Judgments

Yam Seng Pte Ltd (a company registered in Singapore) v International Trade Corporation Ltd

Contract – Condition – Breach – Effect – Right of other party to terminate contract – Parties entering into contract – Claimant company terminating contract for defendant company's breaches – Claimant seeking damages for breach of contract – Whether claimant's termination of contract lawful – Whether claimant entitled to damages for breach

Misrepresentation – Damages – Reasonable ground for belief that facts represented true – Parties entering into contract – Claimant company seeking damages for defendant company's misrepresentation – Whether defendant making misrepresentations – Whether claimant entitled to damages for misrepresentations – Misrepresentation Act 1967, s 2

[**2013**] **EWHC 111** (**QB**), HQ11X00722, (Transcript)

QUEEN'S BENCH DIVISION

LEGGATT J

31 OCTOBER, 21, 22, 23, 26, 27 NOVEMBER 2012, 1 FEBRUARY 2013

1 FEBRUARY 2013

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

A Salter for the Claimant

D Eaton Turner for the Defendant

Benson Mazure LLP; Edwin Coe LLP

LEGGATT J:

A. INTRODUCTION

[1] On 12 May 2009 the parties to this action entered into a written contract entitled "Manchester United Distribution Agreement". Under this Agreement the Defendant ("ITC") granted the Claimant ("Yam Seng") the exclusive rights to distribute certain fragrances bearing the brand name "Manchester United" in specified territories in the Middle East, Asia, Africa and Australasia. The rights were for the most part limited to duty free sales but also included "domestic" sales in Hong Kong, Macau and two provinces of mainland China. The contract period initially ran from 12 May 2009 until 30 April 2010 but was later extended until 31 December 2011.

[2] To begin with, the business relationship between the parties was a warm one, despite some strain caused by delays in supplying products. In 2010, however, the relationship soured and in July 2010 it ended acrimoniously with Yam Seng informing ITC that it was terminating the contract as ITC was in breach.

[3] In this action Yam Seng claims damages for alleged breaches of the Agreement which are said to have consisted in late shipment of orders, failing or refusing to supply all the specified products, undercutting prices agreed with Yam Seng and providing false information. Yam Seng also claims damages on the alternative ground that it was induced to enter into the Agreement by misrepresentation.

[4] Both claims are strenuously denied by ITC. As regards the claim for breach of contract, ITC denies that it committed any breach, or any breach which caused loss, and in any event denies that it committed any breach which was repudiatory and justified Yam Seng in terminating the Agreement. As regards the claim for misrepresentation, ITC denies that any misrepresentation was made or, if made, was relied upon by Yam Seng. ITC also disputes the quantum of damages claimed.

The Parties

[5] Although the contract in this case was made between two companies, the business relationship was essentially one between two individuals.

[6] The Claimant, Yam Seng, is a company incorporated in Singapore which is controlled by Mr Sunil Tuli. Mr Tuli was born in India but now lives in Singapore. He is employed by King Power Group (Hong Kong) as managing director of its Duty Free Travel Retail Division; but he also carries on business ventures through his own company, Yam Seng. Mr Tuli has extensive experience of duty free sales, particularly in the Asia Pacific region, having been in this business for some 28 years.

[7] The Defendant, ITC, is an English company controlled by Mr Roy Presswell. Mr Presswell is also a very experienced businessman, who has been selling fragrances for some 40 years. Since 1990 he has carried on business through ITC.

The Evidence

[8] Mr Tuli and Mr Presswell were the only two witnesses of fact who gave evidence at the trial. There are many matters on which they disagreed. Fortunately their business dealings are well documented. In particular, there are many contemporaneous emails. I approach the evidence on the basis that, as in almost every case where there is a contemporaneous documentary record, the documents provide the best evidence of what happened. Human memory is notoriously unreliable, and the strong interests and emotions to which disputes resolved through litigation give rise are powerful distorting factors, however honest and well-intentioned the witness. Indeed, the more patently honest and convincing the witness, the greater can often be the risk of placing reliance on their testimony.

[9] That was not a risk presented by the evidence of Mr Presswell. It is clear from the correspondence that when his business relationship with Mr Tuli broke down, he felt angry and outraged at what he regarded as unwarranted attacks on his integrity. Those feelings were equally apparent when he gave evidence. Mr Presswell was completely unwilling to contemplate that in relation to the matters complained of he might have been in any way at fault. In seeking to justify his conduct, Mr Presswell made numerous claims about what he said or must have said on various occasions to Mr Tuli which were inconsistent with the documentary evidence. I have no doubt that Mr Presswell believed those claims, many of them made for the first time during cross-examination. I am unable, however, to attach any credence to his testimony.

[10] Mr Tuli was a far more moderate and reasonable witness who was prepared to make sensible concessions in cross-examination.

[11] In relation to the email correspondence, Mr Presswell pointed out that he does not use a computer or mobile phone and does not have direct access to emails, but relies on a secretary to print out messages received and type emails for him. He suggested that this explains why he sometimes did not respond promptly or at length to Mr Tuli's emails.

[12] I bear in mind that Mr Presswell was not as avid in his use of email as Mr Tuli, but it is clear from the documentary record that Mr Presswell received Mr Tuli's emails and, when it suited him, replied to emails promptly. I do not consider that Mr Presswell would have inadvertently left unanswered significant email messages.

B. THE FACTUAL HISTORY

[13] Before considering the allegations of breach of contract and misrepresentation, I will first describe the history of the parties' business relationship. In doing so, I will record my findings on material points of fact that are in dispute.

The Start Of The Relationship

[14] The first communication between the parties was an email sent by Mr Presswell to Mr Tuli on 23 January 2009. In that email Mr Presswell said that he had been introduced by a mutual friend and that his

company, ITC “has recently signed an exclusive three year worldwide licence agreement with Nike/Manchester United to manufacture and sell Manchester United fragrances”. Mr Presswell went on to say that he intended to visit Hong Kong and would like to meet Mr Tuli to discuss a potential deal.

[15] The statement that ITC had “recently signed” a licence agreement to manufacture and sell Manchester United fragrances was untrue. Documents disclosed by ITC on the morning of the second day on which Mr Presswell gave evidence put that fact beyond doubt. That disclosure showed that the only document which ITC had signed as at 23 January 2009 was a 2-page “Licence Deal Summary”. There were two versions of this document, the first dated 24 October 2008 and the second dated 24 November 2008. Both documents started with the words (underlined in the original):

> “The following details shall not constitute a legally binding contract, nor create any pre-contractual liabilities on either party. They are simply a summary of what has been discussed previously in relation to the proposed licence and are strictly subject to contract.”

Both documents also ended with a statement that, by signing the deal summary, “you agree that this reflects what has been previously discussed as forming the basis on which we will proceed with negotiations”.

[16] I am sure that Mr Presswell knew perfectly well when he contacted Mr Tuli on 23 January 2009 that he had not signed a licence agreement and that his proposed deal with Manchester United Merchandising Limited was at that stage subject to contract. From my impression of Mr Presswell, however, I do not think that it would have struck him that he was making a false statement, as he undoubtedly was. Mr Presswell's attitude, both in his dealings with Mr Tuli and in giving evidence, was characterised by a striking ability to treat wishful thinking as fact.

[17] Under cross-examination Mr Presswell would not admit that his statement that he had signed a licence agreement was untrue. He sought to justify the statement on the basis that the licence agreement for Manchester United fragrances which he did ultimately sign at the beginning of May 2009 specified the licence period as having begun on 1 January 2009. The fact that Mr Presswell was able to convince himself that this somehow made true the statement in his email to Mr Tuli is symptomatic of the attitude I have described.

[18] The meeting proposed by Mr Presswell duly took place in Hong Kong on 26 February 2009. Mr Tuli and Mr Presswell gave very different accounts of what was said by Mr Presswell at this meeting about the availability of the products under discussion. According to Mr Tuli, Mr Presswell said that he already had stock of two products: Eau de Toilette (“EDT”) 100ml and Deodorant Body Spray 150ml in red packaging. Other products were already in production including hair gel and body gel (referred to as “toiletries”) and gift sets. Mr Tuli also claimed that Mr Presswell told him that ITC had a licence from Manchester United for the full product range. Mr Presswell's evidence, by contrast, was that he made it clear that there was no product on the market at that time and that the initial launch would be limited to EDT 100ml, packaged in red to match the Manchester United red home shirt. Subsequently he planned to launch EDT 100ml in black packaging in August 2009 to match Manchester United's new black kit for away matches. Thereafter he hoped to develop deodorant, toiletries and gift sets. Mr Presswell also claimed that he told Mr Tuli that he did not yet have a formal agreement with Manchester United for the toiletry products.

[19] Following the meeting in Hong Kong, Mr Presswell sent a letter to Mr Tuli dated 2 March 2009 in which he referred to their discussion and set out the following timetable:

"The initial launch will be two sku's [stock keeping units] in red packaging:

– Eau de Toilette Spray 100ml

– Deodorant Body Spray 150ml

Thereafter, in August 2009, I will launch two sku's in black packaging, to coincide with the launch of the new Manchester United black away kit:

– Eau de Toilette Spray 100ml

– Deodorant Body Spray 150ml

Thereafter, in October 2009, I will launch 2 gift sets, red packaging and black packaging for Christmas 2009, New Year – 1 January 2010, Chinese New Year 2010, Valentine's Day 2010.

Contents:

– Eau de Toilette Spray 50ml

– Shower Gel (tube) 150ml"

[20] In my view, this letter is the best evidence of what was said at the meeting on 26 February 2009 with regard to the availability of products. I am not convinced that Mr Presswell said that he already had stock of EDT 100ml and Deodorant Body Spray 150ml; but I am sure that he gave the impression to Mr Tuli that those products were about to be launched. The timetable discussed for when other products would be available must have been as set out in the letter dated 2 March 2009. Although the letter referred to shower gel only as part of the gift sets, it was clearly contemplated that the toiletries would be available by the time the gift sets were launched in October 2009. I am sure that Mr Presswell did not disclose to Mr Tuli that ITC at that stage had no licence agreement (nor even any deal proposal) which covered toiletry products. I have no doubt that Mr Presswell gave the impression that the licence agreement which he had claimed in his email of 23 January 2009 already to have signed covered all the products ITC was offering to supply.

[21] Mr Tuli was very interested in a distributorship deal and negotiations continued in email correspondence. On 6 April 2009 Mr Tuli sent an email to Mr Presswell containing what Mr Tuli described as a "business plan", setting out the proposed structure for an agreement. Mr Tuli had previously indicated (on 24 March) that he would be getting back to Mr Presswell on "the initial order quantities, as well as the planned purchases for the first twelve months". In his email of 6 April 2009, however, Mr Tuli said that getting a clear idea of the potential for the Manchester United fragrance was proving to be a rather difficult exercise. He suggested that "we place an initial order for 10,000 bottles, and get a few listings in key locations, and then decide on the figures, planned purchases and budgets a few weeks later".

[22] Mr Tuli's email proposed that the agreement should include, as well as duty free sales, the right to sell the products in the domestic markets of Hong Kong and Macau and some other parts of China. Before a cosmetic product can be imported into China, it must be registered with the Chinese government authorities.

Later on 6 April 2009, Mr Presswell sent an email to Mr Tuli in which he confirmed that four Manchester United products (the Eau de Toilette and Deodorant Body Spray, each in red and black) “will be registered in China within the next four months” and that thereafter “we will register and launch Manchester United Hair Gel, which has massive potential in China and the Asia Pacific/Middle East regions”.

[23] Mr Presswell acknowledged in evidence that, when he sent this email, he had made no enquiries and knew nothing about the process of registration in China and had no basis other than optimism for stating that four products would be registered in China within the next four months. He later learned that the registration process was much more laborious and bureaucratic than he had imagined. His evidence in court was that registration of a new product in China can be expected to take at least twelve months and can take much longer.

[24] In a letter dated 9 April 2009, Mr Presswell responded to various points in Mr Tuli's “business plan”. Amongst other things, this letter stated that ITC would launch a 50ml Eau de Toilette Spray, aimed at sales to airlines, “circa August 2009”. The letter also attached a pro forma invoice for an initial order of EDT 100ml, implying that stock of this product was available to order.

[25] Mr Tuli prepared a draft agreement, which he sent to Mr Presswell by email on 20 April 2009. A plan was made to sign the agreement on 12 May 2009 in Mr Tuli's office in Singapore. Mr Presswell sent back an amended draft on 6 May which Mr Tuli approved. The signing took place as planned on 12 May 2009.

The Agreement

[26] The Distribution Agreement is a short document, which was evidently prepared by the parties themselves without the assistance of lawyers. It consists of eight clauses, as follows:

> (1) Clause A is headed “Grant of Rights” and states that ITC grants Yam Seng “the exclusive rights for the Contract Period to distribute, market and sell in the Territory” products consisting of fragrances, deodorants, hair and body wash and hair styling gel.
>
> (2) Clause B defines the “Territory” as the list of countries set out in Sch 1. Schedule 1 lists 42 territories under the heading “Duty Free and Travel Retail” and also four territories under the heading “Domestic” – namely, Hong Kong, Macau, Chongqing (China) and Xian (China).
>
> (3) Clause C defines the “Contract Period” as a period commencing 12 May 2009 and expiring on 30 April 2010 – with provision for the contract to be extended to 31 December 2011 subject to Yam Seng achieving “mutually agreed targets”.
>
> (4) Clause D provides for payment by letter of credit.
>
> (5) Clause E is headed “Price Structure” and specifies the duty free retail price and Yam Seng buying price for six Manchester United products: EDT 100ml; EDT 50ml; Deodorant Body Spray 150ml; Hair and Body Wash 200ml; Hair Styling Gel 200ml; and a Gift Set comprising EDT 50ml and Hair and Body Wash 150ml.
>
> (6) Clause F provides that ITC will supply Yam Seng with “testers and posters” free of charge to

demonstrate the fragrances, and that other marketing expenses will be borne by Yam Seng.

(7) Clause G (headed “Distribution”) states:

“[Yam Seng] will place an initial order after the signing of this agreement, and depending on the sales results of the first two months, will then forecast the sales/purchases from ITC for the next ten months.

ITC will ensure that all orders placed by [Yam Seng] will be shipped promptly . . . .”

(8) Clause H provides that the contract is to be governed by English law and that the parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales.

[27] It was clearly implicit in the grant of rights to distribute the products referred to in the Agreement that ITC had the rights to grant. In the case of the Eau de Toilette and the deodorant, that was so by the time the Agreement was signed, as a licence agreement between Manchester United Merchandising Ltd and ITC covering those products had been concluded a few days earlier on 5 May 2009. However, in the case of the toiletries (ie the hair and body wash and the hair gel) ITC still did not at that stage possess the rights which it purported to grant. It was only on 21 May 2009 that Mr Presswell received a deal summary for a proposed licence for these products. A licence agreement was subsequently entered into between Manchester United Merchandising Ltd and ITC on 21 August 2009 which granted ITC the non-exclusive rights to distribute hair and body wash and hair gel with effect from 1 July 2009.

[28] I am sure that Mr Tuli would not have signed the Agreement if he had known that ITC did not yet have some of the rights which it was purporting to grant. I am equally sure that Mr Presswell did not explain the true position to Mr Tuli. He would have seen no need to do so when in his own mind he believed (perhaps with justification) that a licence to sell toiletry products would assuredly be granted.

The First Order

[29] After the Agreement had been signed, discussions took place by email regarding Yam Seng's first order. The order was placed on 22 May 2009 and was for 10,000 units of 100ml EDT. In acknowledging the order, ITC stated that the shipment date from the UK would be approximately 30 June 2009. In the event the goods were shipped under a bill of lading dated 24 July 2009. No complaint was made at the time, however, about the delay in shipping this order.

The Second Order

[30] Yam Seng followed up its initial order with a request sent to ITC by email on 5 June 2009 for a pro forma invoice so that Yam Seng could place a second order for the following items: 7,000 units of 100ml EDT, 1,000 units of 50ml EDT and 1,000 units of the deodorant 150ml. Mr Presswell replied on 8 June 2009 attaching a pro forma invoice, but only for the 7,000 units of 100ml EDT. With regard to the 50ml EDT and deodorant, he said: “Let's discuss on 24 June.” This was a reference to a planned meeting on that date in London.

[31] Mr Tuli and Mr Presswell duly met on 24 June 2009 at a hotel near Heathrow Airport. One of the

matters they discussed was when the 50ml EDT and deodorant would be available. According to an email sent a few days later by Mr Tuli on 29 June 2009, Mr Presswell said at the meeting that these two products would be available to Yam Seng by “early August”. Later emails from Mr Tuli suggest that what Mr Presswell in fact indicated was that the products would be available for delivery to Yam Seng in early September, which would mean shipping them in August. Mr Tuli was keen to place an order which included 50ml EDT and the deodorant, as he was getting interest in these products from potential customers, including Dubai Duty Free (the biggest duty free outlet in the world and a key customer for Yam Seng). As part of its marketing, Yam Seng had also been giving potential customers a free gondola stand in Manchester United get-up to display the fragrances. These gondolas were produced at Yam Seng's cost (of about US$800 per unit) and Mr Tuli was concerned that the gondolas could not be used to present an attractive display if they were only stocked with one item.

[32] On 13 July 2009 Mr Tuli sent an email to Mr Presswell proposing that, instead of the 7,000 units of 100ml EDT which ITC had offered to supply, the second order should include 1,000 units of the 50ml EDT and 1,000 units of the deodorant, along with 6,112 units of the 100ml EDT – which would in total come to the same price.

[33] Having received no reply to this email, Mr Tuli explained the situation in a further email to Mr Presswell sent on 16 July 2009:

> “Please refer to my email below and one last week on the same subject, ie our second order, and the inclusion of the 50s and the deos in that.
>
> Could you please give me a response to them as I am having a problem giving answers to my potential customers. Duty Free operators are now in the process of placing orders, and need to know what we can give them and when.
>
> Based on the samples and the product shots you gave me, we have presented the whole range. It is very difficult to convince people to have only the 100ml on a gondola in a shop in the airport, and unless they have at least the 50 and the deo, they will delay orders.
>
> In other words we will be sitting on the stocks of the first order, till we can mix it with the other skus.
>
> In London you had said they would be available in early September to us. I have written to you saying this would mean placing our order in mid July, and your shipping it out in mid August, and verbally you have confirmed this.
>
> Before I make further commitments to my customers, I would however request for an official confirmation of this, as besides the financial exposure I have on this, I also run the risk of losing my credibility with so many people, due to not being able to deliver after going around making presentations etc on the brand, advertising it in the press etc.
>
> I am sorry to keep asking you for a reply on this, but we do need to know to be able to plan ahead, to make sure we make a success of this business.”

[34] Shortly after this email was sent, Mr Tuli attended two football matches as Mr Presswell's guest which

were part of a Manchester United tour of the Far East. The matches were at Kuala Lumpur on 18 July and Seoul on 26 July 2009. When he met Mr Presswell at these matches, and in emails sent afterwards, Mr Tuli emphasised Yam Seng's urgent need to know when the 50ml EDT and the deodorant would be supplied. It appears from emails sent by Mr Tuli to Mr Presswell on 26 July and 30 July 2009 that Yam Seng had told Dubai Duty Free, optimistically, that these products would be available by mid August, in time for a launch at the airport on 1 September 2009.

[35] It is apparent from the email correspondence that Mr Tuli spoke to Mr Presswell on the telephone on 4 August 2009 to discuss Yam Seng's order, and that Mr Presswell said that ITC would be able to get the 50ml EDT and deodorant to Yam Seng by the end of September. As a result of this conversation, Yam Seng placed a revised order dated 6 August 2009 for 5,000 units of 100ml EDT, 2,300 units of 50ml EDT and 2,000 units of deodorant. Yam Seng also fixed a launch date of 1 October 2009 for Dubai, Doha and Bahrain.

[36] There were, however, a series of delays in shipping this order.

[37] In an email dated 6 August 2009 Mr Presswell asked Mr Tuli to bear with him until the following Monday, 10 August – “at which time I will hopefully be able to confirm [a] definitive shipment date from the UK”. However, Mr Presswell did not notify a shipment date on 10 August and, despite various chasing emails, he had still not done so over a month later when he met Mr Tuli in London on 14 September 2009. At this meeting the parties signed a revised version of the Distribution Agreement which amended the Contract Period specified in Cl C. The continuation of the contract after 30 April 2010 until 31 December 2011 had been subject to Yam Seng “achieving mutually agreed targets”. Mr Presswell accepted that because of the delay and uncertainty over deliveries it had not been possible for Yam Seng to commit to targets for the first year of operation of the Agreement. He accordingly agreed to delete this condition. The revised Agreement provided that the Contract Period would expire on 31 December 2011 and that the contract was subject to renewal by mutual agreement after this date.

[38] At the meeting Mr Presswell also explained that there had been delays in getting component parts, in particular the bottles and caps needed for the 50ml EDT, and that delivery by the end of September was now not going to be possible. Mr Presswell proposed, and Mr Tuli agreed, that they should start “with a clean sheet”. He said he would let Mr Tuli know definite delivery dates later that week.

[39] However, this promise too was not kept. In an email dated 30 September 2009, Mr Tuli wrote:

> “Please urgently advise delivery dates for the 50ml and the Deodorant. You had advised me in London on the 14th that you would let me know definite dates by 16th (the following Wednesday).
>
> Please do let me know the situation as we are having to slow down our efforts to get more business due to our not being able to supply. As you know the 100mls that we have are mostly booked, but we cannot ship them as customers want other products as well . . . .”

[40] It appears that a few days after this email was sent Mr Tuli spoke on the telephone to Mr Presswell who assured him that supplies of the 50ml EDT and the deodorant would be with Yam Seng by the end of October. On this basis Mr Tuli arranged a new launch date of 7 November 2009 with Dubai Duty Free. Mr Tuli emphasised the importance of meeting this date in an email sent to Mr Presswell on 12 October 2009.

[41] Mr Tuli met Mr Presswell again at a trade fair in Cannes in the week beginning 18 October 2009. It was agreed that the 5,000 units of 100ml EDT included in the second order would be supplied to Yam Seng from stock left over from a promotion which ITC had organised in Singapore in collaboration with Singapore Telecom. ITC also agreed to supply another 5,000 units from the Singapore stock on open account (rather than requiring payment by letter of credit). Mr Tuli confirmed this agreement in an email dated 26 October 2009. In the same email he asked Mr Presswell to air freight a quantity of the 50ml EDT and the deodorant to Dubai and Doha in view of the proximity of 7 November launch date. In another email sent later that day Mr Tuli asked if he could call Mr Presswell to discuss the position as the Dubai launch was being prepared and press organised etc. Mr Tuli stressed that “it will be absolutely necessary to make it this time or there will be negative publicity, something we cannot afford”.

[42] Mr Tuli was unable to contact Mr Presswell by phone and got no reply to his emails until 29 October 2009, when Mr Presswell finally contacted Mr Tuli to say that delivery of the order had been further delayed “due to circumstances beyond my control being the late delivery of certain components and packaging”. As a result, the launch was postponed again, this time until 22 November 2009. Arrangements were discussed for sending supplies of the 50ml EDT and deodorant directly to Dubai by air. The goods finally arrived on the night of 19 November 2009, but because the next day was a public holiday Yam Seng did not manage to get them to the duty free outlets in time for the proposed launch, which was missed. The launch finally took place in the first week of December 2009.

[43] It was Mr Tuli's evidence, which I accept, that the repeated postponement of the launch in Dubai damaged his credibility with an important customer, although because of his good relationship with Dubai Duty Free he still managed to keep their custom.

Other Products

[44] From the start of the contract period Yam Seng had been marketing to its customers the full range of products covered by the Distribution Agreement. Mr Presswell was well aware of this having, for example, been shown by Mr Tuli at their meeting in London on 24 June 2009 a marketing presentation which Yam Seng was using entitled “Welcome to the Theatre of Dreams”. According to the original timetable set out by Mr Presswell before the Distribution Agreement was signed, the black “away kit” versions of the EDT and deodorant were to be launched in August 2009 and the toiletries (ie the hair and body wash, the hair gel and the gift set) in October 2009. However, this did not happen. Against this background, Mr Tuli asked Mr Presswell in an email dated 2 December 2009 to advise “when the other products, ie the hair gel, body wash and the gift set will be available, and also when will the Black range be available”.

[45] Mr Presswell did not reply to this email, but it is apparent from a later email that the matter was discussed when Mr Tuli visited ITC's offices in England later that month. On that occasion, and at a subsequent meeting in Singapore, Mr Presswell said that these products would be available by the end of March 2010.

[46] On 2 February 2010 Yam Seng placed a further order for the existing products (ie the 100ml and 50ml EDT and deodorant in red) followed by an order dated 3 February 2010 for an initial quantity of the 100ml EDT in black. On 8 February 2010 Mr Tuli's son asked when these orders would be shipped and also for an indication of when the other products would be available. There was no response until 17 February 2010, when Mr Presswell telephoned Mr Tuli. In this call he informed Mr Tuli that ITC would not, after all, be launching the toiletry products.

[47] Mr Tuli recorded his disappointment at this news in an email dated 18 February 2010. He wrote:

> "I was disappointed to hear yesterday that the body wash and hair gel will not be available, and we should not accept the orders and forget about these products. As you know, since you started sending us product information, pictures, pricing, catalogues etc from June last year, these items have been included in every presentation we have made.
>
> . . .
>
> Going forward, Roy, I think we need to understand the availability of products, and the schedules, before we go out to customers and start the selling process. As you know we had a lot of problems last year with supplies to Dubai, as deliveries kept getting delayed, and we lost a lot of goodwill. We have also invested a lot in the brand, and it will be a shame if the brand loses its reputation due to us not being able to keep our commitments on deliveries etc. Customers, as you very well know, lose interest very quickly, if the support of the brand is not behind them."

[48] Mr Presswell explained in evidence that the reason for his decision not to produce the toiletries was that the tube supplier insisted on a minimum order quantity (MOQ) of 25,000 for any particular product or design, and that it had become clear that Yam Seng would not be able to place an order of this size. In his oral evidence (although not in his witness statement) Mr Presswell claimed that he told Mr Tuli that any supplies of the toiletries would be subject to MOQs, although he said he could not recall whether this had been mentioned before the Distribution Agreement was signed.

[49] I am sure that Mr Presswell did not say anything about MOQs before the Agreement was signed, not least because he only discovered himself that there would be such a requirement when he reached the stage in the product development of having discussions with component manufacturers in September or October 2009. I think it likely that at that stage Mr Presswell nevertheless hoped, optimistically, that there would enough demand for the products, from Yam Seng and other customers, to make it economic for ITC to order the minimum quantity. Mr Presswell was still no doubt living in hope that this would be so, and failing to face reality, when he told Mr Tuli in December 2009 that the products would be available at the end of the following March. It was only in February 2010 that Mr Presswell, to quote his witness statement, "examined the situation in detail" and "came to the conclusion that there was simply no practical reason in proceeding with launching [the toiletry products]". He may well have told Mr Tuli at that time that the reason for his decision was that the components were subject to MOQs and that the demand was insufficient to make it economic for ITC to manufacture the toiletries. I am sure, however, that it had never previously been suggested to Mr Tuli that there was any constraint of this kind on the availability of the toiletry products.

Further Orders

[50] The orders which Yam Seng had placed on 2 and 3 February, and another order placed on 18 February 2010 for the 50ml EDT and Deodorant Spray in black, were shipped on 23 March 2010. It took a number of chasing emails before the shipment date was confirmed, but Mr Tuli accepted in evidence that the delay in shipping these orders was not significant. The final orders placed by Yam Seng before the contract was terminated were placed on 7 and 9 April 2010. These orders were shipped on 20 April 2010. Mr Tuli agreed that this shipment was prompt.

China Registration

[51] On 22 April 2010 Mr Tuli sent an email to Mr Presswell informing him that Yam Seng was now ready to

launch the Manchester United fragrance in China and asking to know the status of the registration of the products in China. There was no reply to this email.

[52] The registration of the products in China had been discussed the previous July at the football match in Kuala Lumpur to which Mr Presswell had taken Mr Tuli on 18 July 2009. On that occasion Mr Tuli was introduced to someone called Dro Tan who was to be ITC's distributor in China. According to Mr Tuli, he was told that Dro Tan would be applying for the registration of the Manchester United products with the Chinese authorities to enable them to be sold in China. It was also Mr Tuli's evidence that he telephoned Mr Presswell a few days later to ask about the registration and was told that Dro Tan had already applied. There is no contemporaneous reference in any of Mr Tuli's emails to these conversations and Mr Presswell said that the football match at which Mr Tuli was introduced to Dro Tan was a purely social occasion at which there was no detailed business discussion. However, it was also Mr Presswell's evidence that, as a result of an email received from Dro Tan on 31 July 2009, he (Mr Presswell) thought at that stage that everything was moving smoothly towards achieving registration. In these circumstances I think it likely that Mr Presswell did tell Mr Tuli a few days after introducing him to Dro Tan that the registration process in China was underway. That said, there is insufficient evidence for me to conclude that Mr Presswell specifically stated that an application for registration had been submitted or made any statement to Mr Tuli at that time which he did not believe to be true.

[53] I further think it likely that the progress of the registration was subsequently raised by Mr Tuli from time to time in discussion, although it was not a matter of such priority as to be the subject of any emails. The first reference to the subject in an email was on 28 January 2010 when Mr Presswell stated that ITC was “in the process of registering” the EDT 100ml and 50ml which “should be registered by end April 2010”. It was no doubt this statement which prompted Mr Tuli's enquiry on 22 April 2010 about the status of the registration.

[54] It appears (from an email dated 2 June 2010) that Mr Tuli spoke to Mr Presswell about the China registration on the telephone in early May and on that occasion was told that an application for registration had been made only about two weeks earlier. That surprised Mr Tuli as he had previously been given the impression that the registration process was almost complete. In fact, an application had still not even then been made. On 15 April 2010 Mr Presswell had been told in an email from a company assisting with the arrangements for registration that “we are now ready to go pending receipt of the samples”. However, there is no evidence that samples were ever sent.

[55] In response to a request for further information made in these proceedings ITC admitted that, although it “began the process leading up to an application for registration in China”, ITC “did not make a formal application” before the Agreement was terminated.

Breakdown Of The Relationship

[56] On 10 May 2010 Mr Tuli and Mr Presswell met at the Fairmont Hotel in Singapore. Mr Presswell described this meeting in his evidence as “something of a turning point in our relationship because Mr Tuli's whole attitude and approach to me was noticeably different from then on”. He said that at this meeting Mr Tuli for the first time was cold and brisk. I have no doubt that Mr Presswell's perception was correct and that Mr Tuli's frostiness reflected pent-up frustration. It is clear from Mr Tuli's later email dated 2 June 2010 that the two issues which had vexed him most of all were the discovery that he had been misled about the status of the China registration and the announcement earlier in the year that the toiletry products would not after all be made available (together with the fact that Mr Tuli's email of 18 February 2010 complaining about this decision had been ignored by Mr Presswell).

[57] Mr Tuli's anger finally boiled over in a telephone conversation with Mr Presswell on 21 May 2010. The trigger was a request by Mr Tuli for payment of an invoice for certain testers which Yam Seng had supplied to customers. This was a cost which ITC had agreed to bear under Cl F of the Distribution Agreement. Mr Presswell's response to the request for payment was to say: “I am not the Bank of England”. This angered Mr Tuli and the conversation became very heated. Mr Tuli followed up the conversation with an email on 25 May 2010 in which he referred to Mr Presswell's remark and said: “I certainly hope that the Bank of England does not back away from written agreements and commitments made!”

[58] In a further email dated 2 June 2010, Mr Tuli set out a list of issues which he said he had wanted to discuss, the first two of which were the China registration and the decision not to produce the toiletries. Mr Tuli nevertheless ended this email on a more conciliatory note and Mr Presswell replied suggesting that the issues should be discussed at a meeting which they were due to have in Hong Kong on 1 July 2010.

[59] By the time the meeting in Hong Kong took place, a further issue had arisen concerning the price at which the Manchester United fragrance was being sold in Singapore. It was this issue which, from Mr Tuli's point of view, proved to be the final straw.

Singapore Pricing – The Final Straw

[60] It was common ground between Mr Tuli and Mr Presswell that there is an industry assumption that retail prices in domestic markets will be higher than the corresponding duty free retail prices at airports or on board aeroplanes. For Singapore, Yam Seng had been granted the distribution rights for duty free sales but not for the domestic market. For the Singapore domestic market, ITC had appointed another distributor called Kay Ess. Mr Tuli was accordingly concerned that the retail prices of the Manchester United products in the Singapore domestic market should not be lower than the duty free retail prices which Yam Seng had agreed with the airport operator, Nuance Watson, and with airlines operating out of Singapore.

[61] ITC had launched the Manchester United fragrance in Singapore through a special promotion run by Singapore Telecom in which the 100ml EDT had been offered for sale online at a price of 59 Singapore dollars (S$59). This was lower than the intended duty free retail price, and Yam Seng therefore waited for the Singapore Telecom promotion to end before commencing duty free sales in Singapore. The retail price Yam Seng agreed with Nuance Watson and with the airlines was US$44 (equivalent to around S$62).

[62] After the Singapore Telecom promotion had ended, ITC began to sell the 100ml EDT to Kay Ess to distribute in the Singapore domestic market. In emails sent on 20 and 26 January 2010, Mr Tuli asked Mr Presswell to confirm that the retail price for the 100ml EDT in the Singapore domestic market would not be less than the duty free price of US$44. Mr Presswell replied on 26 January 2010 saying that he had informed Kay Ess that they must increase the Singapore domestic retail price to S$65 being the equivalent of US$46.40.

[63] At the time when he sent this email, Mr Presswell had not yet actually informed Kay Ess that they must increase the retail price to S$65. But he did so three days later, in an email sent on 29 January 2010. The response that he received from Kay Ess, on that day, was that the products had already gone on sale at a price of S$59 which had been agreed with ITC, and that Kay Ess could not go back to their customers and inform them that the retail price had increased within a matter of days.

[64] Mr Presswell did not pass on this reply to Mr Tuli, who was therefore left with the impression that ITC had taken action to ensure that the domestic retail price in Singapore would be S$65. In evidence, Mr

Presswell sought to justify his conduct on the basis that there was, in fact, no reason for him to get back to Mr Tuli urgently because Nuance Watson, the duty free operator at Singapore Airport, did not place its first order with Yam Seng until 15 May 2010. This information, however, is something that Mr Presswell only learnt as a result of the disclosure of documents in the present action: at the time he did not know when Nuance Watson would be placing any order. The justification given by Mr Presswell was therefore a spurious one.

[65] On 2 June 2010 Mr Tuli said in an email to Mr Presswell:

> "As we have now launched Singapore Airport Duty Free and the four airlines out of Singapore, and also Malaysia Duty Free, it becomes very important for the prices in the domestic markets of Malaysia and Singapore to be at least the duty free price plus the duty or tax. I am therefore looking forward to receiving the confirmation of these prices which I am sure you have finalised along with your agreement of distributorship."

This issue was also mentioned in Mr Tuli's longer email sent the same day (referred to at para 56 above) listing issues that he wanted to discuss with Mr Presswell.

[66] Mr Tuli was not prepared to leave this issue for discussion at the planned meeting in Hong Kong on 1 July 2010, and sent a further email on 3 June 2010 pressing for confirmation of the domestic price for Singapore. Mr Presswell replied the same day stating that the EDT 100ml (red) "is being retailed in Singapore at S$59 each".

[67] In an email sent on 4 June 2010 Mr Tuli reminded Mr Presswell of what he had said in his email of 26 January 2010, when he had reported having informed Kay Ess that they must increase the Singapore domestic retail price to S$65. Mr Tuli pointed out that a domestic price of S$59 rather than S$65 meant that Yam Seng had violated its agreement with Nuance Watson and the airlines, all of whom had launched the fragrance on 1 June 2010. In a further email sent on 8 June 2010, Mr Tuli reiterated that he had "gone ahead with these accounts in good faith, and on the basis of your written confirmations on the prices".

[68] Mr Presswell responded on 9 June 2010 saying that he had "today" sent an email to Kay Ess informing them that they must immediately increase the Singapore domestic retail price for the Manchester United EDT 100ml to S$65 each. He said that he expected to receive their confirmation the next day that they would follow his request and that he would keep Mr Tuli further informed.

[69] Mr Presswell did send such an instruction to Kay Ess on 9 June 2010. However, the response that he received the next day from Kay Ess was that, while they could advise the department stores to increase the price, it would usually take one or two months before a price change would be implemented. Mr Presswell did not pass this reply on straight away to Mr Tuli. Instead he simply told Mr Tuli in an email dated 11 June 2010 that he had received confirmation from Kay Ess that they had already advised the department stores to increase the price to S$65. Mr Presswell omitted to mention that he had been told this would take one or two months to implement.

[70] The pricing issue was raised at the meeting on 1 July 2010 in Hong Kong when, in Mr Presswell's words, "Mr Tuli absolutely berated me" about the retail price in Singapore. Mr Presswell assured Mr Tuli that he had requested Kay Ess to increase the price immediately from the previously agreed S$59 to S$65. Mr Tuli accepted his explanation.

[71] A few days later, however, Mr Tuli visited a store in Singapore and found the 100ml EDT on sale at a price of S$53.10 – in other words, significantly lower even than the price of S$59 which had supposedly now been increased to S$65. Mr Tuli took a picture on his mobile phone showing the price and emailed it to Mr Presswell on 5 July 2010, saying "From our point of view, the image of the brand, and the pricing as compared to Duty Free, this is a disaster, as the duty free operator is being undercut by the domestic distributor by over 20%!!!!"

[72] Mr Presswell immediately contacted Kay Ess by email. They replied the next day reminding Mr Presswell that they had said the price increase could only take effect after one or two months as the retail stores needed time to activate the change in their system. Kay Ess also explained that the price which Mr Tuli had found was especially low as the store in question (SASA) was a discount store and had been running a sale promotion. Mr Presswell sent this email exchange, together with his earlier email exchange with Kay Ess on 9 and 10 June 2010, to Mr Tuli on 6 July 2010 for his information.

[73] On 7 July 2010 ITC's agent in Singapore, Shunil Lal, sent an email to Mr Presswell in which he pointed out that stores in Singapore were following ITC's "instructed price strategy" of S$59 at retail. Mr Tuli was copied into this email. The conclusion which Mr Tuli drew was that Mr Presswell must have lied to him when informing him in January that the domestic price was being increased to S$65. The belief that Mr Presswell had lied to him on this commercially important issue was a breaking point in the relationship.

Termination Of The Agreement

[74] On 8 July 2010 Mr Tuli sent two emails to Mr Presswell. In the first of these Mr Tuli referred to the email from Shunil Lal about the retail price in Singapore and said:

> "If what Shunil is saying is correct, then apparently you had agreed to the price of S$59 with Kay Ess last year. In this case, I am led to believe that your email of January this year, where you had confirmed the price of $65 to me, was deliberately misinforming me, and I was not told the truth."

Mr Tuli ended by saying that he felt he now had no other choice but to seek legal advice on how to proceed.

[75] In his second email sent on 8 July 2010, Mr Tuli referred to another matter which had been raised at the meeting in Hong Kong. On that occasion Mr Presswell had mentioned his plans for distribution of the Manchester United products in China and had asked Mr Tuli if Yam Seng would agree to "give back" the rights to distribute the toiletry products in Hong Kong and Macau. Mr Presswell had repeated this request in an email sent to Mr Tuli on 2 July 2010. He said that this would be beneficial for him as it would enable ITC to work with the same distributor for the toiletry products in Hong Kong and Macau as they planned to use for the rest of China.

[76] In his second email sent on 8 July 2010, Mr Tuli reminded Mr Presswell that Yam Seng had made considerable efforts to promote the toiletry products only to be told (in February) that ITC would not be able to supply the products. He commented that to have the distribution rights for Hong Kong and Macau taken away now, without Yam Seng even been given chance to sell the products, "does not seem fair". Mr Tuli also pointed out that Yam Seng had, in turn, entered into an exclusive agreement for these territories with SASA.

[77] Mr Presswell did not reply to the email about the Singapore pricing but he did reply later the same day to the email about "giving back" the distribution rights in Hong Kong and Macau. Mr Presswell wrote:

> "If you want to be very precise about our original discussions regarding exclusivity for Hong Kong/Macau, then you were supposed to supply a business plan with quantities for me to agree before actually granting you the exclusivity. This you did not do and therefore I am quite within my rights to inform you that you no longer have any distribution rights for Manchester United products in Hong Kong/Macau other than Manchester United Eau de Toilette."

Mr Presswell's email ended "Sunil, it seems to me that we may have reached the end of the road with regard to our business relationship. The final call is yours!"

[78] After this, the tone of the email correspondence deteriorated further. Mr Tuli accused Mr Presswell of not being a man of his word. Mr Presswell took offence at the aspersion that he was a liar and demanded a retraction. Mr Tuli pressed for a response to his email sent on 8 July 2010 regarding the Singapore pricing, but did not get one. On 29 July 2010 Mr Presswell demanded to know whether Yam Seng intended to pay an invoice for US$38,705 which had become due for payment that day. In response, Mr Tuli made a proposal that:

> "1.We terminate the business with you with immediate effect.
>
> 2. You take back whatever stock we have.
>
> 3. You compensate us for the expenses and losses incurred in our doing this business, as we are terminating the agreement with you as you are in breach."

[79] At 10:33 on 29 July 2010 Mr Presswell replied. He said "My absolute gut instinct has proven to be correct and if you think you can manipulate your way out of the Distribution Agreement then you are totally mistaken." Mr Presswell went on to threaten legal proceedings unless payment of ITC's invoice was received before 13 August 2010.

[80] At 11:04 on 29 July 2010 Mr Tuli replied to say that he was terminating the agreement "as you are in breach" and would now take legal action.

[81] There was further correspondence during August 2010, at first between Mr Tuli and Mr Presswell and then between their solicitors. The point was fairly made by Counsel for Yam Seng in cross-examining Mr Presswell that, although Mr Tuli and his solicitors on several occasions set out their allegations of breach of contract by ITC, no attempt was made Mr Presswell or his solicitors in any correspondence to answer the allegations. The first time that any substantive response was provided by ITC was in its Defence in these proceedings.

[82] These proceedings were commenced by Yam Seng on 28 February 2011.

C. THE CONTRACTUAL CLAIM

The Alleged Breaches

[83] It is Yam Seng's case that ITC committed breaches and demonstrated an intention to commit further breaches of the Agreement which justified Yam Seng in terminating the contract when it did. In summary, the breaches of contract alleged by Yam Seng are that ITC:

> (1) failed to ensure that orders placed by Yam Seng were shipped promptly;
>
> (2) failed to make products available when promised or, in the case of the toiletries, at all;
>
> (3) undercut the duty free prices agreed with Yam Seng by offering the same products for sale at a lower price in the domestic market of the same territory; and
>
> (4) provided false information on which ITC knew that Yam Seng was likely to rely in marketing the products.

The Issues

[84] I will consider these allegations in turn. In relation to each of them, three issues arise: (1) what, if any, relevant obligation did ITC have under the Agreement; (2) was ITC in breach of that obligation; and (3) if so, did the breach justify the termination of the Agreement?

[85] The third of these issues has two aspects which depend on well established legal principles.

[86] In the first place, whether an actual or threatened breach of contract is sufficiently serious to justify the other party in treating the contract as at an end depends (in the absence of any other expressed intention) on whether the breach is characterised as repudiatory. A number of expressions have been used to describe what amounts to a repudiatory breach. Two tests commonly applied are whether the breach is such as to "go to the root of the contract" or to deprive the innocent party of "substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain" from the obligations then remaining unperformed: see Chitty on Contracts (31st ed), Vol 1, paras 24-018 and 24-041.

[87] Second, a breach which has this repudiatory character does not automatically terminate the contract but gives the injured party a choice whether or not to treat the contract as at an end. If the injured party, with knowledge of the breach, instead elects to treat the contract as continuing, he will be taken to have "affirmed" the contract and cannot afterwards terminate it on account of that breach.

Failure To Ship Promptly

[88] In all, seven purchase orders were placed by Yam Seng which were delivered in four shipments. The dates of these orders and the relevant shipment dates were as follows:

Order Date	*Shipment Date*
22 May 2009	24 July 2009
6 August 2009	18 November 2009
2 February 2010	23 March 2010
3 February 2010	23 March 2010
18 February 2010	23 March 2010

9 April 2010	20 April 2010
7 April 2010	20 April 2010

It is Yam Seng's pleaded case that ITC failed to ensure that the orders placed by Yam Seng were shipped "promptly", as required by Cl G of the Agreement.

[89] ITC contended that the obligation to ship "promptly" meant promptly following manufacture of the goods; or alternatively that what counted as prompt depended on whether Yam Seng had previously provided a forecast of its future purchases, as it was required to do by the first paragraph of Cl G. Counsel for ITC, Mr Eaton Turner, argued that ITC could not be expected to have stock immediately available to ship if Yam Seng had failed to forecast its requirements, and that a shipment time which could not have been described as prompt if a forecast had previously been given might nevertheless comply with ITC's obligation where no forecast had been given.

[90] I do not accept that ITC's obligation to ship "promptly" was affected by whether Yam Seng had fulfilled its obligation to provide a forecast of the purchases which it expected to make during the ten months following the first two months of sales. It is clear from the wording of Cl G that Yam Seng's obligation to provide a forecast and ITC's obligation to ensure that all orders will be shipped promptly are independent of each other. Nor on the plain wording of the Agreement did the latter obligation depend in any way on the time required to manufacture products. Yam Seng did not know what arrangements ITC had made with its own suppliers, what stock levels ITC would maintain nor what the time involved in manufacture would be – all of which were matters outside Yam Seng's control. Indeed the obvious purpose of the obligation on ITC to ensure that all orders were shipped promptly was to make it clear that such matters were the sole responsibility of ITC. Thus it was ITC's responsibility to ensure that it had enough stock available at any given time to fulfil its shipment obligation.

[91] I accept, however, that what counts as "prompt" must allow for the need to book container space on a ship sailing to the relevant destination and arrange transportation to the port. There was no evidence specifically directed to the process of shipping goods from England to Singapore. However, from the time which the later orders took to ship and my sense of the parties' expectations, I consider that an order could fairly be described as shipped "promptly" if the bill of lading was issued within around two or three weeks after the order had been placed.

[92] On this basis the first order placed by Yam Seng (on 22 May 2009) was not shipped promptly, as the goods were not shipped until two months later (on 24 July 2009). However, Mr Tuli did not complain of the delay either at the time or in his witness statement, and he accepted in evidence that it did not cause him problems. Mr Tuli further accepted that although there was a delay in making the third shipment (on 24 March 2010), the delay was not significant and that the fourth shipment (on 20 April 2010) was made promptly. I accordingly consider that there was no breach of contract in relation to the last shipment and that any breach in failing to make the first and third shipments promptly was not material.

[93] The position was very different in the case of the second shipment. In that case there was a serious delay, exacerbated by the fact that Mr Presswell made several promises of shipment and delivery dates which were not kept. Furthermore, as reflected in the correspondence at the time, the delay caused significant embarrassment to Mr Tuli and damaged his credibility with an important customer, Dubai Duty Free, which had to be asked to postpone the launch of the new fragrance several times.

[94] Nevertheless, in the context of a distribution agreement with a contract period of two and a half years

and which covered many territories, it cannot in my view be said that the breach of contract in shipping this order late was such as to deprive Yam Seng of substantially the whole benefit which it was intended that Yam Seng should obtain from the contract. In any event, Yam Seng did not seek to terminate the contract on account of this breach but chose to go on with the contract despite the breach and with knowledge of it. Having thus affirmed the contract, Yam Seng could not subsequently rely on the breach as a reason to terminate the contract in July 2010.

Obligation To Make Products Available

[95] The Agreement did not expressly state when products would be available to order. Yam Seng's case is that it was implicit in ITC's obligation to ensure that all orders would be shipped promptly that all the products described in the Agreement would be available to order from the start of the contract period. Hence ITC was in breach of the Agreement because:

> (1) for the first six months of the Agreement only one product was available (EDT 100ml); and
>
> (2) three of the six products (hair and body wash, hair gel and the gift sets) were never made available.

[96] ITC's pleaded case is that it had no obligation to make the products referred to in the Agreement available for distribution: the Agreement simply provided a framework within which sales could take place of such products as ITC in fact made available and Yam Seng chose to order. Understandably, Mr Eaton Turner drew back in his oral submissions from the unattractive implication of this argument that ITC, having entered into the Agreement in the knowledge that Yam Seng would be incurring significant expenditure in marketing and promoting the products, could then have chosen to make none of the products available for Yam Seng to order. Mr Eaton Turner submitted that the contractual obligation to make products available was defined by the letter from ITC dated 2 March 2009 which specified dates when the various products would be launched.

[97] If the Agreement were to be read in isolation, I would construe it as containing an implied undertaking that all the products described in the Agreement were available for order. I would derive that implication, not from the shipment obligation in Cl G, but from the grant of rights in Cl A. It would ordinarily be implicit in the grant of a right for the contract period to “distribute, market and sell” a particular product that the product was and would throughout the period be available to distribute. However, the Agreement was, as I have found, made against the background of a clear understanding that most of the products would not be available to order immediately and that they would be launched on dates which had been set out in ITC's letter of 2 March 2009 (and in the case of the EDT 50ml, in its letter of 9 April 2009). In these circumstances to interpret the Agreement as obliging ITC to make all the products available for order immediately would, it seems to me, be as unreasonable as the opposite contention that ITC had no obligation to make products available. Neither contention reflects the reality of what the parties reasonably understood and expected the position to be.

[98] In my view, the legal analysis which best gives effect to what a reasonable person would have understood the parties to have intended is to interpret the letters of 2 March and 9 April 2009 as containing collateral warranties. The language of those letters is categorical. They do not state that it is ITC's current intention to launch the products on the specified dates but that ITC “will” do so. ITC knew that Yam Seng would be relying in marketing the products and soliciting orders from customers on the time scales specified. In those circumstances I consider that the objective intention was that the commitments as to dates given in the letters would have contractual effect.

[99] On that basis the absence of any provision in the Agreement dealing with the matter is explicable. The Agreement did not stipulate when the products would be launched, but that had been set out elsewhere.

Breaches Of The Obligation

[100] On this analysis, ITC was in breach of its obligation to make products available in the following respects:

> (1) The deodorant body spray was not available at the outset or until November 2009;
>
> (2) The EDT 50ml was not made available in around August 2009 but only in November 2009;
>
> (3) The EDT and deodorant were not made available in black in around August 2009 but only in February 2010; and
>
> (4) The toiletries and gift sets were not made available in October 2009 and ITC indicated in February 2010 that they would never be produced at all.

[101] The delays in producing the deodorant and EDT 50ml led to the delay in shipping the second order. For the reasons given above, however, the late supply of these products, although disruptive for Yam Seng and damaging to its relationship with Dubai Duty Free, was not in my view a repudiatory breach of the Agreement. In any event, Yam Seng did not seek to terminate the Agreement on account of these delays and therefore lost any right to do so.

[102] Little mention was made either at the time or in evidence of the delay in producing the black versions of the EDT and deodorant, and I infer that this did not cause any significant prejudice.

Failure To Produce The Toiletries

[103] As for the hair gel and hair and body wash, ITC's case was that these products were peripheral and of little relevance. In his first witness statement Mr Presswell expressed the view that the toiletries would account for, at the very most, 2% of total duty free sales. In his second witness statement Mr Presswell suggested that this was, if anything, an over-estimate. He exhibited print-outs from the websites of various duty free operators showing that none of them sells or promotes any hair gel or body wash products.

[104] Mr Tuli agreed that the EDT was always going to be the main driver of duty free sales and the main source of profits. His own profit estimate made at the time of entering into the Agreement, to which I will refer later, confirms this. He made the point, however, that he had included the toiletries in all his presentations to customers before eventually being told that they were not going to be produced. Mr Tuli also pointed out that Mr Presswell had led him to believe that the hair gel had massive potential in the domestic market in China.

[105] The evidence established that the toiletry products were of far less commercial importance than the EDT. I do not accept, however, that they were as irrelevant as Mr Presswell sought to suggest. Indeed, if Mr

Presswell's evidence were accurate one may wonder why they were included in the Distribution Agreement in the first place. Furthermore, the very fact that Yam Seng featured the toiletries in all its marketing presentations indicates that they were thought to have some significant value. I take their main value to have been to enhance the overall attractiveness and profile of the Manchester United fragrance brand by enabling Yam Seng to offer a full range of products, even though it was not expected that the toiletries would themselves account for more than a small proportion of total sales and profits.

[106] There is a further aspect to Mr Presswell's announcement in February 2010 that ITC would not after all be producing the toiletries which, in my view, is of greater significance. ITC had led Yam Seng to believe that the toiletries were under production and on the faith of this Yam Seng had presented the hair gel and body wash products to its customers and solicited orders for them. For Yam Seng then to have to inform its customers that the toiletries were not going to be available after all was damaging to its credibility. Even more important, it was very damaging to ITC's credibility.

[107] Even so, serious as this breach was, I have concluded that it was not so serious as to justify termination of the Agreement. In any event Yam Seng with knowledge of the breach chose to carry on with the contract, placing further orders in April 2010. Having affirmed the Agreement in this way, Yam Seng could not afterwards terminate it on account of this breach.

Request To "*Give Back*" *Distribution Rights*

[108] It might have been expected that after being told that ITC was not going to produce the toiletries Mr Tuli would have heard no more about them. As described earlier, however, when they met in Hong Kong on 1 July 2010 Mr Presswell asked Mr Tuli if Yam Seng would agree to "give back" the rights to distribute the toiletry products in Hong Kong and Macau as it would be beneficial for ITC to distribute the toiletry products in those territories using another distributor.

[109] One of the potential benefits advertised by Mr Presswell when the Agreement was being negotiated had been that the Manchester United hair gel had "massive potential" in China. After Yam Seng had been marketing the hair gel and other toiletry products for several months, Mr Tuli had then been told that they would not after all be produced. He had also had his expectations disappointed over registration in China. Those were two of the issues which Mr Tuli had raised for discussion at the Hong Kong meeting. Against that background, for Mr Presswell to ask at the meeting if Yam Seng would "give back" the rights to distribute the toiletry products in two of its Chinese territories so that ITC could distribute those products there using another distributor was undiplomatic, to put it no higher.

[110] When Mr Tuli did not agree to "give back" these distribution rights, Mr Presswell's response (in an email sent on 8 July 2010) was to claim that the grant of exclusivity for Hong Kong and Macau had been conditional on Yam Seng supplying a business plan with quantities for him to agree. That was not true. Although Cl G of the Agreement had required Yam Seng, based on the sales results for the first two months, to provide a forecast of sales and purchases from ITC for the next ten months, the grant of rights in Cl A was not made conditional on the provision of such a forecast. The only relevant condition in the Agreement when signed was that its continuation after 30 April 2010 until 31 December 2011 was subject to Yam Seng achieving "mutually agreed targets". Moreover, that condition was later removed when the Agreement was revised in September 2009 in recognition, as I have found, of the fact that the delays and uncertainty over deliveries had made it impracticable for Yam Seng to commit to such targets.

[111] Mr Presswell accepted in cross-examination that he had been mistaken in claiming that Yam Seng was supposed to supply a business plan before being granted exclusivity. He said that he had written this in

his email based on his recollection without checking the actual terms of the Agreement. The real controversy, however, surrounded the further statement in Mr Presswell's email that therefore “I am quite within my rights to inform you that you no longer have any distribution rights for Manchester United products in Hong Kong/Macau other than Manchester United Eau de Toilette.”

[112] Mr Salter on behalf of Yam Seng submitted that this statement amounted to a purported withdrawal of the right to distribute any product other than the EDT in Hong Kong and Macau. Mr Eaton Turner disputed this and argued that the words “I am quite within my rights to inform you” signified that Mr Presswell was not actually purporting to withdraw the distribution rights but was merely suggesting (albeit incorrectly) that ITC would be entitled to do so if it chose. At the very least, Mr Eaton Turner submitted, the statement was equivocal and therefore did not amount to a clear refusal to perform the Agreement.

[113] In my view a reasonable person in the position of Mr Tuli would have understood Mr Presswell's email as a clear refusal to perform the Agreement. I agree with Mr Eaton Turner that the email was equivocal as to whether Mr Presswell was actually purporting to withdraw Yam Seng's distribution rights there and then – though it is to be noted that Mr Presswell did not say that he “would be” within his rights to inform Mr Tuli that Yam Seng no longer had such rights but (categorically) that he was within his rights to do so. The essential point, however, which Mr Presswell was making was that he did not accept that Yam Seng had any right to prevent him from appointing another distributor for the toiletry products in Hong Kong and Macau and, by clear implication, that he intended to do so whether Yam Seng gave its consent or not. Mr Presswell's further statement that “it seems to me that we may have reached the end of the road with regard to our business relationship. The final call is yours!” reinforced the message that Mr Presswell had no intention of backing down on the point and that, having refused to supply the toiletries to Yam Seng in flagrant breach of the Agreement, ITC now intended to supply them to someone else, in further plain breach of the Agreement, whether Yam Seng liked it or not.

[114] In short, Mr Presswell's email was not confined to asserting his (erroneous) view as to the effect of the contract. It was not only provocative but conveyed a clear threat to breach the contract on a manifestly spurious ground. Coming as it did against the background of ITC's earlier breaches of contract and in particular the refusal to supply the toiletry products to Yam Seng after promising that they would be available by the end of March 2010, I consider that this communication put Mr Tuli in a position where he simply could no longer reasonably place any reliance on ITC to adhere to the terms of the Agreement.

[115] I conclude that the email sent by Mr Presswell on 8 July 2010 amounted to a repudiation and that Yam Seng was entitled in response to this communication to terminate the contract.

Alleged Threat To Withdraw Distribution Rights In China

[116] Yam Seng advanced an argument that an email from Mr Presswell to Mr Tuli dated 11 June 2010 contained a denial of Yam Seng's rights to act as the domestic distributor for the Manchester United products in the two Chinese cities of Chongqing and Xian which amounted to a repudiation of the Agreement. In that email Mr Presswell stated that:

> “. . . I may appoint Jahwa Shanghai as the China domestic distributor for Manchester United personal care fragrance products excluding Chongqing and Xian providing that your business plan for these two cities justifies ITC granting you exclusivity.”

Mr Salter submitted that under the Agreement ITC had already granted Yam Seng the exclusive distribution

rights for Chongqing and Xian without making this conditional on the provision of a business plan and that by this statement ITC evinced an intention not to honour the Agreement.

[117] As in the case of the grant of exclusive rights for Hong Kong and Macau, Mr Presswell was wrong to suggest that the grant of exclusivity for Chongqing and Xian was, or could be made, conditional on the provision of a business plan. I do not consider, however, that the statement in this email can reasonably be understood as demonstrating any firm intention to act in breach of the Agreement, let alone the clear and absolute refusal to perform the contract in some essential respect which would be required to establish a repudiation. The appointment of the China domestic distributor was raised only as a possibility ("I may appoint") and in circumstances where no distribution in China could in any event take place unless and until the products had been registered. Even then, the email indicated that any such appointment would, *prima facie*, exclude the two cities named in the Agreement with Yam Seng, although that intention was unjustifiably qualified. Nor were the domestic distribution rights for these two Chinese cities of such importance in the overall scheme of the Agreement that a denial of exclusivity in relation to them could in itself be said to deprive Yam Seng of substantially the whole benefit which it was intended that Yam Seng should obtain from the contract.

[118] I think it notable too that Mr Tuli did not respond to this statement in any email and made no reference to it in the correspondence leading up to and immediately following his decision to terminate the Agreement. The reason for that, I infer, is that he rightly at the time did not attach the significance to the statement in Mr Presswell's 11 June 2010 email which Yam Seng has since sought to give it.

An Implied Duty Of Good Faith?

[119] As pleaded in the Particulars of Claim, it is Yam Seng's case that there was an implied term of the Agreement that the parties would deal with each other in good faith.

[120] The subject of whether English law does or should recognise a general duty to perform contracts in good faith is one on which a large body of academic literature exists. However, I not am aware of any decision of an English court, and none was cited to me, in which the question has been considered in any depth.

[121] The general view among commentators appears to be that in English contract law there is no legal principle of good faith of general application: see Chitty on Contract Law (31st ed), Vol 1, para 1-039. In this regard the following observations of Bingham LJ (as he then was) in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439, [1988] 1 All ER 348, [1988] 2 WLR 615 are often quoted:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing . . . English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

[122] Another case sometimes cited for the proposition that English contract law does not recognise a duty of good faith is *Walford v Miles* [1992] 2 AC 128, [1992] 1 All ER 453, [1992] 2 WLR 174, where the House of

Lords considered that a duty to negotiate in good faith is “inherently repugnant to the adversarial position of the parties when involved in negotiations” and “unworkable in practice” (per Lord Ackner at p 138). That case was concerned, however, with the position of negotiating parties and not with the duties of parties who have entered into a contract and thereby undertaken obligations to each other.

[123] Three main reasons have been given for what Professor McKendrick has called the “traditional English hostility” towards a doctrine of good faith: see McKendrick, Contract Law (9th ed) pp 221-2. The first is the one referred to by Bingham LJ in the passage quoted above: that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight.

[124] In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham LJ in the *Interfoto* case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems – including those of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation. For example, the Unfair Terms in Consumer Contracts Regulations 1999, which give effect to a European directive, contain a requirement of good faith. Several other examples of legislation implementing EU directives which use this concept are mentioned in Chitty on Contract Law (31st ed), Vol 1 at para 1-043. Attempts to harmonise the contract law of EU member states, such as the Principles of European Contract Law proposed by the Lando Commission and the European Commission's proposed Regulation for a Common European Sales Law on which consultation is currently taking place, also embody a general duty to act in accordance with good faith and fair dealing. There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase.

[125] It would be a mistake, moreover, to suppose that willingness to recognise a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism. Any such notion is gainsaid by that fact that such a doctrine has long been recognised in the United States. The New York Court of Appeals said in 1918: “Every contract implies good faith and fair dealing between the parties to it”: *Wigand v Bachmann-Bechtel Brewing Co*, 222 NY 272 at 277. The Uniform Commercial Code, first promulgated in 1951 and which has been adopted by many States, provides in s 1-203 that “every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement”. Similarly, the Restatement (Second) of Contracts states in s 205 that “every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement”.

[126] In recent years the concept has been gaining ground in other common law jurisdictions. Canadian courts have proceeded cautiously in recognising duties of good faith in the performance of commercial contracts but have, at least in some situations, been willing to imply such duties with a view to securing the performance and enforcement of the contract or, as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into: see eg *Transamerica Life Inc v ING Canada Inc* (2003) 68 OR (3d) 457, 468.

[127] In Australia the existence of a contractual duty of good faith is now well established, although the limits and precise juridical basis of the doctrine remain unsettled. The springboard for this development has been

the decision of the New South Wales Court of Appeal in *Renard Constructions (ME) Pty v Minister for Public Works* (1992) 44 NSWLR 349, where Priestley JA said (at 95) that:

> ". . . people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations."

[128] Although the High Court has not yet considered the question (and declined to do so in *Royal Botanic Gardens and Domain Trust v Sydney City Council* (2002) 186 ALR 289) there has been clear recognition of the duty of good faith in a substantial body of Australian case law, including further significant decisions of the New South Wales Court of Appeal in *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NWSCA 187 and *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15.

[129] In New Zealand a doctrine of good faith is not yet established law but it has its advocates: see in particular the dissenting judgment of Thomas J in *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 at 517.

[130] Closer to home, there is strong authority for the view that Scottish law recognises a broad principle of good faith and fair dealing: see the decision of the House of Lords in *Smith v Bank of Scotland* 1997 SC (HL) 111 esp at p 121 (per Lord Clyde).

[131] Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.

[132] Traditionally, the two principal criteria used to identify terms implied in fact are that the term is so obvious that it goes without saying and that the term is necessary to give business efficacy to the contract. More recently, in *Attorney General for Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988 at 1993-5, the process of implication has been analysed as an exercise in the construction of the contract as a whole. In giving the judgment of the Privy Council in that case, Lord Hoffmann characterised the traditional criteria, not as a series of independent tests, but rather as different ways of approaching what is ultimately always a question of construction: what would the contract, read as a whole against the relevant background, reasonably be understood to mean?

[133] The modern case law on the construction of contracts has emphasised that contracts, like all human communications, are made against a background of unstated shared understandings which inform their meaning. The breadth of the relevant background and the fact that it has no conceptual limits have also been stressed, particularly in the famous speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896 at pp 912-3, as further explained in *BCCI v Ali* [2001] UKHL 8, [2002] 1 AC 251 at p 269, [2001] 1 All ER 961.

[134] Importantly for present purposes, the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. Some of these are norms that command general social acceptance; others may be specific to a particular trade or commercial activity; others may be more specific still, arising from features of the particular contractual relationship. Many such norms are naturally taken for granted by the parties when making any contract without being spelt out in the document recording their agreement.

[135] A paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust. Yet it is seldom, if ever, made the subject of an express contractual obligation. Indeed if a party in negotiating the terms of a contract were to seek to include a provision which expressly required the other party to act honestly, the very fact of doing so might well damage the parties' relationship by the lack of trust which this would signify.

[136] The fact that commerce takes place against a background expectation of honesty has been recognised by the House of Lords in *HIH Casualty v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] 2 Lloyd's Rep 61. In that case a contract of insurance contained a clause which stated that the insured should have "no liability of any nature to the insurers for any information provided". A question arose as to whether these words meant that the insured had no liability even for deceit where the insured's agent had dishonestly provided information known to be false. The House of Lords affirmed the decision of the courts below that, even though the clause read literally would cover liability for deceit, it was not reasonably to be understood as having that meaning. As Lord Bingham put it at 15 "Parties entering into a commercial contract . . . will assume the honesty and good faith of the other; absent such an assumption they would not deal." To similar effect Lord Hoffmann observed at 68 that parties "contract with one another in the expectation of honest dealing", and that:

> ". . . in the absence of words which expressly refer to dishonesty, it goes without saying that underlying the contractual arrangements of the parties there will be a common assumption that the persons involved will behave honestly."

[137] As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes without saying. Such a requirement is also necessary to give business efficacy to commercial transactions.

[138] In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document. A key aspect of good faith, as I see it, is the observance of such standards. Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include "improper", "commercially unacceptable" or "unconscionable".

[139] Another aspect of good faith which overlaps with the first is what may be described as fidelity to the parties' bargain. The central idea here is that contracts can never be complete in the sense of expressly providing for every event that may happen. To apply a contract to circumstances not specifically provided for, the language must accordingly be given a reasonable construction which promotes the values and purposes expressed or implicit in the contract. That principle is well established in the modern English case law on the interpretation of contracts: see eg *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137, [2012] 1 All ER (Comm) 1; *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3

at 23, 45 and 54. It also underlies and explains, for example, the body of cases in which terms requiring cooperation in the performance of the contract have been implied: see *Mackay v Dick* (1881) 6 App Cas 251, 263, 8 R 37, 29 WR 541; and the cases referred to in Chitty on Contracts (31st ed), Vol 1 at paras 13-012 – 13-014.

[140] The two aspects of good faith which I have identified are consistent with the way in which express contractual duties of good faith have been interpreted in several recent cases: see *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch) at 95 – 97, [2007] 3 EGLR 101; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at 246.

[141] What good faith requires is sensitive to context. That includes the core value of honesty. In any situation it is dishonest to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue. Frequently, however, the requirements of honesty go further. For example, if A gives information to B knowing that B is likely to rely on the information and A believes the information to be true at the time it is given but afterwards discovers that the information was, or has since become, false, it may be dishonest for A to keep silent and not to disclose the true position to B. Another example of conduct falling short of a lie which may, depending on the context, be dishonest is deliberately avoiding giving an answer, or giving an answer which is evasive, in response to a request for information.

[142] In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith. English law has traditionally drawn a sharp distinction between certain relationships – such as partnership, trusteeship and other fiduciary relationships – on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such “relational” contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements.

[143] The Agreement in this case was a distributorship agreement which required the parties to communicate effectively and cooperate with each other in its performance. In particular, ITC needed to plan production and take account of the expected future demand from Yam Seng for Manchester United products. For its part Yam Seng, which was incurring expense in marketing the products and was trying to obtain orders, was arguably entitled to expect that it would be kept informed of ITC's best estimates of when products would be available to sell and would be told of any material change in this information without having to ask. Yam Seng's case was not advanced in this way, however, and it is therefore unnecessary for me to decide whether the requirements of good faith in this case extended to any such positive obligations of disclosure.

[144] Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people. The standard is thus similar to that described by Lord Nicholls in a different context in his seminal speech in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at pp 389-390, [1995] 3 All ER 97, [1995] 3 WLR 64.

This follows from the fact that the content of the duty of good faith is established by a process of construction which in English law is based on an objective principle. The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.

[145] Understood in the way I have described, there is in my view nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts. It is consonant with the theme identified by Lord Steyn as running through our law of contract that reasonable expectations must be protected: see *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409, [1993] 2 Lloyd's Rep 194, 196; and (1997) 113 LQR 433. Moreover such a concept is, I believe, already reflected in several lines of authority that are well established. One example is the body of cases already mentioned in which duties of cooperation in the performance of the contract have been implied. Another consists of the authorities which show that a power conferred by a contract on one party to make decisions which affect them both must be exercised honestly and in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally): see eg *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The "Product Star")* [1993] 1 Lloyd's Rep 397, 404; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304, [2008] 1 Lloyd's Rep 558, 575-7. A further example concerns the situation where the consent of one party is needed to an action of the other and a term is implied that such consent is not to be withheld unreasonably (in a similar sense): see eg *Gan v Tai Ping (Nos 2 & 3)* [2001] Lloyd's Rep IR 667; *Eastleigh BC v Town Quay Developments Ltd* [2009] EWCA Civ 1391, [2010] 2 P & CR 19. Yet another example, I would suggest, is the line of authorities of which the *Interfoto* case is one which hold that an onerous or unusual contract term on which a party seeks to rely must be fairly brought to the notice of the other party if it is to be enforced.

[146] There are some further observations that I would make about the reasons I mentioned earlier for the reluctance of English law to recognise an implied duty on contracting parties to deal with each other in good faith.

[147] First, because the content of the duty is heavily dependent on context and is established through a process of construction of the contract, its recognition is entirely consistent with the case by case approach favoured by the common law. There is therefore no need for common lawyers to abandon their characteristic methods and adopt those of civil law systems in order to accommodate the principle.

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

[149] Third, a further consequence of the fact that the duty is based on the parties' presumed intention is that it is open to the parties to modify the scope of the duty by the express terms of their contract and, in principle at least, to exclude it altogether. I say "in principle at least" because in practice it is hardly conceivable that contracting parties would attempt expressly to exclude the core requirement to act honestly.

[150] Fourth, I see no objection, and some advantage, in describing the duty as one of good faith "and fair dealing". I see no objection, as the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in

which the expression “good faith” is used.

[151] Fifth, in so far as English law may be less willing than some other legal systems to interpret the duty of good faith as requiring openness of the kind described by Bingham LJ in the *Interfoto* case as “playing fair'” “coming clean” or “putting one's cards face upwards on the table”, this should be seen as a difference of opinion, which may reflect different cultural norms, about what constitutes good faith and fair dealing in some contractual contexts rather than a refusal to recognise that good faith and fair dealing are required.

[152] Sixth, the fear that recognising a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation.

[153] In the light of these points, I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.

[154] I have emphasised in this discussion the extent to which the content of the duty to perform a contract in good faith is dependent on context. It was Mr Salter's submission that the relevant content of the duty in this case was captured by two more specific terms which Yam Seng contends are to be implied into the Agreement. I therefore turn to consider these.

A Duty Not To Give False Information?

[155] The first more specific term said by Yam Seng to be implied in the Agreement is a term that:

> “insofar as [ITC] instructed or encouraged [Yam Seng] to incur marketing expenses it would not do so for products which it was unable or unwilling to supply, nor offer false information on which [Yam Seng] was likely to rely to its detriment.”

[156] As I see it, the essential difficulty with this formulation is that it does not distinguish between encouraging expenditure in the expectation that products would be supplied, or providing false information, dishonestly and doing so innocently. In my view, such a distinction is critical. To take the first limb of the alleged implied term, in so far as ITC led Yam Seng to expect that products were going be supplied believing that it would be able to supply them and intending to do so, there would be no lack of good faith on the part of ITC. The position would be different if ITC wilfully led Yam Seng to expect that products would be supplied in circumstances where ITC did not in fact intend to supply them or knew that it would be unable to do so. Conduct of the latter kind would be clearly contrary to standards of commercial dealing which the parties would reasonably have taken for granted; but I can see no basis for implying any more onerous obligation. The same distinction needs to be drawn in relation to the second limb of the alleged implied term. I can see no justification for implying an unqualified obligation not to provide false information – equivalent to a warranty that any information given by ITC on which Yam Seng was likely to rely would be true. By contrast, it was clearly implied that ITC would not *knowingly* provide false information on which Yam Seng was likely to rely. Such conduct would plainly infringe the core expectation of honesty discussed earlier.

A Duty Not To Undercut Duty Free Prices?

[157] The second more specific term which Yam Seng contends was implied in the Agreement is a term that “[ITC] would not prejudice [Yam Seng]'s sales by offering the same products for sale within the same

territories at a lower price than [Yam Seng] was permitted to offer."

[158] As pointed out by Mr Eaton Turner, this alleged term as formulated does not accord with the facts, as ITC did not itself make any direct sales in any territory. In particular, in Singapore – which was the focus of Yam Seng's complaint – ITC sold the Manchester United 100ml EDT to a distributor, Kay Ess, which in turn sold the product to retailers for sale to consumers. There is no evidence of the price at which ITC sold the product to Kay Ess. In any case, the price about which Yam Seng complained was not the price paid or charged by Kay Ess but was the retail price in stores. ITC could not directly dictate the retail price. What ITC could do is agree with its distributor, Kay Ess, a recommended retail price for the Singapore domestic market and ask Kay Ess to seek to ensure so far as it could that retailers offered the product for sale at that price.

[159] The highest that the putative implied term could therefore be put is as an obligation not to approve a retail price for any product for any domestic market which was lower than the duty free retail price for the product agreed with Yam Seng.

[160] In ordinary circumstances I would see no justification for implying such a term. The reasonable commercial expectation would be that ITC was free to sell its products to others on such terms as it chose unless it had expressly agreed otherwise with Yam Seng. Three particular contextual features of this case, however, lead me to conclude that there was in fact such an implied term of the Agreement.

[161] The first is that the Agreement is a skeletal document which does not attempt to specify the parties' obligations in any detail. In relation to such a document it is easier than in the case of a detailed and professionally drafted contract to suppose that a part of the bargain has not been expressly stated.

[162] Second, I think it significant that the Agreement (at Cl E) specified the "duty free retail price" for each product. Yam Seng was thus constrained by the Agreement from selling or authorising the sale of any product in duty free outlets at any lower price than the specified duty free retail price. It would be surprising in these circumstances if the parties had intended that ITC should be free to authorise the sale of a product in the domestic market of any territory at a lower price than Yam Seng was permitted by its contract with ITC to sell the same product in duty free.

[163] The third and in my view decisive contextual feature is that, as was common ground, the background to the Agreement included an industry assumption that retail prices in domestic markets will be higher than the corresponding duty free retail prices at airports or on board aeroplanes. The parties would reasonably have understood and expected that their obligations would reflect this assumption without needing to spell this out.

[164] In my view these matters, taken together, lead to the necessary implication that ITC would not authorise the sale of any product in the domestic market of any territory covered by the Agreement at a lower retail price than the duty free retail price for the product which had been specified in the Agreement with Yam Seng.

Was There A Breach By ITC?

[165] The next question is therefore whether there was a breach by ITC of either of the particular terms which I have held was implied in the Agreement: namely, the implied duty of honesty in the provision of information and the implied duty not to approve a domestic retail price for a product which undercut the duty

free retail price.

[166] It is convenient to take the latter first. I find that Yam Seng has not established that ITC was in breach of this implied term.

[167] The retail price agreed by ITC with Kay Ess for sales of the 100ml EDT in the Singapore domestic market was S$59, equivalent to just over US$42. The duty free retail price for the 100ml EDT specified in the Agreement was US$42. Therefore, ITC did not agree a lower price for the domestic market than the retail price agreed with Yam Seng for duty free sales.

[168] The problem seems to have arisen because the duty free retail price which Yam Seng communicated to Nuance Watson, the duty free operator at Changi Airport in Singapore, and to the airlines, was US$44. There is no evidence, however, that before setting this price Mr Tuli obtained Mr Presswell's agreement to vary the duty free retail price for the 100ml EDT specified in the Agreement.

[169] Where I consider that Yam Seng has legitimate cause for complaint in relation to domestic pricing in Singapore is that Mr Presswell misled Mr Tuli about what ITC had done. For the reasons indicated, Yam Seng was not entitled to insist that ITC instruct Kay Ess to set the Singapore domestic retail price for the 100ml EDT above US$44. However, Mr Presswell agreed to do so and in his email to Mr Tuli dated 26 January 2010 said that he had informed Kay Ess that they must increase the Singapore domestic retail price to S$65 being the equivalent of US$46.40. I have found that at the time when he sent this email Mr Presswell had not yet sent such an instruction to Kay Ess, and that when he did so on 29 January 2010 he was told in reply that the product had already gone on sale at a price of S$59 and that Kay Ess was not willing go back to its customers and inform them that the retail price had increased within a matter of days. Mr Presswell nevertheless left the matter there and did not inform Mr Tuli that the domestic retail price had not, after all, been increased. Instead he left Mr Tuli with the understanding, for which he was responsible and on which he knew that Yam Seng would be relying, that the domestic retail price was being increased when he knew that this information was false.

[170] Mr Presswell showed no sign either in the emails exchanged when the facts came to light in July 2010 or in his evidence in court that he saw anything dishonest about his conduct. When Mr Tuli accused him in their correspondence of having lied about the Singapore domestic price, Mr Presswell took great offence and (in an email dated 9 July 2010) demanded “by return email your retraction and sincere apology”. Despite numerous requests, however, Mr Presswell never gave any answer in correspondence to the accusation that he had knowingly misled Mr Tuli. He simply ignored the requests for an explanation.

[171] There can, however, be no doubt that objectively, whether Mr Presswell recognised it or not, his conduct in leaving Mr Tuli with the belief that the domestic retail price had been increased to S$65 when Mr Presswell knew that to be untrue was dishonest. Furthermore, the nature of the dishonesty, on a matter of commercial importance in Yam Seng's dealings with its customers, was in my view such as to strike at the heart of the trust which is vital to any long term commercial relationship, particularly one which is dependent as this relationship was on the mutual trust of two individuals. I do not think that a businessman in Mr Tuli's position could reasonably be expected to continue to do business with ITC after Mr Presswell's dishonest behaviour regarding the Singapore pricing had come to light – all the more so given Mr Presswell's refusal to explain his conduct. I therefore have no hesitation in holding that this was a repudiatory breach of contract.

[172] There was a further matter about which Mr Presswell appears to have misled Mr Tuli, although it is not one of which Mr Tuli was aware at the time of his decision to terminate the Agreement. This concerned the steps taken to register the products in China. I have found that both before the Agreement was made and

afterwards Mr Presswell gave information to Mr Tuli about the time frame within which registration would take place which was wholly unrealistic. That in itself did not amount to breach of the duty of honesty in the provision of information which I have held was implied. However, when, as I have found that he did, Mr Presswell told Mr Tuli in early May 2010 that an application for registration had been made some two weeks earlier, it is hard to suppose that he did not appreciate that this information was false and that, as ITC has admitted in these proceedings, an application had still not in fact been made. Yam Seng did not allege, however, that the information given in early May 2010 was a further instance of bad faith, and in these circumstances it is not right that I should make any finding to that effect.

Conclusion On Lawfulness Of Termination

[173] In summary, I have found that ITC was in repudiatory breach of the Agreement in two respects:

> (1) In signifying its intention to use another distributor for the toiletry products in Hong and Macau, in breach of the exclusivity granted to Yam Seng, having previously refused, in breach of its contractual obligation, to supply the toiletries to Yam Seng; and
>
> (2) In giving Yam Seng information about the Singapore domestic retail price on which Mr Presswell knew that Yam Seng was likely to rely and which he knew to be false.

[174] Either of these breaches on its own would in my view have justified the termination of the Agreement on 29 July 2010; in combination they certainly did so.

Measure Of Damages For Breach Of Contract

[175] Yam Seng claims damages for breach of contract on two alternative measures. Its primary claim is for loss of profits which Yam Seng would allegedly have made if ITC had performed its obligations under the Distribution Agreement for the whole of the contract period. Alternatively, Yam Seng claims as wasted expenditure the loss which it sustained as a result of entering into the contract.

[176] I will consider the figures in more detail later, but in broad terms Yam Seng appears to have made a loss in its trading under the Distribution Agreement because such gross profits as it has received from sales of the fragrance have failed to defray its marketing and promotion costs.

Claim For Loss Of Profits

[177] Yam Seng claims that, if it had not been for ITC's breaches and the consequent premature termination of the Distribution Agreement, Yam Seng would have made a net profit from the Agreement which Yam Seng quantifies at S$789,516 (equivalent to around £370,000).

[178] This figure is based on an estimate which Mr Tuli says he made at the time of entering into the Agreement of the profits which Yam Seng could expect to make from selling the 100ml EDT. There is no document evidencing the calculation, but it was Mr Tuli's evidence that he made what he called the “conservative assumption” that Yam Seng could sell 1,500 units per month in each of China, the Middle East and the Asia Pacific region and another 1,000 units per month to airlines. This would produce total monthly sales of 5,500 units. Mr Tuli estimated that his gross profit per unit would be US$6.80 and assumed selling

expenses (to include marketing) of 50% of the gross profit, yielding a net margin of US$3.40. Sales of 5,500 units at a net margin of US$3.40 would generate a net profit of US$18,700 per month which at the time was equivalent to about S$26,180. Mr Tuli says he rounded this down to S$25,000 as “a safe estimate”. Over the whole contract period from 12 May 2009 to 31 December 2011, a profit of S$25,000 per month would have resulted in a total profit of S$789,516.

[179] The fundamental problem with this calculation is that it takes no account of what actually happened in performing the Agreement. Sales of the 100ml EDT fell far below Mr Tuli's expectations. According to an analysis made by ITC's expert accountant, only some 15,000 units of the product were sold during a period of about a year. That equates to average monthly sales of around 1,250 units, which is less than a quarter of the rate forecast by Mr Tuli. Of course it is Yam Seng's case, which I have found to be justified in most respects, that ITC committed breaches of the Agreement. However, no attempt has been made to estimate what impact on sales any of those breaches actually had.

[180] Moreover, one of Mr Tuli's complaints which he made at the time of termination of the Agreement and maintained in evidence was that the product was not as good as he had been led to believe. For example, in an email to Mr Presswell dated 2 August 2010, Mr Tuli said this:

> “We also feel that you are now in a bit of a panic situation with regards to the brand, as you have realised that you have made a sub standard product, which is losing its listing due to the poor performance. We have many times told you that quality, packaging etc is of poor quality, and you have always ignored this. You have 20,000 pieces lying in Dubai at the warehouse, and the same number in Singapore for over a year that you cannot sell . . . .”

The reference to stock lying in Dubai and Singapore was to stock left over from the promotion organised by ITC with Singapore Telecom which was the first launch of the Manchester United fragrance. Mr Tuli's understanding was that this promotion failed dismally and only a few bottles were sold.

[181] There was also evidence that sales of the fragrance by airlines were disappointing. In an email dated 8 February 2010 Mr Tuli reported to Mr Presswell that sales on board Cathay Pacific and Dragonair were a bit slow, but he had persuaded them keep listing the fragrance for another quarter. Sales did not improve, however, despite a special promotion and on 10 May 2010 Cathay Pacific informed Yam Seng that the Manchester United fragrance would be de-listed “due to unsatisfactory sales performance”. In his email to Mr Presswell dated 2 June 2010 setting out issues that he wanted to discuss, Mr Tuli identified slow sales as one such issue, giving Korean Airlines as an example, and said “. . . while we are trying to promote the brand we are getting de-listed from places as well, and this is a matter of concern which should be addressed”.

[182] All this tends to suggest that the sales performance would probably have been much poorer than Mr Tuli had forecast even if ITC had complied in full with the Agreement.

[183] In considering the general attractiveness and likely profitability of the product, I think it also relevant to note that ITC appears to have had no success in selling the Manchester United fragrance in other territories and in domestic markets, and that since the termination of the Agreement the product line has been discontinued altogether.

[184] In these circumstances it seems to me impossible to treat Mr Tuli's estimate of profits, made at the time of entering into the Agreement and before there was any actual experience of trying to sell the product, as a reasonable estimate of what financial results would have been achieved if ITC had performed all its

obligations under the Distribution Agreement. The likelihood is that sales would have fallen short of Mr Tuli's original expectations even if there had been no breach of contract by ITC. Neither party, however, has put forward any other estimate of what the outcome would have been in those circumstances.

[185] I conclude that Yam Seng has failed to prove what profit it would have made or indeed that it would have made a profit at all if ITC had fully performed its obligations under the Agreement.

Claim For Wasted Expenditure

[186] ITC's alternative claim is for its net expenditure incurred as a result of entering into the Agreement. The basis on which wasted expenditure can be recovered as damages for breach of contract was considered by Teare J in *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm), [2011] 2 All ER (Comm) 155, [2011] 1 Lloyd's Rep 47. In his masterly judgment Teare J has shown that awarding compensation for wasted expenditure is not an exception to the fundamental principle stated by Baron Parke in *Robinson v Harman* (1848) 18 LJ Ex 202, 1 Exch 850 at 855, 154 ER 363 that the aim of an award of damages for breach of contract is to put the injured party, so far as money can do it, in the same position as if the contract had been performed, but is a method of giving effect to that fundamental principle. That conclusion must logically follow once it is recognised, as it was by the Court of Appeal in *C & P Haulage v Middleton* [1983] 3 All ER 94, [1983] 1 WLR 1461, that the court will not on a claim for reimbursement of losses incurred in reliance on the contract knowingly put the Claimant in a better position than if the contract had been performed.

[187] The advantage of claiming damages on the “reliance” basis is not that the Claimant can recover expenditure which would have been wasted even if the contract had been performed but that, where such a claim is made, the burden of proof lies on the Defendant to show that the expenditure would not have been recouped and would have been wasted in any event: see *CCC Films (London) Ltd v Impact Quadrant Films* [1985] QB 16, [1984] 3 All ER 298, [1984] 3 WLR 245. In this regard the English courts have adopted the approach stated by Learned Hand CJ in *L Albert & Son v Armstrong Rubber Co* 178 F 2d 182 (1949):

> “We cannot agree that the promisor's default in performance should under this guise make him the insurer of the promisee's venture; yet it does not follow that the breach should not throw upon him the duty of showing that the value of the performance would in fact have been less than the promisee's outlay. It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other.”

[188] The “common expedient” referred to by Chief Judge Learned Hand reflects a general theme which runs through the law of damages. On the one hand, the general rule that the burden lies on the Claimant to prove its case applies to proof of loss just as it does to the other elements of the Claimant's cause of action. But on the other hand, the attempt to estimate what benefit the Claimant has lost as a result of the Defendant's breach of contract or other wrong can sometimes involve considerable uncertainty; and courts will do the best they can not to allow difficulty of estimation to deprive the Claimant of a remedy, particularly where that difficulty is itself the result of the Defendant's wrongdoing. As Vaughan Williams LJ said in *Chaplin v Hicks* [1911] 2 KB 786 at 792, 80 LJKB 1292, [1911-13] All ER Rep 224: “the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract”. Accordingly the court will attempt so far as it reasonably can to assess the Claimant's loss even where precise calculation is impossible. The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the Defendant's wrongdoing by making reasonable assumptions which err if anything on

the side of generosity to the Claimant where it is the Defendant's wrongdoing which has created those uncertainties.

[189] A classic statement of this principle in the context of a claim for breach of contract is to be found in the case of *Wilson v Northampton and Banbury Junction Railway Co* (1873-74) LR 9 Ch App 279. In that case a railway company was in breach of a contract to build a station in a particular location. The contract contained no further description of the station nor of what use the railway company was to make of it. The Plaintiff sought an order for specific performance of the contract on the ground that the loss caused by the breach was too uncertain to be quantified so that damages would not be an adequate remedy. The Court of Appeal in Chancery rejected that argument, considering that an inquiry into damages met the justice of the case. Lord Selborne LC said at 285-6 that in the assessment damages:

> ". . . the Plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of Law and Equity against persons who are wrong-doers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim, that in assessing damages every reasonable presumption may be made as to the benefit which the other parties might have obtained by the bonâ fide performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting and was not forthcoming, a great Judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case . . . . It appears to me, therefore, that substantial justice may in that way be done between the parties."

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

[191] Applying this approach to the present case, ITC has not attempted to discharge the burden of showing what financial return Yam Seng would have made if ITC had not been in breach of contract. It is reasonable to suppose that if ITC had made all the Manchester United products available in accordance with the timetable promised and had shipped all orders promptly, Yam Seng would have made more sales than it in fact did. What the proceeds of such sales would have been and whether they would have been sufficient to defray Yam Seng's expenditure including its expenditure on marketing and promoting the fragrance is impossible for me to determine. ITC has not put forward any estimate of what loss, if any, Yam Seng would have suffered in those circumstances and I am unable to make such an assessment.

[192] I therefore conclude that Yam Seng is entitled to recover as damages for ITC's breach of contract its net expenditure incurred in performing the Agreement.

D. THE MISREPRESENTATION CLAIM

[193] As an alternative to its claim for damages for breach of contract, Yam Seng claims damages on the basis that it was induced to enter into the Agreement by misrepresentation.

The Facts

[194] I have found that, in his very first communication to Mr Tuli, Mr Presswell falsely represented that ITC had "recently signed" a licence agreement to manufacture and sell Manchester United fragrances and that during the subsequent negotiations leading to the conclusion of the Agreement on 12 May 2009 Mr Presswell continued (expressly or impliedly) to represent that ITC had the legal right to manufacture and sell the products which it was offering to supply to Yam Seng and to grant Yam Seng the exclusive right to distribute. In fact, ITC did not acquire any such rights until 5 May 2009, and when the Agreement with Yam Seng was signed ITC still had no such rights in relation to the toiletries – for which it acquired a (non-exclusive) licence only on 21 August 2009.

[195] The likely reason why Mr Presswell falsely represented that ITC already had rights which in truth it had not yet acquired was that he wanted to get the maximum benefit from the three year licences which he was negotiating and expected to conclude with Manchester United Merchandising Limited, and therefore wanted to start selling the products as early as possible. If Mr Presswell had waited until he had in fact signed a licence agreement before starting to negotiate a distribution agreement valuable time would have been lost.

[196] Mr Tuli's evidence was that he would not have proceeded with negotiations for a distribution agreement if he had known that ITC did not yet have the right to manufacture and sell the Manchester United fragrances. That seems to me to make obvious sense. I also infer that if Mr Presswell had said nothing about his licence position Mr Tuli would have asked. Any businessman of ordinary prudence who was offered a distributorship deal for a branded product would naturally want to know what rights in the brand the person offering the deal had, and would be unlikely to think it worth entering into any detailed discussions unless and until assured that that person had secured the legal right to manufacture and sell the product. I am sure that this was Mr Presswell's perception also, which is why he falsely represented that ITC had already signed a licence agreement.

[197] Mr Tuli also gave evidence that he would not have gone ahead with the Agreement if he had not believed that ITC was able to supply the entire range of products, including the toiletries. While I have no doubt that the inclusion of the toiletries added to the overall attractiveness of the product line, I think it likely – given their relative unimportance commercially, as discussed earlier – that Mr Tuli would have been willing to enter into a distribution agreement without them. That said, I am sure that the Agreement would not have been signed in the terms that it was on the date that it was if Mr Presswell had not led Mr Tuli to believe that ITC had the legal rights which it purported to grant in respect of the toiletries.

[198] I conclude that, if Mr Presswell had not made the representations which I have found were made regarding ITC's rights to manufacture and sell the Manchester United products, the Agreement dated 12 May 2009 would not have been made.

Section 2(1) Of The Misrepresentation Act

[199] Yam Seng has not pleaded a case of deceit, being content to rely on s 2(1) of the Misrepresentation Act 1967. This provides:

> "2 – *Damages for misrepresentation.*
>
> (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the

misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

[200] To establish a right to recover damages under this statutory provision, it is thus necessary for a Claimant to show:

(1) that it has entered into a contract with the Defendant;

(2) that it did so after a representation of fact had been made to it by the Defendant (and in reliance on that representation);

(3) that the representation was false; and

(4) that as a result of entering into the contract with the Defendant, the Claimant has suffered loss.

[201] Provided these matters are established and the Defendant would be liable to pay damages if the misrepresentation had been made fraudulently, then the burden is on the Defendant in order to avoid liability under s 2(1) to prove that it had reasonable ground to believe, and did believe, up to the time the contract was made that the facts represented were true.

[202] In the present case I have found that Yam Seng has established the first three of the above requirements. I am also satisfied that Mr Presswell did not believe, let alone have any reasonable ground to believe, when he represented that ITC had recently signed a licence agreement to manufacture and sell Manchester United fragrances that the fact represented was true. Nor did he believe, let alone have any reasonable ground to believe, at the time when the Agreement was made that ITC had yet signed a licence (nor even agreed a deal subject to contract) which included the toiletries.

[203] It only remains therefore to consider the question of loss.

Measure Of Damages For Misrepresentation

[204] In *Royscot Trust v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, [1991] 3 WLR 57 the Court of Appeal held that the wording of s 2(1) of the Misrepresentation Act requires damages awarded under that provision to be calculated in the same way as if the representation been made fraudulently. In a case of fraudulent misrepresentation the Claimant is entitled to recover compensation for all loss directly flowing from (ie caused by) the transaction induced by the representation, whether or not the loss was reasonably foreseeable and including any consequential losses: see *Doyle v Olby* [1969] 2 QB 158, [1969] 2 All ER 119, [1969] 2 WLR 673; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, [1996] 4 All ER 769, [1997] 1 BCLC 350. The Court of Appeal in *Royscot Trust* therefore applied this measure of damages to a claim under s 2(1).

[205] Applying this measure, Yam Seng claims as damages the costs which it incurred in marketing and

distributing the products which were the subject of the Agreement less the income received from sales of those products. This is the same sum which Yam Seng claims as damages for breach of contract if such damages are calculated on the basis of wasted expenditure.

[206] The decision in *Royscot Trust* has been much criticised. As has been pointed out by academic writers, the policy considerations which justify a broad measure of damages where fraud has been demonstrated do not apply, or in nothing like the same degree, in cases of mere negligence. Nor does the language of s 2(1) seem to me to compel such a conclusion. It is possible to construe the words "and as a result thereof has suffered loss" as requiring the Claimant to show that he has suffered loss as a reasonably foreseeable result of a misrepresentation having been made to him, and to treat the following words as imposing an *additional* requirement (that the Defendant would be liable to damages had the misrepresentation been made fraudulently) which must also be satisfied. Unless and until *Royscot Trust* is over-ruled, however, it represents the law; and I must therefore apply it.

[207] Yam Seng cannot claim to have suffered any loss by reason of the representation that ITC had already acquired a licence being false. ITC did acquire the legal right to manufacture and sell all the products which were the subject of the Agreement and the fact that ITC did not have any such legal right when the negotiations began and still did not have a licence for the toiletries for the first few months of the contract period did not cause Yam Seng any prejudice. In a case of negligent misrepresentation at common law, ITC could in these circumstances rely as a defence on the principle which limits damages to the loss attributable to the representation being untrue: see *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, [1996] 3 WLR 87. That limitation does not apply, however, where the misrepresentation is fraudulent: see *Smith New Court*, *supra*, overruling *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426 on this point. On the authority of *Royscot Trust*, therefore, the limitation also does not apply where damages are awarded under s 2(1).

[208] The argument made by Mr Eaton Turner on behalf of ITC was that the misrepresentations made in this case did not cause loss because Yam Seng would still have lost money if it had not entered into the Agreement. The only effect of the misrepresentations, Mr Eaton Turner submitted, was to accelerate the making of the contract. If Mr Presswell had waited before approaching Mr Tuli until he had signed a licence agreement with Manchester United Merchandising Limited, the likelihood is that a distribution agreement would still have been concluded with Yam Seng in similar terms to the agreement actually made; the only difference would have been that the contract period would have commenced a few months later. In that event, Mr Eaton Turner submitted, there is no reason to think that the sales and profits would have been materially different from the results actually achieved. Thus, the likelihood is that Yam Seng would still have suffered a loss similar to that which it in fact suffered.

Relevance Of Alternative Transactions

[209] This argument raises a question of principle: in assessing damages for fraudulent misrepresentation or under s 2(1), is it relevant to consider what, if any, other transaction the Claimant would have entered into if the misrepresentation had not been made? One approach would be to say that it is not. It might be said that where the Claimant has been induced to enter into a contract by misrepresentation the object of an award of damages is simply to restore the Claimant to the position before the contract was made: there is no warrant for going further and examining what the Claimant would or would not have done if it had not made the contract and then bringing into account in assessing damages the financial consequences of such hypothetical alternative transactions. This approach finds support in a dictum of Hobhouse LJ in *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426 at 441:

> "In general, it is irrelevant to inquire what the representee would have done if some different representation had been made to him or what other transactions he might have entered into if

> he had not entered into the transaction in question. Such matters are irrelevant speculations."

[210] This statement was cited and applied by May J in *Slough Estates plc v Welwyn Hatfield District Council* [1996] 2 PLR 50, [1996] NPC 118, [1996] 2 EGLR 219. In that case the Plaintiffs were induced by fraudulent misrepresentations to invest in a property development. During the period of the investment property values fell. The Plaintiffs recovered damages calculated as the difference between all their costs incurred in relation to the development and all their receipts plus the value of the property at the time of assessment. Applying the dictum of Hobhouse LJ in *Downs v Chappell* quoted above, May J considered that it was irrelevant to inquire whether if they had not entered into the transaction the Plaintiffs would have invested in another development and incurred a loss as a result of the fall in property values. Commenting on the Defendant's objection that the damages awarded amounted to a windfall, he said (at 124):

> "If, as I conceive, the policy of the law is to transfer the whole foreseeable risk of a transaction induced by fraud to the fraudulent Defendant, and if, as I conceive, the court does not speculate what, if any, different transaction the Plaintiff might have done if the fraudulent representation had not been made, damages on this basis are not to be regarded as a windfall, but the proper application of the policy of the law."

[211] Another case where the court refused to speculate about what the Claimant would have done if the representation had not been made is *Naughton v O'Callaghan* [1990] 3 All ER 191, [1990] NLJR 589. In that case the Plaintiffs were induced to buy a thoroughbred yearling colt by a misrepresentation as to the colt's pedigree. As part of their damages the Plaintiffs claimed costs incurred in training and keeping the colt before the misrepresentation was discovered. The Defendant argued that the expenditure would have been incurred anyway as the Plaintiffs would, if they had not bought this particular yearling, have bought another one at the same sale. The Plaintiffs accepted this but said that had they bought a different horse it might have paid for its keep and reaped for them rich rewards. Waller J said:

> "I have concluded that the Plaintiffs are entitled to ask the court to look simply at the contract they made in reliance on the representation which induced them to enter into that bargain. They are entitled to say that there must be no speculation one way or the other about what would have happened if they had not purchased this horse and if no misrepresentation had been made to them."

[212] Nevertheless, there is a line of cases in which courts have inquired and taken account in assessing damages of what other transaction the Claimant would have entered into if no misrepresentation had been made.

[213] In *East v Maurer* [1991] 2 All ER 733, [1991] 1 WLR 461 the Plaintiffs bought a hairdressing salon from the Defendant in reliance on a fraudulent misrepresentation that the Defendant did not intend to carry on operating another salon which he also owned in the same area. The business lost money as customers deserted it for the Defendant's other salon. The Court of Appeal held that the Plaintiffs were entitled to recover as damages not only the trading losses they sustained in running the salon and the capital loss suffered on its eventual resale, but also the profits which they could reasonably have expected to make if they had instead bought another similar hairdressing business in a different part of the town.

[214] In *Clef Acquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488, [2000] 3 All ER 493, [2000] 3 WLR 1760, the Court of Appeal went a step further. In that case the Plaintiffs entered into two distributorship agreements with the Defendant which were in fact profitable. However, the judge found that, but for the Defendant's deceit during the negotiations, the agreements would have contained more

favourable terms as to price and the profits made by the Plaintiffs would consequently have been greater. The Court of Appeal held that the Plaintiffs were entitled to recover as damages the additional profits which they would have made in those circumstances.

[215] In *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch), [2009] Ch 91, [2008] 3 WLR 892 damages were awarded on a loss of a chance basis for the lost opportunity of entering into another, more profitable transaction. The Claimant was induced by fraudulent misrepresentations to buy a company from the Defendant which turned out to be worthless. David Richards J found that there was another company which the Claimant would have sought to buy if it had not bought the company in question and that there was a good chance, which he assessed at 80%, that the owners of that company would have been agreed to sell it to the Claimant. On this basis he awarded as damages 80% of the income and capital gain which the Claimant would have received from such an investment, assessed at the date of trial.

[216] In all these cases the hypothetical alternative transaction which the Claimant would otherwise have entered into was one which would have been profitable. Should account also be taken of a transaction which would probably have resulted in a loss? Chitty on Contracts (31st edn) at para 6-064 suggests not, citing an observation of Lord Steyn in *Smith New Court* at 283 that ". . . it is not necessary for the judge to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred". Similarly, Clerk & Lindsell on Torts (20th edn) at para 18-45 states that:

> "where a Defendant deceives the Claimant into entering a business transaction, the Claimant is entitled to recover the loss he suffers as a result, without reference to the fact that he might otherwise have invested his money in some other unprofitable way and lost it anyway."

The editors add in a footnote, however, that such an attitude is difficult to defend and that:

> "if the Claimant can increase his recovery by showing he would have invested his money profitably, by parity of reasoning the Defendant ought to be able to reduce his exposure by showing that, but for his deceit, the Claimant would have lost it in any case."

[217] In my view such an attitude would be not merely difficult but impossible to defend. In circumstances where it is established that the Claimant can recover a profit that would have been obtained from entering into some other transaction, it must in principle be equally relevant to take account of any loss. Nor in my view does the case law justify any different conclusion. In particular:

> (1) The dictum of Hobhouse LJ in *Downs v Chappell* quoted above begins with the words "in general". It cannot therefore have been intended to state a rule of law – all the more so since it immediately follows a reference to *East v Maurer* where the Plaintiffs were awarded profits which they would have been made if they had entered into a different transaction.
>
> (2) The observation of Lord Steyn in *Smith New Court* quoted in Chitty is taken out of context. The hypothetical reconstruction which Lord Steyn was disapproving was a reconstruction of the kind suggested separately by Hobhouse LJ in *Downs v Chappell* of what the Claimant would have done if the representation had been true; Lord Steyn's observation should not be interpreted as a statement that it is never relevant to consider what alternative transaction would have been entered into if the representation had not been made – not least since Lord Steyn (at 282) specifically approved *East v Maurer* as showing that "an award based on the hypothetical profitable business in which the Plaintiff would have engaged but for deceit is permissible: it is classic consequential loss."

(3) The statements of Hobhouse LJ in *Downs v Chappell* and of Lord Steyn in *Smith New Court* were both considered by the Court of Appeal in *Clef Aquitaine* and explained by Simon Brown LJ in the way I have indicated above.

(4) There is no difference in principle between an alternative transaction which would have been more profitable and one which would have been less profitable than the actual transaction such that it can be relevant to take account of the former but not the latter.

(5) The evidential burden will be on the Defendant, however, to show that if the misrepresentation had not been made the Claimant would have incurred a loss. In seeking to discharge this burden, the Defendant (unlike the Claimant) does not have the benefit of the principle that if the financial outcome of the alternative transaction is uncertain the court will make reasonable assumptions in its favour (for example by allowing damages to be calculated on a loss of a chance basis) to assist in the proof of loss.

(6) Unless the Defendant can demonstrate with a reasonable degree of certainty, therefore, both the fact that the Claimant would probably have suffered a loss from entering into an alternative transaction and the amount of that loss, the damages will not be reduced on that account. In this respect there is a disparity, but a principled one, between hypothetical transactions which would have made the Claimant worse off and those which would have made the Claimant better off.

(7) *Slough Estates* and *Naughton v O'Callaghan* are both consistent with this analysis. In those cases there was evidence which justified a very general inference that the Claimant would quite likely have suffered some loss if it had not entered into the contract in question (by investing in another property development or buying another horse). But there was no way of estimating with any certainty or precision what loss, if any, the Claimant would have incurred from any such transaction. As it was the Defendant rather than the Claimant who wished to rely on such a loss, that difficulty was insuperable and meant that there was no quantifiable loss which could be taken into account.

Conclusions On Right To Damages For Misrepresentation

[218] I therefore consider that in this case it would in principle be open to ITC to show that, if the misrepresentations regarding ITC's legal right to manufacture and sell the Manchester United products had not been made and the Agreement had not been concluded, Yam Seng would nevertheless have entered into a similar contract at a later date and lost money. However, in order to reduce the damages recoverable by Yam Seng on this basis, it would be necessary for ITC to quantify a sum of money which the court can conclude with reasonable confidence that Yam Seng would have lost. That is not an exercise which ITC has attempted to undertake, nor which I would be able to undertake.

[219] I think it likely that, if the misrepresentations had not been made, a distribution agreement would have been concluded between ITC and Yam Seng a few months later than the Agreement was in fact concluded, after ITC had acquired the relevant licences. In that event, however, there would not have been the same delay after the contract was made in producing the deodorant and 50ml EDT. Nor would Yam Seng have been encouraged to market the full range of products including the toiletries for as long as it did, if at all, in the expectation that they would be produced. Nor can it be assumed that the contract would have been

terminated prematurely because of breaches of contract by ITC as the Agreement was. It is safe to assume that in those circumstances the expenditure incurred and sales made by Yam Seng would have been different from the actual figures. What exactly the differences would have been, however, and what would have been the net financial outcome of such a hypothetical contract is not a matter about which I can properly speculate.

[220] I conclude that Yam Seng is entitled to recover as damages for misrepresentation its net loss incurred as a result of entering into the Agreement without any reduction on account of the possibility that, if no misrepresentation had been made, Yam Seng might still have entered into a similar agreement at a later date and lost money anyway.

E. QUANTUM OF DAMAGES

[221] Yam Seng's calculation of its loss resulting from the Agreement is as follows:

Cost of goods sold	S$235,521.08
Outward freight charges	S$50,480.68
Agent's charges	S$53,175.74
Marketing, sales and promotion costs	S$468,115.38
Less total sales	S$467,719.82
Net loss:	S$339,353.06

These figures are supported by schedules produced by Mr Tuli.

[222] The main focus of dispute is the amount of unsold stock still held by Yam Seng. The cost of purchasing such stock has not been included in the loss calculation, which includes only the cost of purchasing the goods which Yam Seng has sold. The explanation for the omission appears to be that, according to the response given by Yam Seng to a request by ITC for further information, the stock still held by Yam Seng after the Agreement had been terminated consisted entirely of the merchandise comprised in ITC's final invoice (in the sum of US$38,705.28) which Yam Seng has not paid. Yam Seng has not given any credit for the value of the remaining stock because it was Mr Tuli's evidence that there is no reasonable prospect of making any further sales in mitigation of Yam Seng's loss and that the products will in any event reach their expiry dates within the next few months.

[223] Although Mr Tuli said that stock checks have been carried out, Yam Seng has not disclosed any list of the stock which it still has. An expert accountant instructed by ITC has, however, compared the goods purchased by Yam Seng with the goods sold (as recorded in Yam Seng's invoices) and has deduced from this comparison the quantity of each product which Yam Seng should theoretically still hold. This reconciliation exercise has demonstrated conclusively that the unsold stock does not coincide with the goods comprised in ITC's outstanding invoice as Yam Seng has claimed in its statement of case. On the one hand it is clear that some of the goods comprised in that invoice have in fact been sold. On the other hand it also appears that Yam Seng still holds stocks of products which were not included in that invoice.

[224] In fact, it seems that this error may have resulted in Yam Seng understating its claim. On my calculation the total cost to Yam Seng of the goods which it purchased from ITC (excluding the unpaid invoice) is US$223,090. Converted at an exchange rate of 1.4 this is equivalent to S$312,327. This is significantly more than the sum of S$235,521 claimed as the cost of purchasing the goods sold by Yam Seng and indicates that the stock still held by Yam Seng cost correspondingly more than the amount of the unpaid invoice.

[225] Numerous items included in the schedule of marketing, sales and promotion costs were contested in cross-examination of Mr Tuli. No previous notice had been given of ITC's grounds of objection to these items. Although some of the points raised were plainly not well founded, some appeared to have merit. Indeed Mr Tuli accepted that some items, for example some payments made to solicitors, have been wrongly included in the schedule. An adjustment will therefore need to be made to this element of the claim. However, there was insufficient time for the scope of any remaining issues to be identified before the end of closing submissions.

[226] An item of promotional expenditure which was made the subject of a discrete claim by a re-amendment to Yam Seng's particulars of claim at the start of the trial was the cost of a particular airline promotion for which ITC had agreed to fund the prizes in a sum of HK$40,000. Liability to reimburse Yam Seng for this expense was conceded by ITC in the course of the trial.

[227] I invite the parties to seek to agree the quantum of damages. If agreement cannot be reached, I will give directions after this judgment has been handed down for how any sum which remains in dispute is to be assessed.

F. ITC'S COUNTERCLAIM

[228] ITC has pleaded a counterclaim which has two elements. The first element is the amount of ITC's unpaid invoice. Yam Seng admits that it owes this amount (of US$38,705.28) to ITC. However, if this amount were paid, the effect would simply be to increase Yam Seng's entitlement to damages by a corresponding sum. The claim therefore fails for circuity of action.

[229] The second element of the counterclaim is an allegation that, as a result of Yam Seng's wrongful termination of the Agreement, ITC suffered loss of profit from sales to Yam Seng that would otherwise have occurred. This claim was abandoned in closing submissions. In any event it would have failed, as I have held that Yam Seng was justified in terminating the Agreement.

G. CONCLUSIONS

[230] My conclusions, in summary, are as follows:

> (1) ITC was in breach of contract in delivering the second order placed by Yam Seng very late, in failing to make products available when promised and in acting in bad faith in misleading Yam Seng about the steps taken to ensure that the domestic retail price in Singapore was not lower than the duty free price.
>
> (2) The last of these breaches and ITC's threat not to honour the rights granted to Yam Seng in respect of Hong Kong and Macau were repudiatory in nature and justified Yam Seng in terminating the Agreement.
>
> (3) Yam Seng is entitled to recover its net loss resulting from the Agreement as damages for breach of contract.

(4) Yam Seng is also entitled to recover the same loss under s 2(1) of the Misrepresentation Act 1967 as damages for misrepresentation, having been induced to enter into the Agreement by false representations that ITC had a licence to manufacture and sell the products.

(5) ITC's counterclaim fails.

Judgment accordingly.