IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 147

Originating Application No 62 of 2024

Between

EBS Flow Control Ltd

… *Claimant*

And

Greene, Tweed & Co Pte Ltd

… *Defendant*

JUDGMENT

[Contract — Contractual terms — Admissibility of Evidence]
[Contract — Contractual terms — Interpretation]
[Contract — Contractual terms — Incorporation by reference]
[Contract — Contractual terms — Unfair Contract Terms Act]
[Contract — Contractual terms — Implied term]
[Damages — Liquidated damages or penalty]

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v
Greene, Tweed & Co Pte Ltd

[2024] SGHC 147

General Division of the High Court — Originating Application No 62 of 2024
Hri Kumar Nair J
24 May 2024

7 June 2024 Judgment reserved

Hri Kumar Nair J:

Background

1 From 2016 to 2020, the Claimant ("EBS") and the Defendant ("GT") entered into yearly distributorship agreements ("2016 DA",[1] "2017 DA",[2] "2018 DA",[3] "2019 DA",[4] and "2020 DA",[5] collectively "DAs"), whereby GT sold industrial products and materials to EBS for EBS to sell in China.

2 This dispute turns on the proper construction of the 2020 DA.

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1 Joint Bundle of Cause Papers dated 30 April 2024 ("Joint Bundle") at pp 28–42.

2 Joint Bundle at pp 43–57.

3 Joint Bundle at pp 58–71.

4 Joint Bundle at pp 372–383.

5 Joint Bundle at pp 384–399.

3 The 2020 DA was entered into on 12 August 2020,[6] and was expressly made effective for one year.[7] On 29 June 2021 (*ie*, 44 days before the 2020 DA was due to expire) GT sent a notice ("the GT Notice") to EBS informing them of its intention "not to renew or extend the [2020 DA]" after 12 August 2021.[8] When the 2020 DA purportedly expired on 12 August 2021, EBS still held about US$2.8m worth of products.[9] After 12 August 2021, GT delivered products worth about US$2.8m to EBS – on the basis that they were "pursuant to purchase orders that EBS had submitted, and which GT had accepted prior to the expiry of the 2020 DA on 12 August 2021".[10] This ultimately left EBS with an inventory of products worth approximately US$5.6m ("the Leftover Inventory"), which EBS claimed it was unable to sell given that its distributorship rights had been terminated.[11]

4 On 19 January 2024, EBS brought this application, claiming that:

(a) GT wrongfully terminated the 2020 DA by failing to comply with an express term of the 2020 DA to provide 90 days' notice of its intention not to renew and/or allow the 2020 DA to expire;[12] and

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6 Joint Bundle at p 384.

7 Joint Bundle at p 389.

8 Sun Chengyou's 1st Affidavit dated 3rd January 2024 ("EBS' 1st Affidavit") at p 84; Joint Bundle at p 92.

9 EBS' 1st Affidavit at paras 15 and 17.

10 Swee Heng Low's 1st Affidavit dated 27 February 2024 ("GT's 1st Affidavit") at para 33.

11 EBS' 1st Affidavit at para 23.

12 EBS' 1st Affidavit at para 3(a).

(b) GT is in breach of an implied term of the 2020 DA that GT is obliged to buyback the Leftover Inventory upon termination of the 2020 DA (the "Implied Term").[13]

5 GT brought a counterclaim for unpaid invoices in respect of products sold to EBS amounting to US$182,087.20.[14]

Issues to be determined

6 The issues are:

(a) Whether GT wrongfully terminated the 2020 DA?

(b) Whether the Implied Term exists?

(c) Whether GT's counterclaim should be allowed?

Wrongful termination

7 The 2020 DA contains the following clause (the "2020 Term Clause"):[15]

> Term and Termination.
>
> Term. The term ("Term") of this Agreement shall become effective on the Effective Date and shall remain in effect for one (1) year. During this period either Party may terminate this Agreement by providing the other Party with not less than

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13 EBS' 1st Affidavit at para 3(b).

14 GT's 1st Affidavit at paras 49–51.

15 Joint Bundle at p 389.

> ninety (90) days written notice of its intention not to renew and/or allow the Agreement to expire.

"Effective Date" is not defined in the 2020 DA, and in the absence of an intention to the contrary, must be understood to refer to 12 August 2020, being the date the 2020 DA was entered.[16]

8 The GT Notice states:[17]

> As you know, the [2020 DA] will terminate in accordance with its terms on August 12, 2021 (the "Termination Date"). This letter is to inform you that [GT] has decided not to renew or extend the [2020 DA] or enter into a new replacement agreement with [EBS] after the Termination Date. …
>
> We will continue to fulfil the outstanding confirmed orders which we have accepted pursuant to the Agreement. With respect to orders that have been made by [EBS] but which we have not yet accepted or rejected, [GT] will continue to review such orders in light of our production schedule and other factors, in accordance with our rights under the [2020 DA].

9 It is not in dispute that the GT Notice was issued 44 days before the 2020 DA was due to expire on 12 August 2021.[18]

Parties' interpretation of the 2020 Term Clause

EBS' interpretation

10 EBS argues that the 2020 Term Clause obliges GT to provide EBS with at least 90 days' notice of its intention not to renew the 2020 DA and/or to allow it to expire,[19] and GT's failure to give such notice had the effect of automatically

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16 Joint Bundle at p 384.

17 Joint Bundle at p 92.

18 Joint Bundle at p 92; Claimant's Written Submissions dated 30 April 2024 ("CWS") at para 34; Defendant's Written Submissions dated 30 April 2024 ("DWS") at para 15.

19 EBS' 1st Affidavit at para 16; CWS at para 16.

renewing the 2020 DA for another year.[20] GT's Notice therefore amounted to a wrongful termination of the 2020 DA.[21]

11 In support of this interpretation, EBS raises the following:

(a) The plain reading of the 2020 Term Clause states that a party is required to give 90 days' written notice to inform the other party of its "*intention not to renew and/or allow the [2020 DA] to expire*", and this must mean that parties intended for the automatic renewal of the 2020 DA if such notice is not given.[22]

(b) The 2020 Term Clause does not allow for early termination of the 2020 DA before the expiry of its one-year term.[23] In other words, even if notice is given at the start of the contract, parties would still only be able to terminate the agreement at the end of the one-year term. EBS argues that this makes commercial sense given the significant capital outlay involved in its labour, marketing, and operational costs – it would not make sense to allow premature termination, as that would undermine EBS' return on investment.[24]

(c) If there is any ambiguity in the 2020 Term Clause, any reasonable doubt in its interpretation should be resolved against GT under the *contra proferentum* rule.[25]

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20 CWS at para 16.

21 CWS at para 16.

22 CWS at paras 19–21.

23 CWS at para 22.

24 CWS at paras 22–25.

25 CWS at paras 29–33.

GT's interpretation

12 GT's interpretation is that the 2020 DA was only effective for one year and expired on 12 August 2021 without any requirement for notice.[26] In other words, there is no automatic renewal, and the notice was only relevant if a party wished to terminate the 2020 DA prematurely (*ie*, before its one-year term was up).[27]

13 In support of this interpretation, GT refers to:

(a) The plain wording of the 2020 Term Clause, where the first sentence provides that the 2020 DA was to "remain in effect for one (1) year".[28] The second sentence of the 2020 Term Clause which provides that if a party wished for the 2020 DA to be terminated "[d]uring this period" (*ie*, before the one-year mark), that party would have to provide 90 days written notice.[29]

(b) The presence of an express automatic renewal clause in the 2019 DA, which was subsequently removed in the 2020 DA, evinced the parties' intention to remove automatic renewal of the 2020 DA.[30]

(c) Each year, parties entered a fresh DA on new terms, which suggests that none of them were automatically renewed. Parties had to negotiate and enter a new contract every year.

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26 DWS at para 19.

27 DWS at para 20.

28 DWS at para 20.

29 DWS at para 20.

30 DWS at paras 23–25.

(d) The "Initial Order" and "Initial Stock" clauses in the 2020 DA which only refer to two six-month periods without providing for any subsequent periods.[31] This reflects parties' intention that the 2020 DA would only be in effect for a total of 12-months.

(e) Parties' correspondence after GT's Notice suggested that EBS themselves recognised the 2020 DA would terminate at the end of the one-year mark.[32]

14 I note that the GT Notice did not purport to *terminate* the 2020 DA or give notice of an intention to terminate. Consistent with GT's arguments, the GT Notice stated that the 2020 DA would expire at the end of its one-year term.[33]

The law

15 The law on the interpretation of terms was summarised by the Court of Appeal (*Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [30]):

> In gist, the purpose of interpretation is to give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language. Embedded within this statement are certain key principles: (a) first, in general both the text and context must be considered (at [2]); (b) second, it is the *objectively ascertained intentions of the parties* that is relevant, not their subjective intentions (at [33]); and (c) third, the object of interpretation is the verbal expressions used by

31 DWS at paras 21–22.

32 DWS at paras 27–28.

33 Joint Bundle at p 92.

> the parties and so, *the text of their agreement is of first importance* (at [32]).
>
> [emphasis in original]

16 In ascertaining the objective intentions of the parties, "the courts must remain ever vigilant to ensure that, in interpreting a contract, extrinsic evidence is only employed to illuminate the contractual language and not as a pretext to contradict or vary it" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [122]). However, if, in light of the relevant extrinsic material, "the plain language of the contract becomes ambiguous (*ie*, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language" (*Zurich Insurance* at [130]) – with the caveat that the meaning must still be one which "the words are reasonably adequate to convey" (see *Zurich Insurance* at [122]). Whether the interpretation amounts to: (a) "contradiction or variation" of the plain language; or (b) merely adopting an interpretation which is "different from that demanded by its plain language" but still within a meaning which "the words are reasonably adequate to convey" – is ultimately a question of "degree" (*Zurich Insurance* at [122]).

17 The contextual approach to contractual interpretation proceeds in two broad steps (see *Zurich Insurance* at [124]):

(a) the first step requires consideration of whether the extrinsic evidence sought to be adduced in aid of interpretation is admissible; and

(b) the second step is the task of interpretation itself, which involves ascertaining the meaning of expressions used in a contract, taking into account the admissible evidence.

The admissibility of extrinsic evidence

18 The starting point for the admissibility of extrinsic evidence in aid of interpretation is ss 93 and 94 of the Evidence Act 1893 ("EA") which provides:

> **93.** When the terms of a contract … have been reduced … to the form of a document, … no evidence may be given in proof of the terms of such contract … except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.
>
> **…**
>
> **94.** When the terms of any such contract … have been proved according to section 93, no evidence of any oral agreement or statement is to be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:
>
> **…**
>
> (*f*) any fact may be proved which shows in what manner the language of a document is related to existing facts.

19 In light of the "Entire Agreement"[34] clause in the 2020 DA which reduced the agreement to the "form of a document", ss 93 and 94 of the EA apply. This includes s 94(*f*), which allows for the admission of extrinsic evidence to aid in the exercise of the interpretation (as distinguished from the contradiction, variation, addition or subtraction) of the expressions used by the parties (see *Yap Son On* at [41]; *Zurich Insurance* at [132(c)]).

20 However, the general admissibility of extrinsic evidence under s 94(*f*) EA is subject to the following restrictions:

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[34] Joint Bundle at p 391.

(a) the three general requirements that the extrinsic evidence sought to be admitted must be: (a) relevant; (b) reasonably available to all the contracting parties at the time of the contract; and (c) relate to a clear or obvious context (*Zurich Insurance* at [125] and [132(d)]); and

(b) section 95 EA which acts as an absolute bar to the admissibility of extrinsic evidence in the case of patent ambiguity (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [65(c)]).

The Zurich Insurance requirements

21 The three *Zurich Insurance* requirements are (*Yap Son On* at [53]; *Zurich Insurance* at [125]):

(a) First, the evidence had to be *relevant*. Evidence is relevant if it would affect the way in which the language of the document would have been understood by a reasonable man.

(b) Second, it must be *reasonably available* to all parties at the time of contracting. Given that a contract is a bilateral (or multilateral) agreement involving one or more parties, its terms can only be interpreted by reference to material which all the parties to the agreement would reasonably have had access to. In this connection, the availability of the material is measured with reference to the situation in which the parties were at the time of the contract.

(c) Third, it must relate to a *clear or obvious context*. Evidence relates to a clear or obvious context if it would allow the court to objectively ascertain a clearly defined or definable intention held by

both parties with respect to how the contractual term in question should be interpreted.

22 In this regard, although there is no absolute prohibition against evidence of prior negotiations or subsequent conduct, such evidence is likely to be inadmissible for non-compliance with the *Zurich Insurance* requirements (*Zurich Insurance* at [132(d)]; *Sembcorp Marine* at [75]; *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*") at [62] and [73]). However, a distinction should be drawn between evidence of "prior negotiations" and "antecedent contracts". The Court of Appeal stated (*MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379 ("*MAE Engineering*") at [24]):

> Although evidence of prior negotiations is inadmissible as it does not represent any consensus between the parties, *evidence of an antecedent agreement is an objective fact that the court should take into account as part of the "factual matrix" in which the parties made their contract.*
>
> [emphasis added]

23 Here, GT sought to rely on two main groups of extrinsic evidence: (a) the previous editions of the DAs between 2016 to 2019; and (b) correspondence between the parties after GT's Notice of termination.

24 The previous editions of the DAs satisfy the *Zurich Insurance* requirements. First, they are relevant as they provide historical context to the evolution of the term clauses from 2016 to 2020. Second, they were reasonably available to all parties at the time of contracting. The parties to the 2020 DA and the previous editions of the DA are identical, and the evidence suggests that the 2020 DA was adapted from the previous editions. For instance, a number of

clauses in the 2020 DA contain references to "Section" numbers,[35] which are absent in the 2020 DA itself but found in all previous editions of the DAs.[36] Third, they relate to a clear or obvious context as they shed light on how the same parties had phrased the term clause in the past when they provided for automatic renewal. Moreover, they constitute "antecedent agreements" which are "objective fact[s] that the court should take into account as part of the 'factual matrix' in which the parties made their contract" (*MAE Engineering* at [24]).

25 However, the correspondence does not satisfy the *Zurich Insurance* requirements, as it was not reasonably available at the time of contracting.

The s 95 EA prohibition

26 Beyond the *Zurich Insurance* requirements, s 95 EA prohibits the admissibility of extrinsic evidence where there is patent ambiguity on the face of the clause itself:

> **Exclusion of evidence to explain or amend ambiguous document**
>
> **95.** When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.
>
> *Illustrations*
>
> (*a*) *A* agrees in writing to sell a horse to *B* for $500 or $600. Evidence cannot be given to show which price was to be given.
>
> (*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

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35 Joint Bundle at pp 386, 387, 388, 390, and 393.

36 Joint Bundle at pp 28–72, and 372–383.

27 In such cases, extrinsic evidence is not admissible in spite of s 94(*f*) EA because, "admission of such evidence would not be interpreting a contract, but making a new one" (*Zurich Insurance* at [76]). "On account of the inherent ambiguity or imperfection in the language or the deficiency or inconsistency of the words used, the intention of the maker of the document becomes a matter of pure speculation and the document fails" (*Zurich Insurance* at [76], citing Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence* (Wadhwa & Co, 16th Ed, 2007) at p 1552).

28 Neither party argued that s 95 EA applied in this case to exclude any extrinsic evidence. In any event, I note that "[t]he operation of s 95 is … extremely narrow" (*Zurich Insurance* at [76]), and there is no patent ambiguity in the 2020 Term Clause which warrants its application.

The plain language of the 2020 Term Clause

29 The first sentence of the 2020 Term Clause is clear and there can be no argument as to what it means:[37]

> The term ("Term") of this Agreement shall become effective on the Effective Date and shall remain in effect for one (1) year.

30 The parties clearly intended for the 2020 DA to expire at the end of one year on 12 August 2021. The issue is whether the second sentence of the Term Clause qualified this by extending or renewing that one-year term or providing a mechanism for doing so. Given the clear and unambiguous language in the first sentence, the qualification, if any, should be clear as well.

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[37] Joint Bundle at p 389.

31 The second sentence bears re-stating:[38]

> ***During this period*** [*viz.* the one-year term] either Party may ***terminate this Agreement*** by providing the other Party with not less than ninety (90) days written notice of its intention not to renew and/or allow the Agreement to expire.
>
> [emphasis added]

32 I make the following observations.

33 First, on its plain language, the second sentence is intended to give the parties a right or mechanism to *terminate* the 2020 DA *during the one-year term*, and not to renew or extend it.

34 Second, that right to terminate is in respect of "this Agreement", which must be the 2020 DA with a one-year period. There is no reference to any renewed or extended agreement.

35 Third, there is no express right to renew or automatic renewal.

36 Fourth, the phrases "During this period" and "terminate this Agreement" suggest that parties intended to confer a right to terminate the 2020 DA before its expiry. However, what then to make of the phrase "*of its intention not to renew and/or allow the Agreement to expire*"? If the intention is to allow the parties to terminate the 2020 DA prematurely, then that phrase is redundant. GT's counsel suggested that it may be superfluous. But if the notice expressly states that the issuer does not intend to renew the 2020 DA and/or intends to allow it to expire, it would be inconsistent that the parties then intended for that same notice to terminate the 2020 DA *before* its term expires. Further, there are other clauses in the 2020 DA which expressly deal with when it may be

[38] Joint Bundle at p 389.

terminated prematurely, namely the clauses dealing with the parties' breach, change of ownership, or insolvency of EBS.[39]

37 Given this, I find that the second sentence does not give either party the right to terminate the 2020 DA prematurely. That does not mean that *failure* to give the 90-day notice automatically renews the 2020 DA. The second sentence is, at best, ambiguous and does not qualify the clear meaning and effect of the first sentence.

The extrinsic evidence

38 The term clauses in the previous DAs make clear that parties did not intend an automatic renewal mechanism in the 2020 DA. The term clause in the 2016 DA ("2016 Term Clause") provides:[40]

> The term ("Term") of this Agreement shall become effective on the Effective Date and shall remain in effect for one (1) year. ***Thereafter, this Agreement shall renew on a month-to-month basis*** or until the Parties execute a written renewal. ***During such month-to-month renewal period*** either Party may terminate this Agreement by providing the other Party with not less than ninety (90) days written notice of its intention not to renew and/or allow the Agreement to expire.
>
> [emphasis added]

Similarly, the term clause in the 2017 DA ("2017 Term Clause") provides:[41]

> The term ("Term") of this Agreement shall become effective on the Effective Date and shall remain in effect for one (1) year. ***Thereafter, this Agreement shall renew on a [sic] annual basis*** or until the Parties execute a written renewal. ***During the initial term or any term renewal term*** either Party may terminate this Agreement by providing the other Party with not

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39 Joint Bundle at pp 389–390.

40 Joint Bundle at p 34.

41 Joint Bundle at p 49.

> less than ninety (90) days written notice of its intention not to renew and/or allow the Agreement to expire.
>
> [emphasis added]

Finally, the term clause in the 2019 DA ("2019 Term Clause") provides:[42]

> The term ("Term") of this Agreement shall become effective on the Effective Date and shall remain in effect for one (1) year. ***Thereafter, this Agreement shall renew on a month-to-month basis*** or until the Parties execute a written renewal. ***During such month-to-month renewal period*** either Party may terminate this Agreement by providing the other Party with not less than thirty (30) days written notice of its intention not to renew and/or allow the Agreement to expire.
>
> [emphasis added]

39 The only DA (besides the 2020 DA) where parties did not provide expressly for automatic renewal was the 2018 DA ("2018 Term Clause"):[43]

> The term ("Term") of this Agreement shall become effective on the Effective Date and shall remain in effect for one (1) year. During this period either Party may terminate this Agreement by providing the other Party with not less than thirty (30) days written notice of its intention not to renew and/or allow the Agreement to expire.

40 In short, the parties expressly provided for automatic renewals in the 2016 and 2017 Terms Clauses, removed it in the 2018 Term Clause, reintroduced it in the 2019 Term Clause and removed it again in the 2020 Term Clause. This is strong evidence that the parties applied their minds to the issue of renewals and included express language in the Term Clauses when they intended automatic renewals.

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42 Joint Bundle at p 376.

43 Joint Bundle at p 63.

41 The objective interpretation is that parties did not intend for the 2020 DA to be automatically renewed.

42 Finally, EBS relies on the *contra proferentum* rule which allows the court to resolve any ambiguity against the person seeking to rely on the term or the person who proposed the term for inclusion in the contract (*LTT Global Consultants v BMC Academy Pte Ltd* [2011] 3 SLR 903 ("*LTT Global*") at [56]–[57], endorsed in *General Hotel Management (Singapore) Pte Ltd and another v The Wave Studio Pte Ltd and others* [2023] 1 SLR 1317 at [47]). However, the courts have declined to apply the *contra proferentum* rule where the contract was "bilaterally negotiated" (*LTT Global* at [58]–[59]; *Leong Hin Chuee v Citra Group Pte Ltd and others* [2015] SGHC 30 at [103]–[104]).

43 This was not a case of a standard form contract which EBS had no choice but to take or leave (*LTT Global* at [59]). Although the DAs are on GT's letterhead, each of them contains several differences. It was not EBS' evidence that these were unilateral changes imposed by GT which they had no choice but to accept.

44 GT's counsel highlighted a handwritten note signed by the Managing Director of EBS, Mr Sun, on a page in the 2018 DA dealing with EBS' "Downstream Sales Target for FY19":[44]

> Subject to a further discussion on this. Ebs did not have any exclusive agreement with target sales, as we focus on a long term. To have a target sales could conclude some kind of short vision and effect [*sic*] a long time future sales. But the manufacturer [GT] is always in a clear point stand to see every

[44] Joint Bundle at p 71.

> week on what Ebs is doing. But we do have some forecasting on our sales. This is not a bound term to this agreement.

45 This handwritten note suggests that parties engaged in some discussions on the terms of the 2018 DA, which suggests negotiations. Even if I put aside the evidence of negotiations, the burden lies on EBS to demonstrate the application of the *contra proferentum* rule and it has failed to meet that burden. In any event, given the extrinsic evidence, the parties clearly did not intend for the 2020 DA to be automatically renewed, and the *contra proferentum* rule does not assist EBS.

46 The result is that the 2020 DA was effective for one year and terminated upon its expiry. It was not automatically renewed. If follows that GT was not in breach by issuing the GT Notice or otherwise.

47 For completeness, I do not accept GT's arguments at [13(c)] and [13(d)] above – that parties entered into yearly agreements and provided stock orders for 6-month periods is neutral to whether parties intended an automatic renewal.

Implied term to buyback

48 For the reasons below, I reject EBS' case that the 2020 DA contains the Implied Term.

The law

49 The implication of terms in fact involves a three-step process (*Sembcorp Marine* at [101]):

> (a) First, ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.

(b) Second, the court considers whether it is necessary in the business or commercial sense to imply a term to give the contract efficacy.

(c) Third, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, then, the gap persists, and the consequences of that gap ensue.

Whether there was a gap

50 GT argues that the Implied Term fails on the first threshold requirement as the issue is specifically dealt with in cl 16(m) of GT's standard Terms & Conditions of Sale ("T&Cs"),[45] which provides:[46]

> Upon any termination of the Distributorship by either party and for any reason, ***Seller [GT] may, but shall have no obligation to, repurchase from Buyer [EBS] any Goods shipped to Buyer on or before the effective termination date***, and may, but shall have no obligation to, ship any Goods to Buyer or to Buyer's customers on or after the date upon which notice of termination is given.
>
> [emphasis added]

GT's position is that the T&Cs were incorporated into the 2020 DA by way of its "Terms and Conditions" clause:[47]

> Terms and Conditions. EBS's purchase orders submitted to GT from time to time with respect to Products to be purchased

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45 DWS at paras 35–49.

46 Joint Bundle at p 454.

47 Joint Bundle at p 385.

> hereunder shall be governed by this Agreement and the then current Standard Terms of GT, located on the GT website at http://www.gtweed.com/terms&conditionsofsale.htm (the "Standard Terms"), and nothing contained in any such purchase order shall in any way modify such terms of purchase or add any additional terms or conditions unless otherwise is agreed upon by both Parties in writing. To the extent that the terms of this Agreement and the Standard Terms are in conflict, the Standard Terms shall govern.

51 EBS claims that the T&Cs were not incorporated into the 2020 DA because it was not given a copy of the T&Cs and it was unable to access it on GT's website via the given Uniform Resource Locator ("URL").[48] In any event, EBS argues that cl 16(m) is invalid or unenforceable as it is an onerous clause which GT failed to draw to its attention, and separately, that it contravenes the Unfair Contract Terms Act 1977 ("UCTA").[49]

Whether the T&Cs were validly incorporated into the 2020 DA

52 GT relies on the High Court decision of *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 ("*Press Automation*") to argue that it does not have to give EBS a copy of the T&Cs or even a working link to its website which contained the T&Cs. According to Prakash J (as she then was) in *Press Automation* (at [39]):

> … the fact that the incorporating clause here was contained in a document that was signed by [the plaintiff], resulted in the conditions being incorporated as part of the contract between the parties notwithstanding that [the plaintiff] did not have a copy of them and had not read them. I hold that the conditions were incorporated as a whole and that the line of authorities that decides that onerous and unusual conditions cannot be incorporated unless the attention of the party sought to be bound has been specifically drawn to them does not apply to a

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48 CWS at paras 42–45.

49 CWS at paras 46–51.

> case like this where there is a signed contract with an explicit incorporating clause.

In this regard, while there is no, or no admissible, evidence that the T&Cs could at the relevant time be accessed via the URL provided in the 2020 DA, GT gave evidence of the T&Cs which was in effect at the time of the 2020 DA.[50] It is undisputed that EBS could have asked for a copy of the T&Cs, but did not.

53 The "Terms and Conditions" clause does not provide that the T&Cs would be incorporated only if they could be accessed via the URL. It only provides where the "then current" T&Cs could be found. There was nothing to stop EBS from asking for a copy. There is no evidence that they even attempted to access the T&Cs via the URL when they executed any of the DAs. Indeed, in Mr Sun's affidavit filed on 19 January 2024, he said "*I am* also unable to locate a copy of the [T&Cs] on the [*sic*] GT's website [emphasis added]"[51] – which suggests that he only attempted to access the URL at the time he filed his affidavit.

54 EBS argued that I should decline to accept *Press Automation* and instead follow *Blu-Sky Solutions Limited v Be Caring Limited* [2021] EWHC 2619 (Comm) ("*Blu-Sky*").[52] In that case, the English High Court held that in order for an onerous clause to be incorporated, it first had to be brought to the attention of the other party (at [108]–[112]).

55 At the close of the hearing, I directed parties to address me on whether I was bound by the Court of Appeal decision of *Bintai Kindenko Pte Ltd v Samsung C&T Corporation & another* [2019] SGCA 39 which upheld the

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50 GT's 1st Affidavit at para 35.

51 EBS' 1st Affidavit at para 35.

52 CWS at paras 53–59.

incorporation rule espoused by Prakash J in *Press Automation* (at [61]). EBS agreed that I was bound and accepts that I may not depart from *Press Automation*.[53] I therefore find that the T&Cs were validly incorporated into the 2020 DA as it is a signed contract with an explicit incorporating clause.

56 In any event, I would have found that *Blue-Sky* did not apply on the facts. The subject clause in *Blu-Sky* was found to be onerous as it imposed an additional "administration charge" on the counter-party which was "out of all proportion to any reasonable estimate of its loss resulting from a cancellation" (at [109]). In contrast, cl 16(m) does not impose any obligation *on EBS*. It simply gives GT the option of buying back any goods shipped to EBS on or before the effective termination date. Further, EBS' argument assumes cl 16(m) relieves GT of an *obligation* to buyback the Leftover Inventory when that obligation is the subject of the Implied Term it seeks to introduce. As I further explain below (at [62]), cl 16(m) does not leave EBS in an "impossible situation"[54] as EBS claims, nor is it "particularly onerous".[55]

Whether cl 16(m) is invalid under the UCTA

57 EBS claims that s 7(3) of the UCTA bars the unreasonable restriction of a party's liability through a contractual term.[56] However, s 7(1) specifies that s 7(3) only applies to "contract terms excluding or restricting *liability for breach of obligation arising by implication of law from the nature of the contract* [emphasis added]". In this regard, EBS' argument fails as cl 16(m) does not

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53 K&L Gates Straits Law LLC's Letter to Court dated 27 May 2024 at para 3.

54 EBS' 1st Affidavit at paras 18 and 37; 2nd Affidavit of Sun Chengyou dated 11 April 2024 (EBS' 2nd Affidavit) at para 15.

55 CWS at para 55.

56 CWS at paras 46–50.

exclude or restrict GT's liability for breach. Like its argument that cl 16(m) is onerous, EBS' argument presupposes that GT is under an obligation to buyback in the first place. Without first proving the existence of the Implied Term, GT is under no obligation to buyback the Leftover Inventory, and is not in breach of the 2020 DA if it refuses to do so.

Whether cl 16(m) proves that there is no gap

58 I therefore find that cl 16(m) was incorporated into the 2020 DA and is enforceable. However, I also find that cl 16(m) does *not* apply on the facts. Clause 16(m) applies "[u]pon any *termination* of the Distributorship *by either party* and for any reason [emphasis added]". This suggests that it only applies to a situation of premature termination and not expiry (as in this case). Further, cl 16(m) is contained in GT's standard terms, and any doubt as to its interpretation should be read against GT under the *contra proferentum* rule. Clause 16(m) also only applies to products shipped to EBS "on or before" the 2020 DA expired – this only covers half the Leftover Inventory (see [3] above).

59 Nonetheless, I agree with GT that cl 16(m) indicates that parties had applied their minds to the issue of GT buying back the Leftover Inventory. The fact that parties agreed to give GT a *discretion* to buyback in the circumstances covered under cl 16(m) suggests that there is no *obligation* on GT to buyback at all. Further, it appears logical for parties to only address the buyback issue in the event of a premature termination. In that event, EBS may be left with inventory which it may not have time to sell off before termination. Despite this, the parties agreed that GT would not have an obligation to buyback. In the case where the 2020 DA expires, EBS would know when that would happen and can make plans to deal with, or limit, their inventory before then. Clause 16(m) therefore leaves less room for this court to find in favour of the Implied Term.

60 In any event, even if cl 16(m) was not incorporated into the 2020 DA or is unenforceable, I find against the Implied Term as the other conditions for implication are not met.

Whether it is necessary for business efficacy

61 The Implied Term is not *necessary* for business efficacy. The law is clear that the standard for the implication of terms remains one of necessity, not reasonableness (*Sembcorp Marine* at [82]). The court will only imply a term "in order that a *minimum of efficacy* should be secured for the transaction [emphasis added]" (*Sembcorp Marine* at [86], citing *The Moorcock* (1889) 14 PD 64 at 69). This has also been described as a term without which an "honest business could not [otherwise] be carried on" or a term that is the "least onerous" one that could be implied (*Sembcorp Marine* at [87]).

62 The Implied Term does not meet this standard. Mr Sun asserted on affidavit that "EBS has not been able to sell the inventory without a 'letter of authorization' from GT",[57] without explaining why. There is nothing in the 2020 DA prohibiting EBS from selling the Leftover Inventory even after the 2020 DA has expired, and Counsel for GT confirmed that EBS is free to sell the Leftover Inventory if they wish. At the hearing, counsel for EBS accepted that there was no *legal* impediment to EBS selling the Leftover Inventory and clarified that the restriction was a *practical* one as buyers in China would not want to accept the goods without a letter of authorisation from GT which guarantees that the goods are genuine. In my view, this does not make the Implied Term *necessary*. There is nothing to stop EBS from selling off the

[57] EBS' 1st Affidavit at para 23.

Leftover Inventory at a discounted price and/or by giving their customers an indemnity as the genuineness of the products.

63 Further, while the Implied Term would obviously be beneficial to EBS, it makes little to no sense for GT as it entails GT accepting significant commercial risk. The 2020 DA entitles EBS to on-sell the products it purchases from GT at a price it (EBS) deems appropriate (within certain limits).[58] The Implied Term would incentivise EBS to order more goods than it may be able to sell or sell at a profit, without taking on significant risk as GT would be obliged to buyback what EBS cannot sell. In other words, EBS enjoys the upside if the market moves in its favour, and GT bears the downside if it does not. It is difficult to imagine GT agreeing to such an outcome.

Whether parties would clearly respond "Oh, of course!"

64 I also find that the parties would *not* have clearly responded with "Oh, of course!" if an officious bystander had suggested the Implied Term to them at the time of contracting.

65 First, there are various express provisions in the 2020 DA which are inconsistent with the Implied Term:

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[58] The Terms of Purchase of Products by EBS provides: "EBS has the right to resell Products at any price at which EBS deems to be appropriate. In order to adequately promote the sale of Products, GT suggests that EBS sell the Products at prices which will give EBS an adequate profit so as to effectively carry out its business. Accordingly, GT has set out in Exhibit "D" hereto attached (or in any such Exhibit "D" as may from time to time be amended by GT) suggested resale prices for each of GT's Products to be sold by EBS. GT suggests that EBS resell at these suggested prices, but EBS and GT recognize that EBS is not bound by these suggested prices.": Joint Bundle at p 385.

(a) The "Fulfilment of Orders" clause ***obliges*** GT to fulfil orders and deliver products even ***after*** the 2020 DA is terminated. It provides that:[59]

> Fulfillment of Orders. Upon termination of the Agreement for other than EBS's breach or insolvency, GT shall continue to fulfill, subject to the terms of Section 3 above, all orders accepted by GT prior to the date of termination; provided that GT and EBS agree to assurances of payment by EBS, with such assurances to be in form and substance acceptable to GT.

In essence, EBS may, *after* the 2020 DA expires, receive products it had ordered prior to the expiry date. It would be absurd to suggest that GT, having been compelled to fulfil those orders, would then be obliged to buyback the same. Although parties did not address me on the phrase "subject to… Section 3 above", that would not have affected my analysis. There is no "Section 3" in the 2020 DA. In all likelihood, it is a remnant from the previous 2019 edition of the DA which contained numbered clauses. Section 3 of the 2019 DA expressly limits the circumstances in which EBS may return products to GT,[60] which aligns with the view that parties would not have agreed to a free-standing and unrestricted obligation on the part of GT to buyback the Leftover Inventory.

(b) The "Minimum Product Purchase" clause which provides:[61]

> Minimum Product Purchase. EBS shall purchase Product in the minimum amounts set forth in Exhibit "E" to achieve mutually agreed upon sales goals. Failure to meet the minimum purchase requirements set forth in Exhibit "E" shall result in GT having the option to

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59 Joint Bundle at p 390.

60 Joint Bundle at pp 374–375. The 2020 DA has identical provisions: Joint Bundle at pp 386–387.

61 Joint Bundle at p 388.

> terminate the exclusive nature of this Agreement, upon written notice to EBS.

The intention behind this clause is to ensure GT a minimum level of sales. If GT was obliged to buyback all inventory from EBS upon termination, that may defeat GT's right under this clause. EBS argued that this clause only allows GT to *terminate* the 2020 DA in the event EBS fails to meet the minimum purchase amount.[62] Further, they highlight instances in past years where GT did not terminate the DA even though EBS failed to achieve the sales targets in those years.[63] However, the fact that GT chose to overlook those years does not undermine the underlying intention of the clause – which is to ensure GT a minimum level of sales that it can enforce if it wishes. More importantly, EBS' arguments do not address the inconsistency between EBS' obligation to purchase a minimum amount of products, while at the same time imposing a contrary obligation on GT to buyback the Leftover Inventory, which may end up with EBS not meeting its minimum purchase obligation. For completeness, I accept that this clause is not inconsistent with GT being obliged to buyback anything above the minimum amount, but that is not EBS' case.

(c) The "Initial Order" and "Initial Stock" clauses contemplate that EBS would only be holding stock for the first and second six-month period of the DA and not at its expiry:[64]

> Initial Order. Upon execution of this Agreement, EBS shall deliver to GT a written purchase order for an initial stocking order adequate to initiate a successful sales program for GT products in the Territory. The order

62 CWS at para 72.

63 EBS' 2nd Affidavit at para 11.

64 Joint Bundle at pp 386 and 387.

> shall be shipped to EBS as soon as GT's production schedule will reasonably permit. After six (6) months from receipt of initial stocking order, EBS shall refresh inventory with a one-for-one offset order.
>
> …
>
> Initial Stock. GT and EBS shall agree on the appropriate initial minimum level of inventory of each Product to be stocked by EBS. At the conclusion of the first six (6) months the EBS will be entitled to place its subsequent order for the next six (6) month period.

While parties are entitled to place and fulfil orders at other times, the 2020 DA appears to contemplate that EBS would only order what is necessary for it to sell during the term of the 2020 DA, which would render the Implied Term unnecessary.

66 For completeness, the following clauses GT argues are inconsistent with the Implied Term, are not necessarily so:[65]

(a) the "Return of Materials"[66] clause deals with documents or other materials containing proprietary information;

(b) the "Return of Products"[67] clause deals with defective goods and discontinued products; and

(c) the "Independent Contractors"[68] clause deals with the nature of the relationship between the parties.

None of them are relevant to the Implied Term as they deal with specific matters unrelated to the Leftover Inventory.

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65 DWS at paras 46(a); 46(b); and 55.

66 Joint Bundle at p 390.

67 Joint Bundle at pp 386–387.

68 Joint Bundle at p 385.

67 Second, the Implied Term does not specify a reasonable timeframe within which EBS may compel GT to buyback the Leftover Inventory. This is clearly something which GT would not have agreed to. The market for GT's products may be volatile, in that the products may fall in price or become outdated. In this regard, the Implied Term as advanced by EBS does not deal with *when* the Leftover Inventory was first purchased from GT. GT would not likely have given EBS the unconditional right to compel it to buyback the Leftover Inventory when the 2020 DA expired.

68 Third, the Implied Term does not specify the price at which the products are to be repurchased, and the party who is to bear the associated shipping charges. At the hearing, counsel for EBS clarified that the buyback would be at cost price (including shipping fees). However, GT is again unlikely to have agreed to such an obligation when that price may no longer reflect the market price of the products.

69 Further, even if the Implied Term exists, to be workable, it must require EBS to exercise its right to compel GT to buyback the Leftover Inventory within a reasonable time. It was only in or around January 2022 that EBS first raised the issue with GT to buyback the Leftover Inventory, but crucially, it did not demand that GT did so or assert the existence of the Implied Term. Instead, EBS only *requested* that GT consider buying back the Leftover Inventory. In two emails Mr Sun sent to GT in early 2022, he makes the following requests: "now the agreement terminated, ***I think GT should*** but [*sic*] these inventory back or let your new distributor to buy back [emphasis added]"[69] and "I ***hope*** GT can take these inventories back and pay to EBS [emphasis added]"[70]. Importantly,

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69 Joint Bundle at p 188.

70 Joint Bundle at p 459.

even though GT asked EBS on 22 February 2022 for a list of the Leftover Inventory so that GT could consider EBS's request,[71] EBS did not provide the list for close to *one and a half years*.[72] EBS first purported to exercise its (alleged) right to demand a buyback on 19 January 2024, by filing these proceedings.[73] This was more than two and a half years since the 2020 DA expired on 12 August 2021. In the circumstances, even if the Implied Term exists, I find that EBS had failed to exercise it within a reasonable time.

70 For the above reasons, I dismiss EBS' claims.

GT's counterclaim

71 Save for the defence of set-off, EBS does not dispute GT's counterclaim of US$182,087.20 (excluding interest).[74] However, at the hearing, EBS belatedly argued that the interest GT is claiming on the unpaid invoices are unenforceable penalties.

72 I do not accept that argument. The interest rates are provided in cl 2 of the T&Cs, which were validly incorporated into the 2020 DA (see [55] above):[75]

> Except as otherwise provided by these Terms of Sale, the Buyer shall pay the full Purchase Price and Additional Charges within thirty (30) calendar days after the date of Seller's invoice. …
>
> For every thirty (30) days that the Buyer's account is overdue, the Seller reserves the right to charge the Buyer interest on the

71 Joint Bundle at pp 504–505.

72 Joint Bundle at pp 461–470.

73 EBS' 1st Affidavit at para 3(b).

74 CWS at paras 85–88.

75 Joint Bundle at p 449.

> outstanding sum at 2% per annum to account for administrative costs. …
>
> If the outstanding amount of the Purchase Price and Additional Charges are not paid in full when due, Buyer shall in addition pay, from the due date until payment in full, (i) interest at the monthly rate of one and one half percent (1 1/2%) of the sum of the unpaid Purchase Price plus (ii) any increases in Additional Charges. Interest shall be compounded monthly.

There are two interest rates at play: (a) 2% per annum for every thirty (30) days the Buyer's account is overdue; and (b) 1.5% per month from the due date until payment in full. These rates are compounded monthly.

73 The burden falls squarely on EBS to show that these interest rates are an unenforceable penalty (*CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [63]). However, they failed to adduce any evidence to this end, despite being aware of the interests claimed. In GT's affidavit filed on 27 February 2024, they brought a counterclaim for "US$$182,087.20, *plus applicable interest* [emphasis added]".[76] This was specified with reference to cl 2 of the T&Cs in GT's written submissions filed on 30 April 2024.[77] EBS could have applied to file a supplemental affidavit to address the interests claimed but chose to only raise the issue belatedly at the hearing on 24 May 2024. Without any evidence, EBS' claim that the interest rates are an unenforceable penalty must fail.

74 In the circumstances, I allow GT's counterclaim in full, with interest at the stipulated contractual rate.

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76 GT's 1st Affidavit at para 51; Joint Bundle at p 367.

77 DWS at para 72.

Conclusion

75 In summary:

(a) GT did not wrongfully terminate the 2020 DA, as it came to an end upon the expiry of its one-year term.

(b) There is no Implied Term for GT to buyback the Leftover Inventory upon the termination of the 2020 DA.

(c) I allow GT's counterclaim of US$182,087.20 plus interest at the rate of 2% per annum, plus interest at the rate of 1.5% per month, both compounded monthly, on:

(i) the sum of US$4,585.40 from 23 October 2021 to the date of payment;

(ii) the sum of US$1,200 from 13 November 2021 to the date of payment;

(iii) the sum of US$2,250 from 15 November 2021 to the date of payment;

(iv) the sum of US$93,720.20 from 23 January 2022 to the date of payment; and

(v) the sum of US$80,331.60 from 4 February 2022 to the date of payment.

76 I also order EBS to pay costs fixed at S$12,000 (inclusive of disbursements).

Hri Kumar Nair
Judge of the High Court

Joan Peiyun Lim-Casanova, and Lim Min (K&L Gates Straits Law LLC) for the claimant;
Cavinder Bull SC, Tay Hong Zhi, Gerald, and Belle Tan Ling Yi (Drew & Napier LLC) for the defendant.