



Neutral Citation Number [2019] EWHC 2004 (Ch)

IN THE HIGH COURT OF JUSTICE

Claim No: HC-2017-001606

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

MR ANDREW HOCHHAUSER QC

(Sitting as a Deputy Judge of the High Court)

7, Rolls Building,
Fetter Lane
London

29 July 2019

B E T W E E N:

SPI NORTH LIMITED

Claimant

and

(1) SWISS POST INTERNATIONAL (UK) LIMITED

(2) ASENDIA UK LIMITED

Defendants

Hearing dates 14 and 15 May 2019

Vikram Sachdeva QC, instructed by Milners, for the Claimant

David Drake, instructed by Peters & Peters LLP, for the Defendants

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

ANDREW HOCHHAUSER QC

APPROVED JUDGMENT

Introduction

1. This is the resumed hearing to deal with the remaining parts of six applications that were listed before HHJ Klein on 13 and 14 June 2018. He dealt with two of those applications, but he did not have time to hear the other four. As well as adjourning those, he also adjourned argument on the costs of the two he had dealt with, so that all the costs could be dealt with together. This was reflected in Master Shuman's Order of 17 August 2018, directing the listing of the hearing.
2. The four applications now before the Court are all concerned with the pleadings:
 - (1) The Defendants' application dated 20 December 2017 to strike out certain parts of the Amended Particulars of Claim (the "**APC**"). Much of this has been rendered unnecessary by proposed amendments to the APC that the Defendants do not contest.
 - (2) The Claimant's application dated 10 January 2018 for permission to amend the APC. The draft Re-amended Particulars of Claim of that date (the "**DRAPC**") has been superseded by no less than eight subsequent iterations on 6, 8, 13 and 19 June 2018 and 4 May 2019 and three further versions produced at various points during the course of the hearing before me. In this judgment I will deal only with the ninth iteration of the draft ("**DRAPC v9**"). The fact that there have been so many different versions of this draft pleading, seeking to address various objections which have been made, may obviously impact on the question of costs.
 - (3) The Defendants' application dated 22 May 2018 for summary judgment on the implied terms alleged in the APC, and for the consequential striking out of related parts of the APC, although some of those consequential matters have been overtaken by further changes in the DRAPC.

- (4) The Defendants' application dated 1 June 2018 for permission to re-amend the Amended Defence (the "AD").

The narrowing of the issues

3. Before me Mr Vikram Sachdeva QC represented the Claimant and Mr David Drake represented the Defendants. I am grateful for their oral and written submissions. As a result of discussions between them, there has been considerable degree of agreement reached in relation to the disposal of the remaining four applications.
4. The upshot is that:
 - (1) the Defendants' application to re-amend the AD is no longer opposed; and
 - (2) the only parts of the draft amendments contained in the current iteration of the DRAPC or existing pleading within the APC that are still opposed are as follows:

"24. There were further terms of the PPA [the premium partnership agreement], implied for business efficacy or necessity, on the basis of the facts that (1) the fact that the relevant products were branded SWISS POST was a central aspect of the PPA for both parties, as evidenced by the terms of the PPA including in particular Annex A, (2) the products were required to be commercialised in the UK by the First Defendant which was a subsidiary of Swiss Post, (3) the aim of the PPA, according to the recital to the PPA, was to increase the First Defendant's brand presence and its market shares in the northern part of the United Kingdom, (4) it would directly conflict with the objectives of the PPA and indeed frustrate them for the First Defendant to set up in competition with the PPA either directly or indirectly, that:

- a. the First Defendant would not derogate from its grant to the Claimant, such grant including (i) the supply of solely Swiss Post branded products, (ii) exclusivity of supply within the territory; (iii) with the Swiss Post Group and the First Defendant supporting the Claimant's efforts to perform the PPA and (iv) without the First Defendant directly or indirectly soliciting the Claimant's clients or potential clients (other than Excepted Clients) using services which could compete with the PRODUCTS within the territory ; and*
- b. The First Defendant would not compete and/or assist any other entity to compete with the Claimant's performance of the PPA;*
- c. There was an implied duty of good faith, which placed the First Defendant under an obligation:*

- (i) *Not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;*
- (ii) *To act reasonably and with fair dealing having regard to the interests of the parties and to the provisions, aims and purposes of the contract, objectively ascertained.*
- (iii) *Not to transfer its assets to any third party which is not a subsidiary or franchise [I believe this should be “franchisee”] of the Swiss Post Group;*
- (iv) *Not to compete and/or assist any other entity to compete with the Claimant’s performance of the PPA...*

34. It was a term of the PPA implied for business efficacy and/or necessity (there would otherwise be a conflict with the very purpose of the PPA and with the prevention principle) that the First Defendant would not do anything to frustrate the purpose of the contract alternatively the Claimant’s ability to meet the turnover and quality management targets settled in the Yearly Target Agreements. Further or alternatively, it was a term of the PPA implied by virtue of the duty of good faith owed by the parties to one and other (by virtue of the PPA being a relational contract) that the First Defendant would not do anything to frustrate the Claimant’s ability to meet the turnover and quality management targets settled in the Yearly Target Agreements.”

Further at paragraph 46, which contains Particulars of breach of contract, there are challenges made to sub-paragraphs i.-k., which deal with alleged breaches of the implied terms contained in paragraphs 24 and 34. Even were I to allow the implied terms, it is contended by the Defendants that the formulation of certain breaches should be struck out because they are too vague or add nothing. I will deal with the detail of that in due course. Finally at sub-paragraph 47 viii, there is a claim against the Second Defendant for assisting the First Defendant to derogate from its grant to the Claimant.

The relevant test to be applied when considering an application to amend or an application for summary judgment in relation to a claim already pleaded

5. The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success. A real prospect of success is to be contrasted with a “fanciful” prospect of success: see *Swain v Hillman* [2001] 1 All ER 91. A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable see: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8], applied and approved in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].
6. In *Easyair* case, when setting out at [15] the principles to be applied in dealing with an application under CPR 24.2, Lewison J (as he then was) stated at vii):

“... it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim ... Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”

7. Mr Sachdeva drew my attention to the passage in the judgment of Lord Donaldson MR in *R. G Carter Ltd v Clarke* [1990] 1 WLR 578 Lord Donaldson MR stated as follows at [584]:

“If a judge is satisfied that there are no issues of fact between the parties, it would be pointless for him to give leave to defend on the basis that there was a triable issue of law. The only result would be that another judge would have to consider the same arguments and decide that issue one way or another. Even if the issue of law is complex and highly arguable, it is far

*better if he then and there decides it himself, entering judgment for the plaintiff or the defendant as the case may be on the basis of his decision. The parties are then free to take the matter straight to this court, if so advised. This was the situation in the classic case of Cow v. Casey [1949] 1 K.B. 474 . **But it is quite different if the issue of law is not decisive of all the issues between the parties or, if decisive of part of the plaintiff's claim or of some of those issues, is of such a character as would not justify its being determined as a preliminary point, because little or no savings in costs would ensue. It is an a fortiori case if the answer to the question of law is in any way dependent upon undecided issues of fact.***

(emphasis added)

8. Mr Sachdeva submitted that in this case aspects of the factual matrix relating to the relevant agreement are hotly disputed, as well as the ambit of the factual matrix. Given that dispute, he contends that it cannot be properly said that the implied terms in paragraphs 24 and 34 of DRAPC v9 are not fit to be considered at trial. Mr Drake, on behalf of the Defendants, sought to address the matter in this way: he said that all material facts contended for by the Claimant should be accepted for the purposes of this application, and even were that to be done, the contested paragraphs could not stand. For present purposes, I propose to assume that where there is a dispute in relation to material facts that they will be found in the Claimant's favour. This accords with the approach taken by the Court of Appeal in *Morgan Crucible v Hill Samuel* [1991] Ch 295.
9. If the Court can see that an amendment has no real prospect of success, it will not flinch from disallowing the amendment, because a claim with no real prospect of success should not be allowed to proceed. Some analysis and evaluation of the case raised by the amendment objected to, whether it be a question of fact or a matter of law, must, therefore, be attempted, to see if it leads (without an unduly prolonged or difficult enquiry, bearing in mind that the procedure is a summary one) to the conclusion that the amendment has no real prospect of success. But if the Court is not persuaded that the amendment has no real prospect of success, the ultimate decision maker should not be encumbered with a preliminary view on the point raised by the amendment, nothing like a probability of success being required for these purposes.
10. Further authorities, such as *Nesbit Law Group LLP v Abasta European Insurance Co. Ltd* [2018] EWCA Civ 268, make clear that, in accordance with the overriding objective, when exercising the discretion whether or not to allow an amendment, one

has to strike a balance between the injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted (per Vos C at [38]). I did not, however, understand Mr Drake to contend on behalf of the Defendants, that if I were to find that the existing pleading which is the subject of the Part 24 application or the proposed amendment stood a real prospect of success, then there were other grounds for refusing the amendment, given that, despite the amount of time that has passed since the claim was issued, the litigation remains in the early stages with disclosure yet to take place.

Background

11. The Claimant was incorporated in April 2010 for the purposes of entering into a “premium partner agreement” with the First Defendant, Swiss Post’s wholly owned subsidiary in the UK, to promote Swiss Post postal services across Northern England, Scotland, and Wales. The premium partnership agreement dated 1 September 2010 (the “**PPA**”) gave the Claimant the exclusive right to market Swiss Post postal services in the North of England, Wales and Scotland (the “**Territory**”). It is a detailed agreement.

The material terms of the PPA

12. The PPA came into effect on 1 September 2010 for an “*indefinite period of time*” [Article 23.1], although a party could terminate the contract at any time for just cause [Article 23.3] or on or after 31 July 2015 upon giving six months’ notice in writing [Article 23.2]. Article 23.2 further provided:

“The decision regarding the continuation of the co-operation with [the Claimant] or the withdrawal of the Contract shall be taken by [the First Defendant] to its discretion and will be particularly founded on the meeting of targets (satisfying turnover and quality management) settled in the Yearly Target Agreements (see Partner Guidelines/Annex A) (see also article 17 of the present Contract).”

13. In Article 1.1 the Recitals and Annexes were expressly stated to form “*integral and essential parts of the present Contract*”. Recital (b) stated that the First Defendant “*is a subsidiary of the SWISS POST Group which operates in this field in the UK using the “Swiss Post” registered trade mark and logo (the “**BRAND**”).*” The PPA’s objectives were set out in the Recital (d): “*[The First Defendant] intends to increase its BRAND presence [i.e. the Swiss Post registered trademark and logo: recitals (a) and (b)] and*

its market shares in the northern part of the UK by assigning the sale of its products to a party with suitable organization to offer a high-quality service and with thorough sales expertise. The aim of [the First Defendant] is to have a representative in order to propose the sale of its products and promote the brand to all the potential clients, in all parts of the UK.” Recital (g) provided that the First Defendant and the Claimant “*are both interested to create a mutually advantageous business relationship and wish to establish relations of commercial co-operation on the following terms.*”.

14. This was to be achieved by the sale of SWISS POST’s products (the “**PRODUCTS**”), which were to be commercialised in the UK by the First Defendant as a subsidiary of the SWISS POST group: [Article 2.1]. The SWISS POST group was expressed to operate by means of subsidiaries and franchisees in different countries all around the world, using the registered “Swiss Post” trademarks and logo. The field in which the group operates is that involving national and international consignments: [Recital (a)].
15. The PRODUCTS to be sold by the Claimant were defined in article 2.2, and described in Annex A, as “*International Mail Priority; International Mail Economy; Marketing Mail Professional*”. Thus, the subject matter of the PPA was the SWISS POST mail consignment service, commercialised in the UK by the First Defendant as a subsidiary of SWISS POST. Under Article 2.3, the First Defendant had an express contractual power to modify the PRODUCTS, subject to a right of objection by the Claimant, which would result in a cancellation of the contract in accordance with Article 23.3, unless otherwise agreed.
16. Under Article 2.1, the Claimant undertook to offer the PRODUCTS to all potential clients within the Territory save for certain excepted clients set out in Article 4.1 to 4.4 and Annex C (the “**EXCEPTED CLIENTS**”). A tariff of prices to be charged by the First Defendant to the Claimant for fulfilling delivery obligations in relation to PRODUCTS was annexed to the PPA [Article 6.1, 6.2 and Annex F], but the First Defendant was also given the power to alter the prices it charged the Claimant on giving 30 days’ notice [Article 6.3]. The Claimant was, however, left free to charge its customers whatever prices it chose. Under Article 2.4 it was also free to sell to its own clients, both within and outside the Territory, other products other than the PRODUCTS listed in Annex A, save that the Claimant was prohibited to sell products which were in competition with the PRODUCTS “*unless in prior agreement with [the*

First Defendant]” in accordance with Article 15. I pause to note that there was no corresponding prohibition on the First Defendant.

17. Under Article 4.1 the Claimant was granted the exclusive right to sell the PRODUCTS in the Territory, save in relation to the EXCEPTED CLIENTS, with permission to use Swiss Post trademarks and branding in doing so [Article 13], performance of which was to be fulfilled through Swiss Post companies and their commercial partners. The Claimant was for these purposes to contract with customers as principal, not as agent for the First Defendant [Articles 10.1, 10.2 and 12].
18. In return for this right, the Claimant paid a one-off up-front “License Fee” of £5,000 to the First Defendant [Article 8], and was obliged bi-annually to pay a royalty calculated on a percentage of turnover on PRODUCTS and other delivery services it sold, as set out in Article 7.
19. Further, it was expressly provided that:
 - (1) The First Defendant was to pay the Claimant a “Marketing Contribution” of £3,000 per year to fund the Claimant’s marketing activities of the PRODUCTS [Article 9];
 - (2) The Claimant and the First Defendant were to agree yearly Target Revenue Agreements, stipulating qualitative and quantitative targets for the Claimant [Articles 17.1 and 17.2], including a Target Bonus to be paid to C in the event of the targets being achieved [Article 17.2 and Annex K, which expresses the bonus as a discounted “Royalty” rate];
 - (3) Each party agreed not to disclose any information concerning the other to any third party for any reason other than performance of the contract [Articles 14.1 and 14.5];
 - (4) There was a two year post-termination non-competition restraint on the Claimant, preventing it within the Territory from carrying out “*the activity under the present Contract, directly or indirectly and/or in any way in favor [sic] of third parties*” or engaging “*in activities competing with those of the First Defendant*” [Articles 15.3 and 15.4].

Two alleged collateral contracts

20. When considering the alleged implied terms of the PPA at paragraphs 24 and 34 of DRAPC v9, it is also relevant that there are two collateral contracts alleged. Both are denied. The first is set out at paragraphs 26 and 29 of DRAPC v9 and relates to the prices to be charged for the PRODUCTS by the First Defendant to the Claimant, which it is alleged the First Defendant promised would be always be at the cost of the services to the First Defendant with no mark up. Alternatively, it is contended that this amounted to a variation of the PPA, or the same binding effect on the First Defendant is said by the Claimant to be achieved by the price promise being “*part of the factual matrix to the PPA [that] constrained price changes which were permissible under the PPA*”, by promissory estoppel, estoppel by convention, rectification of the PPA for mutual mistake, or rectification of the PPA for unilateral mistake [DRAPC v9 paragraphs 28, 30-32].
21. The second collateral contract is pleaded at paragraph 35 of DRAPC v9 as follows:

“Further or alternatively it was clearly agreed that termination at the end of five years could only take place if the Claimant failed to meet the turnover and quality management targets settled in the Yearly Target Agreements pursuant to Clause 23.2 This term formed a collateral contract (the “Second Collateral Contract”).”

Events after the parties entered into the PPA

22. Thereafter, in or around September 2011, about one year after the PPA took effect, Swiss Post and La Poste, the French national postal service, entered into discussions to merge their global operations (except within France and Switzerland) and, as a result, formed a joint venture that would sell their combined services under a new brand name “Asendia”, which, among other things, would compete with the Claimant’s provision of Swiss Post postal services within the Territory. The Second Defendant, Asendia UK Limited, is a company formerly known as La Poste UK Limited, which was the UK operations arm of La Poste and is the company used to provide Asendia’s services in the Territory. The joint venture was announced to the market in December 2011.
23. On 4 July 2012 the European Commission approved the merger, holding that it did not breach EU competition law. The specific terms of the approval made it clear that a 100% subsidiary of the Swiss Post group and a 100% subsidiary of the La Poste group would contribute to a full-function joint venture “*as its future core business all their*

current activities in the area of cross border mail services excluding the inbound and outbound mail activities carried out by (i) La Poste in France and (ii) Swiss Post in Switzerland...”

24. On 6 July 2012 the First Defendant ceased being a subsidiary of the Swiss Post group, and became a subsidiary of Asendia Holdings AG, which was owned equally by Swiss Post group and La Poste group. The Claimant contends that from that point on, the First Defendant’s marketing resources were used to promote Asendia postal consignments, rather than Swiss Post PRODUCTS, in direct competition with C’s attempts to perform the PPA. From January 2013 the prices charged to the Claimant by the First Defendant for the PRODUCTS were in excess of the cost to the First Defendant, being the price which the Claimant considered that it was entitled to under the PPA.
25. On 10 December 2013 the First Defendant wrote to the directors of the Claimant as follows:

“...As we have explained to you, the trade and assets of SPI UK will be transferred into Asendia UK on 31 December 2013, as part of the overall reorganization of Asendia's businesses in the United Kingdom, to merge them all under one company. This is to inform you that as part of the transfer, the Agreement will be novated from SPI UK to Asendia UK. If you have any queries or concerns regarding this transfer, please let us know immediately.

As we have also discussed, the scope of activities of Swiss Post International (UK) has considerably evolved since you entered into the Agreement. Now part of Asendia, there have been considerable changes to our business, our operations and the products we offer. This will be further harmonized once we are just one company operating in the UK.

This has a direct impact on our relationship, as for example it is Asendia products which will be commercialized in the UK under Asendia trade mark. Thus the commercialization should no longer be based on Swiss Post products and Swiss Post trade mark (we will further communicate to you Asendia's graphic chart). As a result, the Agreement is not really pertinent...” (emphasis added)

26. On 31 December 2013 the First Defendant’s assets and liabilities were transferred in their entirety to the Second Defendant, pursuant to an Asset Purchase Agreement. The First Defendant then ceased actively trading on its own behalf.

27. There was no novation and the PPA was terminated in April 2014, each side claiming to accept the other's repudiatory breaches. It is the Claimant's case that, as a result of the establishment of Asendia, there have been numerous breaches of the PPA by the First Defendant, as a result of which the Claimant's growth has been dramatically curtailed, and it has suffered significant losses, comprising a net loss in value of the Claimant, and a claim for loss of profits.
28. The Claimant claims the following remedies:
- (1) Rectification of the PPA;
 - (2) Damages for consequential losses, amounting to between some £9.8 million and £17.3 million;
 - (3) Interest thereon.
29. The Defendant denies the claim and brings a counterclaim for £95,000 by way of debt or *quantum meruit* in relation to unpaid invoices, together with interest thereon.

Paragraphs 24 and 34 of DRAPC v9

30. Both of those paragraphs seek to imply terms into the PPA on the grounds of business efficacy and necessity. Before turning to the detail of those paragraphs, I set out the relevant principles relating to the implication of terms into a contract which both Counsel accept are to be found in the judgment of Lord Neuberger in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, and those principles were helpfully summarised, and applied at first instance, in *Europa Plus SCA SIF, Anthracite Balanced Company (R-26) Limited v Anthracite Investments (Ireland) Plc* [2016] EWHC 437 (Comm) at [33] per Popplewell J as follows:

“33. The law on implication of contractual terms was recently considered by the Supreme Court in Marks & Spencer, in which Lord Neuberger gave the majority judgment. I derive the following principles from paragraphs [14] to [24]:

- (1) There are two types of contractual implied term. The first is a term to be implied into a particular contract in the light of the express terms, commercial common sense, and the factual circumstances known or reasonably available to the parties at the time the contract was made. The second type arises where the law, sometimes by statute sometimes*

through common law, effectively imposes terms into certain types of relationships unless such a term is expressly excluded. What follows applies to the first type.

- (2) The question whether a term is to be implied is to be judged at the date the contract, and is to be made by reference to a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances available to the parties. The implication of a term is not critically dependent on proof of an actual intention of the parties when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting.*
- (3) Subject to the comments and qualifications below, in order for a term to be implied each of the following four conditions must be satisfied:*

 - (i) it must be reasonable and equitable; and*
 - (ii) it must either:*

 - a. be necessary to give business efficacy to the contract; or*
 - b. be so obvious that 'it goes without saying'*

(although in practice it would be a rare case where only one of those two requirements would be satisfied); and
 - (iii) it must be capable of clear expression; and*
 - (iv) it must not contradict any express term of the contract;*
- (4) Requirement (ii)(a) (necessity/business efficacy) involves a value judgment. The test is not one of absolute necessity, not least because the necessity is judged by reference to business efficacy. A more helpful way of putting this requirement may be that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.*
- (5) A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the Court considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.*
- (6) It may well be doubtful in a particular case whether the parties have failed to make provision for the matter in issue by oversight, or whether, by contrast, it was by a deliberate omission. Implying a term*

in the latter case would be impermissible because it would be contrary to the intention of the parties who had specifically chosen to leave the matter unprovided for. Accordingly a term will not be implied where it is possible that the omission of the term may have been deliberate (see per Lord Bingham as MR in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472 at pp. 481–482, and as Bingham LJ in The AJP Priti [1987] 2 Lloyd's Rep 37 at p. 42).

(7) It is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown that there was only one contractual solution, or that one of several contractual solutions would have been preferred. In other words it is not sufficient if it is necessary to imply some term; it must be necessary to imply the term which is contended for: see Philips v British Sky Broadcasting at p. 482.”

31. Before I turn to the parties’ respective submissions, I should record that I have received substantial skeleton and supplementary skeleton arguments. The original ones were directed at the wording of earlier drafts and, as those drafts have been replaced, many of the points have changed or fallen away. I also heard two days of oral argument and was referred to no less than three volumes of authorities. I therefore summarise the principal submissions made below. It is not intended to be exhaustive, but I stress that I have carefully considered and taken into account all the points made by both sides.

The Claimant’s submissions in relation to paragraphs 24 and 34 of DRAPC v9

32. The Claimant contends that it is necessary to imply into the PPA, obligations on the First Defendant:
- (1) not to derogate from grant (in substance, not to withdraw the PRODUCTS, to support and promote the Claimant’s efforts to perform the PPA, not to focus energy and investment on competing products and directly or indirectly soliciting the Claimant’s clients and potential clients (other than EXCEPTED CLIENTS), using services which could compete with the PRODUCTS within the Territory);
 - (2) not to compete with the Claimant’s performance and/or assist any other entity to compete with the Claimant’s performance of the PPA;
 - (3) to act in accordance with the implied duty of good faith (as particularised in paragraph 24c. and paragraph 34); and

- (4) not to do anything to frustrate the purpose of the contract, alternatively the Claimant's ability to meet its turnover and quality management targets settled in the Yearly Target Agreements.

General points in relation to implied terms made on behalf the Claimant

33. The law on implied terms contains the requirement that the terms are reasonable. However, in practice, the requirement of necessity, will encompass the requirement of reasonableness: *Marks & Spencer* at [21]. Whether a term is to be implied will therefore turn on whether it satisfies the requirements of business necessity or obviousness: *Lewison, The Interpretation of Contracts ("Lewison"), First Supplement to the 6th Ed, para 6-05*. As to business necessity, it is clear that the test is not one of absolute necessity (*Marks & Spencer* at [21]) (i.e. would the contract not work at all without the implied term?), but instead it should be demonstrated that without the implied term, it would not work in the way the parties might reasonably have expected to. *Lewison, para 6-08*, citing Lord Steyn in *Equitable Life Assurance Society v Hyman* [2002] AC 80. As Edwards-Smith stated in *Manor Asset Ltd v Demolition Services Ltd* [2016] EWHC 222 (TCC): "...the overriding point to be borne in mind is that before implying any term the court must conclude that the implication of the term is necessary in order to give business efficacy to the contract, or to put it another way, it is necessary to imply the term in order the make the contract work as the parties must have intended." (cited in *Lewison First Supplement to the 6th Ed, para 6-05*).
34. As to obviousness:
- (1) It is vital to formulate the question with the utmost care: *Lewison, para 6-09*;
 - (2) The "officious bystander" must be equipped with such knowledge as is necessary for him to be able to ask the necessary question, including all the background knowledge that would have been admissible for the purpose of interpreting the contract: *Lewison, para 6-09*.
35. As to the requirement for certainty, the proposed implied term must be "reasonably certain" (per Sales J in *Torre Asset Funding*, cited by *Lewison* at *para 6-10*), a relative lack of precision in defining an implied term may not be a reason not to imply a term for a court will not shrink from deciding which side of the line a particular case falls: per Bridge LJ in *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187, approved by

Moore-Bick J in *Esso Petroleum Co Ltd v David* [2003] EWHC 1730 (Comm) at [144]–[145], and by *Lewison* at para 6-10.

36. As regards prevention of performance, in general a term is necessarily implied in a contract that neither party will prevent the other from performing it: *Lewison* para 6-14. The classic formulation is that “*if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances...*” (*Stirling v Maitland* (1864) 5 B & S 841), which formulation “*has been applied many times*” (*Lewison* para 6.14). The Court of Appeal has stated that “... [*G*]enerally such a term is by law imported into every contract.” (*Barque Quilpue Ltd v Brown* [1904] 2 KB 264 per Vaughan Williams LJ).
37. The Claimant submits that the factual matrix is critical to a proper finding in relation to each term. A material part of the factual matrix relied upon by the Claimant (for instance: Swiss Post’s history of partnership agreements around the world, the trading history of Arctic Media Limited (“**AML**”), and Swiss Post’s invitation to the directors of AML to enter into the PPA) and the allegations at paragraph 1 and 4–7 of the APC, namely that (1) the Claimant was set up specifically for the purpose of entering into the PPA and (2) that incorporation and the fact that the Claimant had no assets or employees would enable an easy onward sale to the Claimant to the First Defendant, appears to be disputed by the Defendants. When determining whether there are the implied terms contended for, if there is to be a determination at this stage, these matters must be taken into account.

Paragraph 24a. - non-derogation from grant

38. Non-derogation from grant is a familiar term which is certain in concept, and has been upheld in a number of different contexts, including commercial contracts. It is closely connected with the principles governing implied terms. As the Defendants concede, the precise ambit of the term depends on the context, and is a question for the construction of the contract. That is not a reason not to hold the term as presently formulated reasonably arguable. It could certainly protect the Claimant against the First Defendant soliciting within the Territory the Claimant’s clients or potential clients (other than EXCEPTED CLIENTS) by offering products which could compete with the PRODUCTS, falling short of a non-competition clause, which is not otherwise

prohibited by an express term (see *Trego v Hunt* [1896] AC 7 at 20). This readily satisfies the requirements of obviousness and of business necessity (given the factual matrix). Not to have such a term would wholly undermine the deal struck by the parties.

39. The Defendants are incorrect in contending that the term as formulated in paragraph 24a. would mean that it would extend to a support obligation which required the use of any and all means available. Nor would implication of the term render the contract lop-sided; the Claimant had to suffer a very extensive limitation on the services it could lawfully offer for sale (see Articles 2.4 and 15), and was obliged not to sell products which were in competition with the PRODUCTS, unless there was a prior agreement with the First Defendant. There was also a two year post-termination non-competition. It would be contrary to the expectations of reasonable parties, and of commercial sense, for the First Defendant to be permitted to derogate from grant. It is plainly a fit term to proceed to trial.

Paragraph 24b. - not to compete and/or assist any other entity to compete with the Claimant's performance of the PPA

40. The very aim of the PPA was to increase SWISS POST's brand presence and market share in the northern part of the UK, by creating a mutually advantageous business relationship and to establish relations of commercial co-operation (Recitals (a), (b) (d) and (g)). The Claimant tied itself in to selling SWISS POST postal services for the duration of the contract plus two years, eschewing its predecessor's successful business as a consolidator of postal services. There were express non-competition obligations on the Claimant, to protect the agreement. The reason why there was no equivalent express obligation on the First Defendant was because it would be astonishing if the First Defendant sought to compete with itself. The implied term plainly passes both the business efficacy and obviousness tests. It is potentially incorporated in an implied term not to actively prevent performance (*Lewison para 6.14*). Further, competing using a third party (as occurred here) would inevitably involve sharing confidential information with a third party in breach of Article 14 of the PPA, and it is a short step to an implied term precluding competition with the PPA. That the term precludes indirect competition would provide protection against a group company competing with the PPA, for it would inevitably use the First Defendant's know-how, and probably its resources too. This is a short extension of the "prevention principle", discussed at

paragraphs 46 below, namely that neither party will do anything to prevent the other party from performing the contract, and which is relied upon in paragraph 34 of DRAPC v9.

Paragraph 24c. - the implied duty of good faith

41. *Chitty on Contracts 33rd Edn* (at para 1-057 p57) states as follows:

“[T]he courts have been willing to imply duties of honesty and good faith in contracts for joint business ventures and similar types of contract” (reference is made to examples such as *Nathan v Smilovitch (No. 2)* [2002] EWHC 1629 (Ch) at [9] and *Training in Compliance Ltd v Dewse* [2004] EWHC 3094 (QB)).

42. In *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E R (Comm) 1321, at [119] to [154], Leggatt J (as he then was) examined the circumstances when an implied duty of good faith would arise in contractual relationships. He did so in relation to a commercial contract for the distribution of deodorant and other toiletries which were branded to show an association with a well-known football team. At [142] he stated:

“In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith.... While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties to which they make a substantial commitment. Such “relational” contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements.

Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements.”

And at [144], he continued:

“Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party’s perception of

whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people. The standard is thus similar to that described by Lord Nicholls in a different context in his seminal speech in Royal Brunei Airlines v Tan [1995] 2 AC 378 at pp.389-390. This follows from the fact that the content of the duty of good faith is established by a process of construction which in English law is based on an objective principle. The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.”

At [147] he stated:

“I have emphasised in this discussion the extent to which the content of the duty to perform a contract in good faith is dependent on context.” [148]:

“as the basis of the duty of good faith is the presumed intention of the parties and meaning of their contract, its recognition is not an illegitimate restriction on the freedom of the parties to pursue their own interests. The essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit. The obligations which they undertake include those which are implicit in their agreement as well as those which they have made explicit.”

43. Mr Sachdeva submits that it is more than arguable that the PPA is a relational contract, taking into account the factors identified listed by Fraser J in *Bates v Post Office Ltd* [2019] EWHC 606 (QB) at [725]:
- (1) There is no express term that prevents a duty of good faith being implied;
 - (2) The contract is a long term one, with the mutual intention being that there will be a long term relationship;
 - (3) The parties must have intended that their respective roles were to be performed with integrity, and with fidelity to that bargain;
 - (4) The parties were committed to collaborating with each other in the performance of the contract (Recital (g), Article 2.1 (final sentence, Article 3.1 (final sentence));
 - (5) The spirits and objectives of their venture were not capable of being expressed exhaustively in a written contract;
 - (6) They each reposed trust and confidence in one another (not in a fiduciary sense);

- (7) The contract involved a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty;
 - (8) There was a degree of significant investment by one party or both. Here the very significant investment was primarily by the Claimant, in giving up the chance of selling other services, and redirecting its efforts and resources into Swiss Post, but also by the First Defendant, by sacrificing its ability to sell Swiss Post products throughout the northern part of the UK by placing in the Claimant the faith that they would return sales growth in the venture;
 - (9) Exclusivity of the relationship was present in the PPA.
44. In the circumstances the ambit of the duty of good faith placed the First Defendant under a duty:
- (1) not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;
 - (2) to act reasonably and with fair dealing having regard to the interests of the parties and to the provisions, aims and purposes of the contract, objectively ascertained;
 - (3) not to transfer its assets to any third party which is not a subsidiary or franchisee of the Swiss Post Group;
 - (4) not to compete and/or assist any other entity to compete with the Claimant's performance of the PPA.
45. It is highly relevant that the Defendants conceded that the discretion (1) to determine the nature of the products to be sold and (2) to determine the prices which C was obliged to pay for the products "*had to be exercised in good faith and not arbitrarily or capriciously*" (see the Defendants' solicitor's letter dated 21 February 2018 to the Claimant's solicitors). It is a short step from that substantive concession to allowing the amendment to paragraph 24c.

The Claimant's submissions in relation to paragraph 34 of DRAPC v9

46. The case here is put in two ways: first the application of the "prevention principle", namely that in general a term is necessarily implied in a contract that neither party will prevent the other from performing it: *Lewison* para 6-14. The classic formulation is that

“if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances...” (Stirling v Maitland (1864) 5 B & S 841), which formulation “has been applied many times” (Lewison para 6.14). The Court of Appeal has stated that “... [G]enerally such a term is by law imported into every contract” (Barque Quilpue Ltd v Brown [1904] 2 KB 264 per Vaughan Williams LJ). When looking at the very purpose of the PPA and the application of the prevention principle, there was an implied term that the First Defendant “would not do anything to frustrate the purpose of the contract alternatively the Claimant’s ability to meet the turnover and quality management targets settled in the Yearly Target Agreements.”

47. Further or alternatively, it is submitted that it was a term of the PPA implied by virtue of the duty of good faith owed by the parties to one and other (by virtue of the PPA being a relational contract) that the First Defendant would not do anything to frustrate the Claimant’s ability to meet the turnover and quality management targets settled in the Yearly Target Agreements. Such a term readily satisfies the business efficacy and obviousness and clarity tests in any event. The secondary obligation to pay damages for breach cannot replace the primary obligation not to prevent performance; the former is not an alternative to the latter.

The First Defendant’s submissions in relation to paragraphs 24 and 34 of DRAPC v9

48. Such terms are not necessary, particularly when looking at the express terms of the PPA, because there was little by way of express obligation placed upon the Claimant, other than to pay an up-front fee of £5,000 in September 2010. There was, however, no substantial constraint on the Claimant which would prevent it from abandoning sales of the PRODUCTS entirely at any point.
49. The requirement that a term must be capable of clear expression in order to be implied is not a formalistic requirement about the use of plain English. It is a substantive requirement that the term must be reasonably certain in its operation, certainty being of great importance in a commercial context: see *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187, 1197D-E, 1201A-C and 1204F-H; *Torre Asset Funding Ltd v The Royal Bank of Scotland Plc* [2013] EWHC 2670 (Ch), per Sales J (as he then was) at [152(iv), (x) and (xi)]. The terms relied upon are vague and uncertain.

Paragraph 24a. _ non-derogation from grant

“Supplying PRODUCTS”

50. Insofar as paragraph 24a. relates to the exclusive supply of PRODUCTS, the complaint at paragraph 46(i)(i) appears to be that the First Defendant withdrew the PRODUCTS or failed to supply them. Yet, the PRODUCTS are contractually defined [Article 2.2 and Annexes A and F], and it is obvious from the PPA as a whole, and Article 3.1 and Annex B in particular, that the First Defendant is promising to supply the relevant delivery services: where mail is delivered to First Defendant in accordance with Annex B it is to be “*dispatched accurately and on time*” by it. It is not clear why one would need to address a failure to supply the contracted-for services by implying a duty not to derogate from grant. No implication is required where the express terms of the contract deal with the situation.

“Supporting the Claimant’s efforts to perform the PPA”

51. In relation to “supporting the Claimant’s efforts to perform the PPA”, it is unclear how much further this goes than the earlier formulation of “supporting the BRAND”, particularly when one looks at the breach pleaded at paragraph 46(i)(ii) and (iii), which seems to relate solely to failure to support the BRAND and instead to support the Asendia brand at the expense of the Swiss Post BRAND and PRODUCTS. Mr Drake submitted that the term is not sufficiently certain in its operation to be capable of clear expression. Secondly, Mr Drake submits the proposed term is just one among a range of possible terms that the parties might, had they bargained expressly regarding the issue, have adopted. It is impossible to say that the proposed term is the only contractual solution to a problem or the solution that would inevitably have been preferred.

52. Insofar as Recital (d) is strongly relied upon by the Claimant, that simply articulates the First Defendant’s present intention at the time of entering into the PPA, that intention being to use the Claimant – and specifically, Claimant’s sales activities – to increase the First Defendant’s brand presence and market share. It was not intended to achieve increased brand presence and market share by any and all means available. The PPA involved the First Defendant paying the Claimant “Marketing Contribution” payments of £3,000 per annum to pursue “*marketing activities with the aim of developing the sale of the PRODUCTS to the CLIENTS in the TERRITORY*” [Article 9.1], and “*authorized*

[the Claimant] to use the BRAND [the “Swiss Post” registered trademark and logo] and other SPI UK distinctive signs” for that purpose [Article 13.1]. Mr Drake submits that it is the Defendants’ case that PRODUCTS would have been continued to be sold via the Second Defendant as the agent of SWISS POST for the minimum duration of the agreement (i.e. until 15 July 2015). I interject to say that when one looks at the terms of the First Defendant’s letter dated 10 December 2013, referred to at paragraph 25 above, that is not apparent.

53. The extent to which the First Defendant envisaged its own UK-wide marketing activities continuing is a matter as to which the PPA’s express terms provide no definite answer, and it is impossible to say that the parties “obviously” or “necessarily” envisaged any particular obligation on the First Defendant to carry on any particular level of UK-wide marketing activities throughout the life of the PPA.
54. The implication of the proposed term would make the contract notably lopsided in the obligations it placed upon the parties, particularly because aside from the £5,000 up-front one-off “license fee” payable by the Claimant, the PPA is notable for placing the Claimant under very little ongoing obligation throughout the life of the contract. Although I interject to observe that this ignores the continuing obligations: (1) under Article 2.1 to offer the PRODUCTS to all potential clients within the Territory save EXCEPTED CLIENTS and ; (2) to pay Royalties as set out in Article 7 for the duration of the agreement.
55. Finally, it is it is impossible to say that the contract lacks commercial or practical coherence without the implication of the proposed term.

“Not developing a competing brand and products”

56. In the context of the Claimant’s case, the function of this proposed term appears to be render wrongful any promotion by the First Defendant of the “Asendia” brand. One obstacle in the way of implying the proposed term is that, far from elaborating on obligation that must inevitably have been implicit in the parties’ bargain, it radically alters that bargain.
57. The PPA is a contract under which the Claimant is granted exclusive rights to sell a particular class of ‘product’ to a particular class of customer. It is a very substantial step beyond this to preclude the First Defendant promoting, or participating in the

promotion of other, potentially competing brands. The grant of exclusive distribution rights in relation to a brand does not necessarily carry with it an obligation on the part of the grantor not to promote alternative brands. That non-competition obligation is something that might or might not have been included as a facet of the PPA, had the parties chosen to address the issue of competition on the part of the First Defendant. There are a variety of possibilities: it is impossible to say that the proposed term is an “obvious” or “necessary” facet of the PPA.

Paragraph 24b. - non-competition

58. If what is intended by this proposed term is an extended version of the duty not to compete apparently intended to be rolled up in paragraph 24a., then it should be rejected for the reasons already explored in paragraphs 56 and 57 above.
59. The actual words of the proposed implied term are, however, that the First Defendant “*would not compete and/or assist any other entity to compete with [C]’s performance of the PPA*”. This duty would appear to be a duty not to market and sell PRODUCTS to exactly the customers to which the Claimant has exclusive sales rights under Arts 4.1 and 5.1. But there is no need to imply such a duty, because the situation envisaged is expressly catered for by Articles 4.1 and 5.1, which give the Claimant an *exclusive* right. Any implication would be otiose.

Paragraph 24c. - the implied duty of good faith

60. The proposed term containing the implied duty of good faith in paragraph 24c. now has four component parts. This is to be contrasted with the context within paragraph 34 in which it appears, where it is said to give rise to an implied duty on the First Defendant not to do anything to frustrate the Claimant’s ability to meet targets set in the Yearly Target Agreements.
61. Like paragraph 34, the implied duty of good faith alleged in paragraph 24c. is based on the assertion that the PPA is a relational contract.
62. The following principles in respect of “relational contracts” can be derived from the authorities:
 - (1) First, it is characteristic of “relational contracts” into which it may be appropriate to imply a duty of co-operation or good faith, that the parties make a substantial commitment to an arrangement where they collaborate with one another on a long

term basis, the contract requiring predictable performance based on mutual trust and confidence and expectations of loyalty, which are not legislated for in the express terms of the contract (*Yam Seng PTE v International Trade Corp Ltd* [2013] 1 All ER (Comm) 1321, [142]-[143]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [67]-[68]; *Al Nehayan v Kent* [167], [173]; *Bates v Post Office Ltd* [2019] EWHC 606 (QB), [705], [712]-[721], [725]-[726], [728]).

- (2) Secondly, taken at its highest, the general nature of a duty of good faith on a contracting party is to require honesty and fidelity to the parties' bargain (rather than undermining it or the substance of the contractual benefit bargained for by the other party), and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. This does not, however, require one party to subordinate its interests to that of the other (*Al Nehayan v Kent* [175]).
- (3) Thirdly, and in consequence, the *content* of any duty of good faith in a particular contractual context is heavily dependent on that context and has to be established through a process of construction of the contract (*Yam Seng*, [141], [147]).
- (4) Fourthly, the corollary is that whether a duty with some particular content can be implied depends on the terms of the particular contract (*Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), [101]-[112]; *Globe Motors Inc*, [67]-[68]).

The PPA is not a “relational contract”

63. There are three principal objections to implying the proposed term under this heading.
64. First, the PPA is not a “relational contract” in the relevant sense:
 - (1) Although the PPA was a long-term contract, in the sense that it was intended to run from September 2010 to July 2015 at least, the parties did not make a substantial commitment to their arrangement. On the contrary, the Claimant paid a flat fee of £5,000 up-front under Article 8.1, but was not obliged to achieve any particular level of sales whatever. The marketing activity required of the Claimant under the contract did not exceed that subsidised by the Marketing Contribution

of £3,000 that the First Defendant was required to pay it under Article 9.1. Indeed, the Claimant's own case is that the Claimant was an off-the-shelf SPV that was not envisaged as having any fixed assets or employees (paragraph 7 and 7b. of DRAPC v9).

- (2) Furthermore, the PPA did not require from both parties predictable performance based on mutual trust and confidence and expectations of loyalty. The principal practical requirement on the First Defendant was to dispatch items properly consigned to it accurately and on time, in whatever volumes they arrived from the Claimant or the Claimant's customers. That was an essentially mechanical operation.
- (3) Lastly, the express terms of the contract made detailed provision for the operation of the parties' contractual relationship.

65. Secondly, even if the PPA were a relational contract, the content of any duty of good faith has to be assessed against the background of the parties' express bargain. For these purposes, it is not appropriate to subject the First Defendant to an open-ended obligation not to do "*anything unreasonable*" that might frustrate the Claimant's ability to earn a marginal discount on its Royalty obligations. To do so is inappropriately to elevate the importance of express provisions regarding bonuses, and to subject the whole of the First Defendant's conduct in relation to the contract to a criterion based on that one obligation, in the face of a wider regime of detailed contractual provisions, including ones that afford the First Defendant's wide (but not unfettered) contractual discretions under Articles 2.3 and 6.3.

66. Thirdly, the objections set out in paragraph 71 below in relation to business necessity regarding the unworkable uncertainty of the proposed term apply as much when considered under the rubric of good faith as under the rubric of business necessity.

67. For all these reasons, it would be inappropriate to rewrite the parties' bargain by implying the proposed term.

Paragraph 34 of DRAPC v9

68. Looking at the way in which the implied term in paragraph 34 is formulated, it has two different bases – (1) based on business efficacy or necessity or (2) based on the PPA being a "relational contract". Neither stands scrutiny.

69. At paragraph 34 of DRAPC v9, the implied term is said to be implied “*by virtue of the duty of good faith owed by the parties to one another (by virtue of the PPA being a relational contract)*”.
70. The “prevention principle” to which paragraph 34 refers is most straightforwardly exemplified by an implied obligation that neither party will act so as to prevent the other from discharging its contractual obligations. There is, however, no magic involved in the invocation of the “prevention principle” that relieves the Claimant from having to establish that the test of necessity is met for the implication of this term.
71. The test of necessity has to be applied in the context of the provisions of the PPA:
- (1) The consequence for the Claimant of a failure to meet a target contained in a Yearly Target Agreement is that the Claimant has to forego the Target Bonus to which it would otherwise be entitled [Articles 17.1 and 17.2].
 - (2) The Target Bonus provisions in PPA Annex K identify a range of targets, and a range of bonuses: more than 10% growth in revenue results in a 0.25% discount on the Claimant’s Royalty obligations; more than 15% growth, a 0.5% discount; more than 20% growth, a 0.75% discount; more than 25% growth, a 1% discount.
 - (3) Against this background, which is the operative target that the First Defendant is required “*not to do anything to frustrate*”? The minimum target of more than 10% growth? Or the maximum target of more than 25% growth? The constraints placed on the First Defendant by the proposed term are (plainly) not the same, dependent on which target one chooses. This is a powerful indication that the proposed term does not meet the criterion of clarity and certainty.
 - (4) Notably, paragraph 46 of DRAPC v9 does not identify any particular conduct as being said to infringe the proposed implied term in paragraph 34. As pleaded, it is entirely unclear what relevant conduct it is said to preclude.
72. Further, the formulation of terms supposedly required by the “prevention principle” requires careful consideration:
- (1) In cases where a contract provides for a conditional benefit to party B, and the “prevention principle” requires an implied term to protect B’s opportunity to earn that benefit, the objectives of the principle are, without more, as well met by a term that (i) B is to be entitled to the benefit if A acts so as to prevent the

condition being satisfied, as by one that (ii) A is required not to prevent the condition being satisfied.

- (2) If the impetus for implication is the protection of this benefit, then it cannot be necessary to imply a term more extensive than the minimum required for this purpose.
- (3) Of course, where party B sues to secure the value of the benefit, it is immaterial which type of term is relied on – and the court may be accordingly relaxed about whether it adopts formulation (i) or (ii).
- (4) But in the present case, the Claimant is not bringing proceedings to secure the value of its bonus. It is seeking to use an implied term, ostensibly serving the purpose of protecting that limited interest, to seek compensation entirely unrelated to the value of the bonus concerned. In such circumstances, the criterion of necessity makes it clear that no term more extensive than one in form (i) can be implied.
- (5) The Claimant’s arguments in favour of a term in form (ii) should be rejected, therefore, because they do not pass the test of necessity.

73. The present case is in important respects reminiscent of *Philips Electronique Grand Public SA v British Sky Broadcasting Limited* [1995] EMLR 472:

- (1) There, the defendant satellite broadcaster, BSB, had engaged the claimant, Philips, to manufacture for sale receivers tailored to broadcasts in the particular technical format used by BSB’s satellite, and to develop substantial manufacturing capacity to that end. After BSB’s satellite service flopped, it merged with rival Sky, and ceased actively promoting broadcasts in its own technical format – with dramatic results for sales of receivers manufactured by Philips.
- (2) Philips contended (inter alia) for an implied term that “the defendant would not commit any act which would tend to impede or render impossible the marketing of the Receivers and/or to render the Receivers useless or unmarketable”.
- (3) The Court of Appeal refused to imply this term, observing in particular that:

“Had the parties addressed their minds at the outset to the eventuality that the operation turned out to be a major commercial flop, it is by no

means clear how they would have agreed that the risk should be allocated or, if they had agreed that Philips should be protected, what form they would have agreed that that protection should take. It seems likely that there would have been tough negotiation, with Philips seeking maximum protection and BSB conceding the minimum. There are, plainly, a number of different ways in which Philips could have been protected to a greater or lesser extent, but it must be doubtful which if any of them would have been adopted.”

- (4) The same point can be made in the present case, in the context of potential alterations to the First Defendant’s brand and commercial strategy during the life of the PPA. Had the parties turned their minds to the risks attendant on such alterations, it is by no means clear how they would have agreed that the risks should be allocated or, if they had agreed that the Claimant should be protected, what form they would have agreed that protection should take.
- (5) It is not sufficient, for the purposes of implication of a term, to complain that changes in the First Defendant’s strategy have rendered the Claimant’s rights less valuable than they would have been had the First Defendant’s strategy remained unchanged. The Claimant could have stipulated for particular obligations regarding brand support and promotion, or non-competition, but it did not do so. What the Claimant is now asking, is not for the court to give the existing bargain full effect, but rather for the court to alter the existing bargain.

74. For all these reasons, the court should summarily determine that the proposed term is not to be implied into the PPA on grounds of business efficacy and necessity.

Discussion and conclusion in relation to paragraph 24

75. I would begin by saying that I find the drafting of certain parts of paragraphs 24 of DRAP v9 difficult to follow. For example, sub-paragraph 24a.(iv) states: “*the First Defendant would not derogate from its grant to the Claimant, such grant including... (iv) without the First Defendant directly or indirectly soliciting the Claimant’s clients or potential clients (other than Excepted Clients) using services which could compete with the PRODUCTS within the territory*”. What precisely does this mean? It seems to me from Mr Sachdeva’s oral submissions that what is intended is that, given the express terms of the PPA, and the rights given exclusively to the Claimant by the First Defendant thereunder, it would be a derogation from those rights for the First Defendant to be permitted, for the duration of the agreement, directly or indirectly to

solicit the Claimant's clients or potential clients (other than Excepted Clients) within the Territory, using services which could compete with the PRODUCTS; alternatively there is to be implied a term on the basis of business efficacy or necessity to that effect. It could certainly have been expressed with greater clarity.

76. Similarly, although Mr Drake addressed paragraph 24a. as including an element of “*not developing a competing brand and products*” (see paragraphs 56 and 57 above), that is not spelt out in terms in sub-paragraphs (i) to (iv) of paragraph 24a., following the reference to derogation from the First Defendant's grant. Again from the oral submissions made by Mr Sachdeva, it seems to be that what is intended is that, given the express terms of the PPA, and the rights given exclusively to the Claimant by the First Defendant thereunder, it would be a derogation from those rights for the First Defendant, during the currency of the agreement, to be permitted directly or indirectly to develop and/or to market a competing brand and products to the BRAND and the PRODUCTS within the Territory; alternatively there is to be implied a term on the basis of business efficacy or necessity that the First Defendant would not be permitted to develop and/or to market a competing brand and products within the Territory.
77. I have decided that I am willing to grant permission to amend, alternatively I will not strike out, certain aspects of paragraph 24 (which I will shortly identify) on the grounds that I am of the view that those aspects (and only those aspects) have a real as opposed to a fanciful prospect of success. They will require further clarification in the pleading as served. Whether they will succeed at trial remains to be seen, but I am not willing to stop the argument being made at trial in those respects.
78. Before I turn to the detail of paragraph 24, I would make clear that I accept Mr Sachdeva's submission that it is realistically arguable that given the nature and terms of the PPA, it is a “relational” contract, applying the approach of Leggatt J in *Yam Seng* and the factors identified listed by Fraser J in *Bates v Post Office Ltd*. I reject Mr Drake's submission that the factors on which he relies, set out in paragraph 64 above, preclude the possibility of the PPA being a relational contract, nor does this amount to rewriting the bargain between the parties.
79. I accept Mr Drake's submissions that in so far as:

- (1) Paragraph 24a. (and the breaches pleaded in paragraphs 46i (i)) relate to the supply of PRODUCTS it is unnecessary, given the express terms of the PPA. This aspect cannot remain;
 - (2) Paragraph 24a. (and the breaches pleaded in sub-paragraphs 46i (ii) and (iii)) rely upon “*an obligation to support the Claimant’s efforts to perform the PPA*”. In my judgment that formulation is not sufficiently certain in its operation to be capable of clear expression. Also when one looks at the breaches pleaded at sub-paragraph 46i (ii) and (iii), it is unclear how further this goes that the earlier formulation of “supporting the brand”. The PPA expressly defines a level of marketing financial support from the First Defendant to the Claimant and I accept Mr Drake’s submission that the extent to which the First Defendant envisaged its own UK-wide marketing activities continuing is a matter as to which the PPA’s express terms provide no definite answer, and it is impossible to say that the parties “obviously” or “necessarily” envisaged any particular obligation on the First Defendant to carry on any particular level of UK-wide marketing activities throughout the life of the PPA. This aspect cannot remain.
80. I would however permit paragraph 24a. to stand insofar as it relates to the matters identified in paragraphs 75 and 76 above, which are matters I am not satisfied are ‘fanciful’. In this regard I note the passages identified in the First Defendant’s letter dated 10 December 2013 recited at paragraph 25 above and particularly those emphasised. It seems to me to be seriously arguable that, given the express terms of the PPA, and the rights given exclusively to the Claimant by the First Defendant thereunder, it would be a derogation from those rights for the First Defendant to be permitted, for the duration of the agreement, directly or indirectly to solicit the Claimant’s clients or potential clients (other than Excepted Clients) within the Territory, using services which could compete with the PRODUCTS; alternatively, applying the principles laid down in *Marks & Spencer*, referred to at paragraph 30 above, there is to be implied a term on the basis of business efficacy or necessity to that effect. Further on the same bases, for the duration of the agreement the First Defendant would be not permitted directly or indirectly to develop and market a competing brand and products to the BRAND and the PRODUCTS within the Territory. I was initially concerned that clause 15 of the PPA contains an express provision on the Claimant selling products which would have been in competition with the PRODUCTS, but is

silent in relation to a corresponding obligation on the First Defendant, but as Mr Sachdeva points out, given Recitals (d) and (g), it would have been odd had the First Defendant sought to compete with its own PRODUCTS.

81. This means that of the breaches pleaded at paragraph 46i., only (iv) remains, but I would also permit that to be expanded to relate to a breach of the obligation not directly or indirectly to develop and/or to market a competing brand and products within the Territory.
82. I grant permission to amend to include paragraph 24b., so long as that contains the words that presently appear at the end of paragraph 24a., namely “[by] *using services which could compete with the PRODUCTS within the Territory*”. This would meet the objection made by Mr Drake as set out at paragraph 59 above.
83. Given my finding in paragraph 78 that it is seriously arguable that the PPA was a relational contract, I would permit the amendment at paragraph 24c., save that:
 - (1) in my judgment, sub-paragraph (c)(ii) is too vague and, given the other sub-paragraphs, is unnecessary. This means that the breaches pleaded at sub-paragraph 46k (ii) cannot stand;
 - (2) for the sake of clarity sub-paragraph 24c.(iv) should have the additional words “[by] *using services which could compete with the PRODUCTS within the Territory.*”
84. I also accept Mr Drake’s submission that once it is alleged that the admitted asset transfer was a breach of the duty of good faith, the allegation that the First Defendant “entered into negotiations to transfer its assets to the Second Defendant” is otiose. This means that the breach pleaded sub-paragraph 46k.(i)(3) cannot stand. It is impossible to see what more a “negotiation” breach could add to a “transfer” breach.

Discussion and conclusion in relation to paragraph 34

85. Given the implied duty of good faith and non-competition aspects which I have permitted to be included in paragraph 24, I am somewhat at a loss to understand what the pleading at paragraph 34 adds. I agree with Mr Drake that when one looks at paragraph 46, it does not identify any particular conduct as being said to infringe the proposed implied term in paragraph 34. Indeed paragraph 46 makes no reference to paragraph 34 at all. As pleaded, it is entirely unclear what relevant conduct it is said to

preclude beyond that already referred to in paragraph 24. For those reasons I am not willing to permit paragraph 34 of DRAPC v9 to stand.

86. Given my earlier findings in relation to non-derogation from grant, I will permit that pleading at paragraph 47 viii to stand as against the Second Defendant.

Conclusion

87. There has been a division of honours in relation to the remaining contested parts of DRAPC v9. It will now be necessary for a revised version of DRAPC v9 to be prepared by the Claimant, reflecting my decision set out above in relation to paragraph 24, excising paragraph 34 and amending paragraph 46. I note that DRAPC v9 does not presently distinguish between the original pleading, the amendments and the re-amendments. The revised version should be appropriately colour coded.
88. It has been agreed that 2pm on Monday 29 July is a convenient time for the judgment to be handed down. I will deal with any consequential applications at that time. In preparation for the hearing, by 4.30pm on Friday 26 July please could I have the following by email:
- (1) From the Claimant, the revised DRAPC referred to at paragraph 87 above;
 - (2) Insofar as it is possible, a draft agreed Order reflecting the outcome of each of the four applications. Where there are areas of disagreement, this should be indicated and the respective versions included. Provision should be made for draft consequential directions in relation to the service of a re-amended Defence and a possible amended Reply (which should await the service of the re-amended Defence);
 - (3) A skeleton argument in support of any costs or other applications. I note that there is still outstanding the issue of costs in relation to the two applications dealt with by HHJ Klein.