. The issues to be considered include:

(a) Whether the plaintiff or the defendant should bear the costs of the Promotional Charges; and

(b) Whether the defendant is obliged to pay any remaining amount under the Instalment Scheme.

50 Fourth, I will consider the issues relating to Ruby Warehouse including:

(a) Whether the defendant is liable to pay rent for February, March and April 2013;

(b) Whether the defendant's removal from the warehouse on 30 April 2013 constitutes wrongful termination of the Agreement; and

(c) Whether the defendant is liable to pay rent for May 2013.

51 The fifth category pertains to the plaintiff's allegations of the defendant's breaches including:

(a) Whether the defendant was obliged to pay for incoming and new stock that had been ordered;

(b) Whether the defendant was in breach of an obligation to maintain sufficient stock levels; and

(c) Whether the defendant breached a term by setting up the Dairy Farm and NTUC accounts in April 2013 and transferring the relevant SKUs in May 2013.

52 The sixth category of issues focuses on the termination of the Agreement. This category will consider whether the plaintiff had properly terminated the Agreement, and the date it was terminated.

53 The miscellaneous category will consider a variety of miscellaneous claims which will be elaborated upon at the appropriate juncture.

Applicable legal principles

54 A key difficulty in the present case is that the Agreement was not reduced into writing and signed. Instead the parties are alleging breaches of terms of an agreement that was made orally, albeit with subsequent unsigned documents as evidence of its terms. This requires the court to embark on a fact finding exercise in order to first ascertain the terms of the contract.

55 The court in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR (R) 927 at [46] has highlighted that in the process of ascertaining the terms of a contract, a holistic approach considering both documentary evidence and witness testimony is to be to undertaken.

56 In the context of determining the existence of an oral agreement, the court in *ARS v ART and another* [2015] SGHC 78 ("*ARS*") at [53] has stated:

> 53 I distil the following guiding principles on the proper approach for determining the existence of an oral agreement as set out in the cases cited above:
>
> (a) in ascertaining the existence of an oral agreement, the court will consider the relevant documentary evidence (such as written correspondence) and contemporaneous conduct of the parties at the material time;
>
> (b) where possible, the court should look first at the relevant documentary evidence;
>
> (c) the availability of relevant documentary evidence reduces the need to rely solely on the credibility of witnesses in order to ascertain if an oral agreement exists;
>
> (d) oral testimony may be less reliable as it is based on the witness' recollection and it may be affected by subsequent events (such as the dispute between the parties);
>
> (e) credible oral testimony may clarify the existing documentary evidence;
>
> (f) where the witness is not legally trained, the court should not place undue emphasis on the choice of words; and
>
> (g) if there is little or no documentary evidence, the court will nevertheless examine the precise factual matrix to ascertain if there is an oral agreement concluded between the parties

57 The plaintiff urges the court to adopt similar principles in the present case. I agree that the principles that guide the court in determining the existence of an oral contract are broadly applicable in the context of ascertaining the terms of an oral contract as well. Both involve a holistic view of the evidence in order to determine what (if anything) was agreed between the parties. As *ARS* makes clear, relevant documentary evidence and the contemporaneous conduct of the parties at the material time is generally more reliable than the subsequent testimony of the witnesses, which may be affected by the passage of time and the interposition of an acrimonious dispute between the parties. Nevertheless, the absence of documentary evidence is not fatal to a claim, and the court can and will examine the precise factual matrix to ascertain the agreed terms of the contract.

Witness credibility

58 As can be seen from the foregoing, witness testimony is important evidence in the course of ascertaining the terms of the Agreement. As such, before delving into the issues proper, I will make

some remarks on the credibility of the two witnesses that appeared before me at trial.

59 I find that David was generally a reliable witness of truth. He provided clear and direct answers in cross-examination and did not waver when confronted with apparent difficulties in his case. He also provided cogent and logical explanations in re-examination.

60 In contrast, I find that Ramu was evasive, contradictory and vague when confronted with the difficulties in his case. There were many examples of such behaviour over the course of trial, but I will only highlight two instances to illustrate my point:

(a) Ramu alleged in the middle of trial that certain cartons of goods were not properly delivered to him. When confronted with documentary evidence that showed that the number of cartons of those goods in his warehouse had in fact increased, suggesting that the goods were in fact delivered, he conjured up an explanation that the documentary evidence was reporting the goods in the smaller unit of "boxes" instead of "cartons". Time had to be expended in order to calculate the quantity of goods in his warehouse based on this alleged unit of measurement. As it turned out, regardless of whichever unit of measurement was used, the documentary evidence clearly contradicted Ramu's allegation. [note: 35]

(b) During cross-examination, Ramu gave the impression that he was totally shut out of the Ruby Warehouse and had no access to the goods he had left behind, after 30 April 2013. He only changed his position when confronted with clear documentary evidence that demonstrated that he was given access to take whatever stock he wanted. [note: 36]

Issue 1: Nature of the Agreement

61 The plaintiff submits that the Agreement effected the appointment of the defendant as the distributor of the Products in Singapore: The Agreement allowed the defendant to purchase the Products from the Plaintiff in order to introduce, sell, distribute, market, advertise and promote the Products in Singapore. [note: 37] On the other hand the defendant suggests that the Agreement was in fact a sale of the distributorship business to the defendant: The defendant was taking over the plaintiff's entire inventory, day-to-day operations of distributorship, and entire customer accounts. [note: 38]

62 In this context, the labels of "appointment as distributor" and "sale of distributorship business" are not terms of art and without clarity over precisely how the obligations between the two versions of the Agreement differ, there is a real danger that the parties would be arguing over semantic differences rather than a difference in the substance of the Agreement.

63 As such, I sought clarity over the matter at trial. After significant questioning, it appears that the key distinction between the two versions of the Agreement put forth is that under the plaintiff's version, the defendant's appointment could be terminated and upon termination the transaction would be "reversed" in the limited sense that the customer accounts and day-to-day operation of the distributorship would revert back to the plaintiff, whereas under the defendant's version, once the business was sold, the only way to "reverse" the transaction was for the plaintiff to make a fresh offer to repurchase the business, and for the defendant to agree to sell the business. [note: 39]

64 The parties proceed on the assumption that this distinction is significant for the purposes of quantification. In particular they assume it is relevant in relation to the plaintiff's claim for damages for the defendant's retention of the SKUs (see [21] above). Given that I had already decided in SUM

3675/2014 that the defendant was obliged to return the SKUs to the plaintiff after the termination of the Agreement, it is unclear what more a finding on this point will add to the quantification of loss. In any event, it will be for the parties during the assessment of damages phase to draw the links as appropriate and for present purposes I will proceed on the assumption that this issue will having a bearing on quantification.

65 I agree with the plaintiff's characterisation of the legal relationship between the parties. The Agreement effected an appointment of the defendant as a distributor in the sense put forward by the plaintiff. I have come to this conclusion for three reasons.

66 First, the undisputed portions of the 9 April Draft support the plaintiff's characterisation. The relevant portions of the 9 April Draft read as follows: [note: 40]

> **WHEREAS:**
>
> …
>
> (C) [The defendant] intends to purchase the Products from [the plaintiff] in order to introduce, sell, distribute, market, advertise and promote them in [the defendant's] respective Territory as defined in Clause 2
>
> …
>
> **2. APPOINTMENT**
>
> 2.1 [The plaintiff] hereby appoints [the defendant] to act as a distributor of [the Products] throughout the Republic of Singapore (hereinafter called the "Territory").
>
> **3. TERM**
>
> 3.1 This Agreement shall become effective as of the 1 February 2013 upon execution by an officer or other authorized representative of [the plaintiff] in Singapore and by an authorized representative of [the defendant] and shall remain in effect until terminated by either Party for any other reason upon not less than one hundred and twenty (120) calendar days prior written notice to the other Party.
>
> **4. HANDOVER**
>
> …
>
> 4.9 [The plaintiff] hereby assigns the use of all registered product codes or sku codes of the Product with customers in the Territory. All registered product codes or sku codes of Naughty G and DJ&A products shall remain the property of [the plaintiff]. …
>
> …
>
> **5. PRICING AND TERMS OF PAYMENT**
>
> 5.1 The price of the Products shall be according to the Pricing Schedule …
>
> …

5.3 Upon the placing of an order, [the defendant] shall pay [the plaintiff] upfront for 50% of the total cost of the order.

…

8.[*sic*] **DUTIES**

9.1 Without prejudice to the foregoing, during the term of this Agreement, [the defendant]:

…

9.1.4 shall maintain in the Territory sufficient inventory of the Products so as to permit delivery of customer orders for a period of 2.5 months for the term of the Agreement.

…

14.[*sic*] **TERMINATION**

15.1 Either Party will have the right to terminate this Agreement when there is a significant breach of this Agreement by the other Party when the other Party gives the Party in Breach written notice of the breach and a notice period of 10 (Ten) working days to correct the breach.

None of the portions set out above were contested by the defendant in the Kalamohan Letter. I reiterate that the final position taken by the defendant is that any dispute as to the terms of the Agreement is confined to the changes and additions raised in the Kalamohan Letter (see [17] above).

67 The undisputed portions make clear that:

(a) The defendant was expressly stated to be appointed by the plaintiff as a distributor and there was no indication that the Agreement involved a sale of the business (see clause 2.1);

(b) The Agreement specified a business arrangement that involved the defendant periodically purchasing the Products from the plaintiff. It also imposed continuing obligations on the parties. For example, the defendant was obliged to purchase a minimum amount of goods in order to maintain sufficient stock levels (see recital (C), clauses 5.3 and 9.1.4);

(c) The SKUs remained the "property" of the plaintiff (see clause 4.9). It is unclear precisely what clause 4.9 means and the parties did not make any arguments on the nature of the SKUs as property. Regardless, the point remains that to the extent that the customer accounts are linked to the SKUs, the plaintiff did not irrevocably transfer the customer accounts to the defendant;

(d) There were clear provisions for the termination of the Agreement, including a shorter notice period for termination if the obligations imposed by the Agreement were not adhered to (see cll 3.1 and 15.1).

68 The defendant's claim that the entire business was sold to it, with no possibility of return of the plaintiff's customer accounts in the absence of a fresh agreement, appears to contradict the abovementioned undisputed clauses of the 9 April Draft. Instead, the plaintiff's claim that the defendant was merely appointed as a distributor, and his term as a distributor could be terminated, whereupon the customer accounts represented by the SKUs would revert to the plaintiff, appears far more consistent with the clauses set out above.

69 Second, the contemporaneous documentary evidence supports the plaintiff's position. In February 2013, when the plaintiff was in the process of informing its customers (the retailers) about the Agreement with the defendant, the plaintiff repeatedly represented to these retailers that the defendant was being appointed as its distributor. Despite this, there was no protest from the defendant on this characterisation even up till April 2013. [note: 41] The earliest documents where the defendant mentions a purchase of the business are dated May 2013, [note: 42] by which point the parties' relationship had deteriorated considerably. In addition, even the Kalamohan Letter sent on July 2013, which set out the disputes as to the terms of the Agreement did not contain an objection to clause 2.1. Clause 2.1 clearly states that the defendant was appointed as a distributor. The Kalamohan Letter also did not mention anything concerning a sale of the business. Ramu did not satisfactorily address these glaring discrepancies in his evidence.

70 Third, Ramu's evidence on the purported "sale of business" was evasive, inconsistent and difficult to decipher. For example, at one point, he appeared to admit that there was no agreement to purchase the company, [note: 43] which contradicted his case. At another point, when asked directly whether he believed that there was a binding agreement to purchase the business, he claimed he did not understand what a binding agreement was. [note: 44]

71 Therefore, I reject the defendant's version of the nature of the Agreement and I accept that the Agreement was in the nature of an appointment of a distributor in the sense described by the plaintiff.

Issue 2: The defendant's allegations of breach

Sale of the Products to 3rd party customers

72 The defendant alleges that the plaintiff breached a term prohibiting the plaintiff from directly selling the Products to 3rd parties in Singapore. There is no dispute that the parties agreed to this term which is accurately reflected in clause 6.6 of the 9 April Draft. The clause reads: [note: 45]

> 6.6 [The plaintiff] undertakes that it will not supply [the Products] to any other Party in [Singapore].

73 There is absolutely no documentary evidence that the plaintiff had breached this term. The only evidence available is a bare assertion made by Ramu in his AEIC that the plaintiff "sold unspecified quantities of Nippy's Milk directly to third parties". [note: 46] There is no precise date given for when the plaintiff had breached this term, neither is there any further explanation on how the defendant had discovered this alleged breach. Hence I find that there is insufficient evidence to prove this allegation and I reject the defendant's argument on this point.

The obligation to clear "short-term expiry stock"

74 The defendant alleges that the plaintiff had breached a term to clear "short-term expiry stocks within 3 months of takeover". [note: 47] I refer to this term as the "Clearance Term". I find that the defendant has failed to prove the existence of this term.

75 The defendant relies on three pieces of evidence to establish the existence of the Clearance Term: The Instalment Scheme, Ramu's testimony and the Kalamohan Letter. I do not think that the evidence adduced is sufficient to prove the defendant's case on this point.

The Instalment Scheme

76 The defendant argues that the fact that the sums due under the Instalment Scheme was to be spread over a 3-month period demonstrates the existence of the Clearance Term. In my view, the fact that payment was to be spread over a 3-month period is a weak basis to support the conclusion that the Clearance Term exists. There could be a variety of equally compelling reasons that the payment terms were spread out over a 3-month period. For example, it could merely be to address liquidity concerns or make it easier for the defendant to pay the total sum due under the Instalment Scheme. Without more, the existence of the Instalment Scheme is insufficient to demonstrate the existence of the Clearance Term. Unfortunately, the rest of the evidence relied on by the defendant did not aid in this regard.

Ramu's testimony

77 Ramu's testimony on this point was weak. The defendant's position is that the Clearance Term was part of the Agreement, made on 1 February 2013. Hence, at the bare minimum, there must have been some agreement between the parties on the definition of "short-term expiry stock" at or before 1 February. Ramu's testimony demonstrated that this was not the case. During cross-examination, Ramu admitted that at the material time, there was no discussion to define the requisite length of time before expiry that would qualify stocks as short-term expiry stocks. [note: 48]

78 In addition, Ramu also could not give a firm definition of what type of stock would fall within the Clearance Term. Ramu initially stated that when Abraham and himself went to the warehouse, he noticed that there was a high quantity of Naughty G products and was concerned. Abraham then allegedly told him "I have a 3 months' program to clear [the goods]". [note: 49] Ramu was later asked to elaborate on this point. The relevant portions of his testimony is as follows: [note: 50]

Q:	So can you tell us, first of all, what promise was made to you in relation to clearance of stock, if any?
A:	…we were walking across the Naughty G thing then he said, "All these will be clear by standing orders." …
…	
Q:	What is "all these" that he is talking about?
A:	We were in front of Naughty G, a few pallets was filled with Naughty Gs---
Q:	So---
A:	---and short expiry.
Q:	Is it just short expiry stock or everything in the warehouse is to be cleared?
A:	This is *inter alia*. If you see, most of them are Naughty G stocks, Naughty G. In the warehouse, it's a---most of them are nau---Naughty G. And within Naughty G, all three flavours or one was divested to us short, yah.
Q:	Yes, fine. But I just want to know what is it that he promised you or he said---what did he say?

A: This---it was---we didn't take a paper and write it down. Said, "It will be clear in 3 months' time." So I said, "Okay, 3 months' schedule, we can do a 3 months' schedule."

…

Q: So he said 3 months to clear all these?

A: Yes.

Q: And what was "all these"?

A: "All these" was a general statement. We're walking through, it was not specifically 10 carton, 20 carton. We don't talk about numbers.

Q: So you're not sure what he was talking about then?

A: No, no, we---we were talking about---

Court: So that was all he said?

Witness: Yes.

…

Q: All he said is, "All these will be cleared within 3 months"?

A: Yah, we were stand---standing in front of the Naughty G pallets.

As can be seen above, Ramu's own description suggested that as Abraham and Ramu were walking past pallets filled with goods, Abraham would point towards a general direction and reassure Ramu that "all these" goods would be cleared by "standing orders". It later turned out that there was no concrete definition for the term "standing orders". [note: 51] In fact, the phrase "standing orders" only appeared for the first time at trial.

79 The picture that emerges from Ramu's testimony is that there was no firm commitment on the part of Abraham to clear a specified set of stock, only vague assurances.

The 27 February Draft

80 Before turning to the Kalamohan Letter, I note that the plaintiff argues that the Kalamohan Letter was an afterthought and the court should instead rely on the 27 February Draft which did not contain the terms sought to be proved by the defendant. Hence, before discussing my findings on the Kalamohan Letter itself, I will first deal with the plaintiff's argument on the 27 February Draft.

81 The plaintiff submits that the 27 February Draft is close in time to the date the parties entered into the Agreement, untainted by any acrimony between the parties and hence is a reliable documentary record of the Agreement. [note: 52] The plaintiff also alleges that the defendant had in fact agreed with the terms set out within the draft shortly after 27 February 2013. The defendant avers that it never received the 27 February Draft. [note: 53]

82 I accept the plaintiff's position that the defendant did have sight of the 27 February Draft and did agree to the terms set out in the draft shortly after 27 February 2013.

83 David and Ramu gave two contrasting accounts of what had occurred in respect of the 27 February Draft. David gave evidence that:

(a) On 27 February 2013, David was on the phone with Abraham while Abraham and Ramu were having a meeting at the Ruby Warehouse. At some point, Abraham and Ramu needed to discuss the 27 February Draft. Hence, David emailed the 27 February Draft to Pooi Yen on 27 February 2013, so that she could pass it to Abraham in order for Abraham to show it to Ramu. [note: 54] Ramu agreed to look over the 27 February Draft and get back to Abraham the next week. [note: 55]

(b) Around one week after receiving the 27 February Draft, Ramu had a meeting with Abraham and David. Abraham attended in person and David attended via telephone. During the meeting, Ramu informed them that he was agreeable to all the terms set out in the 27 February Draft and did not request for any amendments to be made. [note: 56]

84 Ramu claimed that no draft was sent to him on 27 February 2013. The first draft he had sight of was the 9 April Draft. [note: 57] Having examined the evidence, I prefer David's account to Ramu's account for three reasons.

85 First, there is documentary evidence that substantiates David's account:

(a) The plaintiff has produced an email sent on 27 February 2013 at 4.32pm. The email is titled "Contract for Ramu". It was sent from David to Pooi Yen and the 27 February Draft was attached to the email. The email only states "Please Print". [note: 58] David explained that the email was very briefly worded because he was on the phone with Abraham at the time, and the email needed no further explanation than what they had already discussed over the phone. [note: 59] I find David's explanation believable. The title, timing and contents of the email corroborate David's testimony on the events of 27 February 2013.

(b) David sent an email on 9 April 2013 to Ramu. The email is titled "New Prices to Fortune Marketing". An updated price schedule as well as the 9 April Draft was attached to the email. The email states "Dear Ramu, [p]lease see your updated price schedule plus the *updated contract*. Changes have been made to page 2-4 of the contract" [emphasis added]. The contents of the email, in particular, the reference to the 9 April Draft as an *updated* contract and specific references to pages of a written contract, strongly suggest that Ramu had sight of an earlier written draft and the 9 April Draft was an updated version of that earlier draft.

86 Second, Ramu's affidavit filed for the purposes of contesting SUM 3675/2014 appears to admit to an earlier draft. The affidavit refers to the 9 April Draft as the "revised Written Agreement". [note: 60] This phrasing presupposes that there was a prior written draft that was subsequently revised to form the 9 April Draft.

87 Third, Ramu could not give any satisfactory explanation to blunt the impact of the evidence highlighted above at [85]–[86]:

(a) With regard to the email sent on 27 February 2013, Ramu claimed that David would have sent him the email directly since David had a law degree, and hence the fact that David only sent Pooi Yen alone demonstrates that he did not receive the 27 February Draft. [note: 61] This is a non-sequitur: the fact that David had a law degree does not automatically mean he would have

sent Ramu the email. In any event, David had already adequately explained why the email was only sent to Pooi Yen: the hard copy was to be passed to Ramu for his perusal. [note: 62] Ramu also suggested that if he had agreed to the 27 February 2013 draft there would be no need for a new draft on 9 April 2013. [note: 63] However, David clarified that there were no changes to the key terms in the 9 April Draft, and the revisions were mainly to reduce the prices offered by the plaintiff to the defendant in order to help the defendant with rebates and allowances it was liable to pay Dairy Farm and NTUC. [note: 64]

(b) In respect of the email sent on 9 April 2013, Ramu claimed that the term "updated" referred to updating an oral agreement as opposed to a written agreement. [note: 65] However, this explanation makes no sense in light of the specific reference to pages of a contract within the email itself.

(c) In relation to the affidavit, Ramu could only suggest that the phrasing was a "skip of the word", *ie* an inadvertent error. [note: 66] Seen in light of the rest of the evidence, I did not find his explanation on this convincing.

88 Hence, in light of all the evidence highlighted above, coupled with Ramu's relative lack of credibility vis-à-vis David (see [59]–[60] above), I find that the defendant did have sight of the 27 February Draft sometime around 27 February 2013 and agreed to the terms set out within the draft. Hence, the 27 February Draft is an accurate documentary record of the terms of the Agreement.

Kalamohan Letter

89 Turning back to the Kalamohan Letter, I find that the 27 February Draft is a more contemporaneous and accurate record of the Agreement of 1 February 2013. The Kalamohan Letter, which was sent some five months after the entry into the Agreement and sent at a time when the relationship between the parties had already deteriorated considerably, does not adequately assist in determining the terms agreed between the parties at the material time. As such, the fact that the Clearance Term appears in the Kalamohan Letter is not sufficiently probative in light of the absence of the Clearance Term in the 27 February Draft.

90 Therefore, for the reasons given above, I find that the defendant has failed to prove the existence of the Clearance Term. Hence, the plaintiff cannot breach the Clearance Term.

The obligation to ensure that products sold to the defendant would be merchantable

91 The defendant alleges that there was an express or implied term that the Products sold to the defendant were "merchantable or saleable or unexpired or not dead or not de-listed". I shall call this term the "Merchantable Products Term". I find that the defendant has failed to prove the existence of an express or implied term to this effect.

92 It is important to first elaborate on the scope of the Merchantable Products Term. It appears that in response to a request for further and better particulars, the defendant had drawn up a list of problems with the goods it had purchased from the plaintiff. For example, the defendant claimed that some goods had a short expiry date or were not marketable to certain retailers. [note: 67] I shall call these goods the "allegedly unmerchantable goods". The defendant alleged that there was a term agreed between the parties that the stock sold to the defendant would not have the aforementioned problems: The Merchantable Products Term. On the basis of the breach of this term, the defendant issued several invoices billing the plaintiff for the allegedly unmerchantable goods. These were

identified as "Invoice 163", "Invoice 165", "Invoice 166" and "Invoice 167". [note: 68] Significantly, these invoices billed the plaintiff for a sum in excess of the price that the defendant had originally paid to purchase the goods, by inflating the price of the goods in the invoice. [note: 69] The plaintiff had in fact issued credit notes in relation to some (but not all) of these goods, reimbursing the defendant for these goods at the price the defendant had paid for the goods. [note: 70] However, the defendant remained dissatisfied, and continued to assert that the invoices in relation to these allegedly unmerchantable goods were due, even for the goods which it had in effect received free of charge. [note: 71] In effect, the Merchantable Products Term asserted by the defendant is a guarantee from the plaintiff that the allegedly unmerchantable goods would be sold at a profit.

93 The submissions of the defendant do not point to any evidence to substantiate the existence of the Merchantable Products Term. It merely references the list of allegedly unmerchantable goods provided by the defendant. [note: 72] This is a bare assertion from the defendant.

94 During cross-examination, Ramu pointed to a price list sent by the plaintiff to the defendant as evidence of the existence of the Merchantable Products Term. [note: 73] Having examined the price list, I find that it is insufficient to prove the existence of the Merchantable Products Term. The list merely states that a distributor of the Products would have a distributor profit margin that ranges between 25-100% of the purchase value of the Products. [note: 74] It is a leap of logic to suggest that merely stating the prospective profit margin of a distributor would amount to a promise to guarantee that same profit margin.

95 This lack of evidence on the defendant's part must be seen in light of the fact that the 27 February Draft did not contain the Merchantable Products Term. As mentioned above at [80]–[88], the 27 February Draft is an accurate documentary record of the terms of the Agreement. In fact, even the Kalamohan Letter did not contain any mention of the Merchantable Products Term.

96 In the interest of completeness, I would highlight that even if the Merchantable Products Term was set to a slightly lower threshold, namely, that the plaintiff was obliged to repurchase the allegedly unmerchantable goods at cost price (as opposed to adding a profit margin on top of cost price), the defendant would nevertheless have failed to prove this term. This is because there is simply insufficient evidence to suggest that the plaintiff had agreed to any such term pertaining to the allegedly unmerchantable goods.

97 It is true that the plaintiff did repurchase some of the allegedly unmerchantable goods back from the defendant via credit notes. However, the question is whether the plaintiff did so pursuant to a legal obligation contained within the Agreement, or whether the plaintiff did so out of goodwill. On balance, I find that the evidence points towards the latter rather than the former. In this regard I rely on the fact that the 27 February Draft contained no such term as well as the fact that the "stock handover list" (see [14(d)] above) that was signed by Mahipal on behalf of the defendant clearly set out the respective expiry dates of the goods sold to the defendant, but there was no indication in February 2013 that the defendant took issue with the dates. [note: 75]

98 At this juncture, I note that the defendant appears to suggest that there is an implied term in fact with the effect of the Merchantable Products Term. However, beyond asserting that without the Merchantable Products Term "the agreement reached between the parties will not make commercial sense", the defendant does not make any further argument on this point. [note: 76] In particular, I highlight that the defendant has not shown how the requirements for the implication of terms in fact laid down by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193

("*Sembcorp Marine*") at [101] have been satisfied. The defendant has also not made any mention in its pleadings or submissions on any implied term in law pursuant to the Sale of Goods Act (Cap 393, 1999 Rev Ed) and hence I will not consider the existence of the Merchantable Products Term on this basis.

99 Therefore, the defendant has failed to prove the existence of an express or implied term with the effect of the Merchantable Products Term. As such, there can be no breach of the Merchantable Products Term and the defendant's submission on this point fails.

Issue 3: The alleged debts owed under the Instalment Scheme

100 As highlighted above at [16] above, by April 2013, the defendant refused to pay various sums, including the remaining sums under the Instalment Scheme as well as the rental for Ruby Warehouse on the basis that both parties had agreed to set-off their respective debts and the plaintiff, on balance, owed the defendant more money. [note: 77] The plaintiff was of the view that it was the defendant that owed the plaintiff more money. I will deal with rental in the next section and will focus on the alleged debts owed under the Instalment Scheme here.

101 A significant source of the difference in calculation between the two parties was because the defendant claimed in April 2013 that it was owed sales commissions for sales for the months of February and March. [note: 78] The difficulty is that while there is no dispute that the plaintiff agreed to collect sales commissions on behalf of the defendant, the retailers had a 60-day as of the end of month credit period to settle any invoices and the plaintiff had yet to receive payment from the retailers in April 2013. [note: 79]

102 Due to this, there is a question of whether the plaintiff had an obligation to pay the defendant sales commissions even before they had collected the same from the retailers.

103 In my view, the sales commissions were only due to the defendant upon the plaintiff's receipt of the same from the retailers. Ramu conceded during cross examination that the normal practice would be for the plaintiff to reimburse the defendant for any sales only upon receipt of the sales commission from the retailers. [note: 80] Ramu also acknowledged that the plaintiff was acting as a courier for the defendant in respect of the sales commissions. [note: 81]

104 In *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Soup Restaurant*") at [48] the Court of Appeal approved the approach taken by the UK Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, which held that if there are two possible interpretations of a term, the court is entitled to adopt the interpretation that is more consistent with business common sense. This is subject to the caveat that if the evidence demonstrates that the parties objectively intended for a less commercially sensible interpretation to apply, the court cannot disregard this objective intention (see *Soup Restaurant* at [32]).

105 It would be extremely unusual for a courier to deliver money in advance of the actual receipt of the money. No evidence was led to demonstrate that the parties had agreed to terms that would deviate from the normal practice and enter into this unusual arrangement. Hence I find that the parties had objectively intended for the normal practice to apply with respect to the collection of the sales commissions, and the sales commissions were only due upon the plaintiff's receipt of the same.

106 There is one remaining aspect of the sales commissions that is disputed: whether in paying the

sales commissions over to the defendant, the plaintiff ought to deduct the cost of Promotional Charges from these sales commissions that the retailers themselves had deducted from the price of the goods sold to the retailers. I note that this dispute stems from a disagreement with regards to who was to bear the obligation to pay the Promotional Charges generally (see [16(c)] above).

107 Hence, in order to deal with the issue of the alleged debts due under the Instalment Scheme, I will first discuss which party ought to bear the Promotional Charges, before turning to consider the remaining amount (if any) due under the Instalment Scheme.

Whether plaintiff or defendant should bear the promotional charges

108 The plaintiff claims that it is the defendant who should bear the cost of all Promotional Charges, whereas the defendant claims it is the plaintiff who should bear the Promotional Charges.

109 After reviewing the evidence, I am of the view that the Agreement contemplates that the defendant ought to bear the Promotional Charges.

110 It is not disputed by the defendant that Clause 8.2, 9.1.1 and 9.2 of the 9 April Draft accurately reflects the terms of the Agreement. [note: 82] Identical clauses are found in the 27 February Draft. [note: 83] The clauses read as follows: [note: 84]

> 8.2 [The defendant] shall supply on its own account promotion and advertising material as approved by [the plaintiff].
>
> …
>
> **8.**[*sic*] **DUTIES**
>
> 9.1 Without prejudice to the foregoing, during the term of this Agreement, [the defendant]:
>
> 9.1.1 shall promote in [Singapore] the [plaintiff's] names and the Products during the Term hereof;
>
> …
>
> 9.2 All expenses incurred by [the defendant] are payable by it, on its own liability and on its own account alone, including but not limited to the expense for the sale, distribution, advertising, collection of money, taxes, fees, levies and labour salaries.

111 These undisputed clauses reflected that all promotional expenses in Singapore including the Promotional Charges, were to be paid for by the defendant.

112 The defendant's only retort is that the Kalamohan Letter alleges the existence of a term to the effect that the plaintiff "will compensate the defendant for the loss in promotional rebates for the promotions already agreed and set in place by the plaintiff". [note: 85] I shall call this term the "Compensatory Term". For similar reasons in the context of the dispute over the existence of the Clearance Term (see [80]–[89] above), I find that the assertion in the Kalamohan Letter of the existence of the Compensatory Term is an afterthought, and the 27 February Draft, which contains clauses 8.2, 9.1.1 and 9.2, but not the Compensatory Term, more accurately captures the terms agreed between the parties.

113 My conclusion that the Compensatory Term is an afterthought is fortified by the fact that Ramu conceded he was aware of the Promotional Charges by 9 April 2013 at the latest, [note: 86] yet he did not object to being billed the Promotional Charges when it was specifically mentioned to him in an email from David dated 29 April 2013. [note: 87] The first time the defendant raised any issue with the Promotional Charges was in the Kalamohan Letter two months later.

114 Therefore, I find that the defendant was the party that was obliged to bear the Promotional Charges.

Remaining amount due under the Instalment Scheme

115 The Plaintiff claims that the total sum due under the Instalment Scheme amounts to $420,621.24. [note: 88] The defendant claims that the mutually agreed price was $325,199.49 instead. [note: 89] Both parties agree that the defendant has paid up $250,000 from this amount. This leaves a remaining amount of $170,621.24 according to the plaintiff and $75,199.49 according to the defendant.

116 It is not disputed that the parties had agreed to a total sum of $420,621.24 on 6 February 2013 (see [14(d)] above). However, the defendant submits that the plaintiff had made a statement via email on 29 April 2013 ("29 April Email"), that confirms that the parties had mutually varied the total sum to $325,199.49. [note: 90]

117 I find that the total price was never mutually varied to $325,199.49, and the defendant's arguments stems from a misreading of the 29 April Email. The drop in the total price is attributable to the fact that the plaintiff apparently *offered* to waive the charges for three products sold to the defendant, Naughty G Sugar Free, Jasmine Green Tea and Naughty G Original. I set out the relevant portions of the 29 April Email below:

> Please note that we are not charging you for Naughty G Sugar Free, approx. 3700 cartons of Jasmine Green Tea and approx. 450 cartons of Naughty G Original. *I can only extend this offer to you if you*
>
> 1. Pay your due and overdue invoices before 5pm Tuesday 30 April 2013.
>
> 2. Order Naughty G Original and Naughty G Cola within 1 week of Tuesday 30 April 2013. We can discuss this order further after you have paid the due $73,850.28
>
> If you cannot fulfil these two requirements, I will only be able to give you 1750 cartons of Naughty G Sugar Free and 1750 cartons of Jasmine Green Tea free as per our original agreement.
>
> [emphasis added]

118 As seen above, the plaintiff's offer to reduce the price was conditional on the defendant satisfying two requirements. As it turned out, neither of these requirements were fulfilled. The defendant did not pay the plaintiff any sum nor did it make any further orders of Naughty G Original and Naughty G Cola. Hence, there was no mutual agreement to vary the total price to $325,199.49 and the total price remained at the price the parties had last agreed, *ie* $420,621.24.

119 At this juncture I highlight that the 9 April Draft appears to list a total price of $396,811.58, which differs from the plaintiff's position. [note: 91] This point has not been pursued in the defendant's

submissions. I note that David has given an explanation in his AEIC that the plaintiff had offered the defendant a lower price out of goodwill to make sure the defendant could earn money distributing the products, but this offer was not accepted. [note: 92] A timeline appended to David's AEIC also suggests that in the 9 April Draft, "Naughty Vodka Shot that was stored in CWT was not included. The price list did not include GST". [note: 93] It appears that the plaintiff was prepared to waive the charges for Naughty G Vodka Shot, but subsequently decided against it by 22 April 2013. [note: 94] In any event, because the defendant has not made any submissions on this point, I will take David's explanation at face value.

120 Therefore, I accept the plaintiff's position that the remaining amount due under the Instalment Scheme is $170,621.24.

Issue 4: The issues relating to Ruby Warehouse

The obligation to pay rent for the months of February, March and April 2013

121 The defendant does not dispute its liability to pay the plaintiff rental for the use of Ruby Warehouse fixed at $8,367.40 per month for the months of February, March and April 2013. [note: 95] It only refused to do so at the relevant time because it asserted that after an accounting of all the debts on both sides, the plaintiff owed it more money, primarily because it was owed sales commissions. I have already dealt with the defendant's arguments on this point above at [100]–[105]. The defendant is hence liable to pay rent for February, March and April 2013. The more contentious aspect surrounding Ruby Warehouse pertains to the legal significance of the defendant's removal from Ruby Warehouse, and it is to this aspect that I now turn.

Whether the defendant's removal from Ruby Warehouse on 30 April 2013 constitutes wrongful termination of the Agreement

122 The defendant claims that its removal from Ruby Warehouse on 30 April 2013 constitutes wrongful termination of the Agreement. [note: 96] This allegation was not properly pleaded by the defendant. Despite labelling this allegation as the "Crux of the Defendant's case" in its closing submissions, [note: 97] the Defence and Counterclaim (Amendment No.2) ("Defence") does not contain any mention of the plaintiff's act of removing the defendant from Ruby Warehouse, nor does it highlight that this amounted to a breach of the Agreement or wrongful termination. The Defence does mention that "the purported termination is wrong". [note: 98] However, this portion references "[p]aragraph 38 of the SOC", which pertains to the purported termination by the plaintiff on 5 June 2013, not the removal from Ruby Warehouse on 30 April 2013. [note: 99] The defendant also alleged several breaches of the Agreement in various paragraph of the Defence, [note: 100] but none of these pertained to the removal of the defendant from Ruby Warehouse.

123 As highlighted by the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [38], the general rule is that parties are bound by their pleadings and the court is precluded from deciding on a matter that parties have decided not to put into issue. One exception to this general rule is where no prejudice is caused to the other party at trial or it would be clearly unjust for the court not to depart from the rule (see *V Nithia* at [40]).

124 The deficiency in pleadings in the present case has caused prejudice to the plaintiff. In this regard, I note that one way the plaintiff could have addressed the defendant's argument on wrongful

termination would be to prove that the plaintiff was entitled to remove the defendant from Ruby Warehouse if the defendant refused to pay rent for a sustained period of time. They could have done so either by implying a term in fact, or by proposing an interpretation of the existing terms of the Agreement to that effect. However, in order to make such arguments on the construction of the Agreement, the plaintiff would have to satisfy the pleading requirements laid down by the Court of Appeal in *Sembcorp Marine* at [73]. Due to the fact that the defendant has failed to give the plaintiff notice of its intention to pursue the allegation that the removal of the defendant constituted breach and/or wrongful termination, the plaintiff was denied the opportunity to amend its pleadings and prepare a case to meet the defendant's allegation.

125 Therefore, since it was not properly pleaded, I will not allow the defendant to rely on this particular allegation to show that the Agreement was wrongfully terminated. Instead, I will operate on the premise implicit in the pleadings as they stand: that the plaintiff was entitled to remove the defendant from Ruby Warehouse. Hence, there is no wrongful termination of the Agreement due to the defendant's removal from Ruby Warehouse. This leads to the next issue, whether, after its removal from Ruby Warehouse, the defendant was liable for rent for the month of May 2013.

The obligation to pay rent for May 2013

126 The plaintiff claims rent for the month of May 2013 because the defendant refused to clear all its stock from Ruby Warehouse by the deadline of 30 April 2013, [note: 101] and had left its stock there up till the end of May. To prove its case, the plaintiff relies on an email dated 30 April 2013 sent by David to Ramu. The email states: "We will be charging you $500.00 a day for warehousing your stock. The charges will commence 1 May 2013."

127 I highlight that this rate of $500 per day is not founded on the Agreement, since clause 4.6 of the 9 April Draft sets out a rent of $8,367.40 per month. What the plaintiff appears to be suggesting is that there was a fresh agreement for the defendant to rent Ruby Warehouse at a rate of $500 per day. I do not think the email was sufficient to demonstrate an agreement to that effect. The plaintiff merely declared that $500 would be charged, but the plaintiff did not adduce any evidence to show that the defendant had accepted this rate. Hence, on an examination of the factual matrix, I find that there is insufficient evidence to conclude that the parties had agreed for the defendant to use Ruby Warehouse to store its remaining stock at a rate of $500 per day.

128 Nevertheless, the defendant's did use the plaintiff's warehouse space to store its leftover stock in May 2013. Hence, I find that the plaintiff is entitled to a *quantum meruit* claim for the use of the its warehouse space for the period of May 2013. I shall leave the parties to make the appropriate arguments at the quantification stage of proceedings to establish the precise amount to be paid, but at this stage it appears that some relevant factors include the parties' original agreement as to monthly rent (*ie* $8,367.40) and the space taken up by the leftover stock as a proportion of the total warehouse space of Ruby Warehouse.

129 Therefore, I reject the plaintiff's argument on rent for the month of May 2013, subject to the qualification that the plaintiff is entitled to a *quantum meruit* claim, with the precise sum to be subsequently assessed.

Issue 5: The plaintiff's allegations of breach

Whether the defendant was obliged to pay for incoming and new stock that had been ordered

130 Initially, the plaintiff and defendant disagreed on whether certain invoices were due from the

defendant to the plaintiff. These invoices related to shipments of products that had been delivered by the plaintiff to the defendant. Over the course of trial, the plaintiff and defendant came to an agreement on many of these invoices and the sole dispute on this issue now remains a tax invoice from the plaintiff identified by the number 7279 ("Invoice 7279"). [note: 102]

131 The defendant concedes that it is liable to pay for the products listed in Invoice 7279. However, they claim that all new stocks have been fully paid for, including Invoice 7279. [note: 103] The plaintiff says that Invoice 7279 has not been paid.

132 I find for the plaintiff on this issue. The defendant cites an invoice identified as "Invoice 381" as evidence of payment. [note: 104] However, Invoice 381 does not purport to reflect payment to the plaintiff, but instead bills the plaintiff for products listed in a *different* invoice from the plaintiff numbered 7369 ("Invoice 7369"). [note: 105] Invoice 381 has nothing to do with payment for Invoice 7279. In fact, it has nothing to do with payment at all. Hence, there is no evidence that payment has been made for Invoice 7279, which the defendant has conceded is due.

133 In relation to Invoice 7369 and Invoice 381, I note that there is a separate issue of whether the products listed under the invoices, collectively referred to by both parties as "Organic Water", was properly delivered to the defendant. I will deal with this issue in the miscellaneous category below at [169] under Miscellaneous claims.

Whether the defendant was in breach of an obligation to maintain sufficient stock levels

134 The plaintiff claims that the defendant had an obligation to maintain sufficient stock levels and had breached that obligation. The defendant acknowledges the existence of this obligation, but claims that it was not breached. I highlight that this dispute is also the source of the defendant's allegation that the plaintiff was pressuring the defendant to purchase goods (see [43(e)] above).

135 It is not disputed that the obligation to maintain sufficient stock levels is accurately reflected in clause 9.1.4 of the 9 April Draft which states:

> 9.1 Without prejudice to the foregoing, during the term of this Agreement, the [defendant]:
>
> …
>
> 9.1.4 shall maintain in [Singapore] sufficient inventory of the Products so as to permit delivery of customer orders for a period of 2.5 months for the term of the Agreement;

136 The plaintiff takes issue with the stock levels of two products in particular: Naughty G Original and Naughty G Cola. The plaintiff submits that the failure to order additional quantities of both these products in April 2013 amounted to a breach of the obligation reflected in clause 9.1.4.

137 The parties agreed that in order to calculate the requisite quantity of product that would amount to "sufficient inventory…for a period of 2.5 months", they would use the sales average of the three months preceding April 2013. Based on figures agreed by both parties, the average monthly sales of Naughty G Original came up to 274 cartons per month and the total stock of Naughty G Original that the defendant possessed at the end of April 2013 was 1858 cartons. [note: 106] The parties also agreed that the average sales of Naughty G Cola came up to 184 cartons per month and the total stock of Naughty G Original that the defendant possessed at the end of April 2013 was 522 cartons. [note: 107] The agreed figures demonstrate that the defendant had approximately 6.78

months' supply of Naughty G Original and 2.8 months' supply of Naughty G Cola at the end of April 2013.

138 The plaintiff's response to these figures is that due to the lead time in ordering the products as well as the expiry date of the products, once the defendant had refused to order additional stock at the end of April 2013, the quantities of both products would inevitably have fallen below the 2.5 months threshold after April 2013. [note: 108] They asserted that this would have happened by May 2013 for Naughty G Cola and September 2013 for Naughty G Original. [note: 109] To arrive at these dates, the plaintiff made the assumption that the quantity of the products would decrease at a monthly rate corresponding with the average monthly sales figures for the respective product. Additionally, the plaintiff highlighted that all the defendant's stock of Naughty G Original was slated to expire on 9 September 2013.

139 In effect the plaintiff is suggesting that the defendant would have inevitably have breached the agreement by May 2013 and September 2013 respectively. There are three intractable problems with the plaintiff's argument.

140 First, the defendant's obligations under clause 9.1.4 only extended to holding 2.5 months' worth of stock at any point in time. No alternative interpretation of clause 9.1.4. was proffered by the plaintiff. As at April 2013, this obligation was not breached.

141 Second, the factual premise of the plaintiff's argument, *ie*, that it was inevitable that the defendant's stock levels would fall below 2.5 months is untrue. The plaintiff's argument is premised on an assumption of a decline in stock levels at a steady rate, based on the average monthly sales figures. However, the average monthly sales figures are merely a projection of the rate of decline and cannot be used to determine and prove the actual stock levels at the material time of May and September 2013. There are a variety of plausible alternative possibilities that could have occurred with respect to the rates of decline. As an illustration, there could have been a rapid decline in the sales of product in the subsequent months given the troubles between the plaintiff and defendant. In respect of the expiry date, there are also other plausible alternatives, for example, the defendant may have been able to acquire additional stock prior to expiry.

142 Third and in any event, my attention was not drawn to any authorities which suggests that an "inevitable" breach of a future obligation is an actionable breach of contract prior to the time for the performance of that obligation. I note the existence of the doctrine of anticipatory breach. However, the plaintiff has made no arguments on this doctrine in its submissions. This is probably because an unaccepted anticipatory repudiatory breach of contract cannot form the basis of an actionable breach of contract unless and until the actual time for performance of the obligation arises (see *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) ("*Chitty*") at para 24–025). Here, the plaintiff's own position is that it elected to terminate the contract only on 5 June 2013 (see [37] above) and hence even assuming that the defendant had committed an anticipatory repudiatory breach of the Agreement on April 2013 by refusing to order additional stock, this is in itself irrelevant to prove an actionable breach.

143 Insofar as the plaintiff is claiming that there was a breach of clause 9.1.4 at May and September 2013, it was incumbent on the plaintiff to show proof that the stock levels had fallen below the requisite threshold at the *time of performance of the obligation* on May and September 2013. No evidence was adduced on this matter. In this regard, given the plaintiff's position that the Agreement was terminated on 5 June 2013, there would be no obligation under clause 9.1.4 in September 2013.

144 Therefore, I find that the plaintiff has not proved a breach of the term reflected in clause 9.1.4 of the 9 April Draft.

Whether the defendant breached a term by setting up the Dairy Farm and NTUC accounts in April 2013 and transferring the relevant SKUs in May 2013

145 As highlighted (see [15] above), in order to sell the Products directly to retailers, the defendant was required to set up an account with the retailers, and have the relevant SKUs transferred to its account. Both parties are in agreement that the defendant had an obligation to set up an account with Dairy Farm and NTUC and transfer the SKUs corresponding to the Products to its accounts. However, the plaintiff alleges that the defendant has breached this obligation because the defendant only set up accounts with Diary Farm and NTUC sometime in the middle of April 2013, and transferred the SKUs sometime in the middle of May 2013, some three months after entering into the Agreement on 1 February 2013. [note: 110]

146 There is no dispute that the defendant's obligation to set up accounts with the retailers and transfer SKUs to its accounts is reflected in clause 4.3.4 of the 9 April Draft: [note: 111]

> 4.3.4 The remaining $96,811.58 less the rebate outlined in Clause 4.5 to be paid *once the [defendant] is registered with all existing customers of the [plaintiff]* and the [plaintiff] ceases supply to these customers on behalf of the [defendant] [emphasis added]

147 The parties accept that the italicised portion of the clause above recognises that the defendant had an obligation to be "registered" with all existing customers, and "registered" is taken to mean the opening of accounts and the transfer of SKUs. The defendant however highlights that clause 4.3.4 does not set any time limit for this registration process to take place. [note: 112]

148 The lack of a stipulation as to time is not fatal to the plaintiff's case. This is because where a contract does not specify the time for performance by a party that has undertaken to carry out such performance, an obligation to perform within a reasonable time is implied in law: *Max Master Holdings Ltd and others v Taufik Surya Dharma and others and another suit* [2016] SGHC 147 at [98]. What is "reasonable" would depend on all the circumstances of the case, and the court is not limited to what the parties contemplated or ought to have foreseen at the time of entry into the contract: *Chitty* at para 21–021. Hence the crux of the present issue is whether the defendant had performed its obligation within a reasonable time by setting up accounts with retailers in April 2013, and transferring the SKUs in May 2013.

149 I find that the defendant had not performed the obligation within a reasonable time. The evidence of David, which I accept, is that based on his previous experience with opening new accounts with the retailers in question, it would take typically two to three weeks to open an account with a retailer. [note: 113] David also suggested that it would take a few days to a week to transfer the SKUs once an account is set up. I note that the defendant did not offer an alternative reasonable duration for the obligation to be performed. Hence I find that a reasonable time to open an account would be three weeks and a reasonable amount of time to transfer the SKUs would be a further week after the opening of an account.

150 In fairness to the defendant, although it was not highlighted by counsel in submissions, it appears that the plaintiff only informed the retailers of its intention to hand over the SKUs for the Products to the defendant sometime in late February via emails sent between 21 to 25 February 2013. [note: 114] However, even giving the defendant the benefit of the doubt and starting to count

time from 25 February 2013, the opening of the accounts in the middle of April would go beyond the reasonable amount of time of three weeks. The transfer of the SKUs took a further month from the time taken to open the accounts.

151 As such, I find that the defendant had breached its implied obligation in law to be "registered" with the retailers within a reasonable time.

Issue 6: Termination of the agreement

152 The defendant submits that the plaintiff wrongfully terminated the agreement on 30 April 2013 by removing the defendant from the warehouse. I have rejected this argument above at [122]–[125]. The plaintiff claims that the Agreement was properly terminated by the plaintiff on 5 June 2013. [note: 115] The plaintiff grounds this on two alternative bases. First, due to the defendant's significant breaches, the plaintiff was entitled to terminate with immediate effect. [note: 116] Second, the plaintiff was entitled to terminate the agreement pursuant to the term reflected in clause 15.1 of the 9 April Draft. [note: 117] I shall deal with each argument in turn.

153 On the first ground, the plaintiff merely asserts that it was entitled to immediately terminate the Agreement due to the significant breaches of the defendant without further elaboration. The Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR (R) 413 ("*RDC Concrete*") set out four different situations under which an innocent party to a contract may elect to terminate the contract (see *RDC Concrete* at [91]–[113]). It appears that the plaintiff is suggesting that the defendant's breaches fall within "Situation 3(a)" or "Situation 3(b)" of the situations identified in *RDC Concrete*.

154 The difficulty with the plaintiff's argument is that within the Agreement, there is a contractual provision for notice to be given prior to termination for significant breaches. The parties do not dispute that clause 15.1 of the 9 April Draft accurately reflects the terms of the Agreement and it reads: [note: 118]

> 15.1 Either Party will have the right to terminate this Agreement when there is a significant breach of this Agreement by the other Party when the affected Party gives the Party in Breach written notice of the breach and a notice period of 10 (Ten) working days to correct their breach

155 If "significant breach" in clause 15.1 is read to mean a breach of a condition or a breach with consequences which will deprive the innocent party of substantially the whole benefit of the contract, this provision may overlap with the plaintiff's right in law to terminate the Agreement pursuant to Situation 3(a) or Situation 3(b) of *RDC Concrete* respectively. There appears to be an issue of how the term captured in clause 15.1 interacts with the plaintiff's right to terminate in law pursuant to Situation 3(a) or (b) of *RDC Concrete*. This is significant because clause 15.1 imports a notice requirement before any party is entitled to terminate for a "significant breach". The question therefore is whether the plaintiff can nonetheless terminate for significant breaches immediately pursuant to either Situation 3(a) or Situation 3(b), despite the express notice provision. This is a question of interpretation of the relevant clauses to determine whether the parties intended to exclude the right to terminate at common law (see *Chitty* at para 22-049). Given that the plaintiff did not make any submissions on this point and in particular, no construction of clause 15.1 was offered, I will not find for the plaintiff based on its first argument.

156 Nevertheless, I find that the contract was properly terminated on 5 June 2013 because I agree that pursuant to the term reflected in clause 15.1, the defendant did commit a significant breach, and

it was given at least 10 working days' notice to rectify the breach.

157 By May 2013, the defendant had yet to settle the outstanding sum it owed under the Instalment Scheme. I have found that this outstanding sum is owed to the plaintiff (see [120] above). I find that this failure to pay the outstanding sum under the Instalment Scheme was a "significant breach" of the Agreement within meaning of clause 15.1. Non-payment of close to approximately $170,000 is significant in the context of an Agreement that set an original handover fee of approximately $420,000.

158 The plaintiff adduced evidence of two letters sent by the plaintiff's solicitors to the defendant's solicitors on 14 May 2013 and 22 May 2013 as proof of notice ("14 May Letter" and "22 May Letter" respectively). The 14 May Letter specifically mentions that "despite repeated request from our client to pay for the products and to reimburse the expenses incurred by them, you have only paid some monies towards the outstanding sum" and requested that the defendant make payment on all the invoices issued by the plaintiff. [note: 119] The 22 May letter gives a breakdown of the total amount owed under the Instalment scheme and also states: [note: 120]

> 6. Further to our letter, kindly let us know by 5.00pm on 29 May 2013 whether your clients will be removing all the products from the Ruby Warehouse. In the event we do not hear from your clients by the said date and time, our clients will repossess all the products and end your clients' distributorship rights
>
> …
>
> 9. In the event that we do not hear from your clients with regards to our clients' demand by close of business 29 May 2013, we have instructions to commence proceedings

159 The defendant's solicitors responded on 31 May 2013 by stating that the defendant did not owe any money to the plaintiff and it was the defendant that was owed money. [note: 121] This demonstrated that the defendant was unwilling to correct the breaches identified.

160 Based on a consideration of the evidence above, I find that the plaintiff did give written notice to the defendant informing them of the significant breach in failing to pay the outstanding sums under the Instalment Scheme by 22 May 2013 at the latest. The plaintiff's purported termination more than 10 working days after 22 May 2013 on 5 June 2013 was hence consistent with clause 15.1 of the 9 April Draft. [note: 122] Therefore, I find that the Agreement was validly terminated by the plaintiff on 5 June 2013.

Miscellaneous claims

161 I will now deal with a variety of miscellaneous claims raised by both parties. Some of the claims have already been agreed upon by the parties over the course of trial. Nevertheless, I set them out for the purposes of populating the table which I will use to calculate the total amount of debt owed by the defendant to the plaintiff (see Annex 1 below).

162 The defendant initially disputed paying certain staff salaries, reimbursement expenses, working levies and workers' insurance that the plaintiff had paid on its behalf. The parties subsequently agreed that these expenses were indeed owed to the plaintiff. [note: 123] Hence, I find in the plaintiff's favour on this point.

163 The defendant claims that it is owed a "sales commission" of 10% under an invoice labelled "Invoice 147". However the debt is not disputed and is already captured by a credit note issued by the plaintiff labelled "CN000515". [note: 124] Hence I will disregard Invoice 147.

164 The defendant alleges that it should have received a larger credit for certain goods that the plaintiff had repurchased from the defendant pursuant to a credit note issued by the plaintiff labelled "CN000557". The credit note was issued as the defendant had left certain products inside Ruby Warehouse and the plaintiff decided to repurchase these products. The defendant claims that certain other products had not been delivered to it and it ought to be credited for these products as well. [note: 125] The defendant has not proved this allegation. In fact, during cross-examination it appeared to me that Ramu was fabricating evidence on this point. I have described Ramu's testimony on this point in the section relating to witness credibility (see [60(a)] above). I further note that there is no obligation for the plaintiff to repurchase any product (see [99] above). As such, there is no basis to contest CN000557.

165 The plaintiff claims that it is owed utilities charges for Ruby Warehouse, including for the month of May 2013, and it relies on an invoice labelled "Invoice 7443". [note: 126] The defendant says it is not liable for utilities charges for May 2013, since it was no longer in the warehouse at the time. I agree with the defendant. The plaintiff has not highlighted any basis to charge the defendant for the utilities in May 2013, save for its argument on a fresh agreement to rent Ruby Warehouse for the leftover stock. I have rejected this argument (see [129] above) and accordingly this related point fails as well. Hence, the sums in Invoice 7443 should not include any utilities for the month of May 2013, and should be reduced by $309.79.

166 The defendant claims that it is owed rental for "dead stock" for the months of February, March and April 2013 pursuant to three invoices labelled "Invoice 168", "Invoice 170" and "Invoice 171" respectively. [note: 127] It appears that the defendant is attempting to charge the plaintiff for the cost of storing allegedly unmerchantable stock in Ruby Warehouse for the months listed above. The defendant has not highlighted any basis for its claim. Moreover, I note that I have already rejected the defendant's argument on the existence of the Merchantable Products Term (see [99] above). Hence, I reject the defendant's claim.

167 The defendant alleges it is owed a sum of $1,251.90 pursuant to an invoice labelled "Invoice 146" as the plaintiff had used the defendant's resources to load certain containers. David and Ramu gave conflicting testimony on this point. David said in cross-examination that he did not tell the defendant to load the container on the plaintiff's behalf. [note: 128] Ramu in his AEIC asserts that Invoice 146 is due. [note: 129] I accept David's testimony on this point, especially in light of his relative credibility as compared to Ramu's (see [59]–60 above). As such I find that the plaintiff does not owe the defendant the sums listed in Invoice 146.

168 The defendant claims it is owed the fees it paid for opening accounts with various retailers. It issued an invoice, labelled as "Invoice 145" in respect of these fees. [note: 130] No documentary evidence, such as invoices from the retailers, was adduced to prove that the fees were expended. In any event, the defendant could not point to any evidence that showed there was an agreement between the plaintiff and defendant that the plaintiff would bear the fees. In fact, the defendant made no submissions on this at all, save for asserting that Invoice 145 is due. As such I find that the plaintiff is not liable to pay the fees.

169 The defendant alleges that certain products referred to collectively as "Organic Water" was

not properly delivered to the defendant. The defendant suggests that it was improperly delivered because while the plaintiff delivered the goods to Ruby Warehouse on 29 April 2013, it did not release the goods until after 30 April 2013, by which time the defendant had already been removed from Ruby Warehouse. [note: 131] David explained that the plaintiff was subject to Agri-Food & Veterinary Authority of Singapore ("AVA") regulations that mandated that the Organic Water had to be kept in Ruby Warehouse for testing. Once the AVA testing was completed, the plaintiff released the Organic Water for the defendant to collect. He also admitted that the defendant made payment for the Organic Water. [note: 132] I accept that the plaintiff had fulfilled its delivery obligations by delivering the goods to Ruby Warehouse, which was in the control of the defendant on 29 April 2013. The plaintiff had in fact repurchased the Organic Water from the defendant by cancelling Invoice 7369 and issuing two credit notes labelled "CR003285" and "CR003301" after the defendant's refusal to collect the Organic Water. The defendant however is now claiming in Invoice 381 a sum for "loss of sale" in addition to the original purchase price of the Organic Water. The defendant is in substance claiming a sum inclusive of the profit it would have made if it had sold the Organic Water to retailers. I find that the plaintiff has no obligation to compensate the defendant for "loss of sale" and the defendant has no claim to the purchase price since it has already been credited by the plaintiff.

170 The plaintiff claims it is owed rental as well as various related costs such as vehicle insurance and road tax for the use of the Three Vehicles. It is not disputed that while initially these vehicles were meant to be purchased by the defendant under the Agreement, the parties were eventually unable to agree on a price for the purchase and the parties in effect mutually agreed to remove the term from the Agreement. The vehicles were nevertheless used by the defendant for three months. Since the defendant had been conferred a benefit through the use of the plaintiff's vehicles, I find that the defendant owed the plaintiff's reasonable rent and expenses for the use of the vehicles on a *quantum meruit* basis. The plaintiff has charged the defendant rent and expenses (such as road tax) for the period of the use of the vehicles pursuant to two invoices labelled as "Invoice 7438" and "Invoice 7424". The defendant has not offered any alternative calculation for the reasonable sum to be charged, instead focusing on whether any sum was owed at all in respect of two vehicles. As such, I accept Invoice 7438 and Invoice 7424 as reasonable estimations of rent and expenses owed to the plaintiff for the use of the Three Vehicles.

Total debts owed

171 In the interest of clarity, I set out a table in Annex 1 based on the various invoices and credit notes claimed by both sides. After setting off the respective debts owed, a total sum of **$125,561.23** is owed by the defendant to the plaintiff. The table is partially based on an exhibit compiled jointly by the plaintiff and the defendant, where the plaintiff sets out its position with respect to all the invoices and credit notes and the defendant places its response to the same. [note: 133]

172 I highlight that this sum only pertains to the invoices and credit notes issued by both parties. The quantification of the rest of the claims (*eg* reasonable rent for the month of May 2013) will be done subsequently.

Conclusion

173 I summarise my findings below:

(a) I find that the Agreement is in the nature of an appointment of a distributor in the sense described by the plaintiff (see [71] above).

(b) I find that the plaintiff has not breached the Agreement (see [73], [90], [99] and [125] above).

(c) I find that the defendant has breached the Agreement by failing to pay the remaining amount due under the Instalment Scheme (see [120] above), failing to bear the cost of promotions (see [114] above), failing to pay for incoming stock (see [132] above) and failing to set up the retailer accounts and transferring the relevant SKUs in a timely manner (see [151] above). However, I find that the defendant was not in breach of an obligation to maintain sufficient stock levels (see [144] above).

(d) I find that the defendant is liable to pay rent for the months of February, March and April 2013 (see [121] above). However the defendant is not liable to pay the plaintiff the sum claimed with respect to rent for May 2013, instead, the defendant is liable to pay reasonable rent on a *quantum meruit* basis and the precise sum will be determined at a subsequent hearing (see [129] above).

(e) I find that the Agreement was validly terminated by the plaintiff, pursuant to the term reflected in clause 15.1 of the 9 April Draft, on 5 June 2013 (see [160] above).

(f) The defendant owes the plaintiff a total sum of **$125,561.23** after setting off all the invoices and credit notes issued by both parties (see [171] above).

174 Accordingly, judgment is entered for the plaintiff for a total sum of **$125,561.23** with interest from the date of writ at 5.33% p.a. till date of payment. Interlocutory judgment is also granted for other claims where liability has been ascertained with damages to be assessed by the Registrar.

175 I will hear the parties on costs within two weeks if parties are unable to agree that costs incurred up to the conclusion of this portion of the trial on liability should follow the event and are to be taxed if not agreed. Additional costs for the assessment of damages shall be reserved to the Registrar.

Annex 1

Plaintiff's invoices and credit notes pertaining to the Instalment Scheme				
S/N	Item	Amount after determination by the Court (SGD)	Defendant's ("Df") or Plaintiff's ("Pf") Response	Court's Position
1	Pf Invoice ("Inv") 7292 – Stock Handover on 01/02/2013	420,621.24	Df: Final Agreed amount should be $325,199.49	Pf's invoice is correct, see [120]
2	1st payment	-200,000.00	Agreed	
3	2nd payment	-50,000	Agreed	
Net amount owed to plaintiff in relation to the Instalment Scheme: 170,621.24				
Plaintiff's Other Invoices				

4	Pf Inv 7279 – Incoming Shipment – TGHU0841247 Organic Water & Steaz Drinks	15,206.52	Df: Agreed provided pf accepts Inv 166, 167, 381, 580 and 1989	Pf's invoice is correct, no need to accept df's invoices see [92]–[99] Additionally, Inv 580 and Inv 1989 were not adduced in court
5	Pf Inv 7290 – Rubywarehouse Rental – February '13	8,367.40	Df: Agreed provided pf accepts Inv 168	Pf's invoice is correct, no need to accept df's invoice, see [166]
6	Pf Inv 7291 – Staff Payroll & Working Levy – February 13	11,521.89	Agreed	
7	Pf Inv 7311 – OKF Drinks	5,474.55	Agreed	
8	Pf Inv 7323 – Zola Drinks	4,449.06	Agreed	
9	Pf Inv 7352 – Rubywarehouse Rental – March 2013	8,367.40	Df: Agreed provided pf accepts Inv 170	Pf's invoice is correct, no need to accept df's invoice, see [166]
10	Pf Inv 7369 – Organic Water	0	Df: Not accepted as it does not include loss of sale	Pf's invoice is correct, see [169]
11	Pf Inv 7354 - Sale of Fixed Assets [Three Vehicles]	0	Agreed	
12	Pf Inv 7377 - Expenses Reimbursement – February 2013	2,472.69	Agreed	
13	Pf Inv 7396 – Working Levy – March 2013	877.4	Agreed	
14	Pf Inv 7397 – Ruby Warehouse Rental – April 2013	8,367.40	Df: Agreed provided pf accepts Inv 171	Pf's invoice is correct, no need to accept df's invoice, see [166]
15	Pf Inv 7374 - Naughty G Original & Vodka	19,046.86	Agreed	
16	Pf Inv 7424 – Vehicle Insurance/Road Tax/Season Parking	1,465.61	Df: Only agreeable to pay for season parking for one vehicle	Pf's invoice is correct, see [170]
17	Pf Inv 7425 – Worker Insurance (Roger)	828.14	Agreed	

18	Pf Inv 7435 – Vodka Drinks	44,795.68	Agreed	
19	Pf Inv 7436 Daily Warehouse Rental	0	Pf: Ought to be paid 3,745 for rental in May 2013	Df does not have to pay for May rental, see [129]
20	Pf Inv 7437 – Working Levy – April 2013	877.4	Agreed	
21	Pf Inv 7438 – Fixed Assets Rental (Three Vehicles)	10,464.89	Df: Not agreeable to pay rent for all the vehicles	Pf's invoice is correct, see [170]
22	Pf Inv 7440 – Sheng Siong 2% Sales Rebate – February 2013	6.69	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
23	Pf Inv 7441- 7-Eleven – Expense Deduction	6,573.67	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
24	Pf Inv 7442 – Sheng Siong 2% Rebate – March 2013	13.27	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
25	Pf Inv 7443 – Utility, Telephone , Internet Expenses (Ruby Warehouse)	(597.81 – 309.79) = 288.02	Pf: Df has to pay for expenses in May Df: Should deduct 309.79 for expenses in May	Df's position is correct, see [165]
26	Pf Inv 7455 – Daily Warehouse Rental for 8/5/13 – 29/5/13	0	Pf: Pf ought to be paid 11,770 for rental in May	Df does not have to pay for May rental, see [129]
27	Pf Inv 7459 – 7-Eleven Expenses Deduction – up till June 2013	8,115.01	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
28	Pf Inv 7461 – Loss of NTUC Pallets	29.96	Agreed	
29	Pf Inv 7463 – Prime Supermarket Ltd – February 2013 Sales Expenses	4.75	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
30	Pf Inv 7466 – Sheng Siong Supermarket Pte Ltd – March 2013 Sales Expenses Deduction	10.73	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]

31	Pf Inv 7476 NTUC February – April 2013 Expenses Deduction	4,312.56	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
32	Pf Inv 7477 – Cold Storage February – March 2013 Expenses Deduction	35,462.47	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
33	Pf Inv 7479 – 7-Eleven April 2013 Expenses Deduction	941.13	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
34	Pf Inv 7497 – Prime Supermarket Pte Ltd – March 2013 Sales Expense Deduction	5.14	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
35	Pf Inv 7522 – Cold Storage April 2013 Expense	736.62	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
36	Pf Inv 7576 – 7-Eleven May 2013 Expenses	44.13	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
37	Pf Inv 7577 – Cold Storage May 2013 Expenses	310.59	Df: Not accepted, plaintiff should bear cost of promotions/rebates	Pf's invoice is correct, see [114]
Amount owed to plaintiff under the invoices (excluding Instalment Scheme sums): 199,437.63				
Plaintiff's Other Credit Notes				
38	CR003285 50% deposit (for Organic Water)	6,022.00	Df: Not accepted as it does not include loss of sale	Pf's CN is correct, no need to include loss of sale, see [169]
39	CR003301 Remind Balance (for Organic Water)	7,087.13	Df: Not accepted as it does not include loss of sale	Pf's CN is correct, no need to include loss of sale, see [169]
40	CN000479 Aloe Vera & Nippy's Milk Good Return	6,898.76	Df: Not accepted as not all the goods were repurchased by the plaintiff under this credit note	Pf's position is correct, Pf has no obligation to repurchase all the allegedly unmerchantable goods, see [96]–[99]
41	CN000485 Sheng Siong February 2013 Sales	333.84	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]

42	CN000486 7-Eleven February 2013 Sales	9794.37	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
43	CN000487 Cash Sales Collection	2,703.36	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
44	CN000488 Sheng Siong March 2013 Sales	663.5	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
45	CN000509 Goods Return	13,330.49	Df: Not agreed as it is covered in Inv 167 (profit margin included)	Pf not obliged to compensate defendant's for allegedly unmerchantable goods and no obligation to clear "short term expiry stock", see [90] and [99]
46	CN000512 7-Eleven Sales Collection March 2013	15,754.70	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
47	CN000514 Eastmart Natural – Goods Return	961.8	Df: Not agreed as it is covered in Inv 166 (profit margin included)	Pf not obliged to compensate defendant's for allegedly unmerchantable goods and no obligation to clear "short term expiry stock", see [90] and [99]
48	CN000515 Sales Collection Commission 10%	256.28	Agreed	
49	CN000516 Storage, Unloading & Loading Charges March 2013	749	Agreed	
50	CN000518 Prime Supermarket Ltd Feb 2013 Sales	95.02	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]

51	CN000522 Sheng Siong Supermarket Pte Ltd April 2013	400.61	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
52	CN000532 NTUC February – April 2013 Sales	20,809.89	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
53	CN000533 Cold Storage February – March 2013 Sales	45,002.91	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
54	CN000534 7-Eleven April 2013 Sales	6,671.68	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
55	CN000539 Prime Supermarket Pte Ltd March 2013 Sales	102.72	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
56	CN000542 Cold Storage – April 2013 Sales	1,904.02	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
57	CN000549 7-Eleven April 2013 Sales	383.92	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
58	CN000550 Cold Storage April 2013 Sales	4,731.54	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
59	CN000556 Cancelled Invoice 7374 & 7435	63,842.54	Agreed	
60	CN000557 Naughty G Vodka Shots 60ml – CWT Stock Credit – 2112 Dozens	33,355.24	Df: Some stock not included, hence not accepted	Pf's CN is correct, see [164]
61	CN000579 Cash Sales Collection – February & March 2013	2,642.32	Df: Not agreed, plaintiff should not deduct cost of promotions/rebates from sales commissions	Pf's CN is correct, see [114]
Total Amount credited back to defendant: 244,497.64				

Defendant's invoices				
62	Df Inv 143 – Sales Commissions	0		Sales commissions already taken into account in pf's credit notes
63	Df Inv 144 – Sales Commissions	0		Sales commissions already taken into account in pf's credit notes
64	Df Inv 145 – Account Opening Fees	0		No basis to charge plaintiff for account opening fees, see [168]
65	Df Inv 146 – Use of df resources to load containers	0		Not proved, see [167]
66	Df Inv 147 – 10% Sales commission	0		Already taken into account in CN000515, see S/N 48
67	Df Inv 148 – Use of df resources to load containers	0		Already taken into account in CN000516 see S/N 49
68	Df Inv 163 – "Sale" of goods to pf	0		Already taken into account in pf's credit notes, see S/N 40, 45 47
69	Df Inv 165 – "Sale" of goods to pf	0		Already taken into account in pf's credit notes, see S/N 40, 45 47
70	Df Inv 166 – "Sale" of goods to pf	0		Already taken into account in pf's credit notes, see S/N 40, 45 47
71	Df Inv 167 – "Sale" of goods to pf	0		Already taken into account in pf's credit notes, see S/N 40, 45 47
72	Df Inv 168 – Storage of dead stock	0		No basis for claim, see [166]

73	Df Inv 169 – Sales Commissions	0		Sales commissions already taken into account in pf's credit notes
74	Df Inv 170 – Storage of dead stock	0		No basis for claim, see [166]
75	Df Inv 171 – Storage of dead stock	0		No basis for claim, see [166]
76	Df Inv 381 – Claim for loss of sale and price paid for "Organic Water"	0		Pf has no obligation to compensate df for loss of sale and purchase price of "Organic Water" already refunded, see [169]
Additional amount due under defendant's invoices: 0				
Total amount owed by defendant to plaintiff: 170,621.24 + 199,437.63 – 244,497.64 – 0 = 125,561.23				

[note: 1] Exhibit P3.

[note: 2] Closing Submissions of the Defendant, para 33.

[note: 3] Notes of Evidence ("NE") Day 2, pp 39–41.

[note: 4] Bundle of Affidavits of Evidence-In-Chief ("BAEIC") Volume 3 Tab 3, p 2.

[note: 5] NE Day 4, p 35.

[note: 6] BAEIC Volume 3 Tab 3, p 2; BAEIC Volume 1 Tab 1, p 6.

[note: 7] BAEIC Volume 1 Tab 1, p 136.

[note: 8] NE Day 1, pp 21–22; Agreed Bundle of Documents ("ABD") Volume 1, pp 293–298.

[note: 9] BAEIC Volume 1 Tab 1, p 213.

[note: 10] BAEIC Volume 3 Tab 3, p 6.

[note: 11] NE Day 4, pp 104–105.

[note: 12] BAEIC Volume 1 Tab 1, pp 122–138.

[note: 13] NE Day 3, pp 20–22.

[note: 14] BAEIC Volume 1 Tab 1, p 393.

[note: 15] ABD Volume 2, pp 809, 811, 830–833, 853–866.

[note: 16] BAEIC Volume 3 Tab 3, p 7; NE Day 4, p 85.

[note: 17] ABD Volume 2, pp 944–950, 962–966.

[note: 18] BAEIC Volume 1 Tab 1, p 71; ABD Volume 2, p 1006.

[note: 19] Plaintiff's Closing Submissions, para 27.

[note: 20] Ramu Chidambaram's Affidavit in Reply dated 12 July 2017, p 3.

[note: 21] Setting Down Bundle ("SDB"), p 8.

[note: 22] Plaintiff's Closing Submissions, para 51–54.

[note: 23] Plaintiff's Closing Submissions, para 58.

[note: 24] SDB, p 16.

[note: 25] SDB, pp 34–35.

[note: 26] SDB, pp 36–37.

[note: 27] Defendant's Reply to Closing Submissions of the Plaintiff, para 39.

[note: 28] Closing Submissions of the Defendant, para 19.

[note: 29] Closing Submissions of the Defendant, paras 21–22.

[note: 30] Closing Submissions of the Defendant, para 31.

[note: 31] Closing Submissions of the Defendant, para 27

[note: 32] Closing Submissions of the Defendant, para 32.

[note: 33] Closing Submissions of the Defendant, para 12.

[note: 34] SDB, p 50.

[note: 35] NE Day 6, pp 30–36.

[note: 36] NE Day 3, pp 105–106.

[note: 37] Plaintiff's Closing Submissions, para 99.

[note: 38] Closing Submissions of the Defendant, para 6.

[note: 39] NE Day 3, p 14.

[note: 40] BAEIC Volume 1 Tab 1, pp 124–129.

[note: 41] BAEIC Volume 1 Tab 1, pp 37–39.

[note: 42] ABD Volume 2, p 839.

[note: 43] NE Day 3, p 8.

[note: 44] NE Day 4, p 65.

[note: 45] BAEIC Volume 1 Tab 1, p 126.

[note: 46] BAEIC Volume 3 Tab 3, page 11.

[note: 47] Closing Submissions of the Defendant, paras 19–20.

[note: 48] NE Day 4, pp 14–15.

[note: 49] NE Day 2, p 125.

[note: 50] NE Day 3, pp 69–70.

[note: 51] NE Day 3, p 72.

[note: 52] Plaintiff's Closing Submissions, para 50.

[note: 53] Defendant's Reply to Closing Submissions of the Plaintiff, para 17.

[note: 54] NE Day 1, p 49.

[note: 55] NE Day 2, pp 87–88.

[note: 56] BAEIC Volume 1 Tab 1, pp 6–7.

[note: 57] BAEIC Volume 3 Tab 3, p 3.

[note: 58] BAEIC Volume 1 Tab 1, p 104.

[note: 59] NE Day 1, pp 50–51.

[note: 60] Plaintiff's Bundle of Documents, p 100.

[note: 61] NE Day 3, p 89.

[note: 62] NE Day 1, pp 50–51.

[note: 63] NE Day 3, p 89.

[note: 64] BAEIC Volume 1 Tab 1, pp 7–9.

[note: 65] NE Day 3, p 88.

[note: 66] NE Day 3, pp 139–140.

[note: 67] SDB, pp 94,109–110.

[note: 68] Plaintiff's Core Bundle of Documents ("PCB"), pp 374, 375, 376 and 378.

[note: 69] NE Day 2, pp 53–55.

[note: 70] BAEIC Volume 1 Tab 1, pp 343, 345; BAEIC Volume 2 Tab 1, p 668.

[note: 71] Closing Submissions of the Defendant, para 33.

[note: 72] Closing Submissions of the Defendant, paras 20–22.

[note: 73] NE Day 5, pp 99–101.

[note: 74] ABD Volume 1, pp 179–180.

[note: 75] ABD Volume 1, pp 295–298.

[note: 76] Closing Submissions of the Defendant, para 21.

[note: 77] NE Day 4, pp 104–105.

[note: 78] ABD Volume 2, p 687; NE Day 4, pp 41–42.

[note: 79] NE Day 1, pp 94–95.

[note: 80] NE Day 3, p 53.

[note: 81] NE Day 4, p 44.

[note: 82] NE Day 3, pp 21–22.

[note: 83] BAEIC Volume 1 Tab 1, pp 108–110.

[note: 84] BAEIC Volume 1 Tab 1, pp 126–128.

[note: 85] Closing Submissions of the Defendant, para 29.

[note: 86] NE Day 3, p 55.

[note: 87] ABD Volume 2, p 770.

[note: 88] Plaintiff's Closing Submissions, para 123.

[note: 89] Defendant's Reply to Closing Submissions of the Plaintiff, para 64.

[note: 90] Defendant's Reply to Closing Submissions of the Plaintiff, para 64.

[note: 91] BAEIC Volume 1 Tab 1, p 125.

[note: 92] BAEIC Volume 1 Tab 1, pp 7–8.

[note: 93] BAEIC Volume 1 Tab 1, p 213.

[note: 94] BAEIC Volume 1 Tab 1, pp 14–16, 213.

[note: 95] NE Day 4, pp 36 and 99.

[note: 96] Closing Submissions of the Defendant, para 12.

[note: 97] Closing Submissions of the Defendant, p 4.

[note: 98] SDB, p 48.

[note: 99] SDB, p 17.

[note: 100] SDB, pp 50–52.

[note: 101] Plaintiff's Closing Submissions, para 284.

[note: 102] Plaintiff's Closing Submissions, para 292; Defendant's Reply to Closing Submissions of the Plaintiff, para 42; BAEIC Volume 1 Tab, p 285.

[note: 103] Defendant's Reply to Closing Submissions of the Plaintiff, paras 42–43.

[note: 104] Defendant's Reply to Closing Submissions of the Plaintiff, para 43.

[note: 105] BAEIC Volume 1 Tab 1, pp 285 and 297; PCB, p 382.

[note: 106] NE Day 5, pp 29–30; Exhibit P4.

[note: 107] NE Day 5, pp 35–36; Exhibit P5.

[note: 108] Plaintiff's Closing Submissions, paras 300 and 302.

[note: 109] Exhibit P4; Exhibit P5.

[note: 110] Plaintiff's Closing Submissions, para 239; BAEIC Volume 3 Tab 3, p 7; NE Day 4, p 85.

[note: 111] BAEIC Volume 1 Tab 1, p 125.

[note: 112] Defendant's Reply to Closing Submissions of the Plaintiff, para 30.

[note: 113] NE Day 2, p 87.

[note: 114] BAEIC Volume 2 Tab 1, pp 679–684.

[note: 115] Plaintiff's Closing Submissions, para 331(e).

[note: 116] Plaintiff's Closing Submissions, para 330.

[note: 117] Plaintiff's Closing Submissions, paras 329 and 331.

[note: 118] BAEIC Volume 1 Tab 1, p 129.

[note: 119] ABD Volume 2, pp 945–946.

[note: 120] ABD Volume 2, pp 949–950.

[note: 121] ABD Volume 2, p 965.

[note: 122] ABD Volume 2, p 1006.

[note: 123] Plaintiff's Closing Submissions, paras 251–252.

[note: 124] Plaintiff's Closing Submissions, para 407.

[note: 125] NE Day 6, pp 3

[note: 126] BAEIC Volume 1 Tab 1, p 325.

[note: 127] ABD Volume 3, p 1187; Closing Submissions of the Defendant, para 33.

[note: 128] NE Day 2, p 18.

[note: 129] BAEIC Volume 3 Tab 3, p 11.

[note: 130] ABD Volume 3, p 1187; PCB, p 370.

[note: 131] Closing Submissions of the Defendant, para 27.

[note: 132] NE Day 1, pp 97–99.

[note: 133] Exhibit D5.