

Neutral Citation Number: [2021] EWHC 2295 (Ch)

Case No: BL-2019-MAN-000004

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS IN MANCHESTER**

**BUSINESS LIST (ChD)**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester  
M60 9DJ

Date: 13 August 2021

**Before :**

**HIS HONOUR JUDGE PEARCE SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

**ZYMURGORIUM LIMITED**

**Claimant**

**- and -**

**HAMMONDS OF KNUTSFORD PLC**

**Defendant**

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**STEVEN REED AND LOIS NORRIS** (instructed by **NAPTHENS LLP**) for the **Claimant**

**WILLIAM EDWARDS AND CLARISSA JONES** (instructed by **APP LAW**) for the **Defendant**

Hearing dates: 11, 12, 13, 14 May 2021, 7, 8, 9, 10 and 17 June 2021

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**JUDGMENT**

This judgment was handed down in private at 12.00 on 13 August 2021. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

**His Honour Judge Pearce :**

INTRODUCTION    Background

The Trial

HOK's Case in Summary

ZL's Case in Summary

THE ISSUES

THE LAW

Construction

Implied Agreements

Relational Contracts

Reasonable Notice

Repudiation/Renunciation

THE EVIDENCE    Approach to lay witness evidence

Summary of evidence (1) - The development of the relationship between ZL and HOK

Summary of evidence (2) - ZL takes off

Summary of evidence (3) - The breakdown of the relationship between ZL and HOK

DISCUSSION

Assessment of the witnesses

Issue 1 - Interest on the Claim

Issue 2 - Master Wholesale Agreement

Issue 3 - Specific supply Agreements

Issue 4 - Relational contract

Issue 5 - Repudiatory breach/renunciation by ZL supplying direct

Issue 6 - Repudiatory breach/renunciation by HOK developing Imaginaria

CONCLUSION

**Note – in this judgment, the main players and concepts are referred to by abbreviation. The appendix to the judgment contains a list of the various abbreviations used.**

## INTRODUCTION

### Background

1. The Claimant, Zymurgorium Limited (“ZL”), is a company established by Aaron Darke (“AD”) and in which latterly his brother, Callum Darke (“CD”) has worked. It was incorporated in September 2016 and is the continuation of an unincorporated business established by Aaron Darke in order to produce gins and gin liqueurs<sup>1</sup>. The Defendant, Hammonds of Knutsford Limited (“HOK”), is a well established company founded in 1960 by Tony Hammond, the father of the current managing director, Jonathan (generally known as “Jonny”) Hammond (“JH”). It is involved in wholesaling drinks products.
2. From late 2015 until late 2018, HOK and ZL had a commercial relationship which was associated with a rapid expansion of ZL. By way of indication of that growth, when their relationship started, ZL did not meet the threshold for VAT registration; by July 2018, HOK’s monthly sales of Zymurgorium products exceeded £1 million and, in the month of November 2018 alone, they exceeded £1.7 million. In a similar vein, ZL turned over £7.3 million in the year ending 31 December 2018, making a pre-tax profit of £2.8 million.
3. The core terms of the relationship between HOK and ZL were never reduced to writing. There is an issue as to whether the relationship of the parties was governed by an overriding contract. HOK contends that such a contract, which it calls a Master Wholesale Agreement (“MWA<sup>2</sup>”), arose as a result of discussions in a meeting on 16 November 2015, it subsequently being varied, and further that the relationship between the parties in respect of supplies to particular customers were determined by Specific Supply Agreements (“SSAs”). The relationship ended abruptly and acrimoniously in December 2018, when the Defendant discovered that ZL was had started to supply directly to another wholesaler, Matthew Clarke Bibendum<sup>3</sup> (“MCB”), to whom previously HOK had supplied ZL’s products. HOK treated this direct supply as a repudiatory breach of the MWA and/or SSAs and, by letter dated 20 December 2018, purported to accept the breach.

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<sup>1</sup> This term is explained below.

<sup>2</sup> The use of the terms “Master Wholesale Agreement” and “Specific Sales Agreement”, with the capitalisation of the first words, might seem to imply that these are terms of art. They are not. They are the names given by the Defendant to specific contracts that are said to have arisen in in particular circumstances. My adoption of those phrases is for the sake of convenience only and is not intended to supply that there is a particular trade usage or category of contract into which the court pigeonholes the alleged agreements of the parties.

<sup>3</sup> In fact various companies in the Matthew Clark group are named in the documents. For the purpose of determining the issues in this case, no distinction arises between the various companies in the group and “MCB” is used interchangeably.

4. At the time of that letter, ZL had issued outstanding invoices to HOK for products that it had supplied in the total sum of £682,265. It sues on those invoices. HOK admits its liability on those invoices subject to a small issue about interest and a defence by way of set off of a counterclaim. The counterclaim is for losses caused by the alleged repudiatory breach by ZL of the terms of the MWA and/or SSAs.
5. ZL deny the existence either of an overarching agreement in the form of the MWA or the individual SSAs. Further, it alleges that, if such agreements did exist and were relational in nature, HOK was in breach of those agreements by developing a product range called Imaginaria, that was launched in early 2019 and that was intended to (and did) compete with ZL's products.

**The Trial**

6. The trial began on 12 May 2021 with a time estimate of nine days. As is explained more fully below, it quickly became apparent during the trial that it was unlikely that there would be sufficient time to deal with all of the evidence and submissions. Accordingly, it was agreed that all of the lay evidence would be heard, followed by closing submissions on issues of liability. Thereafter a further hearing would be convened to deal with the quantification of the counterclaim, if the Defendant succeeded on the liability issues.
7. Matters were further complicated by the illness of counsel, which caused the loss of most of the original listing. As a result, the court only sat on four days<sup>4</sup> of the original 9 day listing in May 2021, then resumed in June 2021, sitting from 7 to 10 June 2021 to deal with the remainder of the evidence, 15 June 2021 to deal with applications to vary the costs budgets (which applications are not relevant to the issues dealt with in this judgment) and 17 June 2021 for closing submissions.
8. The following witnesses were relied on by the parties:

Party calling	Name	Initials	Date(s) of statement(s)
ZL	Aaron Darke	AD	29 September 2020 5 January 2021
ZL	Callum Darke	CD	25 September 2020
ZL	Michael Hadfield	MH	29 September 2020
HOK	Jonathan Hammond	JH	29 September 2020 23 March 2021
HOK	Danny Appleton	DA	29 September 2020

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<sup>4</sup> The fourth court day itself was very short.

HOK	Christopher Jones	CJ	29 September 2020 24 March 2021
HOK	Philip Rose	PR	28 September 2020
HOK	Charlotte Gilley	CG	28 September 2020
HOK	Andrew Sagar	AS	23 March 2021

All save CG gave oral evidence.

**HOK’s case in summary**

9. It is common ground between the parties that, on 16 November 2015, a meeting took place at HOK’s premises, between JH on behalf of HOK and AD on behalf of ZL. HOK contends at paragraph 17 of the Re-Amended Defence and Counterclaim (“RDCC”) that, during the meeting, it was agreed:

- 9.1 that HOK would promote ZL’s drink products generally to the marketplace;
- 9.2 that HOK would act as ZL’s wholesaler purchasing ZL’s products from ZL and reselling them to HOK’s customers;
- 9.3 that ZL would supply its drink products to HOK to meet the demand for those drink products that HOK generated and received.

This is the agreement which has been called the Master Wholesale Agreement (MWA).

10. At paragraph 18, it is pleaded that there was to be implied into the MWA that it could be terminated by either party giving reasonable notice. That term is said to be implied either:

- 10.1 At the time the original MWA was entered into;
- 10.2 When the MWA was varied in the circumstances set out at paragraphs 19A and 19B of the MWA;
- 10.3 When the MWA became a relational contract in the circumstances set out at paragraphs 19C and 19D of the MWA.

11. As to variation, the Re-amended Defence and Counterclaim (“RDCC”) puts the case in considerable detail:

*“19A. Prior to HOK’s involvement, Mr Darke was operating ZL by himself, from a small rented industrial unit in Irlam, and creating the recipes, mixing, bottling and labelling the drinks himself, as well as delivering them to HOK in person. Mr Darke had few industry connections, little experience of the industry, and no additional personnel resources until his brother Callum Darke joined him on a date believed to be in late 2016. During the course of 2016 and 2017 HOK worked closely with ZL, to enable Mr Darke to develop ZL’s business, and Mr Darke relied heavily upon HOK’s assistance, expertise and resources. For example:-*

- 19A.1 *HOK personnel communicated with ZL, often numerous times a day, and provided ZL with confidential information which would not normally be supplied in the course of a producer-wholesaler relationship, such as information concerning new customers and their requirements, anticipated orders and volumes, and other information relevant to ZL's production schedules, stock availability and delivery dates.*
- 19A.2 *In March 2017, Mr Hammond advanced the sum of £27,000 to ZL by way of an EIS investment into ZL to enable ZL to purchase a new still. Pending finalisation of the investment structure, Mr Darke sent Mr Hammond an email dated 23 March 2017 attaching a 'Rough for a Loan' which acknowledged the preference for the sum to be converted to equity with EIS "when shares are ready"; that the repayment method could be switched to "monthly instalments at a fair market rate of interest", and that ZL "promises to make this a freaking awesome adventure and [Mr Hammond] must promise to come down and have a turn on the still otherwise this contract remains null and void." Mr Darke met with Mr Hammond's financial advisor concerning Mr Hammond's investment into ZL with a view to obtaining HMRC's approval for an SEIS/EIS.*
- 19A.3 *HOK provided ZL with financial assistance and cash flow needs, for example by arranging and paying for transport of ZL's goods as and when ZL required, and storing and/or paying for storage of dry goods and raw materials (charging only the base cost to ZL, without any profit mark-up) that ZL required to produce its products to sell to HOK.*
- 19A.4 *HOK provided ZL with practical and personnel assistance when Mr Darke struggled for lack of resource, for example sending HOK staff or members of Mr Hammond's family to help out at the ZL distillery.*
- 19A.5 *Mr Darke once complained that HOK was selling a product that competed with one of ZL's products. HOK subsequently declined to list a number of brands and/or products that would have competed with ZL, in circumstances where HOK would otherwise have wanted to and benefited from listing those brands. On another occasion, HOK checked with Mr Darke whether ZL would object to HOK stocking a particular product. Mr Darke visited the supplier's premises before responding to HOK that he had no such objection.*
- 19A.6 *In or about May 2017, Mr Hammond and Mr Chris Jones incorporated PBL for the purpose of providing promotional services for drinks brands. In or about September 2017, HOK introduced ZL to PBL. Thereafter HOK and PBL provided ZL with commercial advice for the future development of ZL's business. This entailed almost daily meetings between Mr Hammond, Mr Darke and Mr Jones concerning brand development and marketing.*
- 19A.7 *In or about August/September 2017 Mr Hammond offered to assist ZL with the costs of purchasing new premises (although the purchase then proposed did not in the event go ahead).*
- 19A.8 *During September and October 2017, in numerous meetings and telephone calls between some or all of Mr Hammond, Mr Danny Appleton (HOK's Commercial Director), Mr Jones and Mr Darke and, in particular, at a meeting held at HOK's premises during week commencing 9 October 2017 between Mr Appleton, Mr Jones and Mr Darke, the parties discussed moving ZL's business to the next level, targeting nationwide sales and listings of ZL's products for the benefit of both HOK and ZL (the "Strategy"). Such Strategy would require significant effort from HOK to implement. As such, in order to pursue it, it would require HOK being able to offer the national and regional*

*suppliers attractive discounts on the product, and commitment to adequacy of supply for large orders. That, in turn, would require back to back commitments from ZL in relation to supply, and in relation to multi-party discount arrangements (including ‘retro’ arrangements such as those described further below). Mr Appleton and Mr Jones are unable to recall the precise words used, but Mr Darke agreed to proceed on this basis, and the parties agreed to pursue the Strategy.*

- 19A.9 *During the period over which the Strategy was being discussed and formulated, HOK and PBL, identified ZL’s “Sweet Violet” gin liqueur for targeted development and marketing. Accordingly PBL advised and assisted ZL concerning the outsourcing of production and bottling of “Sweet Violet”, introducing ZL to H&A Prestige Bottling Limited (“H&A”), contract producers and bottlers, on or about 22 September 2017. ZL subsequently entered into a contract H&A. PBL and HOK thereafter targeted national accounts with “Sweet Violet”.*
- 19A.10 *As ZL had no bonded facility, HOK agreed to assist ZL by taking delivery of the completed product from H&A, holding the stock in HOK’s bond, and paying the storage costs and excise duty when stock was drawn down. ZL invoiced HOK for each batch, under bond. Accordingly HOK’s assistance enabled ZL to take no stock risk at all on “Sweet Violet”, as everything that was produced would be sold immediately to HOK.*
- 19A.10<sup>5</sup> *In or about November 2017, PBL and HOK provided ZL with specific advice concerning management of orders for the forthcoming Christmas period.*
- 19A.11 *During 2018, HOK and PBL’s efforts led to a number of confirmed supply arrangements (“Specific Supply Agreements”) particularised below. ZL also directed enquiries that it received to HOK during this period. For example, on 9 March 2018 Mr Darke responded by email to an enquiry from a buyer at TGI Fridays UK, a large potential customer, expressing interest in “Sweet Violet”, by referring her to HOK and stating that “Hammonds of Knutsford (HoK) who are our main wholesaler that leads into MC will sort out a retro for you to get it to a price that works!”*
- 19A.12 *The successful negotiation and maintenance of the Specific Supply Agreements often entailed HOK discussing specific customer requirements with ZL and advising and supporting ZL in respect of meeting those customer requirements, for example, in relation to product and/or packaging design, the supply commitment and pricing arrangements. Particulars in respect of the relevant Specific Supply Agreement are set out below and in Schedule 1.*
- 19A.13 *In or about early June 2018, JDW offered Mr Jones the opportunity to develop a new but lower alcohol content gin that sparkled like “Unicorn Tears”, a gin produced by another distiller. Mr Jones offered this valuable opportunity to ZL, and together PBL and HOK advised and assisted ZL with the development of a suitable product, called “Realm of the Unicorn” (“Unicorn”) to JDW’s specifications. JDW subsequently accepted and launched Unicorn nationally, and it became at least as if not more successful than “Sweet Violet” – see paragraph 21.9 below.*
- 19A.14 *Neither HOK nor PBL were separately remunerated for any of the extensive services or support provided to ZL. On the contrary, when PBL suggested that it be remunerated, by way of a commission payment, for its role in bringing*

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<sup>5</sup> Numbering here, as elsewhere, as the original.

*and developing the Unicorn opportunity to ZL, Mr Darke responded by an email dated 10 October 2018 that he considered PBL to be providing its services through (and paid for by) HOK, as “this was the whole point of us reducing the price of the bottle to allow for that” and “The payment [for HOK and PBL’s services] is the fact we have given and will give an extremely favourable rate for years”*

- 19A.14 *Accordingly, (as evidenced from inter alia Mr Darke’s “Rough for a Loan” email and his email of 10 October 2018), Mr Darke of ZL was aware, and as was obvious, that the clear intention (which HOK, on the basis of Mr Darke’s conduct, reasonably believed to be mutual, and which objectively appeared to be mutual) was that the relationship was intended to be a long-term arrangement, in which Mr Hammond would obtain an interest in ZL, and HOK would obtain its remuneration through its profit through selling ZL’s product to customers, including under the Specific Supply Agreements.*
- 19B. *By reason of the facts and matters pleaded above, the Master Wholesale Agreement was varied by conduct so as to add the following terms into the Master Wholesale Agreement, such terms being implied by necessity (to achieve the obvious intentions of the parties and/or for business efficacy):-*
- 19B.1 *That ZL would not directly supply or attempt to directly supply its products to customers who were the subject of a Specific Supply Agreement while the Master Wholesale Agreement and/or the Specific Supply Agreement remained in force.*
- 19B.2 *That each party would provide the other with such reasonable cooperation as was necessary to the performance of that other party’s obligations under or by virtue of the Master Wholesale Agreement or any Specific Supply Agreement.*
- 19B.3 *That neither party would terminate the Master Wholesale Agreement or any Specific Supply Agreement concluded pursuant to the Master Wholesale Agreement:*
- 19B.3.1 *arbitrarily, irrationally or capriciously; or*
- 19B.3.2 *without the other’s agreement or, alternatively, without giving reasonable notice which, in all the circumstances of this matter, HOK alleges would have been at least 12 months’ notice.*
- 19C. *Further or alternatively, as a result of the conduct described at paragraph 19A above, from at the latest March 2017, the Master Wholesale Agreement referred to at 17 above developed into, if it was not already, a “relational contract” for, inter alia, the following reasons:*
- 19C.1 *Over time the contractual relationship developed into far more than that of supplier and wholesaler, with HOK providing promotional and marketing support, extensive business and commercial advice, financial and cash-flow assistance, resourcing assistance, storage facilities and other support, as particularised above.*
- 19C.2 *This involved a high degree of commitment, communication, co-operation and predictable performance, to co-ordinate the marketing of ZL’s products, manage the increase in orders, and enable and assist ZL to increase supply.*
- 19C.3 *The services and support provided comprised a significant investment by HOK in the relationship with ZL, and the mutual intention was that the relationship would be a long-term arrangement.*
- 19C.5 *The parties reposed trust and confidence in each other, and expected and intended their respective roles to be performed with integrity and with fidelity.*



*These expectations included expectations of loyalty (as evidenced by, inter alia, Mr Darke complaining when HOK offered competitor brands, and HOK declining to list a number of brands because they competed with ZL's brand).*

19C.6 *Whilst there was no express agreement of exclusivity, in practice HOK was the only stockist listed on ZL's website, and, further reflecting the extremely close relationship between ZL and HOK, ZL's business cards included the words "Available through the awesome Hammonds of Knutsford"*

19D. *In consequence of the Master Wholesaler Agreement being or becoming a relational contract the following terms were to be implied into it:-*

19D.1 *To act in good faith towards each other and to deal with and cooperate with each other fairly, transparently and in trust and confidence and to refrain from conduct that would be regarded as commercially unacceptable by reasonable and honest people.*

19D.2 *Not to take any step which would undermine the relationship of trust and confidence between HOK and ZL*

19D.3 *Each of the terms pleaded at paragraphs 19B.1 to 19B.3 above, which are repeated."*

12. The RDCC goes on to plead that, from early 2018, HOK "*secured listings for ZL's products with target customers*" and that HOK and ZL entered into a series of oral contracts, termed Specific Supply Agreements (SSAs) in respect of the sale by ZL of its products to HOK for supply to the following customers of HOK:

12.1 Booths, a retail grocery chain with around 28 stores mostly in Northwest England;

12.2 J D Wetherspoon (JDW), a national chain of pubs;

12.3 Greene King, a large pub chain with over 1,600 outlets;

12.4 Bargain Booze, a discount off-licence chain with around 600 stores throughout England and Wales operated by franchisees;

12.5 Booker, a wholesale cash and carry chain with 200 branches in the UK.

13. Of each of the SSAs, HOK pleads:

*"20A by reason of the facts and matters pleaded at paragraph 19B above, by conduct and/or by necessity (to achieve the obvious intentions of the parties and/or for business efficacy), the following terms were to be implied into each Specific Supply Agreement:-*

20A.1 *That ZL would not directly supply or attempt to directly supply its products to customers who were the subject of the Specific Supply Agreement while the Specific Supply Agreement remained in place.*

20A.2 *In order to maintain the listing, that ZL would ensure that it was always able to provide sufficient stock to HOK (at the price agreed in the particular Specific Supply Agreement) to avoid the customer having any shortage of a necessary product.*

20A.3 *That each party would provide the other with such reasonable cooperation as was necessary to the performance of that other party's obligations under or by virtue of the Specific Supply Agreement.*

20A.3 *That ZL would not change the prices or specifications of the relevant products without the agreement of HOK;*

20A.4 *That the Specific Supply Agreement would continue until the customer no longer listed or required the product or, alternatively, until terminated by either party giving reasonable notice which, in all the circumstances of this matter, HOK alleges would have been at least 12 months' notice; and*

20A.5 *That neither party would terminate the Specific Supply Agreement arbitrarily, irrationally or capriciously.*

20B. *Further or alternatively, each of the Specific Supply Agreements referred to at 20 above (and further particularised below and in Schedule 1) comprised a "relational contract" for the same reasons as pertained to the Master Wholesale Agreement, in respect of which paragraphs 19A and 19C above are repeated. In consequence of each Specific Supply Agreement being a relational contract the following terms were to be implied into it:-*

20B.1 *Each of the terms pleaded at paragraphs 19D.1 and 19D.2 above, which are repeated; and*

20B.2 *Each of the terms pleaded at paragraphs 20A.1 to 20A.4 above, which are repeated."*

14. It is HOK's case that ZL acted in repudiatory breach of these various obligations by supplying products directly to MCB in late November 2018 and that in consequence HOK was entitled to accept the breach, thereby terminating the contract(s), and sue on the contracts for ZL's breaches, claiming the profit that it would have made had ZL instead of acting in repudiatory breach of contract, terminated by giving reasonable notice. It is HOK's case that, in all of the circumstances, the reasonable period of notice as of late 2018 would have been 12 months.

#### **ZL's case in summary**

15. In response to the Defendant's primary case as to the existence of a MWA, the Claimant in its Reply and Re-Re-Amended Defence to Counterclaim ("RRRADC") pleads in response to the allegation of the existence of the MWA

*"3.2 Insofar as it is able to plead to the allegations but without prejudice to paragraph 3.1 above, the Claimant pleads as follows:*

*3.2.1. It is admitted that the Defendant agreed to act as a wholesaler of the Claimant's drink products by purchasing drink products from the Claimant and reselling them to the Defendant's customers.*

*3.2.2. It is admitted that the Defendant agreed to promote the Claimant's drink products generally to its customers. Such promotion would be expected by any wholesaler.*

*3.2.3. It is admitted that the Claimant agreed to supply its drink products to the Defendant.*

*3.2.4. It is denied that the Claimant agreed to supply drinks products to meet the demand that the Defendant generated and received...*

*4.1 It is denied that the agreement between the parties for the sale and purchase of the Claimant's drinks products constituted a "Master Wholesale Agreement" either as alleged or at all. As set out in the Particulars of Claim, the Claimant's drinks products were supplied to the Defendant pursuant to various purchase orders whereby the Defendant offered to purchase various cases of gin and vodka at the unit price stated*

*therein and, by its conduct in booking in the delivery of the various cases of gin and vodka with the Defendant, the Claimant accepted the Defendant's offers. There were therefore numerous agreements between the parties rather than a single "Master Wholesale Agreement".*"

16. It is therefore tolerably clear from the RRRADC, and in so far as it was not clear<sup>6</sup>, ZL clarified at trial, that it denies the existence of any overarching agreement with contractual effect, whether the MWA or otherwise, but rather contended there were individual contracts for the sale of quantities of ZL's products from time to time. Equally the alleged individual SSAs are denied. In any event, the alleged express or implied terms are denied.
17. As to the allegation that the contract(s) between ZL and HOK was/were relational, ZL denies this to have been the case. In particular ZL draws attention to the development by HOK of the Imaginaria range of products which were competitor products to those of ZL. This is said to be inconsistent with the existence of a relational contract. Alternatively, if the contract(s) was/were relational, HOK was in repudiatory breach of the agreement(s) in developing Imaginaria, which breach was accepted by ZL in renouncing the contract.

## THE ISSUES

18. The issues between the parties are clearly expressed in the list of issues which I have slightly amended for convenient cross reference as follows:

No.	Sub-no.	Issue
1		Interest on the claim
	1.1	Was there any contractual term entitling ZL to interest on its invoices?
2		Master Wholesale Agreement (MWA)
	2.1	Was there a MWA between ZL and HOK?
		If there was an MWA,
	2.2	What were its terms (including as to notice)?
	2.3	Was it varied?
	2.4	If it was varied, when was it varied?
	2.5	If it was varied, what were its terms as varied?
3		Specific Supply Agreements (SSA) <sup>7</sup>
	3.1	Was there a SSA between ZL and HOK in relation to Booths?
	3.2	If so, what were its terms (including as to notice)?

<sup>6</sup> HOK read paragraph 3.2 as at least potentially admitting an agreement with contractual effect that might be consistent with the MWA pleaded by HOK.

<sup>7</sup> I have sought to set these out in chronological order on HOK's case. The Bargain Booze agreement is pleaded at paragraph 22C to have been made in or about August 2018, although paragraph 22C.9 pleads events that occurred in May 2018 therefore presumably subsequent to it. In any event, the facts pleaded to amount to the agreement relate to events in May 2018 and I take that date to be correct.

- 3.3 Was there a SSA between the Claimant and HOK in relation to JD Wetherspoon?
- 3.4 If so, what were its terms (including as to notice)?
- 3.5 Was there a SSA between ZL and HOK in relation to Greene King?
- 3.6 If so, what were its terms (including as to notice)?
- 3.7 Was there a SSA between ZL and HOK in relation to Bargain Booze?
- 3.8 If so, what were its terms (including as to notice)?
- 3.9 Was there a SSA between ZL and HOK in relation to Booker?
- 3.10 If so, what were its terms (including as to notice)?
- 4 Relational contracts
  - If there was an MWA:
    - 4.1 Did it become a relational contract?
    - 4.2 If so, when did this occur?
    - 4.3 What term were to be implied in it?
  - If there was an SSA:
    - 4.4 Did it become a relational contract?
    - 4.5 If so, when did this occur?
    - 4.6 What terms were to be implied in it?
- 5 Repudiatory breach/renunciation by ZL supplying direct
  - If there was an MWA:
    - 5.1 Did ZL commit a repudiatory breach and/or renounce the contract by supplying direct?
    - 5.2 Did HOK accept any repudiatory breach or renunciation of the MWA?
  - If there was an SSA:
    - 5.3 Did ZL commit a repudiatory breach and/or renounce it, by supplying direct?
    - 5.4 Did HOK accept any repudiatory breach or renunciation of the SSA?
- 6 Repudiatory breach/renunciation by HOK developing Imaginaria
  - If there was an MWA:
    - 6.1 Did HOK commit a repudiatory breach and/or renounce the contract by developing Imaginaria?
    - 6.2 Did ZL accept any repudiatory breach or renunciation?
  - If there was an SSA:
    - 6.3 Did HOK commit a repudiatory breach and/or renounce it, by developing Imaginaria?
    - 6.4 Did ZL accept any repudiatory breach or renunciation?
- 7 Damages
  - If ZL committed a repudiatory breach and/or renounced the contract and this was accepted by HOK:

- 7.1 What wasted costs did HOK occur?
- 7.2 Which of ZL's products would HOK have sold over the notice period?
- 7.3 What volume of ZL's products would HOK have sold over the notice period?
- 7.4 What was the net profit that HOK would have generated on those sales over the notice period?
- 7.5 What profits did HOK make from Imaginaria products over the notice period?

19. At the beginning of the trial, the parties agreed that, since the accountancy evidence was largely agreed in its project, but depended for its detail on findings under issues 1 to 6 above, it would be better to release them from giving evidence during the main trial. When judgment was given on issues 1 to 6, they would be able to respond to the findings and produce further reports which would either substantially narrow the issue between them and or potentially dispose of the need for them to give oral evidence. As the trial proceeded, it became apparent that there was insufficient time to deal with all of the remaining evidence and submissions within the fixture. After hearing submissions, I ruled that the court should proceed to the end of the lay evidence, with oral closing submissions, deferring the evidence of drinks market experts to a second stage of the trial, which could include the accountancy evidence as well.

20. The result is that issue 7 has not been dealt with at this stage and need not be considered further in this judgment. In the event that a further hearing is required to deal with quantum issues, that will take place before me, with the lay witness evidence on quantum already having been given. It is agreed that the further hearing necessary should have a time estimate of 4 days, the first day being a reading day; the second day to encompass cross-examination of drinks market experts (if necessary) and submissions on issues relating to the probable trading between the Claimant and the Defendant but for the termination of their relationship; the third day spent on preparing and handing down judgment on the issue of the probable trading between the parties; and the fourth day to deal with cross examination and the accountants (if necessary) and closing submissions on accountancy issues. It is quite possible though that the judgment anticipated on the third day will allow the parties to resolve the remaining matters.

## **THE LAW**

### **A. Construction**

21. The contracts upon which the Defendant seeks to base the counterclaim are in all cases either oral or to be implied from the circumstances. The well known canons of construction relating to written contracts do not apply in the case of oral contracts. Rather:

*“Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The*

*accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the contract. It is simply helping him to decide whose recollection is right. It is not surprising to me that the editor of Lewison should observe that there is nothing in the authorities to prevent the court from looking at post contract actions of the parties. As a matter of principle, I can see every reason why such evidence should be received.”* (Smith LJ in Maggs v Marsh [2006] EWCA Civ 1058).

22. Evidence of what the parties subjectively thought that they had agreed is also relevant. In Thorner v Major [2009] UKHL 18, [2009] 1 WLR 776, at §82, Lord Neuberger referred to Lord Hoffmann’s “*illuminating analysis*” in Carmichael v National Power plc [1999] 1 WLR 2042, saying that it:

*“...shows that (a) the interpretation of a purely written contract is a matter of law, and depends on a relatively objective contextual assessment, which almost always excludes evidence of the parties’ subjective understanding of what they were agreeing, but (b) the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties’ subjective understanding of what they were agreeing is admissible.”*

### **B. Implied Agreements**

23. A contract may be implied from conduct. In such a case, the analysis is not that there is a contract formed by conduct with implied terms, but rather that there is a contract, on whatever the relevant terms are, implied from conduct. An example is the implied novation found in Evans v SMG Television Ltd [2003] EWHC 1423 (Ch).
24. The relevant principles were summarised by Vos LJ in Heis v MF Global UK Ltd [2016] EWCA Civ 569, at §13:

*“The judge began his consideration of the issues by citing two well-known dicta. The first stated that no contract should be implied on the facts of any given case unless it is necessary to do so in order to give business reality to a transaction and to create enforceable obligations in circumstances in which one would expect such enforceable obligations to exist (May LJ at page 115 in The Elli 2 [1985] Lloyd’s LR 107). The second expressed 3 propositions: (a) that contracts are not to be lightly implied, (b) that the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for, and (c) that in most cases the court must be able to answer the question ‘what was the mechanism for offer and acceptance?’ (Bingham LJ at page 1202 in Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195).”*

25. Vos LJ went on at §36 to say:

*“It is important, in my judgment, to avoid reading the helpful dicta in the cases concerning implied contracts as if they were prescriptive deeds. The most significant aspect of the consideration of whether to imply a contract is the court’s consideration of all the circumstances and, in particular, of the conduct of the parties. Mance LJ gave two informative judgments on the subject in 2001 in Baird Textiles supra and in Modahl v. British Athletic Federation Ltd [2002] 1 WLR 1192. The first principles stated in the latter judgment at paragraph 100 are valuable: “[f]or there to be a contract, there must be (a) agreement on essentials of sufficient certainty to be enforceable, (b) an intention to create legal relations*

*and (c) consideration". At paragraph 102, Mance LJ continued by explaining the distinction between express and implied contracts: "[w]here there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed ... It is otherwise when the case is that a contract should be implied from the parties' conduct ... It is then for the party asserting a contract to show the necessity for implying it". In this case, the question of intention to create legal relations is, I think, the central point, because UK submits with some force that what it did was as consistent with the intention to contract directly with Services, as it was with a number of other possible scenarios. It is for this reason that the intention of the parties may be relevant in determining the existence of an implied contract (see Lord Hoffmann's speech at pages 2050-2051 in Carmichael v. National Power plc [1999] 1 WLR 2042). This is echoed by Bingham LJ in Blackpool Aero Club supra at page 1202, where he said that "[h]aving examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create legal relations and that the agreement was to the effect contended for".*

26. The editors of Chitty on Contracts at §37-044 cite G Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25 in support of the following proposition:

*"Occasionally, where it proves impossible to discern a clear offer or a clear acceptance then, when judged objectively, a contract may still be found to have been made since the canons of offer and acceptance are not the last word and may be incapable of precise application."*

27. As Steyn LJ put it in G Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25 at p27:

*"... it is important to consider briefly the approach to be adopted to the issue of contract formation in this case. It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to be made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See Brogden v Metropolitan Railway (1877) 2 AC 666; New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd [1974] 1 Lloyd's Rep 534 at p.539, Col 1; [1975] AC 154 at p.167 D-E; Gibson v Manchester City Council [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See British Bank for Foreign Trade Ltd v Novinex [1949] 1 KB 628, at 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See Trollope & Colls Ltd. v. Atomic Power Construction Ltd [1963] 1 WLR 333."*

### C. Relational contracts

28. In Bates v Post Office Ltd [2019] EWHC 606 (QB), Fraser J considered the concept of the relational contract thus:

*“I consider that there is a specie of contracts, which are most usefully termed “relational contracts”, in which there is implied an obligation of good faith (which is also termed “fair dealing” in some of the cases). This means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. An implied duty of good faith does not mean solely that the parties must be honest.”*

29. This analysis reflects the basis for imposing such obligations as identified by Leggatt J as he then was in Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111:

*“[142]...“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.”*

30. Fraser J summarised the characteristics that determine a relational contract and summarised at §725 of Bates v Post Office:

*“...I consider the following characteristics are relevant as to whether a contract is a relational one or not:*

- 1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.*
- 2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.*
- 3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.*
- 4. The parties will be committed to collaborating with one another in the performance of the contract.*
- 5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.*
- 6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.*
- 7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.*
- 8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.*
- 9. Exclusivity of the relationship may also be present.”*

31. I would add to this that, whilst context is all in cases where the court is concerned to ascertain whether a contract is relational, the court being concerned with the presumed intention of the parties, the authorities suggest that court should be slow to imply a general duty of good faith, at least where a contracting party is not given a discretion (see, for example Norris J in Hamsard



3147 v Boots UK [2013] EWHC 3251 (Pat) and Andrews J, as she then was, in Greenclose Ltd v National Westminster Bank plc [2014] EWHC 1146 (Ch)).

32. Fraser J went on at paragraph 726 in Bates v Post Office:

*“I hesitate to describe this as an exhaustive list. No single one of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter. However, many of these characteristics will be found to be present where a contract is a relational one. In other cases on entirely different facts, it may be that there are other features which I have not identified above which are relevant to those cases.”*

#### **D. Reasonable Notice**

33. HOK’s case is that there were implied terms in the MWA and/or the SSAs that they were each only terminable on giving reasonable notice. The basic principle as to the implication of a duty to give reasonable notice is summarised in Reda v Abdul-Jali [2002] UKPC 38 at §57:

*“The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that it is determinable by reasonable notice: see Chitty on Contracts (28th Ed.) at para. 13-025. The implication is made as a matter of law as a necessary incident of a class of contract which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision to the contrary.”*

34. In assessing what is reasonable, the Court must consider the circumstances as they were at the time that the notice was (or would have been) given:

*“... whereas the question whether a term is to be implied must be judged as at the time of the contract, once it is decided that a term as to reasonable notice should be implied, the question what period of notice would be reasonable must be judged as at the time the notice is given. It will be known at the time the contract is made that circumstances may change between the time of the contract and the time of the notice, which may be many years later. It would thus be unsatisfactory and make no commercial or other sense to hold that the period of reasonable notice should be determined long before the notice was to be given.”* (Paper Light Ltd v Swinton Group Ltd [1998] CLC 1667, at 1677).

35. The decision in Alpha Lettings Ltd v Neptune Research & Development Inc. [2003] EWCA Civ 704 supports the following propositions:

- 35.1 The degree of formality in the relationship is important. A completely formal agreement may itself provide for the necessary notice, but the more relaxed the relationship, the less likely it is that the court will imply a lengthy notice period;
- 35.2 Where a distributor has spent considerable capital in the early stages of the relationship to build up the business with lesser expenditure thereafter, this may militate in favour of a lengthier notice period in the early years of the relationship;

35.3 If the relationship involves an obligation on the party continuing to use its best endeavours to promote the products of the other party after notice of determination is given, this militates in favour of a shorter period of notice.

36. As the Defendant acknowledges, what amounts to reasonable notice depends on the circumstances of the case and previous decisions are unlikely to be of very great assistance. Nonetheless the Defendant has, in its opening submissions, provided a helpful table of cases to show comparisons.

### **E. Repudiation/Renunciation**

37. In Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2015] EWHC 718 (Comm), [2015] 2 Lloyd's Rep 407, Popplewell J, as he then was summarised the principles in relation to repudiation and renunciation and the relationship between the two:

*"208. The principles are well established and may be summarised as follows:*

*(1) Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract. Development Inc. 66, 72; The Nanfri at pp. 778G-779D.*

*(2) Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory: Universal Carriers v Citati at p. 436, The Afovos at p. 341 col 2.*

*(3) Evincing an intention to perform but in a manner which is substantially inconsistent with the contractual terms is evincing an intention not to perform: Ross T Smyth & Co Ltd v T.D. Bailey, Son & Co [1940] 3 All ER 60, 72. Whether such conduct is renunciatory depends upon whether the threatened difference in performance is repudiatory...*

*(4) An intention to perform connotes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so. As Devlin J put it in Universal Carriers v Citati at p. 437, to say: "I would like to but I cannot" negatives intent just as much as "I will not."*

*209. ...The reason why a defaulting party commits an actual breach is generally irrelevant to whether it constitutes a breach, or whether the breach is a repudiation. But the reason may be highly relevant to what such breach would lead the reasonable observer to conclude about the defaulting party's intentions in relation to future performance, and therefore to the issue of renunciation. Often the question whether conduct is a renunciation falls to be judged by reference to the defaulting party's intention which is objectively evinced both by past breaches and by other words and conduct."*

## **THE EVIDENCE**

### **A. Approach to lay witness evidence**

38. It has been customary to commence judgments, especially in the commercial field, with warnings as to the potential unreliability of witness evidence. In Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ1413, at [48], Males LJ said:

*“In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence.”*

39. In Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560, Leggatt J, as he then was, said in respect of evidence based on recollection:

*"15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*

*16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*

*17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*

*18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time<sup>8</sup>.*

*19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the*

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<sup>8</sup> I would venture to suggest that the part of this analysis that deals with memory relating to past beliefs being particularly unreliable applies with equal force to memory of past understandings. Whilst written records of people's understanding may be relatively reliable, oral evidence based on recollection of what one understood at some point in the past is likely to be distorted.

*party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*

*20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."*

40. Similar issues as to the fallibility of memory and its ability to be distorted are addressed in Practice Direction 57AC "*Trial Witness Statements in the Business and Property Courts*" which, at paragraph 1.3 of the Appendix, headed "*Statement of Best Practice in Relation to Trial Witness Statements*", states:

*"Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:*

*(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but*

*(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore*

*(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration."*

41. That is not to say that the court may or should simply dismiss witness evidence when it is inconsistent with documents. As Floyd LJ said in Kogan v Martin [2019] EWCA Civ 1645, "*a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all<sup>9</sup> of the evidence.*" The limits of the principles set out in Gestmin were also considered by the Court of Appeal in NatWest Markets v Bilta [2021] EWCA Civ 680:

*"50. In a case such as the present, where the events in question took place over 9 years before the trial and occurred in a narrow period of around 3 weeks, the salutary warnings about the recollections of witnesses in Gestmin SGPS SA v Credit Suisse UK Ltd [2015] EWHC 3560 at [22] and Blue v Ashley [2017] EWHC 1928 at [68] are pertinent. It was therefore of paramount importance for the Judge to test that evidence against the contemporaneous documents and known or probable facts if and to the extent that it was possible to do so.*

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<sup>9</sup> Emphasis in the original

51. We say, “if and to the extent that it was possible to do so”, because it is important to bear in mind that there may be situations in which the approach advocated in *Gestmin* will not be open to a judge, or, even if it is, will be of limited assistance. There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another’s, and the uncontested facts may well not point towards A’s version of events being any more plausible than B’s. Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented...

52. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness’s version of events; supporting or adverse inferences to be drawn from other documents; and the judge’s assessment of the witness’s credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment.”

42. This case involves the common commercial situation, anticipated by Leggatt LJ in *Gestmin* where there is extensive documentary evidence on much of the relationship. That provides a clear basis for determining relevant factual material. However, on one of the central issues in the case, what happened in the meeting on 16 November 2015, there is no clear direct documentary evidence, though there may be inferences to be drawn from such documents as are available. Further, in so far as may be relevant, there are issues about the motivation for the parties’ actions in various respects.

43. I have also been reminded of the judgement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd’s Rep 1 at p. 57:

*‘Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.’*

This remains good advice to any judge.

44. In summarising the relevant history, I divide the factual evidence into three main areas: the development of the relationship; the period in which the relationship blossomed and ZL really took off; and the breakdown of the relationship. I summarise the main documentary and witness evidence.

## **B. Summary of evidence (1) - the development of the relationship between ZL and HOK**

45. It is helpful to understand three concepts that were mentioned a number of times in the case:

45.1 The first is the meaning of the term “gin liqueur”. In his report at paragraph 2.1, Myles Doran, the drinks market expert instructed by the Defendant, makes the following distinctions:

*“• Full Strength Gin – such as Gordons and Bombay Sapphire - is juniper-based, typically dry and served with a low sugar/regular Indian Tonic Water and a simple garnish over ice. This more traditional “serve” is popular with both the Baby Boomer (born between 1946– 1964) and Generation X (born between 1965-1980) consumer classifications.*

*• Flavoured Gin – such as Gordons Pink Gin – fruity and flavoursome, these are a relatively new introduction to the gin category, with sales volumes only starting to register from 2014 onwards. Typically served with more challenging tonic variations such as Elderflower, Clementine, Mediterranean or Rosemary, with a fresh fruit garnish such as grapefruit or strawberry, over ice. Flavoured Gin appeals to consumers who wish to trade up from the more traditional serve and experiment, have more disposable income and are prepared to spend a little more on their night out or at-home-affordable treat. Flavoured Gins can be further distinguished between “standard” Flavoured Gins such as Gordons Pink Gin and Beefeater Pink Gin, and “premium” Flavoured Gins, such as Tanqueray Sevilla and Malfy.*

*• Gin Liqueurs – such as Edinburgh Raspberry liqueur – are typically much sweeter in flavour profile. This is intentional, to mask the reduction in ABV%. They first appeared around 2015. They are more colourful in presentation style. While you will see a simple Indian Tonic Water used as a mixer to compliment the taste, you also see gin liqueurs as an ingredient in cocktails. Those appeal to younger Millennials (born between 1981-1996) and Generation Z (born between 1997-2012) who are attracted by lower ABV and a broad range of flavours, and tend to alternate between sweeter tasting cocktails and Gin Liqueurs during their visit to a hospitality environment.”*

45.2 The second is the concept of the wholesaler. It might be thought that any business that sells to other businesses rather than direct to consumers would be classified as a wholesaler. However it would appear that this is not how the term is typically or at least necessarily used in the drinks trade. As Mr Andrew Sagar<sup>10</sup> (AS) explained, there is a distinction between a company such as HOK, which sells to the on trade and delivers goods to them, and a company such as AS’s own, Kingsland Drinks Ltd (“KDL”), that acts as a distributor of other people’s products, selling them to wholesalers (such as HOK) who in turn supply the on trade. This however is complicated by at least two other matters:

- a) A wholesaler such as HOK might itself sell to other wholesalers – as will be seen, that is relevant to events in this case;
- b) AS’s definition of wholesaler appeared to exclude the position of selling to supermarkets and the such-like. On the other hand, JH’s definition appeared to

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<sup>10</sup> AS is the Executive Chairman of Kingsland Drinks Ltd, another business based in Greater Manchester which works in the drinks industry. He was called to give evidence by HOK.

include such trading. Fortunately this difference appears to have no significance to this case other than, perhaps, explaining why people speaking of a “wholesaler” might be other than clear in the definition.

45.3 The third issue relates to pricing. In negotiating the price for sale of its products, the wholesaler such as HOK might simply discount its usual price to achieve a particular deal. But sometimes customers might prefer an alternative arrangement in which a payment was made after the event so as to credit to the purchaser a sum of money, the so-called “retro”. It would appear that the attraction of this might come from the fact that the retro would be credited to a different part of the company’s business than paid the original price. JH said in an exchange with me:

*“Q. As compared to a discount, what is the difference?”*

*A. Some customers like to receive a retro because it goes into a pot.*

*Q. Right.*

*A. They want that separately.*

*Q. Yes.*

*A. You would say: “Oh, we can give it you off invoice” and they will say: “Oh no, no, no, we would prefer to have that separately. We will invoice you for it.” It would be their way of operating to build up funds to do whatever they do with them.*

*Q. From your point of view, did it make a difference whether it was a discount or a retro?”*

*A. Just a little bit more administration work, but in the whole scheme of things my answer would always be however you prefer it, you can have it any way you like.”*

46. AD established ZL in the circumstances set out at paragraphs 4 to 20 of his statement of 29 September 2020. It is apparent from the success of ZL that he has a talent in the drinks industry; his witness evidence both oral and written, tends to indicate that this is borne of a passion about the products. He describes in his witness statement how, encouraged by his mother and aunt and assisted by a former head teacher, he had started to craft a variety of drinks. Whilst at university “*this became a great way to make new friends, made for great parties and passed the time.*” When he left university in 2012, he decided to use the skills he had acquired to develop a business. The business, originally called Darke Craft Spirits, was renamed Zymurgorium in 2013.

47. In 2015, ZL was relatively small, albeit that it was looking to expand. AD accepted in cross examination that, between 10 December 2014 and 9 November 2015, there were about 42 invoiced sales of ZL products to 8 different customers. His written business plan comprised “*a diagram describing where we wish to be within 10 to 15 years*” rather than a detailed account of targets, costings, projections, cashflow and the suchlike, which he had accepted had not been prepared.

48. He obtained a job in Selfridges working in the Wines and Spirits department but at the same time began to build his business, winning several awards. He developed a variety of products, demonstrated by the products that were discussed with HOK when they first started to work together in October 2015 – Manchester Gin, Manchester Vodka, rhubarb and cranberry liqueur, sweet violet liqueur, gooseberry liqueur, pink grapefruit liqueur, mandarin dynasty gin<sup>11</sup> and crème de framboise.
49. In contrast to ZL, HOK was a long established company. As a wholesaler it traded both with the on trade (pubs, bars, restaurants and similar) and the off trade (retailers, from small off licences to national chains and supermarkets, as well as online retailers such as Amazon).
50. According to AD’s first witness statement, ZL first approached HOK in mid-2015. By late 2015 he states that *“Gin Festival and Bottle were already wholesaling our products.”* HOK note that part of ZL’s case is that it was *“quite extraordinary”*<sup>12</sup> to assert that an exclusive arrangement was agreed with HOK given that others were wholesaling their products, namely Gin Festival and Bottle. HOK deny that either Gin Festival or Bottle were wholesalers and note that the only evidence before the court is that these were companies that sold to the ultimate consumer, therefore rendering them retailers not wholesalers (on any definition of that word).
51. AD also referred both in his statement and his oral evidence to KDL. He spoke of ZL’s then premises at an industrial estate in Soapstone Way, Irlam, Manchester and said:
- “Next door were Kingsland Drinks Ltd (“KDL”), operating one of Europe’s largest bottling facilities and a supplier of wines and spirits to supermarkets. We made contact with KDL and we learnt a lot about the spirits and wine world and how it functions from them. In collaboration with KDL we got our brand into supermarkets such as Marks and Spencer (“M&S”). KDL were wholesaling and promoting our brand to supermarkets before we started to supply product to HOK.”*
52. AD said in cross examination that he and JH had discussed the fact that Kingsland were wholesaling for ZL. In fact, on closer examination it appears that Kingsland never in fact wholesaled for ZL, either before or after ZL developed a relationship with HOK, albeit that there was discussion about the possibility of such an arrangement. In his evidence, AS, the Executive Chairman of KDL, explained that the company had developed as an offshoot of the Cooperative supermarket and were a manufacturing business who dealt mostly with the off trade. He and AD had conversations about producing and bottling drinks, with the possibility of these being promoted to supermarkets by KDL. AS was aware that ZL were also discussing matters with HOK, and the idea was that the relationship with KDL would run alongside that

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<sup>11</sup> By way of illustration of the exotic nature of the products that AD was developing, this was flavoured with star anise, Sichuan peppers and mandarin oranges amongst other things.

<sup>12</sup> The phrase is used at paragraph 24 of AD’s first witness statement.



with HOK but this did not come to fruition. However KDL incurred considerable costs (around £75,000) in pursuing a prospective relationship with ZL.

53. On 16 November 2015, a meeting took place at HOK’s office, when AD attended and met Tim Dunlop<sup>13</sup>, then a sales manager with HOK. Latterly JH joined the discussions.
54. The account that AD gives of the meeting on behalf of ZL is set out at paragraph 27 of his first witness statement dated 29 September 2020. On AD’s evidence, the conversation related simply to HOK supplying ZL’s goods to its customers. JH describes the discussion differently. He does not expressly deny that the word “*exclusive*” was used or that the concept of exclusivity was discussed, but it should be borne in mind that there was no express pleading of an agreement as to exclusivity and therefore AD did not need to meet that particular case in his statement. It was not put to him that the word “*exclusive*” was used<sup>14</sup>.
55. On behalf of HOK, the meeting is described at paragraphs 30 to 45 of JH’s first witness statement, dated 20 September 2020. He acknowledges that ZL was already supplying a small number of outlets and that HOK was happy for this to continue. However, he wished ZL to become one of HOK’s so-called “*agency brands*.” Of this concept, JH says at paragraph 40 of his first statement:

*“I told Aaron that his products would fit in well as one of our “Agency Brands”. I feel sure I would have told Aaron the names of some, possibly all, of the existing Agency Brands at that time, and showed him samples of them. I will have explained how our Sales Team focused on the Agency Brands, and would present them to every customer. We would create some really nice “lifestyle” images of his products, in house, to include in our Price List, and on our website. And that we planned to attend trade shows to feature the Agency Brands, which would be a great opportunity to showcase the Zymurgorium brand and increase awareness of it with key buyers.”*

At paragraph 44 of his first statement, JH continues:

*“We agreed that [AD] would continue looking after the small accounts he already had. For us it would have been more trouble than it was worth having to deliver the odd bottle here and there, so he was happy to carry on doing that. But apart from those few accounts, we agreed that all other sales would go through us.”*

This evidence is the source of the case advanced by HOK that there is an over-arching agreement, the so-called MWA, pursuant to which ZL owed the duties pleaded at paragraph 17 of the RDCC.

56. In a Reply to a Request for Further Information dated 8 April 2021 (therefore postdating the first witness statement of JH), HOK states at paragraph 5:

<sup>13</sup> TD did not give evidence. No adverse inference is to be drawn from this, but the result is that the only evidence of the meeting comes from AD and JH.

<sup>14</sup> Of course, JH’s oral evidence that he was “*absolutely certain*” that, in the meeting on 16 November 2015, he and AD had “*expressly*” discussed exclusivity was given after the oral evidence of AD, so AD could not have commented on JH’s absolute certainty unless it had been put to him.

*“It was agreed between the Claimant and the Defendant that the Defendant would be the exclusive wholesaler of the Claimant’s Zymurgorium products in the sense that all Zymurgorium products (with the exception of a few small accounts) would go through the Defendant, and the Defendant would then sell on those products, including to other wholesalers.”*

The document is verified by a statement of truth signed by JH.

57. In cross examination, JH maintained that he was “*absolutely certain*” that, in the meeting on 16 November 2015, he and AD had “*expressly*” discussed the parties having an exclusive relationship. It was put to JH that, in fact, paragraph 40 of his first witness statement was the first occasion on which there was any suggestion of an express agreement of exclusivity, and that even that was hedged with the qualification in paragraph 44. He was pressed on what he or HOK had said at different times about the original MWA:

57.1 In a letter dated 20 December 2018, the first formal communication between the parties after the alleged repudiation/renunciation of the contract by ZL, the background to the parties’ relationship is set out. It is stated that, since 2015, the parties had “*developed a very close relationship, under which HOK became [ZL]’s main UK wholesaler. Indeed, we have since then been your only UK wholesaler and distributor.*” There is no mention of an express agreement as to exclusivity at the outset of the relationship, that letter referring instead to the “*key terms*” as being:

- “1. That HOK was [ZL]’s main wholesaler for the UK;*
- 2. That where arrangements for distribution of [ZL]’s products via HOK were agreed between us in relation to specific products and/or specific customers, such as for Wetherspoon/MC, those arrangements would not be materially changed by [ZL] without [HOK’s] consent; and*
- 3. That neither party would terminate the Agreement without first giving the other reasonable notice of termination.”*

JH stated that, in hindsight, he wished that he had mentioned the agreement between ZL and HOK in the letter of 20 December 2018.

57.2 Paragraph 19 of the RDCC, dated 31 March 2021, pleads that “*there was no express agreement on exclusivity.*” The statement of truth to that document is signed by JH. Thus, says Mr Reed for the Claimant, HOK was not putting its case on the basis of an agreement of exclusivity even then.

57.3 In an email dated 17 November 2015, TD spoke of the discussion the previous day. The part of that email relating to the discussion the previous day states:

*“Hope you are well and many thanks for your time yesterday. As hopefully you saw Jonathan, myself and the team are really excited about working together with Zymurgorium in becoming partner wholesaler for you across the UK. You have some great products and both Jonathan and I are under the impression that the current*

*range is just the tip of the iceberg as you certainly have some great ideas.*” (The email goes on to ask ZL to complete a “new supplier information” form.)

ZL points out that there was no mention of exclusivity, the concept of “agency brand” or any agreement there, which would be improbable if in fact such an arrangement had been agreed on the previous day. On the other hand, HOK says that the phrase “*partner wholesaler for you across the UK*” can only bear the meaning that it was agreed that HOK would be the exclusive wholesaler for ZL’s products throughout the country.

58. As the relationship between HOK and ZL developed over the following months and years, AD continued to have considerable contact with JH and it seems clear that they struck a friendship which went beyond that strictly necessary for their business relationships. Many though not all of the dealings between the parties were between AD on behalf of ZL and JH on behalf of HOK, though HOK’s Commercial Director, Danny Appleton (“DA”) was involved in some discussions. Latterly AD’s brother, Callum (“CD”) became involved on behalf of ZL and Christopher Jones (“CJ”) on behalf of HOK<sup>15</sup>.

59. In support of its case either that the original contract contained terms as to exclusivity or that the contract was subsequently varied to include such a term, HOK points to a series of later communications in which statements were made that are said to support the contention that the parties had agreed that HOK was ZL’s exclusive wholesaler.

59.1 In an email dated 5 February 2016 to AD, JH, at ZL’s request, shared information about the price at which it was purchasing goods from a competitor of ZL, Edinburgh Gin, stating:

*“From our perspective, you are one of a few companies we feel we have an extra special relationship with, and are enjoying working closely with. With yourself, you are a new supplier, but we are looking forward to the future, of many years enjoyment in developing our business together, and hoping you have keep having confidence in us to be your Master Wholesaler.”*

HOK place reliance on this communication and its aftermath to make various points, First, ZL did not reply to that email either denying that HOK was acting as “Master Wholesaler” or querying what that meant. Second, HOK points to the fact that, when asked about an email dated 1 November 2016 referred to below, AD said “*If there was a master wholesaler agreement, I would have expected them to say they were a master wholesaler.*” Given that the phrase “*master wholesaler*” was used in the email of 5 February 2016, written shortly after JH and AD first met in November 2015, this is said to be good evidence that the term as to exclusivity must have been agreed from the

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<sup>15</sup> CJ is the Managing Director and a shareholder of Paragon Brands Ltd (“PBL”), the involvement of whom is described further below.

outset. Third, HOK relies on the fact that it was sharing confidential information about the prices of one of ZL's competitors as evidence of the close relationship that existed. While AD accepted that there was a close relationship, ZL denies that this is indicative of some kind of overarching agreement between the parties.

59.2 In an email dated 9 April 2016, AD contacted TD at HOK showing a proposed design for a label for a new product, Nonne Gin, which was to be exclusive to Harvey Nicholls. That label states, "*Distributed by Hammonds of Knutsford.*" TD responded saying that HOK were "*fine*" with having their name on the label. HOK point out that there was no need to put these words on the product if all they were meant to signify was that HOK were the distributors of this particular product, since that would be of no interest either to Harvey Nicholls (who knew who the distributor was) or customers of Harvey Nicholls (who could only buy the product through that store so would gain nothing from knowing who was the distributor of the particular product). Rather, it was suggested that the label was intended as an indication to consumers and retailers that ZL's products generally were available through HOK.

59.3 On 8 June 2016, ZL<sup>16</sup> emailed JH attaching business cards for ZL which had been produced, saying, in one case relating to Manchester Gin, "*supplied by Hammonds*", and on another more generic card, "*supplied by the awesome 'Hammonds of Knutsford'.*" In response to the email, JH confirmed his agreement to the use of these cards.

59.4 On 15 July 2016, AD emailed a company called Venus plc, which in cross examination he agreed was a wines and spirits wholesaler specialist in hotels, restaurants, pubs and clubs in the Knutsford area, stating:

*"We'd therefore like to know more about your process of listing products as I'm sure you hear many product offers every day. We supply wholesale-wholesale through Hammonds..."*

59.5 On 16 July 2016, AD emailed a business called Beers of Europe, a beer superstore, stating, "*... our beers are available through Hammond's of Knutsford as our primary wholesaler...*" When asked about the use of the phrase "*primary wholesaler*" during cross examination, AD said, "*Hammonds of Knutsford being described as a primary wholesaler ... is because they had most of our range in stock. They were also the largest wholesaler that could supply people very easily.*"

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<sup>16</sup> Probably AD wrote this email

59.6 In an email dated 1 September 2016 to Renaissance Hotels<sup>17</sup>, ZL described HOK as their “*primary distributor.*”

59.7 In the email dated 1 November 2016 from TD to Ivan Dixon at Harvey Nichols referred to above, TD described HOK as ZL’s “*partner wholesaler.*” ZL was copied into the email, but AD accepted that they had not contacted HOK to query the description as “*partner wholesaler.*” He said in cross examination that the word partner was not “*a particularly exclusive term.*”

59.8 In an email to Hartley Wines dated 14 November 2016, AD said:

*“...our primary wholesaler is Hammond’s of Knutsford who probably have the best gin selection of any UK wholesaler so hopefully you might be able to find other products from Jon (CC’d) that you’re<sup>18</sup> customers have been longing for!”<sup>1</sup>*

59.9 In response to an email from Ancoats General Store seeking to order two bottles of ZL’s vodka dated, AD said in an email dated 9 December 2016, “*The order has to go through Hammond’s of Knutsford.*” In cross examination, AD denied that this was an indication of an exclusivity arrangement. He pointed out that the order was placed at Christmas time and said that it would not have been economic for ZL to be delivering two bottles to one store.

59.10 In an email dated 5 January 2017 to AD and CD, JH stated:

*“... The UK agency side of Hammonds of Knutsford has developed quickly in 2016, and I feel we have a portfolio of products that stands apart from its peers. Your product has certainly enabled us to do this, and in it’s own right are unique and desirable. As you will have seen from our repeat orders, there has been good growth, that we carry in to 2017 with great optimism. Working alongside each other we feel we should all benefit and that there remains many exciting opportunities in 2017, with some planned and I am sure some that will just present themselves!!!*

*I believe our respective businesses are perfectly aligned for the continued development of your product in the UK market, and should you ever need to speak to me then please always feel free to pick up the phone. Developing an even closer relationship remains part of my 2017 strategic plan, and I am sure as we continue to work more and more together we will all reap the rewards...*

*Just to let you know, we have some high profile customers we are either already speaking with, or have contacted, with a view of hoping they will wish to stock your product.*

*Once again I want to thank you for having the confidence in us to distribute your product, exclusively in the UK, and wish you all the success for 2017...”*

When asked why he had not queried this email, given that it referred to exclusivity, AD said “*we were moving from one new unit. I must have just missed this.*” However, as Mr

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<sup>17</sup> Again, probably AD wrote the email.

<sup>18</sup> In citing emails and letters in this judgment, errors of spelling and grammar have not been corrected.

Edwards correctly point out, the move to a new unit in fact occurred a year later in 2018, so this could not explain this omission. In re-examination, AD appeared to suggest an alternative reason, namely that he was very busy in the first quarter of 2017 because of the LADbible post referred to below. Again Mr Edwards points out, this time in closing submissions, that this also cannot be correct given that the LADbible post occurred in February 2018.

59.11 In an email dated 19 March 2017 to Barcelona Artisan Drinks, AD and CD, copying in JH, said, *“This is Jon who is our wholesaler here in the UK...”* When asked about this, AD said *“Hammonds of Knutsford was our preferential wholesaler. They were also our largest wholesaler and they also had the ability to sell abroad.”*

59.12 In an email to TGI Fridays dated 9 March 2018, AD said *“...on the wholesale point... you can get it through MC. However, Hammonds of Knutsford who are our main wholesaler that leads into MC will sort out a retro for you to get it to a price that works...”*

60. HOK asserts that there are various other indicators of the closeness of the relationship of the parties that supports its case either on the original terms of the MW or on the variation of that contract:

60.1 I have noted above the fact that, in February 2016, HOK shared the price that it was paying for Edinburgh Gin with ZL. The price of Edinburgh Gin was an issue that was raised again in the parties’ relationship:

- a) At an unstated time, AD says<sup>19</sup> that he raised the issue with DA, JH and TD that HOK were selling Edinburgh Gin for considerably less than ZL’s products.
- b) On 10 February 2018, AD emailed JD to check the price of Edinburgh Gin.

60.2 By 2017, HOK was (it asserts) plainly promoting ZL as an *“agency brand”*. In an email dated 17 November 2016, from TD to AD, reference is made to TD *“working on updating our agency brands brochure”* for which purpose he requested various images. When asked about this, AD’s account was that *“the agency brands thing came in after we had already been into”* HOK. As Mr Edwards pointed out in closing submissions, ZL’s position is unclear about how it came about that ZL’s products were to be listed as an agency brand. In an exchange during cross examination, the following evidence was given:

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<sup>19</sup> At paragraph 37 of his first witness statement.

*“Q: ... Now, you accept, do you, sorry, do you accept that HOK was promoting 33 Zymurgorium as one of its 20 agency brands?”*

*A. My Lord, yes, I admit that there is this agency brochure, but this is not something that was proposed to us the very beginning.*

*Q. What I am suggesting to you is that HOK was, to your knowledge, sending out material promoting you as one of its agency brands.*

*A. Yes.*

*Q. You never disagreed with that, and said: “Why are you doing this? What is all this agency brand stuff?” did you?*

*A. Well, because there was never any talk of any exclusivity of any sort. This is something that came in and was developed later, as you can see, by 2017. In 2015 this was not a thing.”*

HOK seeks to draw the inference that, because there was no point at which it is said that it was agreed that HOK would become one HOK’s agency brands, this must mean that there was an agreement of exclusivity from the beginning of the parties’ relationship. Equally however, this could be consistent with a developing relationship in which exclusivity became the assumed basis of the relationship.

60.3 AD also accepted that HOK were at least for some time the only wholesaler named on ZL’s website. It was put to him that HOK were only removed from the website as wholesaler with other companies being named at some point between 10 September 2018 and 17 March 2019. He did not dispute this.

60.4 JH gave evidence that he would not have stocked products that competed with those of ZL because to do so would have been “*an act of great disloyalty*”<sup>20</sup> since AD had complained about a competitor who had produced a product called Manchester Gin in competition with ZL’s product of the same name and had succeeded in having it stocked at Harvey Nicholls’ store. JH gave the example that he had consulted AD before stocking another gin product that had associations with Manchester, Three Rivers gin, though in the event AD had not objected to this. AD’s evidence on this issue was that it was up to HOK whose products they stocked and that he had no right to complain about them selling competing products – indeed he says that they did so. His complaint was specific to Manchester Gin and that arose from his discovering that they were breaching his Intellectual Property rights<sup>21</sup> and had managed to get their product into Harvey Nicholls.

60.5 In March 2017, AD and JH discussed the possibility of JH, either personally or through HOK, investing money in ZL or loaning money to ZL in order to purchase a still. On 23

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<sup>20</sup> A phrase used by JH at paragraph 90 of his first witness statement.

<sup>21</sup> AD referred in cross examination to asking the producer of Manchester Gin to “*cease and desist.*”

March 2017, AD emailed to JH a document which he described as a “*rough for the loan*”:

*“Contractual Agreement on Loan from Jon Hammond to Zymurgorium Ltd.*

*Reason for Loan: purchasing of equipment (Istill NextGen 2000)*

*Total Sum Required: £27,000*

*Requirement date: 01/04/2017 (not a prank I promise ... )*

*Payments schedule for equipment:*

*06/04/2017 = 16275 euros*

*Before delivery= 13950 euros*

*Conditions on loan:*

*Preferable form of repayment from payer is convertible equity via EIS when shares are ready. If the Zymurgorium Ltd becomes insolvent Aaron Darke MD of Zymurgorium Ltd will become guarantor for the amount owed to Jon Hammond. The payer may if suits them switch repayment method to monthly instalments at a fair market rate of interest. Repayment terms will be discussed and amended at a later date or the moment if the Zymurgorium Ltd becomes insolvent (if capital has yet been transferred). Zymurgorium Ltd also promises to make this a freaking awesome adventure and Jon must promise to come down and have a turn on the still otherwise this contract remains null and void ...”.*

On 28 March 2017, JH paid to ZL the sum of £27,000 in respect of the still.

- 60.6 From around July 2017, HOK began to collect pallets from ZL rather than ZL delivering to HOK. This became the consistent way of working. HOK argue that this is not the normal way for a wholesaler to operate and that it was indicative of the closeness of the relationship.
- 60.7 In September 2017, HOK allowed ZL to use its account with Safe Cellars to store a large consignment of bottles, enabling ZL to pay less for storage than would otherwise have been the case.
- 60.8 On occasions<sup>22</sup>, HOK assisted ZL in obtaining supplies of material such as corks and bottle.
61. During 2017, a gradual growth can be seen in ZL’s production and sales. In 2016, HOK had obtained a central listing for ZL with a pub chain, Amber Taverns. This seems to have been the largest listing of this scale and it is followed by gradual growth in sales into 2017, in particular from SL’s “Sweet Violet” product, which came to be the cause of a huge increase in sales following the LADbible post in 2018.

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<sup>22</sup> The documents evidence several such events in October and November 2017.



62. In around May 2017, ZL began to have contact with Christopher Jones (“CJ”). At this time, CJ and JH incorporated PBL, the purpose of which was to act as an importer and distributor, working with HOK to promote brands. In his witness statement, CJ puts it thus:

*“Paragon would be an importer-distributor. It would be given the sole rights to sell products by their brand-owners, mostly based outside the UK. It would sit above wholesalers, and all other trade buyers, and act like the brand-owner in the market, handling all marketing, sales and brand development. Anyone wanting to purchase these brands would source them from Paragon. Paragon would utilise the HOK order and invoicing system, taking its profits from the transaction after processing of payment. Jonathan and I agreed to form Paragon as a company owned 50/50 by the two of us.”*

63. CJ became increasingly involved in the development of ZL. Amongst other things, he introduced ZL to H&A Prestige Limited (“H&A”) a spirits manufacturer, with a view to outsourcing the production of ZL’s products. AD states that this was an arrangement that he was “severely forced into”<sup>23</sup>. In his witness statement, he said that CJ and PBL were “*thrust upon me and ZL.*” Whether in fact he was as reluctant at the time as his evidence now suggests is the subject of challenge by HOK though I am unconvinced that anything material turns on this. In any event, a meeting took place on 22 September 2017, when the possibility of H&A manufacturing Sweet Violet on behalf of ZL was considered.

64. On a date in the week commencing 9 October 2017, a meeting took place between AD, CJ and DA. This meeting, which HOK’s witnesses have called “*the whiteboard meeting*”, because of the fact that there is a photograph showing a whiteboard with some strategy written on it, is described by CJ in his statement:

*“41. At the meeting I used a board on my office wall to illustrate the key points I wanted to get home to Aaron. A photograph taken by me on 24 November 2017 shows a Paragon sales team member, Marcus Baxendale, in my office at HOK’s premises and, on the right-hand wall, the whiteboard in question. The diagrams on the whiteboard, which I had left there since the meeting, illustrate:*

*(a) my view as to how Aaron/Zymurgorium’s business focus – as a percentage of their time and efforts – should be split between Sweet Violet (Sweet Violet), Turkish Delight (TD) and everything else (EE). I sketched a pie chart to illustrate my view that 80% or more of Aaron/Zymurgorium’s time and efforts should be devoted to Sweet Violet;*

*(b) the difference between Zymurgorium’s capacity to produce Sweet Violet and my projection of its potential sales – I sketched a graph on which projected sales were shown with a solid line and Zymurgorium’s current production capacity with a dotted line, to illustrate its significant lack of capacity;*

*(c) what the division of labour within Zymurgorium should be to hit the required production volumes – distinguishing between skilled and unskilled – Skilled (i.e. Aaron and his Callum) should focus on design, flavour mixing and bottling – Unskilled, e.g. Aaron’s mum – and any others – should deal with wax dipping, applying labels, boxing finished products and so on;*

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<sup>23</sup> His words in cross examination.

*(d) my suggested mission statement for Zymurgorium – HOW DO WE MAKE AS MUCH SWEET VIOLET AS POSSIBLE?*<sup>24</sup>

42. Danny and I talked all the above through with Aaron, who appeared to embrace and accept it. We emphasised that if HOK/Paragon succeeded in getting listings with large scale customers who operated nationwide, then Aaron/Zymurgorium would have to be able to meet the orders that were obtained. At that point first production by H&A was planned for February/March 2018, so it would be necessary to get through the next five months, and Christmas 2017, without letting any new customers gained go short. Shortages would jeopardise the listings and damage both HOK and Zymurgorium .

43. I recall this meeting very well. Aaron was an active participant. During the meeting Danny and I discussed a number of things with him and it was very much a conversation between all three of us. We talked about workload scheduling, he explained that the skillsets of his mother, brother and father, and that formed the basis of the detail that went onto the whiteboard. We also discussed in some detail the continuity of supply that would be required in order to fulfil the requirements of large national accounts such as Stonegate and JD Wetherspoon – we both again made it very clear to him that we would be unable to pitch for this business without guaranteeing consistent supply, and again I believe he understood and accepted that.”

65. AD’s account, which was not contradicted by HOK’s witnesses, was that this was very much a spontaneous meeting. He was present at HOK’s premises for other purposes and was asked to join DA and CJ to discuss matters. That would appear consistent both with the appearance of the whiteboard (which looks very much like a spontaneous illustration of a few marketing points) and the assertion that the mission statement was “*how do we make as much sweet violet as possible.*” Given the fact that the sales of the product were taking off, this does not seem to amount to a sophisticated marketing strategy. AD accepted CJ’s account of the meeting that the need for consistency of supply was emphasised, though he denied “*embracing*” or “*accepting*” the need for H&A to become involved in production. AD’s line was that ZL would always have done its best to guarantee that demand was met.
66. An example of the close relationship of AD and JH is another investment opportunity in 2017, when ZL were thinking of buying a farm from which to operate the business. It would appear that the two men contemplated JH investing a significant sum of money in the purchase of the farm, though in the event this did not go ahead. It is AD’s account that JH was not the only person with whom he was discussing possible finance and that the terms proposed by JH were not acceptable to him.
67. A relatively minor incident said by both parties to be of some significance occurred in the second half of 2017 when JH discovered that ZL was supplying its products direct to a small independent retailer called Kwoff. It is common ground that HOK had sold ZL’s products to Kwoff between October 2016 and June 2017, but from July 2017, ZL sold direct.
68. In his witness statement, JH said of this:

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<sup>24</sup> This phrase is in capitals in the original.

*“I spoke to Aaron about this, and asked him to explain why. He said he had been approached by the customer, who said that if he could not buy direct he would de-list Zymurgorium’s products. He said he believed he had no choice but to supply them or risk losing their listing. I said I was very disappointed (a) that Aaron had fallen for this, and (b) that he had chosen not to discuss it with us, and left us to find out this way. He was embarrassed and apologetic. He knew that I was not pleased and acknowledged that the correct thing to do would have been to call me to discuss this. I put it down to his inexperience and naivety and did not make a fuss about it. Having raised it with him, I was confident that from what he said he would be straight and honest with us in future if this happened again.”*

69. When cross examined about this, AD said that he had met representatives of Kwoff at a gin festival and had started to supply to them direct. He agreed that JH had spoken to him and was not happy about the situation. He agreed that JH may have said that ZL had fallen for something, but he did not accept that he was “*embarrassed and apologetic*” about what had happened.
70. Each side seeks to draw inferences from this. ZL say that this shows that it was in fact supplying other than through HOK without demur from them, the irritation of JH being a consequence of a belief that AD had been taken in by an issue about pricing rather than a complaint that the direct supply was taking place. HOK say that, when it found about that ZL was supplying others, AD was embarrassed, this only being consistent with his being caught out doing something that he should not have been doing.
71. Notwithstanding the developing close relationship between ZL and HOK, HOK investigated the possibility of itself developing a range of gin liqueurs. In early 2018<sup>25</sup>, CJ began to develop an idea of a product of which the proposed name was Imaginarium, using what JH described as “Victorian sweet shop” flavours – he gives, as examples, sherbet lemon and liquorice & blackcurrant. The development of this idea, which ultimately went on the market under the name Imaginaria in direct competition with ZL, is important considering the breakdown of the relationship between the parties. At this stage, it was, according to HOK’s witnesses, no more than an initial concept, although it included CJ contacting a designer, Jason Groves, at Nettle of Bury. It is however surprising, given the later importance of the concept that it was not referred to in the initial statements of JH and CJ. It would appear that the supplemental statements dealing with the issue followed ZL discovering the product after the original issue of proceedings and seeking to investigate the history of the idea.
72. In his second statement, CJ describes his development of the idea, including having a logo designed. He says that he discussed the matter with JH who liked it but had “*reservations about doing anything that would replicate or clash with ZL’s products.*” Of this, JH says at paragraph 10 of his second statement that he warned CJ of this idea:

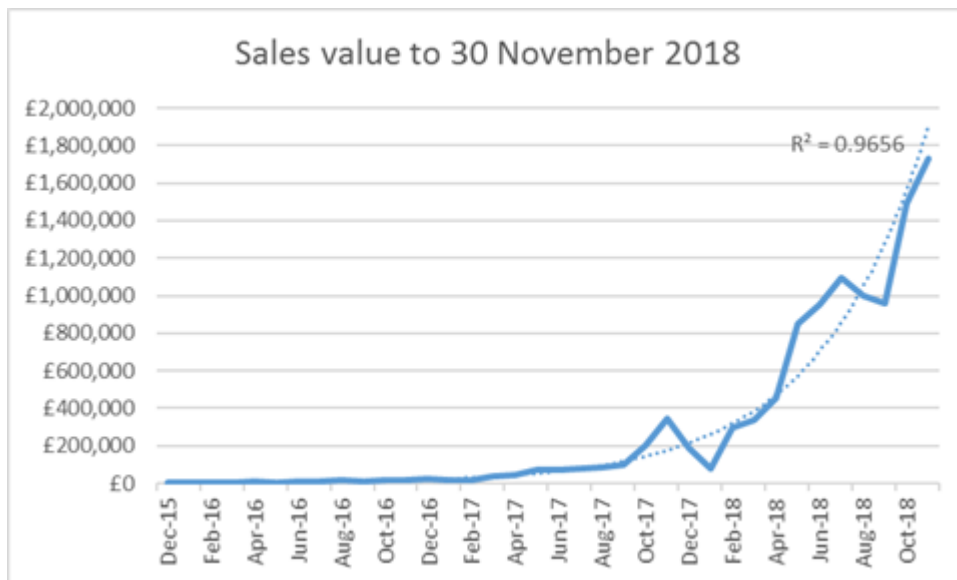
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<sup>25</sup> JH gives a wide range of late 2017 or early 2018. CJ is more precise in timing it to March/April 2018 and has a diary entry on 26 March 2018 consistent with this.

*“I told him I was nervous of being involved in anything which could damage the relationship with Zymurgorium, and that it was not something I was interested in pursuing in view of how things were really beginning to take off with Zymurgorium at that time and the huge sales potential I believed there was for Zymurgorium products.”*

### C. Summary of evidence (2) – ZL takes off

73. The sale of ZL products really took off in late 2017/early 2018. This is demonstrated graphically by a table in Mr Edwards’ opening submissions:



74. The range of ZL’s products in 2018 can be seen in the table at paragraph 5.2 of Mr Geale’s report. The Sweet Violet product represented very nearly 60% of the sales totalling 62,184 bottles listed by Mr Geale for 2017 and almost 70% of the 544,790 bottle sales recorded for 2018. It is common ground that a major cause of this huge expansion was a posting on LADbible, an online social media platform, on 10 February 2018. The posting, apparently in a piece on gin, read:

*“If you can’t get enough of fancy cocktails that remind you of retro childhood sweets, then you can also get one that tastes exactly like Parma Violets”,* there being an adjacent image of ZL’s Sweet Violet gin liqueur. It continued:

*“As you’d imagine, it’s bloody delicious, and really does provide the hit of nostalgia that it promises. Zymurgorium Manchester Sweet Violet Gin Liqueur can be bought for £24.99 for a 50cl bottle from Selfridges, which makes it the perfect treat. ”*

75. UNILAD, another social media business connected to the creator of LADbible then followed up on the same day with their own video and a piece saying:

*“Gin is in right now, and any bar worth its jam jar-glasses has an array of various high quality flavours to peruse. From Cornish Clotted Cream to Yorkshire Tea, there’s a quirky gin to suit every palette. I personally saw a seaweed flavoured gin the other day which certainly appealed to The Little Mermaid fan in me. However, there is one flavour and one flavour alone which unites all gin lovers with it’s luscious, floral, gently nostalgic taste... Yes I’m talking about parma violet gin, and more specifically Zymurgorium Manchester Sweet Violet Gin Liqueur.*

76. This growth in business led to a perceived need on the part of ZL to seek finance for a new bottling line. ZL contacted PMD Business Finance (“PMD”) and, on 19 March 2018, Sam Kaberry, who was a Business Development Director at PMD, sent an email to AD saying that PMD “*need to understand the Hammonds contract (how long it’s for etc and the terms).*” AD responded, copying in JH:

*“Hi Jon,*

*This is Sam and Jill from pmd finance that are helping us get the bottling line/brewing kit. Ladies this is Jon Hammond owner of Hammonds of Knutsford. They just want to know what you believe you’ll be taking over the next year Jon.”*

Mr Hammond replied to this, “*I confirm we will be taking a minimum of 6240 cases (1 full load) per month.*”

77. A few months later, in July 2018, Rob Dermody, a Director at PMD, emailed ZL asking whether they had “*a formal contract*” with HOK, to which AD responded, copying in JH:

*“There have been email exchange official promises by Hammonds of Knutsford for a minimum of 12480 cases a month up to December which Sam was included in I believe. Jon could you please repeat this for the benefit of PMD better still a signed note.”*

78. JH then emailed AD saying,

*“We have agreed to increase production, in line with below, which hopefully will provide enough stocks for requirements/growth, and buffer for Xmas business. We have also agreed, in the event of growth not meeting expectations, we will ask H&A to reduce production accordingly. I don’t wish PMD business finance to cause any delays, so if there is any issue, you can count on my support in assisting.”*

79. It was put to AD that this exchange implied that ZL, in order to help persuade PMD to provide finance, had told PMD that they had a contract with HOK. AD said that this was just “*an assumption made by PMD*”. AD also said in cross examination that, when he spoke of “*official promises*” from HOK, he was referring to “*a contract on the actual volume going through Hammonds of Knutsford, not any other wider contracts.*” In other words, ZL contend that AD was not talking about this size of order flowing from an agreement as to exclusivity; rather AD was speaking as to what HOK was actually committed to buying. But if HOK was in fact buying products significantly in excess of what it needed for orders that it already had, even if only to stockpile it, HOK contend that this is suggestive of a relationship where HOK is taking everything that ZL can manufacture in consideration for a relationship of exclusivity.

80. The Defendant argues that this evidence is inconsistent with ZL’s case that there was no overarching agreement, since it would make no sense for HOK to be committing to buying huge quantities of ZL’s products unless there was a long-term exclusive arrangement. The risk would be inconceivable. Thus, says HOK, the fact that ZL was asserting to H&A that HOK was contractually bound to purchase large quantities of the product is consistent with its case that

HOK was in fact buying nearly everything that ZL could produce and was selling it under an exclusivity arrangement of some kind.

81. During 2018, HOK had dealings with a series of customers with a view to their supplying ZL's products. HOK contend that their dealings with Booths, JDW, Greene King, Bargain Booze and Bookers involved specific contractual arrangements between HOK and ZL, the so-called SSAs. Each of these need to be considered in turn.

82. Booths

82.1 HOK's case is that a SSA was entered into with Booths in or around January 2018.

82.2 HOK had had contact with Booths in 2016 with a view to securing a national listing for ZL. This was unsuccessful.

82.3 On 2 January 2018, Mr Newton (of Booths) emailed Ms Vickers (of HoK) to arrange a discussion about ZL products.

82.4 It is apparent that they thereafter discussed product prices because, on 9 January 2018, JH emailed Mr Newton saying: *"Your correct.....to make 30% margin, we will need to offer you a bespoke price. Would £14.85 be workable for you? I think this should give you the margin you need."*

82.5 On 11 January 2018, Mr Newton responded saying: *"The cost does help so thanks for this. In order to move this forward, can you liaise with the brand owners regarding what annual support investment they can offer? If I am to launch, I can offer some early off shelf support but I would require £1k per sku<sup>26</sup>. If they are agreeable I'm happy to agree to a £2k across both skus for a listing for 2018."*

82.6 On 12 January 2018, JH forwarded the email thread with Booths to AD.

82.7 On 16 January 2018, there was a further email exchange between DA of HOK and Mr Newton of Booths.

a) DA emailed at 09:39:

*"With regards to the listing fee, you mentioned the product would be permanent line. Could you advise how long the £1000 covers?"*

b) Mr Newton's responded at 12:42:

*"I am happy to run the line barring any major sales concerns (f)or 2018. We can always swap out the product for a suitable replacement."*

c) Mr Newton said at 12:42:

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<sup>26</sup> SKU stands for stock keeping unit.

*“I would be keen to understand if you can run any price promotions as this can make a significant impact on sales and allow me to feature off shelf on our gondola ends.”*

d) DA responded at 14:06:

*“I will look in to the promotion side with the brand owners. Is it a saving of £5 per bottle? Based on the revised price that Jonathan shared we certainly don’t have anywhere near this available and I am not sure if the brand owner could fund such a deep discount, but will certainly look in to.”*

82.8 This email thread was forwarded by DA to AD later on 16 January 2018 under cover of an email that said:

*“Please see below. We continue in discussions with Booths and I believe we have agreed to SW and TD to be listed. We are now discussing Marmalade. You will see that there is ongoing discussions with regards to price promotions and this is an area we would like to discuss with you further on Thursday. We have already explained that £5 is too much, but are looking at what could work. We are have agreed to the tastings as this can only boost sales and also the listing fees”.*

82.9 A meeting took place between AD, JH and DA on 18 January 2018. It is HK’s case that at that meeting, it was agreed that, according to DA’s witness statement, the *“previously agreed prices of £11 and £17.85 respectively would apply”*; AD said that these prices were the standard list prices at which ZL sold to HOK. As to the ability of ZL to meet the demand, it is DA’s evidence that they discussed the anticipated demand which AD assured HOK could be met. AD did not accept that he said that ZL would meet the demand but that they would have tried to do so.

82.10 HOK points out that, in paragraph 144 of his first statement, AD says:

*“No one at HOK notified either me or CD of the price at which Sweet Violet, Turkish Delight or Marmalade would be sold to Booths. That was entirely a matter for HOK in relation to their arrangements with Booths for the onward sales of our product.”*

In light of AD’s acceptance that the email chain was forwarded to him, this is clearly incorrect.

83. JDW

83.1 HOK’s case is that a SSA was entered into in or around April 2018.

83.2 At paragraphs 54 and 55 of his witness statement, CJ describes particular features of JDW and its position in the market. He states that listing with JDW would have been likely to stimulate further interest in and demand for ZL’s products.

83.3 In February 2018, CJ started to try to get ZL’s Sweet Violet product listed by JDW. JDW use MCB as its preferred supplier so supply would have to take place through that company.

83.4 In an email of 5 March 2018, Julie Trewren of MCB set out the “*commercial and logistical hurdles*” to pass in order to get MCB to list a product:

*“1. Supplier set up - we would need to set Paragon Brands as a new supplier; our standard payment terms are 45 days end of month following: we would need to conduct our normal AWRS checks etc.*

*2. Logistics— a minimum order quantity that fits the size and scale of the opportunity with a maximum of 7 days stockholding in each depot.*

*3. £500 per depot per sku set up costs.*

*4. 6 months minimum sale or return from product live date.*

*5. Achievement of volume and profit metrics.*

*6. Outside of government imposed duty changes, adherence to a once per annum cost of goods discussion (that being first Monday of each July).”*

83.5 Discussions between CJ and MCB continued, in particular on the issue of price, including when price increases could occur – MCB insisted that only one price increase per year would be accepted, in July, at point 6 of the email of Julie Trewren of 5 March 2018. CJ states that he kept AD informed on the progress of these discussions. This is consistent with emails from AD about the negotiations, including one of 15 March 2018 when he said to JH and CJ in respect of potential dealing with JDW, “*don’t make any rash statements at the moment get as much information as possible. We will make this work just be calm and play it cool.*”

83.6 According to paragraph 62 of CJ’s statement that the proposed arrangement between HOK and ZL was that, rather than offering a discount on the usual stock price when selling to JDW through MCB, a retro would be paid to JDW for every bottle purchased by JDW, such retro to be met in part by HOK and in part by ZL.

83.7 It is apparent from emails that, in late March early April 2018, negotiations between HOK and MCB/JDW continued. These included as to what retro would be offered.

- a) On 4 April 2018, Paul Brimmer of JDW asked what retro was to be offered.
- b) On 5 April 2018, CJ emailed AD, attaching a spreadsheet which showed the pricing structure. It permitted ZL to insert a figure for the retro that it was willing to offer, the spreadsheet being set up to show the impact of that figure. The email invited AD to “*add the additional support you are happy to contribute.*”
- c) AD offered 50p per bottle (see email of 6 April 2018).
- d) Paul Brimmer insisted that the retro needed to be £7 per bottle. It would seem that HOK were willing to contribute £6 of this but insisted that ZL pay the balance of £1. That figure was eventually agreed.
- e) There was further discussion between CJ and AD about the pricing arrangement.



83.8 Thereafter ZL contributed £1 per bottle by way of retro to the products sold to JDW through HOK and MCB.

84. Greene King

84.1 HOK's case is that a SSA was in relation to Greene King entered into in or around May 2018.

84.2 On 26 April 2018, CJ emailed Calum Cameron at Greene King, to promote ZL's Sweet Violet. Mr Cameron replied with enthusiasm and sought "*on trade exclusivity.*" CJ said this was not available because the product was already listed by Amber Taverns but indicated that he could offer exclusivity on the next best selling flavour, Turkish Delight. Negotiations followed, during which, on 3 May 2018, CJ stated to Mr Cameron in an email:

*"I've spoken with the brand owners and I'm just awaiting their feedback on the commercial support request ...we are very keen to work with you/GK, so I will do my best to get to your aspirational pricing target."*

84.3 In his witness statement, CJ says of this email, "*I cannot recall whether I had then actually spoken to Aron about a specific amount of support – I may have done, or may have been making Calum wait a little as a negotiating ploy.*"

84.4 In agreeing the price for sales to Greene King, CJ states that a retro of £1 to be paid by ZL was agreed with AD<sup>27</sup>. He was unable to remember the detail of this conversation. AD's case was that he "*offered to agree to apply retro for Greene King order on the same basis as I had supplies to JDW if needed*<sup>28</sup>, but CJ told me during a telephone conversation in August 2018 that a 'retro' would not be needed".

84.5 It is common ground that ZL did not in fact pay a retro in respect of sales to Greene King. It was put to CJ in cross examination that this was because no retro had in fact been agreed. CJ responded, "*as far as I was aware from the initial conversation we had around the first proposal to Greene King, it was very clear what the commercial structure needed to look like and Aaron consented to that commercial structure.*"

85. Bargain Booze

85.1 HOK pleads that a SSA was entered into by the parties in relation to Bargain Booze in or about May 2018<sup>29</sup>. The negotiations in respect of Bargain Booze were handled on HOK's side by DA.

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<sup>27</sup> See paragraph 104 of his statement.

<sup>28</sup> That retro was indeed £1 – see below.

<sup>29</sup> I have noted in an earlier footnote the ambiguity in the RRDC about the date, but this date seems correct.

85.2 He explains in his statement how a net price of £16 per bottle was agreed with Bargain Booze. Those discussions appear to have taken place around 9 May 2018<sup>30</sup>. He goes on:

*“I then called Aaron to discuss this. It was obviously yet another exciting opportunity. The conversation was primarily about Aaron/Zymurgorium’s ability to meet the likely demand for SV from Bargain Booze. I made him aware of the potential size of the orders Bargain Booze would place: 20 pallets at a time – not as big as Matthew Clark/JDW, but still big. And also that, as with the other large customers, it would be essential to maintain supplies to maintain the listings. However, with production by H&A now up and running we agreed this should not be a problem.*

*105. I told him Bargain Booze might be interested in other liqueurs. We ran through the other liqueurs that he Aaron/Zymurgorium held most stocks of at that time, and agreed that I would offer those to them as well.*

*106. I cannot now recall whether I told Aaron that Bargain Booze were looking for a discounted price from HOK, and that I was proposing to offer them a discount in the hope of securing the listing. I think I may well have done so, but without necessarily telling him what price they were looking for, because I was not asking him to contribute to the discounts I was proposing to offer. We did not discuss what Zymurgorium’s price to HOK would be – we did not need to, as the agreed price for liqueurs was £11.*

...

*I have been asked to comment on what Zymurgorium’s commitments to HOK were as a result of our conversation and the listing with Bargain Booze. Although my discussions with Aaron took place over the phone, and there was no need for a listing fee as in the case of Booths, I am sure that Aaron fully understood and agreed to what was being proposed. As in the case of Booths, and for the same reasons, although this was not explicitly stated and agreed, for the arrangements to work it was necessary that Zymurgorium should not be free to decline orders HOK placed in order to meet orders from Bargain Booze, or to change its prices to HOK, or to start selling directly to Bargain Booze. Otherwise we would not have committed ourselves to Bargain Booze. As I have said, I believed Aaron wanted the sales, logistics and relationship management aspects to be handled by HOK, leaving him free to concentrate on production. They were extremely busy at this time and it was all they could do to keep up with production requirements.”*

ZL makes the valid point from this evidence that there was no agreement between HOK and ZL as to the price which was to be charged – it was simply ZL’s list price of £11.

85.3 In his witness statement, AD denies that any such agreement was reached. He describes the agreement said to have been reached as “*nonsensical*” in particular given the argument advanced on behalf of HOK that the obligation on ZL was to “*maintain supply.*”<sup>31</sup>

<sup>30</sup> See emails of that date between DA and Gemma Addison, Senior Spirits Buyer at Bestway Retail, the owner of Bargain Booze.

<sup>31</sup> These are AD’s words – the RRDC pleads at paragraph 20A.2 an obligation on ZL to “*ensure that it was always able to provide sufficient stock to HOK (at the price agreed in the particular Specific Supply Agreement) to avoid the customer having any shortage of a necessary product.*”

86. Booker

86.1 HOK's case is that a SSA was entered into with Booker in or around August 2018. Again negotiations were handled on HOK's side by DA.

86.2 DA describes the efforts to establish an arrangement between HOK and Booker for the supply of ZL's products via central listing. In August 2018, Charlotte Sutcliffe, a spirits buyer for Booker, contacted DA with a proposal to include Sweet Violet in a multibuy deal, by which customers who bought 3 bottles of gin from Booker in the deal would receive a free case of tonic. Her proposal was that HOK contribute £1.50 per bottle by way of retro if Sweet Violet was to be included.

86.3 DA says in his statement that he discussed this matter with AD during what he thinks was a phone call:

*"137...I explained about the Multibuy promotion, and the volumes of SV I expected Booker would require. I explained the dynamics of the Multibuy to him – i.e. that a customer buying 3 gins in the Multibuy would receive a case of tonic free of charge. I may have told him that a retro was required in order to take part in the Multibuy, but I don't think I told him the amount of the retro because I was not asking him to contribute to it. I am sure I will have stressed to him that in order for us to be considered for this, which was an ongoing commitment at least until the end of the year, Zymurgorium needed to make a commitment that sufficient stocks would always be available. We agreed that with production of SV by H&A having been further increased, then at the levels then proposed through to the end of the year that should not be a problem..."*

*139. As with Booths and Bargain Booze, there was no need for me to discuss with Aaron the price at which Zymurgorium would supply SV to HOK for the purposes of the Booker deal. £11 per bottle was the current price as previously agreed and I was not proposing anything different."*

86.4 In his evidence, AD states:

*"152...I did not have a telephone conversation with DA shortly after 16 August 2018 or at any time regarding the supply of Sweet Violet to Booker nor did I assure DA that ZL could ensure that Sweet Violet would be produced and be available to HOK to maintain continuity of supply to Booker. How could I? Booker is a cash and carry with around 200 branches in the UK. To make such a commitment so that ZL would assume this level of obligation I would need a detailed understanding of levels of supply required."*

*153. I did have a conversation with JH on 18 August 2018, but this conversation was to inform me that HOK would need ZL to produce more Sweet Violet due to an increase in orders for the product by customers such as Booker. JH did not explain why orders were increasing and I did not assure JH that we would be in a position to supply the quantities HOK needed as a result of Booker's orders."*

*154, HOK continued to place orders in the way it had always done and we also invoiced HOK as we had always done. Nothing about how we supplied the products to HOK to Booker changed from how we supplied any other product for any other retailer, as no special agreement was in place."*

87. HOK draw attention to an email from CJ to AD dated 27 September 2018. The communication related to ZL's new gin liqueur, Realm of the Unicorn<sup>32</sup>. As will be noted below, CJ's involvement in the development of this product and his consequent request for a commission payment on account thereof was a cause of annoyance to AD and seems to have been one of the factors in the rapid breakdown in the parties' relationship in late 2018. However, in the email of 27 September 2018, CJ suggested that ZL file a trademark objection in respect of a similar product which a competitor had brought on the market. The Defendant contends that this is indicative of the desire on the part of CJ/PBL, if not HOK itself, as at this time for the relationship with ZL to persist.

**D. Summary of evidence (3) – the breakdown of the relationship between ZL and HOK**

88. In the second half of 2018, problems arose in the relationship between ZL and HOK leading to the final parting of ways. In a short space of time in October 2018, a series of incidents occurred which demonstrate the deterioration in the relationship. It is not entirely straightforward what was cause and what was effect in what happened. Making findings as to the underlying reasons for the breakdown is unnecessary save in so far as they bear directly on the issues identified above. My overall sense is that the parties drifted apart, becoming suspicious of each other and taking steps to protect their own position.
89. The problems that arose included the following:
- 89.1 One of the early issues was a request by CJ in an email dated 10 October 2018 for PBL to be paid a commission for the development of the unicorn product. AD replied at length on the same day, explaining that in his view, HOK should have been paying PBL rather ZL. Whilst, in the email to which his reply was attached, AD said to CJ, "*Please take this in the kindest way possible as I consider you a friend,*" the email from CJ and AD's reply show sharply differing attitudes to the marketing and sale of ZL's products.
- 89.2 One of ZL's products, Cherry Bakewell gin was supplied to Greene King with a label specific to them, apparently because Greene King were interested in promoting the product on a Christmas menu but did not like the label. However, DA presented the labelled product to Bargain Booze, which is of course an off trader. This annoyed AD and he had an exchange of emails with DA about the issue.
- 89.3 On 17 October 2018, Greene King placed an order for one pallet of Cherry Bakewell. AD emailed DA: "*With 22 years of 'intimate' industry knowledge at your side I'm sure all will come to light. Thanks for sending the PO, could you also send us the address so*

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<sup>32</sup> The exoticism of Mandarin Dynasty Gin pales into insignificance beside the sheer exuberance of Realm of the Unicorn – a pink marshmallow flavour gin with the shimmer of unicorn tears in it.

*we may make a label to ensure this lonely pallet reaches its destination.”* The tone is, as Mr Edwards suggests, somewhat sarcastic and is perhaps evidence of the breakdown of the relationship, though I am less sure that it can be said to evidence an intention specifically on ZL’s part to go its own way.

89.4 At some point in October 2018, AD phoned JH about the payment relating to the still, seeking to repay the investment that JH had made. This excited JH.

a) At paragraph 277 of this first statement, JH says:

*“During week commencing 22 October 2018 I had a call from Aaron, asking which account I wanted the £27,000 I had lent in April 2017 to be paid to. I was extremely surprised by this. I said: “I’ve not made any loans, only an investment”. There was a silence and then Aaron said, “we have decided to keep all the shares in the family” and that he intended to repay the money. He said he had mentioned this to Danny when he visited in August 2018. It was a short conversation. I was so shocked and surprised that I said little more.”*

JH says of this conversation that the payment of £27,000 was, at his option, an investment not a loan and that he felt the phone call showed that the relationship had deteriorated. He goes on to say at paragraph 279:

*“I had sensed that the relationship between Aaron and myself had deteriorated, and I already had some unease and concerns about what was going on in his mind and what his future plans were. But this changed everything for me. It was a complete betrayal of the trust I had placed in him.”*

b) In his second witness statement, JH states that the date given in the first statement was wrong and that the conversation must have been in the week commencing 15 October 2018. The reason for saying this is that an email had come to light dated 19 October 2021 in which CJ emailed Jason Groves about the proposed Imaginaria project. This is dealt with further below, but JH’s second statement says :

*“11. I do not recall seeing that email at the time, but what I do now recall clearly is that immediately after the call from Aaron I called Danny and Chris into my office and told them about it because I felt sure it was very important, and signalled a significant change of attitude on Aaron’s part and I wanted to know their views...*

*13. Chris was certain it only meant one thing: Aaron was planning to cut HOK out and deal directly with JDW and the other major customers we had obtained for Zymurgorium products. Aaron knew who they were, what products we were selling to them and, in many cases, the prices. He had complained to both Chris and Danny about the margins he believed HOK was making on his products. Chris thought Aaron would switch to direct dealing rather than consider appointing another wholesaler or distributor – by cutting out the “middleman” margin he could offer the customers the same products at lower prices, and still make more for Zymurgorium.*

*14. Chris had no doubt at all that this was what was going to happen, and that only question was when. He said he thought it would almost certainly be in the New Year....*

*15 If Chris was right about what was going to happen, HOK was obviously going to have a big hole in its product portfolio when it did. Chris thought that the best response would be to produce our own range to offer as an alternative to Zymurgorium products. Chris said we could get them made by H&A, and make sure they were as good if not better than Zymurgorium's; we would not have the supply/capacity problems we had had with Zymurgorium. He reminded me of the "Imaginarium" concept that he had explored earlier that year but which had been shelved...*

*18 At this point in time it was not my intention that HOK would definitely create and market its own range. I saw it a defensive possibility, to give HOK some protection if Aaron did what Chris thought he was planning. If the relationship with Zymurgorium could be got back on an even keel, which I would have much preferred, we would have spent some money on labels and other things but it would not be a big deal in the overall scheme of things."*

In other words, JH's explanation for the resurrection of the Imaginaria project was that AD's conduct suggested an intention to sever the links between the ZL and HOK which required HOK to act quickly so as to protect its interests, as evidenced by the email from CJ to Jason Groves dated 19 October 2018. That explanation would not hold water if the conversation with AD had taken place at the time stated in the first witness statement, since that post dated the approach to Jason Groves.

- c) In cross examination, AD said that the document referring to the payment being treated as an investment at JH's option was only a draft and that in fact the investment proposal was never a concluded agreement.

90. The deterioration in the relationship is apparent from an email from JH to AD dated 29 October 2018, under the subject line "Moving Forward":

*Our stockholding of Sweet Violet is currently over 120 pallets, which exceeds the volume of stock we envisaged holding in any one period at our cost. Could I ask that the next H&A stocks are held by you until we need to place an order. We are now in a position where we are stock piling and paying for stocks well in advance of needing. To give this some further context our customer exposure of credit for your lines is now in excess of £4m, which is a substantial commitment on our behalf, especially when we are having to make advanced retro payments to Wetherspoon of c.£350k this month to name just one.*

*At this juncture there are so many unanswered/unresolved issues our relationship is facing, which gives me increased concerns. When I feel we should be getting ever closer as businesses, we are actually becoming more apart. Something I had not dreamt would ever be happening. My greatest worry is that, whilst I believe are unintentional actions, are such that ultimately the integrity and standing of my business is being impacted.*

*We have always worked together with both our interests aligned. I have forever believed a comment you once shared with me in that "we could and would never fall out". With this in mind I am reaching out to you so that we never put this to the test. It feels not just by me that*

*you no longer feel the Awesomeness is there in working together, a word I adopted from you. Something you were comfortable even including on your business cards.*

*I thought an email is better to start with, as I am so emotionally impacted with what started last week. Such that I want to avoid awkward silence on the phone, but know how important it is we move forward.*

*I seek your guidance on how we move forward, but I think the 30<sup>th</sup> is far too long away. I hope you agree I have done the right thing communicating to you in this way.*

*For now and until we can resolve I would like to place orders for stocks as we need, like we would other suppliers of ours. I don't envisage this will cause you any issues.*

*Whilst it is half term & I am away from the office, I will endeavour to make myself available to meet when you have digested.*

*I look forward to hearing back from you soon.*

*Thanks*

*Johnny"*

JH says that he made many efforts to contact AD but these were unsuccessful.

91. At this time, whatever JH's intentions about trying to resurrect the relationship with ZL, HOK/PBL were moving apace with developing the Imaginaria concept. CJ had emailed Jason Groves on 19 October 2018 to revive their earlier discussions. A trademark application was made, initially in the name Imaginarium, later changed to Imaginaria because of an existing EU trademark. CJ contacted H&A to arrange a slot for manufacture and Kefla to negotiate bottle pricing. He arranged for the printing of labels and conducted flavour development.
92. CJ appears to have been acting with some dispatch in developing the Imaginaria project. In an email to Graham Gibson of H&A dated 30 October 2018, he said:

*"I just wanted to follow up on our meeting earlier to say thanks to you and your team for seeing me at such short notice, I hope my urgency now makes sense!,*

*As we discussed, speed is of the essence for us, so we are keen to push forward (under complete confidentiality) to get the 2 flavours we discussed up and running as soon as possible.*

*We will get all the necessary paperwork across asap and a label design over to you as soon as we have approved a proof, we will also get started on the Box design*

*It goes without saying that you should not divulge your knowledge of the Zym plans to them at any point.*

*Let me know when you are available to meet with Jonathan and I will set up the meeting.*

*Thanks again for your speedy response – looking forward to working with all of you!"*

93. CH stated that this urgency was in part because of the opportunity to develop the Imaginaria product range for sale in Europe (which he did not see as a direct competition to ZL) and partly because of his and JH's concern that HOK was going to be cut out of ZL's plans for the future.

94. On 2 November 2018, CJ emailed<sup>33</sup> JH in respect of the development of Imaginaria, saying:

*“Jonathan I’ve been thinking about the zoo Magorium alternative project and thought it might be worth just pointing out that we need to keep this extremely confidential and within the fewest number of people as we possibly can within the business even a hint of this getting to Earlam good cause all kinds of problems at the moment they are on likely to see our trademark registration because it isn’t similar enough Two pairs to flag it to them however if they become aware they could seek it out and try to block it equally it may complicate things if he is aware there is likely to be a switch out of his products on the horizon and remove control away from us and into his hands.”*

95. In spite of the fact that he spoke of a “switch out” of ZL’s products, that is to say replacing it on HOK’s list with Imaginaria, being “on the horizon”, CJ said in cross examination that this was not an imminent plan, but rather “an insurance policy” in other words an alternative plan to be invoked if ZL chose to cease dealing with HOK. He said that this was the only customer with whom the project was discussed at this stage. However, he acknowledged that the plan was to have the Imaginaria product made by H&A in the week commencing 10 December 2018. That did not come off because not everything could be made ready in time, but production and sales of Imaginaria commenced in January 2019. He also accepted that in December 2018 he showed the intended Imaginaria label to a potential customer, Booths.

96. Meanwhile, ZL had started to have direct contact with JDW. CD describes at paragraph 35 of his statement how ZL were contacted on 17 October 2018 by Nathan McGovern, the manager of one of JDW’s pubs in Liverpool, asking for assistance with creating “eye-catching window and bar displays using gins that are distilled locally in the North-West of England...”

97. CD appears to have responded in an email, then contacted Mr McGovern again on 18 October 2018.

*“I just wanted to add to my last e-mail if you had a more direct a more direct way of us getting in touch with your head buying team .Because of the response we have had from a number of Wetherspoons we would like to have a more personal relationship with them and potentially talk to your head buying team about getting POS across more of the Wetherspoons chain. My brother has tried to get in touch with them today thanks to your response but has found it a bit of a minefield to get in touch with the right people through all the automatic answering machines.”*

98. On 19 October 2018, a discussion took place between ZL and JDW. The conversation is, according to CD, summarised in a typed note.

*“Initial phone call with JDWetherspoons JDW*

*Date: 16/11/2018*

*Purpose: Pre-call*

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<sup>33</sup> As is fairly obvious from some of the strange wording of this document, it was dictated using voice recognition software - as elsewhere, the original text is preserved in the citation.



*Talk about POS (Point of Sale), Many Wetherspoons outlets have contacted us regarding POS, try to set up some POS centrally to be distributed to all Wetherspoons outlets.*

*Services: Is there anything we can help sales through Wetherspoons such as tastings. Any new tenders we can be notified of first so we have a head start.*

*Resolving Issues: Problems faced such as corks/wax, any way we can talk more direct to solve issues faster instead of going through the whole chain to get back to us.*

*Future Plans: A quick chat about our plans for future products and projects and if Wetherspoons seem interested in what we have to offer in the future.*

*If Wetherspoons are happy with what we have done so far.*

**During Call**

*The Conference call opened with JDW asking what our relationship was with Hammonds of Knutsford (HOK) and Paragon Brands (PB) and if there was a way JDW could contact us in a more directly to discuss any issues/future product ideas. Zymurgorium (ZYM) responded with telling JDW that HOK acts as a wholesaler of ZYM products so that we can focus on producing instead of trying to be a manufacturer and distributor and that we were told by HOK any information had to be passed via them as they were supplying our products onwards.*

*Confused, JDW told us that they always like to have a direct contact with the product manufacturer to discuss issues as data can get passed to us with 24 hours meaning issues are resolved faster and with less misinterpreted information, then JDW asked us where does PB come into the equation as Chris Jones from PB told JDW that he was our 'Sales Agent'. ZYM responded that ZYM has no sales agent and has no direct relationship with PB and that PB works for HOK not ZYM.*

*JDW retorted that the chain was far too complicated and that they didn't understand why PB was even involved and expressed that they wanted to simplify the chain and purchase our products more directly rather than buy through PB. ZYM emphasised to JDW that they were not buying through PB as PB is partly owned by HOK.*

*ZYM then asked how that would work and JDW told us that their preferred route would be for us to supply Matthew Clark (MC) direct and for JDW to carry on purchasing through MC. JDW then said that they can buy direct from us if it isn't possible to sell to MC directly.*

*Zym then told JDW that we didn't know if JDW was hearing all of the information we were passing back through the chain when issues occurred to which JDW said a direct correspondence relationship would sport that and they can tell us directly if problems occur and then we can reply directly back.*

*ZYM then asked JDW if any agreement with HOK and JDW existed which JDW told us there was no agreement between them and HOK."*

99. CD stated that he had created this detailed note in around April 2019, after the dispute with HOK had arisen. It was based on handwritten notes, and had been wrongly dated, there having been a further meeting on 16 November 2019.
100. HOK contend that this document is inaccurate. It was not contemporaneous and the wrong date suggests that matters were confused in CD's mind. More importantly, it contends that the note is intended to create a narrative in which JDW were pressing for ZL to cut out the role of HOK, whereas the email of the previous day shows that it was ZL who were pressing to make contact with JDW directly.

101. In any event, it is HOK's case that MCB stopped ordering ZL's products from HOK on behalf of JDW at the end of November 2018<sup>34</sup>. AD did not disagree with this.
102. The final breakdown of the relationship between the parties came in mid December 2018. On 13 December 2018, Mr A Darke emailed Mr Appleton and Mr Hammond with the subject line "Amazon Unicorn Price", saying:

*"We really need this being lowered tomorrow morning immediately. We've had a few customers question why the price is so high and have had to push them elsewhere to get a more reasonable price. It'd be better/more efficient for everyone if people could get the stock through amazon prime. Regardless on views of availability, supply/demand we can produce more than enough and also we have a policy not to over charge our customers. As this is being sold in at the same price it shouldn't be a different price to the consumer I'm sure you'd agree."*

Mr Appleton replied:

*"I am somewhat confused with your email below. I am assuming this is relation to retail price, but not 100% sure Could you give me a call when you are free so I can understand a little more?"*

Mr Darke responded:

*"It's quite simple the price is too high on amazon's website"*

After a further email from Mr Appleton, Mr Darke said:

*"Danny I'm not being rude the problem is that we've been left in a position where we can no longer make contact without it being recorded when concerning business. This isn't us that has created this situation and pains me to have to conduct business in this manner, but it is due to unprofessionalism from certain individuals that has left us where we are. Bringing up questions about our product when we see something clearly in fault is my prerogative as a brand owner. The over inflated price on Amazon is something that Hammonds should have foreseen would be an issue. It is our prerogative to protect our end customers especially when complaints and remarks are not isolated. You may not be my employee but you are our main wholesaler and always claimed to be a friend, who has always stated that we'd be listened to and our concerns would always be taken on board. This goes against the very issue that has been plaguing this relationship for a while. We've been heard and have been blatantly ignored, that is rude no matter how large the person smile may be or how sincere they may feel at the time of making promises. Therefore again promises that have been made have again been broken. We're meant to be working together and I have given my all to this relationship for years. I may be wrong but I believe your reaction stems from the fact there is an unreasonable reason why the prices are so vastly different. As I've said to Jonny, friends should be able to tell each other freely when they are wrong without fear of accusation or lost temper. Unfortunately you have misinterpreted an email and left us now in a very awkward position. Nothing I said was rude unless you were reading it with rudeness in mind, the emails I sent are 'matter of fact' emails, facts aren't rude or polite. Emails like yours are non-productive and are only provocative. Therefore I'll offer the olive branch and say I'm sorry if my emails offended you, but this has been triggered because we're having complaints which potentially damage our reputation as on amazon it looks like it is being sold directly by ourselves to people who do not know. I hope you have nice relaxing weekend and have great sales over the next week."*

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<sup>34</sup> See paragraph 300 of JH's first witness statement

103. On 19 December 2018, AD emailed DA saying:

*“Hi Danny, Hope you are well. Just to let you know we’ve finished off some of the original Manchester 20cl bottles. Just wondered if you needed any for new year and if there’s anything else you need? Also it’s been 4 days since the 15th for Novembers invoices just wanted to remind you as I know Christmas gets busy. Not rushing you just would like to know if you had a date in mind. I know things have been strained this year and we’ve all frustrated each other, but we still need to arrange time for a meeting how are your dates fixed for the beginning of Jan first 2 weeks? I was hoping for a break over Christmas but everything that is going on it doesn’t seem likely. We’ll be closed after this Friday till new year but I’ll still get back to your emails if you need anything urgent. Over the Christmas period I’m going to consolidate our product files so we can fill out forms for you faster if need be. I sincerely hope you all have a great Christmas and that we can make good plans for the future where everyone benefits next year. Also what are your delivery rates into Manchester city centre and delivery days? Just planning for the bar. I think our manager is getting in a sponsor which is boring, but doesn’t stop us from getting the more quirky and expensive stuff from you guys for the back bar. Are there any ranges Hammonds wants to particularly want to promote in a luxury setting?”*

104. The following day, 20 December 2018, JH on behalf of HOK wrote to AD the letter referred to above, setting out the background, asserting that there was a binding agreement between the parties pursuant to which HOK was Zymurgorium's main wholesaler and continuing:

*“I believe and am advised that there was a binding agreement between HOK and Zymurgorium (the Agreement) with the following key terms:*

- 1. that HOK was Zymurgorium's main wholesaler for the UK;*
- 2. that where arrangements for distribution of Zymurgorium’s products via HOK were agreed between us in relation to specific products and/or specific customers, such as for Wetherspoon/MC, those arrangements would not be materially changed by Zymurgorium without our consent; and*
- 3. that neither party would terminate the Agreement without first giving the other reasonable notice of termination.*

*On or about 14<sup>th</sup> December 2018, puzzled by the absence of orders from MC for Wetherspoon, we made enquiries and discovered that Zymurgorium was now supplying the Wetherspoon products directly to MC. Clearly this could not have come about without your first approaching WetherSpoon and/or MC about it some weeks if not months before that. I am advised that your actions constitute a serious breach of the Agreement and a repudiation of it by Zymurgorium. I hereby give you notice that HOK accepts that repudiation as bringing the Agreement, and the commercial relationship between us, to an end.*

*I am further advised that HOK is entitled to claim damages from Zymurgorium for breach of the Agreement. We are in the process of quantifying the claim for damages, but it will clearly and significantly exceed the sum of £682,625.88 which is currently owed by HOK for products supplied. We do not, therefore, intend to pay that amount. I will write to you again when I am in a position to quantify HOK's claim for damages.”*

105. This brought the parties’ relationship to an end. At this time, the following invoices were outstanding, a total of £682,625.88:

<b>Invoice Number</b>	<b>Amount</b>
ZY1044	£18,060.84
ZY1046	£26,611.20
ZYI050	£13,305.60

ZY1054	£102,960.00
ZY1055	£64,310.40
ZY1063	£13,305.60
ZY1064	£13,305.60
ZY1065	£56,472.84
ZY1069	£79,833.60
ZY1070	£14,859.72
ZY1078	£172,972.80
ZY1086	£42,159.60
ZY1094	£50,687.28
ZY1103	£13,780.80

Each contained the words, “*if the invoice is overdue you will incur a compound monthly charge of 8.5% of the total invoice.*”

106. In its RDCC, HOK denies a liability to pay contractual interest. In cross examination, JH said that he was not concerned about a late payment charge. He acknowledged that invoices had been sent to him. He said he would not have read the terms and conditions.

## DISCUSSION

### Assessment of the Witnesses

107. There are relatively few areas of direct conflict of evidence within this case. The most significant is that as to the events in the meeting on 16 November 2015. In addition, each of the leading actors has had to answer questions relating to the ending of their relationship, where each side wishes to portray the other side as wishing to walk away from the relationship.
108. The Defendant criticises both AD and CD. AD is described as “*decidedly unsatisfactory*” having regard to a tendency to avoid answering questions and to make speeches. CD is criticised for his account of the contact with JDW.
109. In respect of AD, I found him to be an engaging witness with a real passion for his product. It is clear from the tone of his emails that for a long time he had a close and warm relationship with JH. I suspect that, with the passage of time, this has substantially cooled. It would appear that this cooling may have dated to the time that CJ became involved with the working relationship between the parties. In any event, the result has been that, at times, the effect of AD’s evidence is to downplay how close he on behalf of ZL and JH on behalf of HOK had become.
110. On the issue relating to the discussions over the supply to Kwoff, I found AD’s account to be unconvincing. It seems to be unlikely that JH would have been making an issue of this if his only concern was that AD had been taken in by Kwoff in the threat to delist the product. It is far more likely that his irritation arose from ZL’s actions in response to that threat, namely, to supply direct. If his evidence on this is correct (and AD’s correspondingly wrong), as I find to be the case, it is supportive of HOK’s case that the parties had a common understanding about HOK’s role as exclusive distributor, subject to very minor known exceptions. There is, for

reasons identified below, a considerable body of evidence that tends to support this conclusion in any event.

111. The attack by HOK on CD's credibility relates in particular to the note of the conversation with JDW of 19 October 2018. In fact, I found CD generally to be a consistent witness, although on this particular issue, his account is improbable. Mr Edwards is right to submit on behalf of HOK that it is improbable that CD could have written so detailed a note from memory. That tends to suggest that the note may not be an accurate account of the discussion and that it may have been written so as to support a narrative that JDW approached ZL with a proposal to cut out HOK rather than vice versa. In reality, nothing turns on it – either ZL was able to enter into a contact with MCB to agree an immediate distribution relationship in respect of JDW without breaching its contractual obligations to ZL or it was not. Whether CD has given a fully accurate and honest account of that will in fact not alter the position.
112. I found JH on the face of it to be a credible witness. With the exception of events in relation to the meeting on 16 November 2015 and to the proposed establishment of Imaginaria, I did not consider that anything that he said was inherently implausible but these aspects of his evidence do cause me to have some conner over his credibility.
113. For reasons set out below when dealing with issue 2, I reject JH's evidence that there was express discussion of exclusivity at the meeting on 16 November 2015, but even then I did not think that this was indicative of a generally unreliable witness. Rather, I think that he has probably come to believe in light of the subsequent dealing of the parties that exclusivity must have been mentioned. This appears to me to be a clear example of the types of problem with memory identified by Leggatt LJ in Gestmin, where an understanding that is acquired subsequently has interfered with the recollection of an earlier event.
114. With regard to JH's evidence about the establishment of Imaginaria, there is an obvious conflict between his account of the conversation with AD about repayment of £27,000 in his first statement (that it happened in the week commencing 22 October 2018) and his account in the second (that it must have been in the previous week). The first statement asserts that this conversation led JH himself to think that AD was betraying his trust; the second places responsibility for the doubts as to AD's future intent very much in the mouth of CJ. It is difficult to conclude which version is right. It would seem that JH was, in his first statement, attempting to give an account of his changed thinking that failed to mention Imaginaria at all (presumably because reference to it might cast doubt upon HOK's motives) whereas in the second statement he was keen to set the timetable so that the reference to Imaginaria followed rather than preceded AD's "betrayal of trust" over the £27,000 payment. Either way, it suggests

that he was slanting his evidence in a manner intended to favour the case that he was seeking to advance.

115. The evidence of CJ was important on certain of the issues relating to the SSAs. I found his evidence to be somewhat less than satisfactory in respect of the Imaginaria concept, given that, like JH, he had not referred to it at all in his first statement and then when he did refer to it was keen to downplay its importance. I also consider that he overplayed the significance of the so-called whiteboard meeting. But more generally his evidence was credible.
116. The other witnesses all gave evidence that was on the face of it credible. In particular I should say that AS came over as a neutral observer who did not show any partisanship in his evidence, notwithstanding the fact that, at least on his case, he had reason to harbour negative feelings about how ZL had behaved in his company's dealings with it.
117. There is however always a risk that the passage of time and the existence of a dispute cause distortions in the evidence in the manner referred to in Gestmin. In truth, most of the factual issues in this case can be resolved from the large amount of written material, especially emails, within the trial bundle.

### **Issue 1 – interest on the claim**

118. The only issue that arises on the claim is as to the Claimant's entitlement to interest. The issue has been formulated thus:

1.1 Was there any contractual term entitling ZL to interest on its invoices?

119. The Claimant's case is that each of the unpaid invoices (as well as many previous invoices) upon which it sues bears the following wording: "*Please make note if the invoice is overdue you will incur a compound monthly charge of 8.5% of the total invoice*<sup>35</sup>." Many of these invoices were copied to JH.
120. This is compelling evidence that the term as to contractual interest was incorporated into the agreements for supply of the products. The Defendant has not seriously disputed this issue and it does not appear as an issue within the Defendant's closing submissions.
121. In my judgment, it is undoubtedly the case that ZL was entitled to interest pursuant to the wording of each of the invoices on which it sues at 8.5% per annum, compounded monthly.

### **Issue 2 – The Master Wholesale Agreement**

122. As noted above, the issues relating to the MWA can be broken down as follows.

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<sup>35</sup> The reference to "*a compounded monthly charge of 8.5%*" is conceded by the Claimant to be an entitlement to 8.5% per annum, compounded with monthly rests (rather than 8.5% per month compounded monthly).

2.1 Was there a MWA between the ZL and HOK?

If there was an MWA,

2.2 What were its terms (including as to notice)?

2.3 Was it varied?

2.4 If it was varied, when was it varied?

2.5 If it was varied, what were its terms as varied?

123. There is a considerable overlap between the material relevant to the existence of an MWA and that relevant to the alleged SSAs. I adopt the division of these issues in a logical basis, but much that is said in this section is relevant to my discussion of the issue of the alleged SSAs under issue 3.

124. I deal first with whether there was a MWA between ZL and HOK (Issue 2.1). The case advanced by HOK is that the MWA arose by reason of the express agreement of the parties in the meeting on 16 November 2015. The primary evidence relied on is JH's account of the meeting. Further, HOK maintain that the subsequent dealings between the parties show that exclusivity was agreed from the outset.

125. It may have made good commercial sense, at least with the benefit of hindsight, for HOK to have acquired an exclusivity obligation from ZL in respect of their dealings, in particular as the relationship between the parties developed and HOK invested increasing time and money in ZL's products. But it is little short of inconceivable that such exclusivity would have been agreed, yet not mentioned either in the email of 17 November 2015 following the meeting or, even more pertinently, in the letter of 20 December 2018, given:

125.1 In the email of 17 November 2015 from Mr Tim Dunlop, the phrase "*partner wholesaler*" appears. That phrase might imply an exclusivity agreement, though if that were meant, one would more naturally expect to see express reference to the concept of exclusivity rather than the far vaguer word "partner" which might connote a variety of relationships.

125.2 Even in the letter of 20 December 2018, there is no hint of a suggestion of any obligation of exclusivity save in so far as that is said to arise from a specific agreement relating to Wetherspoons, and even then the reference is implicit in the criticism that ZL was dealing with JDW through MC rather than through HOK rather than an express assertion.

126. Further, there is an obvious inconsistency in the way that HOK has put its case on this issue, as can be seen if one compares various of the material referred to above:

- 126.1 Paragraph 44 of JH's first witness statement: "...*apart from those few accounts, we agreed that all other sales would go through us*";
- 126.2 Paragraph 84 of JH's first witness statement: "*we had no formal exclusivity agreement*";
- 126.3 HOK's Reply to a Request for Further Information: "*It was agreed between the Claimant and the Defendant that the Defendant would be the exclusive wholesaler of the Claimant's Zymurgorium products in the sense that all Zymurgorium products (with the exception of a few small accounts) would go through the Defendant, and the Defendant would then sell on those products, including to other wholesalers.*"
- 126.4 Paragraph 19 of the RDCC: "*there was no express agreement on exclusivity.*"
127. Whilst HOK did not put its case this way, one possible explanation is that, in those documents where HOK (and in reality this is JH, since he is the author of the statements as well as having signed the statements of truth in the statements of case) has said that there was no "*express*" or "*formal*" agreement on exclusivity, what is really meant is that there was no written agreement on exclusivity. It is indeed the case that there is no such written agreement, but it would be highly surprising if HOK, which after all, has been legally represented throughout these proceedings, worded Statements of Case and/or witness statements in so loose a fashion on what is a central issue.
128. Of the other documents relied on by HOK, it is true to say that one, the email of 5 February 2016, refers to an exclusive relationship. But that is authored by JH not AD or anyone at ZL and hence its force is limited to the point that ZL did not respond to it to correct the statement made there. In any event, the content of later documents is likely to be of limited assistance in determining what was agreed at the time of the meeting in November 2015, given the Defendant's inconsistencies noted above as to whether any such agreement was reached.
129. I bear in mind that JH came over largely as a straightforward witness. What seems to me to be the most probable explanation of his evidence on this issue is that he has come to believe that there was an express agreement as to exclusivity at the outset, albeit that he cannot accurately or consistently give an account of the discussion in which such an agreement was reached because in fact there was no such discussion. This view is fortified in light of the point which was made by Mr Reed in closing submissions that, when one reads the passage at paragraphs 30 to 43 of JH's statement dealing with the discussion on 16 November 2015, many matters are expressed in fairly general terms such as "*I expect that we mentioned that we supplied Booths and Bargain Booze*"; "*I am sure I would have told Aaron that our success and reputation depended on being the best*"; "*I feel sure that I would have told him that we never ever let our customers down*"; "*I feel sure I would have told Aaron the names of some, possibly all, of the existing Agency*



*brands*”; and “*I will have explained how our Sales Team focused on the Agency Brand*”. In contrast, the wording of paragraph 44 is quite clear and the assertion in the witness box that he was “*absolutely certain*” that exclusivity had been “*expressly discussed*” is even more so. This has the flavour of a witness who has convinced himself that he recalls a matter when in fact he does not.

130. I am also not dissuaded by the use of the phrase “*master wholesaler*” in the email of 5 February 2016. This comment is equally consistent with an assumption by TD, the author of the email, that there was an agreement as to exclusivity. AD’s failure to contradict the suggestion that this phrase implied exclusivity is consistent with his not having a detailed understanding of the nature of wholesaling at that time.
131. Further, even if I were persuaded that it was more likely than not that JH had used the phrase “*agency brand*” in his discussions with AD (which I am not), my judgment would not have differed on whether a relationship of exclusivity was agreed at this initial meeting. Mr Edwards said on behalf of HOK in closing submissions that the agency brand concept involved the promotion of ZL’s products and that “*the logical corollary of promotion is exclusivity*”. But the concept of the agency brand seems to have been something of the Defendant’s devising rather than an industry term. It is notable, as counsel for ZL points out, that the phrase is not even mentioned in the RRDC. Certainly, there is no evidence that the Claimant knew precisely what was meant by the use of this phrase, and therefore the use of the term without contradiction from the Claimant would not prove that the Claimant was agreeing that this was the state of their relationship. It is perfectly possible to have seen any early offers or promises by the Defendant to promote the Claimant’s products as simply being the corollary of (and consideration for) the profit that it was to make through selling the Claimant’s products. It is only as the relationship became closer and HOK committed greater resources to the promotion of ZL’s products that an inference of a relationship of exclusivity becomes convincing.
132. Whatever the true explanation for Mr. Hammond’s evidence, I am not persuaded that there was an express agreement as to exclusivity in the meeting on 16 November 2015.
133. However, the further issue arises as to whether an over-arching agreement on any terms was reached at that meeting or is to be inferred from its circumstances. HOK has not pleaded that there was term as to exclusivity to be implied at the time of forming the so-called MWA<sup>36</sup>, but does plead that it was agreed that HOK would promote ZL’s drink products generally to the marketplace; that HOK would act as ZL’s wholesaler purchasing ZL’s products from ZL and

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<sup>36</sup> All of the facts and matters pleaded at paragraph 19A of the RDCC that are said to give rise to an implied obligation of exclusivity at paragraph 19B relate to the period 2016-2017, and therefore post date the meeting in November 2015.

reselling them to HOK's customers; and that ZL would supply its drink products to HOK to meet the demand for those drink products that HOK generated and received. Absent an express or implied term as to exclusivity, such obligations might be thought to have no content, but the question as to whether a MWA was formed in 2015 becomes relevant to the issue of variation subsequently – if there was no MWA, then there is no agreement to be subject to variation as pleaded in paragraph 19B and/or 19C of the RDCC.

134. The difficulty with the case advanced by HOK in this respect lies in understanding precisely what the agreement of 16 November 2015 is said to comprise if there was no exclusivity. The Claimant concedes that there was always an expectation that it would try to produce sufficient of its products to meet the demand created by HOK. It is possible to contemplate a contract that obliged the Claimant to use its best endeavours to produce enough to meet the demand. But such a contract would have very little content. One can reasonably assume that people involved in manufacture would generally wish to meet the demand for their products. The pressure to do so arises naturally from the profit motive that underlies the commercial world. But I do not see that such a contract could be implied from the words used in October 2015. Rather it would have to arise from the conduct of the Claimant beginning to manufacture products for HOK and selling them to HOK. A contractual obligation to use best endeavours to produce the necessary goods might theoretically be an adjunct to such an arrangement, but it is difficult to see that it could be thought necessary to imply such a contract. In this sense an implied contract to this effect would offend against the passages from the judgment of Vos LJ in Heis v MF Global UK Ltd [2016] EWCA Civ 569.
135. Accordingly I am satisfied that the Defendant has failed to prove the existence of a contract on the terms asserted by it or any terms in November 2015. This resolves issue 2.1.
136. As to the remainder of the issues under 2, these become hypothetical. However, in the circumstances of this case it seems to me that it is helpful to consider those hypothetical issues insofar as it is possible to do so for reasons that will become obvious when I consider issues 3 (relational contract) and 4 (SSAs).
137. If I were wrong on issue 2.1 and a contract did come into existence as of November 2015, three possible arguments as to obligations of exclusivity and notice arise.
  - 137.1 That there was an express term of exclusivity with an implied obligation to give reasonable notice in the agreement; or
  - 137.2 That there was an implied term in the agreement as to exclusivity with an implied obligation to give reasonable notice that arose when the agreement was made; or

- 137.3 That, whatever the terms of the agreement, it was subsequently varied to include a term as to exclusivity.
138. If there were an express obligation of exclusivity, there would unarguably be a term as to the requirement to give reasonable notice so as to terminate, having regard to the analysis in Reda v Abdul Jali op. cit. Subject to the issues of repudiation/renunciation and the term of such notice, which are dealt with below, this would resolve issue 2 in favour of the Defendant.
139. In the second scenario, if there were no express term of exclusivity, I have pointed out that no implied term to this effect is pleaded. I have further declined to find that an agreement is to be implied from the circumstances. In any event, it would not be possible to determine whether such an implied term might be found to exist in the absence of being able to make clear findings as to the express terms of that agreement. Having found that there was no agreement with contractual effect at all, this issue is not capable of resolution on my findings.
140. If I were wrong about the creation of a contract but correct that there was no term as to exclusivity, the question of variation of the contract would arise under issue 2.3. This is far less easily answered.
141. Paragraph 19B of the pleads variation of the alleged MWA by conduct, giving rise to implied terms as to:
- 141.1 Not directly supplying customers who were the subject of an SSA;
- 141.2 Providing reasonable cooperation in the performance of the other party's obligations under the MWA or any SSA;
- 141.3 Not terminating the MWA or any SSA
142. The case advanced by HOK as to variation of the contract requires some careful analysis. ZL contend that it is important, if the court is to consider the argument that the alleged MWA was varied, to consider when this variation took place. HOK has been unable to put a date on this. Further, the argument for variation by conduct that leads to the implication of a term is, says the Claimant, a flawed analysis.
143. At paragraph 19B of the RDCC, it is pleaded by HOK that the variation was by the conduct set out in paragraph 19A, the variation being by the importation of terms to be implied by necessity, in order to give effect to the obvious intention of the parties and/or for business efficacy. However, it is common ground that a variation of the contract has the same requirements as its formation, including that there be offer, acceptance, consideration and an intention to create legal relations. Of course, as I have identified above, the language of offer and acceptance may be somewhat misleading in the case of a contractual variation, just as it is in the case of the formation of a contract *ab initio*. There is no conceptual problem in a contract

being varied by conduct any more than there is a contract being formed in this way. However, what is more difficult is identifying the conduct which is said to amount to (or to be capable as being treated as) an offer and an acceptance with the relevant intent.

144. The evidence that HOK relies on in respect of the argument that the parties came to a position in which they each assumed that the Defendant was acting as the Claimant's exclusive distributor is powerful. In particular, the following matters strongly point towards such a common understanding gradually developing:

144.1 The email dated 17 November 2015. The reference to HOK being "*excited about working together with Zymurgorium in becoming partner wholesaler for you across the UK*" suggests an intention to develop such a relationship.

144.2 The sharing of information about the price of the products of a competition, Edinburgh Gin, in February 2016. This is consistent with a close working relationship between ZL and HOK.

144.3 The description by HOK of itself as "*master wholesaler*" in the email of 5 February 2016. This is indicative of a belief on HOK's part that it had such a role. AD agreed that this phrase would be suggestive of a relationship of exclusive distribution, yet did not query the use of the phrase in the email, suggesting that he too thought the parties had such a relationship.

144.4 The creation by ZL of labels for Nonne Gin stating "*Distributed by Hammonds of Knutsford*" and of labels relating to its products saying, "*supplied by Hammonds,*" and, "*supplied by the awesome 'Hammonds of Knutsford.'*" This is indicative of ZL believing that HOK had a special position as its distributor.

144.5 ZL's statement to Venus plc that it supplied "*...wholesale-wholesale through Hammonds...*". This suggests that ZL thought that HOK was an exclusive distributor.

144.6 The use by ZL in general and AD in particular of the phrases "*primary wholesaler*", "*partner wholesaler*" and "*primary distributor*" as a description of HOK to Beers of Europe, Renaissance Hotels, and Hartley Wines. All of these are supportive of HOK's case that AD believed ZL to have a special relationship.

144.7 The use by TD of the phrase "*partner wholesaler*" in the email to Harvey Nicholls dated 1 November 2016. Whilst communication such as this which does not cross the line is of limited relevance, the failure of AD to question this description notwithstanding that ZL were copied into the email is again supportive of a belief on ZL's part that the parties had a special relationship.

145. All of these communications pre-dated JH's email of AD and CD of 5 January 2017 in which he thanked ZL "*for having the confidence in us to distribute your product, exclusively in the UK.*" I am satisfied that AD's failure to query that email is because, by this time if not before, he believed that HOK was indeed acting as ZL's exclusive distributor for all save a small number of so-called legacy arrangements, where it was common ground that ZL could continue to supply direct without breaching the assumed position that HOK was its exclusive distributor.
146. Four other matters support this conclusion:
- 146.1 For reasons identified above, I am satisfied that AD's reaction to the discovery by HOK that he was supplying direct to Kwoff was a consequence of his believing that HOK did have a relationship of exclusivity with ZL.
- 146.2 In the communications with PMD about the relationship between the parties, AD positively promoted the idea that HOK had a commitment to buy large quantities of ZL's products, essentially everything that H&A was able to produce. It would appear unlikely that HOK would agree to this without a belief that ZL was committed to a relationship of exclusivity, a fact that would have been apparent to ZL. On ZL's behalf, Mr Reed submitted that the mere fact that HOK was taking delivery of stock direct from H&A did not mean that the sales of that stock were pursuant to some overarching agreement between the parties, I accept that this is so, but it does point in the direction of an agreement that is broader than simply the sale of ZL's products from time to time.
- 146.3 The evidence that HOK was promoting ZL's products as an "*agency brand*" does not of itself greatly assist the Defendant as to the original intention of the parties for reasons explored above. On the other hand, the phrase was being used as the relationship developed. AD's explanation for not querying this was that exclusivity had not been agreed at the outset. If anything, his answer set out at paragraph 60.2 above suggests that the concept of exclusivity was considered, albeit later in the relationship. This provides some support for the conclusion that the assumption of a relationship of exclusivity was one that gradually developed.
- 146.4 Further, the fact that HOK were, for a long period of time the only wholesaler named on ZL's website is suggestive of the relationship of exclusivity.
147. I should add that some of the other conduct relied on by HOK is less convincing of the existence of such a relationship.
- 147.1 Whilst the varied ways in which HOK assisted ZL in practical matters such as sourcing bottles, undertaking the bottling process and storing the products are consistent with a relationship of exclusivity, they are also consistent with two businesses working to

achieve the same end for the benefit of each of them. That does not suppose a relationship of exclusivity had come into existence.

147.2 The willingness of JH/HOK to either invest or at least to consider investing in ZL might support the Claimant's case but might equally support the finding that JH saw in ZL a potentially profitable business to which he hoped to contribute and from which he hoped to benefit.

147.3 JH's evidence that he was put off from selling certain competitor products by a fear that AD would see this as disloyalty may indicate that JH considered AD someone whom it might be possible to upset fairly easily. But I am cautious about drawing conclusions about AD's state of knowledge/belief from JH's fears on this issue. It may equally well be the case, as AD says, that he was not bothered by what he saw as fair competition.

148. The corollary of the parties having reached a stage when they assumed that HOK had a right of exclusivity in respect of the distribution of ZL's products is that the parties equally assumed that HOK had an obligation to promote ZL's products. That assumption arises in part from the fact that this is what HOK actually did. But more importantly, no manufacturer in the position of ZL would agree to exclusivity without there being a corresponding duty on the distributor to promote. Absent this, it would be open to the distributor to pick and choose which products it promoted, in the sure knowledge that the manufacturer could not act to promote its own interests by selling through other route even if the distributor chose to market products in competition with those of the manufacturer.

149. I note the Claimant's argument that the relationship of exclusivity was simply an assumption on the part of the Defendant. I agree that, if it were no more than an assumption, it would not cross the line of communication between the parties that would be sufficient to found an argument that it was or became a term of the contractual relationship of the parties. For reasons that I have identified, it seems to me that there is clear evidence of the assumption crossing the line and becoming the common assumption of both parties.

150. But notwithstanding my conclusion that, by the beginning of 2017 at the latest, both parties believed that they had a relationship in which HOK was the exclusive distributor for AL does not resolve the issue of contractual variation. The specific problem for HOK here on its argument about contractual variation is in showing any intention to vary the relationship in the manner pleaded in paragraphs 19B.1-19B.3 of RDCC. It would be one thing if it were able to plead and prove some conduct which showed an intention to vary the relationship so that ZL was obliged to market its products exclusively (save for certain defined small parts of the market) through HOK, and associated conduct by which this intention was made known and accepted. But what HOK pleads is evidence that the parties assumed that there was such an

obligation in existence already rather than events from which an intention to vary an existing contract could be inferred so as to achieve the obvious intention of the parties and/or to give the agreement business efficacy.

151. It follows that HOK is not arguing that the parties had that intention and acted accordingly so as to vary the contract; rather it is being said that the parties must be taken to have agreed that so as to give effect to their obvious intention and/or for the contract to have business efficacy. However, in the absence of events from which an intention to vary could be inferred, I do not accept that this underlying common understanding could give rise to the contractual intention contended for by HOK.
152. In so far as the Defendant acted in reliance on this mutually assumed relationship of exclusivity, this does not leave the Defendant without any remedy for reasons set out below in respect of the SSAs. Indeed, this very language is suggestive that an estoppel might be a more natural way in which to give effect to the mutual understanding of the parties. The Defendant has not put its case this way and there might be formidable problems in such an argument. But I do not think that the law as to the formation of contracts as currently developed goes so far as to give contractual effect by way of variation to an existing contract arising from an assumed state of affairs where there is otherwise no evidence of an intention to vary the contract. Thus I would have resolved issue 2.3 favourably to the Claimant.
153. I should add that, whilst HOK has not pleaded a case that an overarching agreement came into existence after the original discussion in November 2015, such an argument would have failed for the same reasons that the argument as to variation would have failed, namely the absence of circumstances from which an intention to enter into such a contract can be inferred.

### **Issue 3 – Specific Supply Agreements**

154. I have summarised the issues on the SSAs as follows:
  - 3.1 Was there a SSA between ZL and HOK in relation to Booths?
  - 3.2 If so, what were its terms (including as to notice)?
  - 3.3 Was there a SSA between the Claimant and HOK in relation to JD Wetherspoon?
  - 3.4 If so, what were its terms (including as to notice)?
  - 3.5 Was there a SSA between ZL and HOK in relation to Greene King?
  - 3.6 If so, what were its terms (including as to notice)?
  - 3.7 Was there a SSA between ZL and HOK in relation to Bargain Booze?
  - 3.8 If so, what were its terms (including as to notice)?
  - 3.9 Was there a SSA between ZL and HOK in relation to Booker?
  - 3.10 If so, what were its terms (including as to notice)?

155. The history set out above has led me to the conclusion that, by the beginning of 2017<sup>37</sup> at the latest, the parties had a shared belief that HOK was ZL's exclusive distributor apart from the small number of accounts that had been reserved to ZL by the parties' initial understanding. Each of the alleged SSAs with Booths, JDW, Greene King, Bargain Booze, and Booker (who might conveniently be called "the SSA customers") post-dated this common understanding.
156. ZL maintain that there is nothing about the arrangements in respect of each of the SSA customers to take them outside of the usual commercial relationship of arm's length dealing between ZL and HOK, where ZL sold to HOK and HOK sold on to the customer. It is true that, on one view, the communications between HOK and ZL relating to each of these customers were similar to earlier dealings with other customers in relation to which an SSA is not alleged. But that is not to say, on a true analysis of the dealings that a broader contractual relationship than simply a series of ad hoc agreement for the purchase of ZL's products should not be inferred for the following reasons:
- 156.1 By the time of the negotiations with each of the SSA customers leading to a central listing, the assumption was shared by the parties that a relationship of exclusivity existed.
- 156.2 In each case, there is evidence of extensive discussion between HOK that achieved the listing by the respective customers of ZL's products. Absent some obligation of exclusivity, HOK would have been investing its time and money in developing relationships that might have to come to an end at any time because of ZL's freedom to deal directly with the customer.
- 156.3 ZL was kept informed about pricing arrangements. It must have been aware that price was a sensitive issue for the customer and that therefore HOK would need to know that there was a commitment from ZL that prices would not be changed arbitrarily.
- 156.4 HOK was purchasing large quantities of ZL's goods, for a while virtually everything that ZL was able to produce. It was therefore committing large scale funding to the development of ZL's range of products. It would be natural to think that it would not do this without at least some agreement as to exclusivity.
- 156.5 Further the relationship between HOK and the SSA customers in each case involved some commitment as to price or discount by HOK, as set out above and as known by ZL save in the cases of Bargain Booze and Booker, and in the second of these, AD was made aware of HOK's commitment to the multibuy option. It would not be in accordance with business efficacy to expect HOK to enter into such arrangements

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<sup>37</sup> To be precise, by the date of the email of 5 January 2017



without some corresponding commitment on price from ZL, at least in so far as price rises would not be applied without reasonable notice being given.

156.6 In the case of JDW, ZL agreed to contribute to the retro to be paid. Were there no overarching agreement in that case, but rather simply one off sales, there would be no basis for an obligation on the part of ZL to meet this payment. At the very least, it must have been a term of the trading relationship between ZL and HOK that any of ZL's products that were purchased by HOK and sold on by it to MCB and by it on to JDW would be the subject of a payment by ZL to JDW of its contribution to the retro of £1 per bottle. Whilst one could draw the inference that this was a term of every sale by ZL to HOK, it more naturally leads to a conclusion of particular terms of dealings between the two companies in respect of that customer.

157. To return to the principles as stated by Vos LJ in Heis v MF Global UK Ltd [2016] EWCA Civ 569:

157.1 If there was no obligation on the part of ZL to sell exclusively (save for the few legacy customers) through HOK, their relationship, by the time of the dealings with the large five customers in respect of whom the existence of SSAs is alleged would lack business efficacy. HOK would be committing considerable resources to setting up arrangements for the supply of ZL's products that ZL could short cut at any time.

157.2 In those circumstances, one would expect obligations of exclusivity. Indeed, for reasons that I have identified, I am satisfied that both parties believed that such obligations existed and intended to be so bound.

158. I have not found the question of the mechanisms for offer and acceptance to be easy to discern. This was a gradually developing relationship. The court must be careful to guard against a casual finding of a contract coming into existence or indeed being varied simply because the parties' relationship has developed, lest an undesirable element of uncertainty be introduced into the law of contract. But where the parties traded over a number of months in the belief that they had a contractual relationship and committed resources to their dealings in that belief, the court can safely apply the rather laxer principle set out in Chitty on Contracts at §37-044, citing G Percy Trentham Ltd v Archital Luxfer *op cit*.

159. It would not however be safe to reach a concluded view on this issue without first identifying the contractual terms that are said to have bound the parties. Just as a contract should not be implied unless it is necessary to do so, equally the terms to be implied are only those that are necessary. In my judgment, the following terms meet this test:

159.1 That, for the duration of the agreement relating to the particular customer:

- a) HOK would pay the agreed price for ZL’s products, subject to a right on the part of ZL to change the price after giving reasonable notice of its intention to do so;
- b) HOK would seek to promote ZL’s products;
- c) ZL would pay any contribution towards a retro that had been agreed in respect of the product;
- d) ZL would use its best endeavours to supply sufficient of its products to HOK to meet the orders from the respective customers<sup>38</sup>;
- e) That ZL would not supply its products to the customers other than through HOK.

These terms accord with what the objective bystander would consider to have been the terms on which ZL and HOK were trading.

159.2 That the parties could terminate the SSA on giving reasonable notice. This term is a naturally corollary of the fact that the parties had entered into a relationship of this kind (see Reda v Abdul-Jali op cit).

160. I have not heard argument on the issue of any other obligations within the SSAs. It is possible that the court would also imply obligations on the part of HOK either (i) not to sell to the customers any product that directly competed with those of ZL; (ii) not to promote any such products; and/or (iii) not to develop any such products.. However, without fuller argument, I could not reach a concluded view on that issue.
161. Counsel for ZL made the point in closing submissions that there were supplies made by ZL through HOK to many customers other than the five customers in respect of whom SSAs are identified. He asks rhetorically why these other customers are not said to be the subject of SSAs. To answer that question would involve looking at those relationships in closer detail. It may be that, in respect of those customers, it is not possible for HOK to show that it engaged in the same level of promotion or that ZL was involved in discussion prices for customers. It may be that sales to other customer were not “national listings” in the same way, carrying with it the implication that the product has been sufficiently promoted by HOK to be in demand nationally. It may be that, in fact the existence of SSAs could be argued in those cases as well as the five customers identified by HOK but that it has not been pursued for reasons of proportionality. Either way, it would not be right to reject HOK’s arguments in respect of these five customers just because there may be similar arguments to be advanced in respect of other dealings.

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<sup>38</sup> The Defendant’s argument that ZL was under an absolute obligation to meet demand, as pleaded at paragraph 17.3 of the RRDC lacks commercial reality – clearly, there must have been some limit on the obligation of ZL to meet demand and wording along the lines suggested here is realistic, as counsel for the Claimant conceded in closing submissions.

162. In my judgment, the court can and ought to infer the existence of SSAs, given the relationship that had developed between HOK and ZL and the underlying assumptions upon which they operated. The minimum terms of such agreements can be clearly identified as set out above and, whilst it may be argued that other terms ought properly to be implied, I am satisfied that to do so would not undermine HOK's central argument that the SSAs were not terminable without reasonable notice being given.
163. I have considered whether the relationship with Bargain Booze lies in a different category, given that there is no evidence that the price at which HOK was to sell or any discount to which it was to contribute was known in this case. Whilst this makes the case less compelling in the individual case, given that this negotiation took place in the course of a series of negotiations where the creating of a SSA can be inferred, it is in my judgment more apt to infer a corresponding contract in this case as well.
164. I turn to the question of what was an appropriate notice period in this case. In my judgment there are several important factors:
- 164.1 The relative informality of the relationship between the parties is a pointer towards a shorter period of notice. If the parties had really intended a long period, it is more likely that they would have formalised the relationship.
- 164.2 Whilst I accept that HOK invested time and money in developing the SSAs, and indeed the market for ZL's products more generally, I do not accept that they did this on the kind of scale that was considered for example by the Court of Appeal in Decro-Wall v Practitioners in Marketing Ltd [1971] 1 WLR 361. The Defendant was promoting products which were very much the brainchild of AD and it was as much his skill in product development as HOK's skill and efforts in marketing which led to the phenomenal success of ZL's products.
- 164.3 The Defendant's obligation to promote the Claimant's products was a burden that a reasonable distributor would only wish to bear for a limited period.
- 164.4 Whilst there was no express prohibition on the Defendant selling competitor goods to the Claimant, the Defendant indicated that it considered itself obliged not to do so.
- 164.5 HOK was in fact able to develop an alternative product and get it on the market within about 3 months. Admittedly it was not profitable to the extent that ZL's products were, but that was the simple consequence of the fact that it was following the established product from ZL – as JH made clear in evidence, it is rare for an imitator to match the success of an original product.

165. Bearing in mind these factors, the reasonable notice period in this case has to be a short one. Whilst not even 12 months was sufficient to enable HOK to develop and market an alternative product that was successful to the same degree as those of ZL, this factor is of limited significance where, during the notice period, the distributor would be restricted from (or at least would consider that it should not) taking steps to market competitive products and where in any event it would be duty bound to continue to promote the manufacturer's products. In my judgment, any notice period in excess of three months would have imposed unreasonable obligations from the point of view of both parties. Their failure to expressly agreed terms of their relationship is consistent with an approach that there was only a small limitation on the parties' rights to disengage. In my judgment, the appropriate notice period that gives effect to these considerations is three months.
166. Following distribution of the judgment in draft, I was asked to determine the issue as to the date from which the notice period runs. I have not heard submissions on this issue, but in my judgment, the correct date for the calculation of the notice period is that the 3 months runs from the date of acceptance of the repudiatory breach, namely 20 December 2018. I say so for the following reasons:
- 166.1 The Defendant, as the innocent party, is entitled to be put in the position that it would have been in, had the contract been properly performed.
- 166.2 Since notice was not in fact given, it could not run from a date earlier than the date on which the contract was in fact terminated.
- 166.3 However the Claimant could then have given notice at any time after the Defendant accepted the repudiatory breach.
- 166.4 The Claimant is liable for such loss as is caused by it not doing what it was bound to do, not by that caused by it not doing things it was not bound to do<sup>39</sup>.
- 166.5 The Claimant's least obligation under the contract, at the time of the acceptance of the repudiatory breach, was to give 3 months' notice of termination.
- 166.6 Accordingly, the three month notice period runs from the moment at which the repudiatory breach was accepted on 20 December 2018.

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<sup>39</sup> See per Scruton LJ in Abrahams v Herbert Reiach Ltd [1922] 1 KB 477: "*I am not inclined to be strict in limiting the damages recoverable against wrongdoers, but if their obligation is left so much to their discretion that there are several ways of performing it, I have always understood that the Court assesses damages on the basis that "if the contract could have been performed by the performance of the alternative least beneficial to the plaintiff, the measure of damages would be regulated by the loss occasioned by non-performance of that alternative": Deverill v. Burnell LR 8 CP 475 at 481, per Bovill C.J. The simple reason for this is that a defendant is not liable in damages for not doing that which he is not bound to do.*" This approach accords with that taken in determining damages in claims for constructive dismissal following repudiatory breach of employment contracts.

#### **Issue 4 – Relational Contract**

167. Having determined the issue of SSAs in favour of the Defendant, the question of whether the contracts were relational in nature becomes academic.
168. However for the sake of completeness, it is not in my judgment correct to find that either the MWA proposed by the Defendant or the SSAs that I have found to exist were relational in nature. I can summarise my reasons by looking at the list of factors proposed by Fraser J in Bates v Post Office:
- 168.1 I accept that there would be no express term excluding the existence of such a duty.
- 168.2 I do not accept that these were or would have been long term relationships. Both the SSAs that I have found to exist and the putative MWA would have been subject to a right to terminate on reasonable notice. I have dealt with what notice is reasonable above. These contracts did not or would not have had the degree of longevity that points towards the relational analysis.
- 168.3 I see no basis for implying obligations of integrity and fidelity in the performance of the contract. Quite simply, the parties were arm's length commercial organisations acting in their own best interests.
- 168.4 The nature of the promotion of ZL's products meant that there a degree of collaboration was necessary in the performance of the parties' duties, but in large part, this was simply a question of two commercial persons whose interests were aligned in the direction of one promoting and selling the other's products.
- 168.5 I see no difficulty in expressing the nature of the relationship in the terms as set out above, albeit I accept there is some uncertainty as to the extent of HOK's obligations under the contract.
- 168.6 Doubtless the particular individuals involved in the dealings, particularly AD and JH, reposed a greater or lesser degree of trust and confidence in the other, but this is not such as to take the relationship out of the usual commercial context.
- 168.7 The contracts did not/would not have involved "*a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.*"
- 168.8 There has been a measure of investment particularly by HOK in the venture.
- 168.9 For the reasons I have identified there is a degree of exclusivity in the relationship.
169. I should add that the SSAs or the putative MWA did not have elements of contractual discretion in their performance.

170. The balance of this analysis does not position towards the contract being relational in nature. Whilst it may not be correct to say that a relational contract should only be found to exist where it is necessary to do so in order to give effect to the presumed intentions of the parties, the court should be slow to introduce obligations into a contract by the use of the concept of the relational contract where it is unnecessary to do so to give proper effect to those intentions.
171. This is likely to be particularly problematic where the contract cannot be said to have any of the characteristics of the relational agreement from the outset. For the contract to become relational in character, there would have to be a basis for finding that the contract had been varied. Indeed, the very finding that a contract which was not relational at the outset but became so indicates that there is a variation to the contractual obligations. On the facts of this case, the argument against the variation of any existing contract so that it became relational suffers even more strongly from the lack of evidence to create a relational contract, than does the argument that a MWA is to be inferred from the developing relationship of the parties, given the cautions in the authorities against too readily inferring a relational contract.
172. Mr Reed for ZL points to the particular danger that one concludes from the relationship of a friendship (as between JH and AD here) the conclusion that the contract is relational. In my judgment, it is not necessary to find such a contractual relationship arose here and I decline to do so.

**Issue 5 – Repudiatory Breach/Renunciation By ZL**

173. Issue five relates to the allegation that ZL was in repudiatory breach by negotiating with and agreeing to supply HOK. It is subdivided as follows:

“If there was an MWA:

- 5.1 Did ZL commit a repudiatory breach and/or renounce the contract by supplying direct?
- 5.2 Did HOK accept any repudiatory breach or renunciation of the MWA?

If there was an SSA:

- 5.3 Did ZL commit a repudiatory breach and/or renounce it, by supplying direct?
- 5.4 Did HOK accept any repudiatory breach or renunciation of the SSA?”

174. Given the terms of the SSAs that I have found, it was undoubtedly a repudiatory breach of the SSA relating to JDW for ZL to supply direct. Its conduct in doing so equally amounted to a renunciation of each of the other SSAs because it amounted to ZL taking a clear position that it was not bound by any obligation to give notice.

**Issue 6 – Repudiatory Breach/Renunciation By HOK**

175. This issue has been broken down as follows:

“If there was an MWA:

- 6.1 Did HOK commit a repudiatory breach and/or renounce the contract by developing Imaginaria?
- 6.2 Did ZL accept any repudiatory breach or renunciation?

If there was an SSA:

- 6.3 Did HOK commit a repudiatory breach and/or renounce it, by developing Imaginaria?
- 6.4 Did ZL accept any repudiatory breach or renunciation?”

- 176. The Defendant contends that this issue is unarguable. Even if the development of Imaginaria was a repudiatory breach and/or renunciation of the contract, there is no evidence that the Claimant accepted any such breach. Rather the evidence is that the Claimant considered the relationship to be a continuing one after its own repudiate a breach/renunciation. This is clearly evidenced by AD’s email of 19 December 2018, with its reference to a continuing relationship.
- 177. I accept that it is arguable that the SSAs contained terms preventing HOK from developing or promoting products that competed with ZL and that, if so, HOK was in breach of the SSAs, capable of being interpreted as renunciation and /or repudiatory breach of contract. However, there is no material from which I conclude that the Claimant accepted any renunciation of the contract or repudiatory breach prior to the Defendant accepting the Claimant’s renunciation and/or repudiatory breaches.
- 178. For the sake of completeness, I add that I am not satisfied that the development of the Imaginaria product by the Defendant was in any event either a renunciation of the contract away repudiatory breach. If positive steps had been made to market the product prior to the termination of the SSAs, that may well have amounted to repudiation/renunciation. Merely preparing for the possibility of manufacturing the product does not.

## **CONCLUSION**

- 179. For the reasons set out above, I am satisfied that:
  - 179.1 ZL was entitled to interest pursuant to the wording of each of the invoices on which it sues at 8.5% per annum, compounded monthly;
  - 179.2 There was no overarching agreement governing the parties’ relationship, in the form of the MWA pleaded by the Claimant or similar;
  - 179.3 The parties entered into contracts relating to the sale by the Claimant to the Defendant of products for the purpose of supplying five specific customers, Booths, JDW, Greene King, Bargain Booze and Bookers;
  - 179.4 Those contracts had terms including an obligation on the Claimant only to sell products to those customers through the Defendant;

- 179.5 The contracts were terminable by either party giving reasonable notice;
- 179.6 Reasonable notice at the time of events with which we are concerned here would have been three months notice;
- 179.7 The unilateral actions of the Claimant in supplying its products directly to JDW (through MCB) amounted to a breach of that specific SSA and a renunciation of the SSAs generally;
- 179.8 The Defendant accepted those breaches, bringing the agreements to an end, by its letter of 20 December 2018;
- 179.9 It is arguable that the Defendant was itself in repudiatory breach of contract and/or renounced the SSAs but there is no evidence of the Claimant accepting such breach prior to termination under the preceding sub-paragraph;
- 179.10 The Defendant is therefore entitled to claim damages for the Claimant's breach of contract in failing to give three months' notice as at the time of the acceptance of the repudiatory breach, that is to say on 20 December 2018.
180. The parties have each intimated an intention to seek permission to appeal. This judgment is handed down in private without the parties attending, in order to ensure this happens at the earliest possible date but allowing for a further hearing in due course to deal with consequential matters. The question may well arise in this case as to whether applications for permission to appeal should not be dealt with until after the determination of quantum pursuant to this order and the further procedure referred to above. I express no view on that issue for the moment, but simply adjourn the applications for permission to appeal to a date to be fixed and extend time for the service of Appellants' notices to 21 days from the further hearing. The question of any further adjournment of the applications and/or extension of time for the service of Appellants' notices can be dealt with at the consequential hearing.



## APPENDIX – TABLE OF INITIALS

AD	Aaron Darke
AS	Andrew Sagar
CD	Callum Darke
CG	Charlotte Gilley
CJ	Christopher Jones
DA	Danny Appleton
JDW	J D Wetherspoon
JH	Jonathan Hammond
HOK	Hammonds of Knutsford
MCB	Matthew Clark Bibendum
MWA	Master Wholesale Agreement
PBL	Paragon Brands Ltd
PMD	PMD Business Finance
PR	Philip Rose
RDCC	Re-amended Defence and Counterclaim
RRRADC	Reply and Re-Re-Amended Defence to Counterclaim
SSA	Specific Supply Agreement
TD	Tim Dunlop
ZL	Zymurgorium Limited