Neutral Citation Number: [2023] EWHC 3285 (Comm)

Case No: CL-2021-000393

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/12/2023

Before :

DAME CLARE MOULDER DBE
Sitting as a Judge of the High Court

- -

Between :

Aston Martin MENA Limited	**Claimant**
- and -	
Aston Martin Lagonda Limited	**Defendant**

- -
- -

Jeff Chapman KC and Samuel Ritchie (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**
Iain Quirk KC, Sophie Weber and Robert Harris (instructed by **Slaughter and May**) for the **Defendant**

Hearing dates: 14-16, 20 and 23 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Clare Moulder DBE :

Introduction

1. The Defendant, Aston Martin Lagonda Limited ("AML" or the "Defendant") is the manufacturer of luxury cars under (*inter alia*) the Aston Martin brand names.

2. These proceedings arise out of the termination by the Claimant, Aston Martin MENA Limited ("AMMENA" or the "Claimant") of an agency agreement dated 19 April 2018 (the "Agency Agreement") between AMMENA and AML. Pursuant to the Agency Agreement AMMENA had appointed AML as its agent in respect of all AMMENA's operations as Distributor of Aston Martin vehicles, parts and services in the Middle East, North Africa and Turkish region (referred to as the "MENA" region) under a distribution agreement dated 19 April 2018 (the "Distribution Agreement").

Chronology of termination of the Agency Agreement

3. On 25 January 2021 Bird & Bird (on behalf of AMMENA) wrote to Eversheds (on behalf of AML) (the "25 January letter") stating that:

> "*AML [is] in material breach of its payment obligations [under clauses 4.3 and 4.5 of the Agency Agreement]" and "demanding payment of the full amount [of MCMP] due to [AMMENA] of GBP 6,050,176.40 within no more than 15 days*".

4. The letter also stated that:

> "*7. Our client has recently been informed that AML is withholding the money due to our client, purportedly relying on the indemnity given by AMMENA to AML in clauses 5.1 and 5.2. AML claims that it has incurred significant costs resulting from disputes with Aston Martin franchisees following decisions by AMMENA to terminate the franchise arrangements in Bahrain and Saudi Arabia. AML has unilaterally decided to cease paying all the sums due to our client and now proposes to offset the total amount it claims it has incurred of GBP5,247,908 (the "Offset Sum") from the sums due to our client.*
>
> *8. We note the indemnity given in clause 5.1 but deny that it is liable to reimburse AML for the Offset Sum for the reasons explained in more detail below. We therefore consider that AML is currently in breach of its payment obligations under clauses 4.3 and 4.5.*"

5. On 15 February 2021 Eversheds sent a letter to Bird & Bird stating that:

> "*[AML] is not in breach of the Agency Deed for non-payment or in relation to the HHA termination … [i]t is in fact [AMMENA] that is in breach for not honouring the indemnity under the Agency Deed…*".

6. On 19 April 2021 (the "19 April letter") Bird & Bird wrote to Eversheds stating that the outstanding sum had not been paid and AML had not therefore remedied the breach. The letter stated:

> "*…We are therefore instructed to give notice to you on behalf of your client that the Agency Deed will come to an end with immediate effect…*".

7. On 3 June 2021 Slaughter and May (on behalf of AML) sent a letter to Bird & Bird (on behalf of AMMENA) stating that:

> "*[AMMENA] did not have the right to rely on clause 6.1 to terminate the Agency Deed with immediate effect and its purported termination of the Agency Deed on 19 April 2021 is invalid. As a result of this wrongful termination, [AMMENA] is in repudiatory breach of the Agency Deed. Such repudiatory breach gives [AML] the right — at common law and pursuant to clause 6.1 of the Agency Deed — to terminate the Agency Deed, which [AML] intends to exercise. Accordingly, this letter constitutes [AML's] notice to terminate the Agency Deed with immediate effect.*"

8. A transitional period (the "Transition Period") was agreed between the parties from the date of termination of the Agency Agreement until 30 September 2021 for AMMENA to resume the obligations under the Distribution Agreement. However, the nature and basis of the parties' obligations during the Transition Period remain in issue.

9. AMMENA resumed those obligations on 1 October 2021 although as described below, AML continued to perform some operational functions until 1 July 2022.

Scope of Judgment and Submissions

10. The Court received combined written closing submissions from the parties of some 250 pages which are extensively footnoted in respect of what was in substance a 5 day trial. The Court has sought to determine only those issues which remained live between the parties at the time of trial as reflected in oral submissions and except where indicated, only those issues which were necessary for the resolution of these proceedings. Where an issue was not referred to in the written closing submissions or pursued in oral submissions the Court has not addressed that issue even if it was in the List of Agreed Issues. This includes AMMENA's claim for an account in respect of its activities and dealings under the Agency Agreement and the allegation that AML failed to comply with such duty by not providing certain information and/or confirmations requested in relation to the period following termination of the Agency Agreement.

11. Even if an issue was referred to in the submissions, it is not practicable or necessary to determine the proceedings to address in the judgment every submission (oral or written) or to deal with every document referred to in the submissions. The Court has however reviewed the written submissions and the transcript of the oral hearing. It should not therefore be inferred that the Court has overlooked submissions merely because they are not referred to expressly in this judgment.

Issues for determination

12. In light of the foregoing, in summary (and as more particularly described in the relevant section of the judgment) the following issues fall to be addressed:

    12.1 Whether the Defendant owes the Claimant sums in respect of Manager Committed Minimum Profit (as defined in the Agency Agreement) ("MCMP") for the period 1 January until 30 September 2021 under the Agency Agreement or alternatively as damages for breach of contract.

12.2 Whether the Claimant validly terminated the Agency Agreement on 19 April 2021.

12.3 Whether during the Transition Period AML acted in breach of the express duties of good faith in Clauses 2.3 and 3.2 of the Agency Agreement and/or an implied duty of good faith.

12.4 The Defendant's counterclaim under the indemnity in Clause 5 of the Agency Agreement.

13. The Defendant has made a counterclaim for sums it alleged the Claimant must indemnify the Defendant in connection with the termination of the appointment of two Dealers either pursuant to the terms of the Agency Agreement and/or pursuant to its duty under common law (the latter was not pursued by AML at trial). One of those claims related to a dispute with the former retail dealer in Bahrain, Montana Motors. AMMENA has now accepted that the sums claimed of £38,725.50 under the indemnity together with £121,452.58 which are costs associated with litigation between AML and Montana Motors are payable. It is not therefore necessary for the Court to consider the counterclaim in that regard.

14. The second aspect of the counterclaim arises following the sending of a letter of termination on 24 August 2017 advising Haji Husein Alireza & Co. Ltd ("HHA"), that an agreement dated 19 August 2008 between AML and HHA (the "HHA Dealer Agreement") would not be renewed and would thus expire on 19 August 2018 (the "HHA Termination Letter").

Witnesses

15. The Court heard evidence from the following witnesses for the Claimant:

15.1 Mr Abdullah Zidan, a director of AMMENA and the President of Al Roumi Capital Holding Co, a shareholder in AMMENA's parent company and responsible for AMMENA's day to day operations.

15.2 Mr Richard Quinlan who left AMMENA in 2022 but remains a director of AMMENA. He was being paid to give assistance in the proceedings and stated that he wanted to support the Al Roumi family. During the Transition Period he gave instructions to CMS Cameron McKenna Nabarro Olswang LLP ("CMS"), the firm of solicitors now acting for AMMENA.

15.3 Mr Larbi Bensouda, currently the Executive Manager of AMMENA and responsible for the relationship between AMMENA and the retail dealers under the Distribution Agreement. He joined AMMENA in December 2016, and when the Agency Agreement and Distribution Agreements were signed he went to work for AML. After the Transition Period, during which his employment was terminated by AML as described below, he returned to working for AMMENA.

16. For the Defendant the Court heard from the following witnesses:

16.1 Mr Arthur Kipferler, a Partner and Managing Director UK at Berylls Strategy Advisors Limited, a firm of management consultants who were brought in to assist AML's management on strategic issues.

16.2 Mr Balmer, Regional President for the MENA region for AML from May 2018. In mid-2020, the MENA region was consolidated with the UK and Mr Balmer became Regional President for the UK and the MENA region. He resigned from AML in March 2021.

16.3 Mr David Robinson. He joined AML in September 2018 as the Global Pricing Lead and was promoted to Head of Pricing and Cross Carline Planning in January 2021.

MCMP

17. I understand it to be common ground that MCMP is prima facie owed under the Agency Agreement for the years 2019 and 2020. This amounts to £5,734,006.70. The issue in relation to this amount is that AML claims that this sum can be set off against the indemnity. I note that while AMMENA's position is that there was no right of set off in the Agency Agreement, it nevertheless accepts that the practical effect of the claim and counterclaim is that if both were made out, there would in effect be set off of these sums. The counterclaim is considered below in a separate section.

18. The first issue for determination therefore relates to the MCMP for 2021. AMMENA claims MCMP for the period from 1 January 2021 until AMMENA took over as Distributor on 1 October 2021. This amounts to a sum of £3,875,162.15.

19. The issues for the Court in this respect are as follows:

19.1 What is the proper construction of Clauses 1.1, 4.5 and 4.7 of the Agency Agreement? Specifically:

19.1.1 In the absence of an agreed Business Plan for any year, is AML obliged to pay MCMP to AMMENA in respect of such year?

19.1.2 In the absence of an agreed Business Plan, do the Projected AMMENA Net Profit and/or MCMP continue to be those forecast in respect of the preceding 12 months? (Issue 1 of the Agreed List of Issues)

19.2 In light of the construction of the above clauses, was AMMENA entitled to MCMP for 2021 until the termination of the Agency Agreement? (Issue 2 of the Agreed List of Issues)

19.3 Was AML obliged to pay MCMP to AMMENA between the termination of the Agency Agreement and the end of the Transition Period on 30 September 2021 and, if so, on what basis? (Issue 8 of the Agreed List of Issues)

Relevant provisions of the Agency Agreement

20. Clause 4.5 of the Agency Agreement provided:

> "*The Manager shall ensure that AMMENA shall receive the Manager Committed Minimum Profit (as stated in the Business Plan), making proper allowance for sums paid under clause 4.3.*"

21. In Clause 1.1 the relevant definitions were as follows:

> "*Manager Committed Minimum Profit" means, for any year, 90% of the Projected AMMENA Net Profit shown for that year in the Business Plan agreed by AMMENA and AML from time to time".*
>
> *"Net Profit" means, for any year, the sum equal to 10% of wholesale price of all Goods sold in the Territory in that year; and*
>
> *"Projected AMMENA Net Profit" means, for any year the anticipated Net Profit (based on the volumes and mix of Goods to be sold in the Territory in that year) as shown in the Business Plan agreed by AMMENA and AML from time to time;*
>
> *"Business Plan" means the proposed business plan set out in Schedule 2, or as agreed between the Parties in accordance with Clause 4.7*".

22. Clause 4.7 provided that:

> "*At least twelve months prior to expiry of the Initial Period, or an Additional Period, the parties will review and agree the Business Plan that will apply to the next Additional Period.*"

23. Clause 2.2 provided that the Initial Period was a period of three years from the date of the Agency Agreement (19 April 2018):

> "*This Agreement shall come into force on the Commencement Date and (subject to the provisions for earlier termination in Clause 6 below) shall last for an initial period of three years (the "Initial Period") and shall continue in force thereafter for additional periods of three years each ("Additional Period(s)") unless and until either party gives to the other not less than 12 months' prior written notice of termination such notice to expire at the end of the Initial Period or one of the Additional Periods.*"

Claimant's submissions in respect of 2021

24. In respect of its claim for MCMP for 2021, the Claimant accepted that the parties had not agreed an update to the Business Plan for the period after the Initial Period, i.e. for 2021 and thereafter. It was submitted for the Claimant that in those circumstances:

    24.1 Either the reference to the "Business Plan" in Clause 4.5 must necessarily be read to refer to the most recent figure in the Business Plan where there has been no agreement on a new Business Plan.

    24.2 Or given the mandatory nature of the obligation to pay MCMP, it is therefore necessary to imply a term for the business efficacy of the Agency Agreement as a whole, such term being that MCMP for the Additional Period would be the same as for the final year in the Initial Period.

25. It was submitted for the Claimant that in the absence of a newly agreed Business Plan under Clause 4.7, the contract must default to the final figure in the Business Plan "*as set out in Schedule 2*". As a result, the MCMP figure for 2021 would be the same as that agreed for 2020, i.e. £6,900,000.

Discussion

Legal principles

26. The legal principles concerning the construction and implication of terms appeared to be common ground.

27. It is nevertheless useful to set out the principles of contractual interpretation by reference to the judgment of Lord Hodge JSC in *Wood v Capita Insurance Services Limited* [2017] UKSC 24:

> "*10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…"*
>
> *11… Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77…"*
>
> *12… To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals…But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.*"

The construction of Clauses 1.1, 4.5 and 4.7 of the Agency Agreement

28. Looking first at the language of Clause 4.5 and the associated definitions, the Claimant submitted that the reference to the "Business Plan" in Clause 4.5 must necessarily be read to refer to the most recent figure in the Business Plan where there has been no agreement on a new Business Plan.

29. It seems to me that the Claimant's interpretation of Clause 4.5 places reliance on the words in parentheses "*as stated in the Business Plan*" in order to establish the MCMP. By relying on the definition of "*Business Plan*" the Claimant then contends that in the absence of an agreed Business Plan the MCMP is taken to be the figure in the business plan in Schedule 2.

> "*The Manager shall ensure that AMMENA shall receive the Manager Committed Minimum Profit (as stated in the Business Plan) …*".

30. However the alternative interpretation of Clause 4.5 is to give more weight to the definition of MCMP which by its language negates the interpretation that the MCMP can be determined by reference to a prior year. The definition of MCMP clearly and expressly stated that:

> "*Manager Committed Minimum Profit" means for any year, 90% of the Projected AMMENA Net Profit shown for that year in the Business Plan agreed by AMMENA and AML from time to time*". [emphasis added]

31. Thus if Clause 4.5 is read with the defined term *Manager Committed Minimum Profit* inserted it would read as follows:

> "*The Manager shall ensure that AMMENA shall receive [for any year, 90% of the Projected AMMENA Net Profit shown for that year in the Business Plan agreed by AMMENA and AML from time to time] (as stated in the Business Plan)…*" [emphasis added]

32. When Clause 4.5 is set out in full in this way, the language of the Clause militates against giving weight to the language in parentheses such that the meaning of Clause 4.5 is that the figure should be taken from a previous Business Plan if no Business Plan has been agreed.

33. Further, the definition of *"Projected AMMENA Net Profit"* used in Clause 4.5 also ties the anticipated Net Profit to the figure *"as shown in the Business Plan agreed by AMMENA and AML from time to time"*. This tends to reinforce the conclusion that the language in parentheses was not intended to fix the MCMP by reference to Schedule 2 but was intended to refer to the agreed figure from time to time.

34. When one considers the rival interpretations of the language in the context of the whole agreement it is evident that the Business Plan in Schedule 2 only specifies the MCMP for the first three years of the Agency Agreement and Clause 4.7 contemplates a procedure whereby the parties would agree the Business Plan for the next three years.

35. It was submitted for the Claimant that the payment of MCMP was *"the essential consideration"* that AML gives in order to be able to exercise AMMENA's rights under the Distribution Agreement as Agent, including the setting of all prices in the region and

the management of retail dealers. It was further submitted that MCMP was *"the crux of the bargain, since it is the consideration that AMMENA agrees to receive to give up its own right to operate in the Territory for a profit"*.

36. As stated by Lord Hodge (set out above) *"where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense"*.

37. I was not taken to any evidence to support the submission that the MCMP was the "*crux of the bargain*". I note that the overall fee structure of the Agency Agreement in Clause 4 was as follows:

    37.1 Clause 4.1 provided that AML was paid a fixed fee of 5% of the wholesale price for each sale of vehicles and parts in the MENA region.

    37.2 Clause 4.3 provided that AMMENA was paid (subject to any additional payment under Clause 4.6) 10% of that price.

    37.3 Clause 4.5 provided for AMMENA to receive a guaranteed minimum level of profit i.e. the MCMP less sums paid under Clause 4.3.

    37.4 Clause 4.6 provided that if, in any year, AML delivered the Business Plan and achieved 110% or more of the Projected AMMENA Net Profit, there would be an additional amount payable to each party: AML was entitled to retain 30% of the Net Profit achieved above 110% and the remaining 70% of that Net Profit would be paid to AMMENA.

38. Thus, AMMENA was entitled to be paid its fee of 10% of the wholesale price under Clause 4.3 of the Agency Agreement whilst the Agency Agreement remained in force even if there was no agreed amount for the MCMP. The Claimant acknowledged (paragraph 36 of its Closing Submissions) that between January and May 2021, AML made payments of USD 1,806,169.67 to AMMENA to reflect 10% of the wholesale price of vehicles that were being sold pursuant to the Agency Agreement.

39. Further, it seems to me that it is far from clear as a matter of business common sense that the parties would have agreed to be bound by the preceding year's MCMP had they addressed the issue of what happens if a Business Plan was not agreed for a subsequent period. Depending on what level of profit was agreed going forward, the MCMP for any year could have represented an increase or a reduction in its return and thus have operated to the benefit or disadvantage of AMMENA. Whilst the Claimant disputes that the consequence of its interpretation of Clause 4.5 (which would take 2020 in default of agreement) would remove the incentive on AMMENA to agree a lower figure going forward, it is difficult to see any commercial logic for an interpretation which defaults to the MCMP for 2020 for the subsequent 3 year period.

40. Balancing the indications given by the language against the context, I find that under Clause 4.5 of the Agency Agreement in the absence of an agreed Business Plan for any year, AML is not obliged to pay MCMP to AMMENA in respect of such year and in the absence of an agreed Business Plan, the Projected AMMENA Net Profit and/or MCMP do not continue to be those forecast in respect of the preceding 12 months.

Alleged implied term in the Agency Agreement

41. In the alternative it was submitted for the Claimant that given the mandatory nature of the obligation to pay MCMP, it is therefore "*necessary to imply a term for the business efficacy of the Agency Agreement as a whole*", such term being that MCMP for the Additional Period would be the same as for the final year in the Initial Period.

42. The law on implied terms was common ground: *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 at [18] and [21]:

> "18 *In the Privy Council case BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283, Lord Simon of Glaisdale (speaking for the majority, which included Viscount Dilhorne and Lord Keith of Kinkel) said that:*
>
> *"for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.*"
>
> "*21 In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266, 283 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyd's Rep 37. First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hofmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be*

> *that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence*." [emphasis added]

43. In my view the proposed implied term would contradict the language of the Agency Agreement and in particular the definition of MCMP as "*for any year, 90% of the Projected AMMENA Net Profit shown for that year in the Business Plan agreed by AMMENA and AML from time to time".*

44. Further, the contract provided a mechanism for the parties to agree a Business Plan for the next 3 year period. The contract did not therefore lack commercial or practical coherence since the parties had an obligation to agree a Business Plan for the succeeding period.

45. Even if the failure to agree meant that the contract could not operate as intended, the Claimant has not shown that it is "*so obvious that it goes without saying*" or "*reasonable*" that the parties would have agreed to use the figure for 2020: the Claimant's case is that the last year of the Initial Period (2020) would apply for the whole of the Additional Period (i.e. the 3 year period). It is not "*obvious*" (or "*reasonable*") that the parties would have agreed to use a retrospective figure for 3 years going forward regardless of projected market conditions and projected sales.

46. For all these reasons I find that the implied term sought by AMMENA is not necessary for "*business efficacy*" nor is it "*obvious*" or reasonable.

MCMP in relation to the Transition Period

Submissions

47. In relation to the Transition Period it was submitted for the Claimant that (paragraph 63 of its Closing Submissions):

    47.1 where AML continued to effectively act as Distributor in an agreed Transition Period, the remuneration structures of the Agency Agreement should also continue to apply. The relationship between the parties did not in fact alter until the Transition Period ended. The Agency Agreement does not expressly provide for this, but it is so obvious as to go without saying and/or is necessary for the business efficacy of the agreement reached by AML and AMMENA as to AML's role during the Transition Period.

    47.2 The alternative would be that AML accrues a significant unjustified windfall, in circumstances where the Agency Agreement has been terminated for material breach. In effect, AML asks the Court to accept that it could retain a role of Agent with remuneration of 100% of everything that role generated. This has no basis in the agreed contractual scheme.

48. For the Defendant it was submitted that AMMENA has not pleaded or adduced any evidence of any *ad hoc* agreement between the parties as regards MCMP for the Transition Period, nor any agreement that the Agency Agreement continued either in full or in part (including as regards MCMP) after its termination. It was further submitted that

AMMENA does not plead or evidence any agreement between the parties or any assent by AML to act as AMMENA's agent (and no such agreement follows from AML's agreement in practice to the Transition Period as AML repeatedly made clear that it did not act as AMMENA's agent during the Transition Period such that there cannot have been any consent to do so). It was submitted that the supposedly uncommercial result is one of AMMENA's own making because it sought to terminate the Agency Agreement with immediate effect when it was not ready and/or able to resume its role as Distributor.

49. The Claimant sought to draw an analogy with the case of *Devani v Wells* [2019] UKSC 4.

50. In response the Defendant submitted that once the Agency Agreement was terminated there was no agreement between the parties that AML would pay anything to AMMENA whilst it refused to act as Distributor during the Transition Period. On the contrary, AML repeatedly made clear to AMMENA that it was not entitled to any remuneration until it resumed its role as Distributor.

Discussion

51. In a letter from Slaughter and May, acting for AML, to CMS dated 23 July 2021 Slaughter and May set out the position with respect to AML during the Transition Period as follows:

> "*As explained in our 30 June Letter, strictly without prejudice to AML's position that (i) the Agency Deed was validly terminated by AML with immediate effect on 3 June 2021 following AMMENA's repudiatory breach, and (ii) AML does not have an obligation under Clause 2.3 of the Agency Deed (or otherwise) to assist with an orderly transition plan to facilitate AMMENA's resumption of its responsibilities under the Distribution Agreement, since the termination of the Agency Deed on 3 June 2021 AML has continued to perform certain of the same activities it used to perform when acting as Manager under the Agency Deed in the interest of ensuring business continuity and minimising disruption for customers. For the avoidance of doubt, for the period between AML's termination of the Agency Deed on 3 June 2021 and 1 September 2021 (or the date on which AMMENA resumes substantive operational control of its responsibilities as Distributor, if earlier):*
>
> *(a) AML has no obligation to perform any such activities and it does so strictly without prejudice to its position. AML reserves the right to cease performing such activities at any point at its full discretion;*
>
> *(b) AML has not and is not acting as an agent of AMMENA;*
>
> *(c) AML has not and will not perform all of the activities it used to perform as Manager. For example, AML will not make any changes to or decisions on price realignment, warranty policies or the addition or termination of dealers;*
>
> *(d) there is no obligation upon AML to continue to make payments to AMMENA on the revenue generated through such activities and it does not intend to do so. It is therefore in the interest of your client to complete the transitional period and assume all of its obligations under the Distribution Agreement by no later than 1 September 2021; and*

> *(e) for the avoidance of doubt, all activities performed by AML are performed on a temporary basis only and will cease to be performed on these terms on 1 September 2021 (or the date on which AMMENA resumes substantive operational control of its responsibilities as Distributor, if earlier).*
>
> *8. As a gesture of goodwill and provided AMMENA confirms that it will resume substantive operational control of its responsibilities as Distributor on 1 September 2021 in accordance with paragraph 5 above, AML is willing to perform these activities for no fee. Absent confirmation, AML reserves all rights.*"
> [emphasis added]

52. The Claimant submitted that the implied term (that the remuneration structure of the Agency Agreement should continue to apply during the Transition Period) is "*so obvious as to go without saying"* and/or is necessary for the business efficacy of "*the agreement reached by AML and AMMENA as to AML's role during the Transition Period*".

53. However the Claimant has not pleaded:

    53.1 any ad hoc agreement between the parties as regards AML's role for the Transition Period, nor

    53.2 any agreement that after its termination under Clause 6, the Agency Agreement would continue either in full or in part (such that the provisions regarding MCMP continued to apply).

54. Clause 6.1 of the Agency Agreement provided that a notice would terminate the agreement with immediate effect. Clause 6.4 only preserved rights that had accrued up to the date of termination and there is no express provision for the fees in Clause 4 to continue post termination. Clause 6.3 of the Agency Agreement only preserved the rights under Clause 5.

55. In its submissions (paragraph 63.2) the Claimant submitted that "*it was agreed that AML would continue to effectively operate as Distributor*" and that the relationship did not alter "*in fact*" until the end of the Transition Period. However there is no pleaded case (or evidence relied upon) that there was an agreement reached that AML was acting as agent for AMMENA during the Transition Period. There is therefore no basis for any finding of any implied term that the remuneration of AML "as agent" under the Agency Agreement should be implied into any agreement other than the Agency Agreement where it has not been established that there was an agreement or that AML was acting as agent as a matter of law.

56. Further and in the alternative, even if an agreement had been pleaded, it cannot be said that it was "*so obvious that it goes without saying*" that a term should be implied into such an agreement that the remuneration structures of the Agency Agreement should continue to apply: for the reasons set out above in relation to the Agency Agreement it is equally the case that it cannot be said to satisfy the requirements for an implied term, to imply that the MCMP should be calculated absent an agreed Business Plan for that year (2021) by reference to the figures for the preceding year.

57. It was submitted for the Claimant that it was commercially unjustifiable that AMMENA was not due remuneration at all when AML remained in the effective role of Distributor.

However, a term cannot be applied into contract merely because it appears fair. Unlike in *Devani* the Claimant has not established that there was a binding contract.

Claim for damages

58. As a further alternative the Claimant seeks the sums which AMMENA would have made as MCMP for the Transition Period be paid to AMMENA as damages. It was submitted that the Agency Agreement would have remained on foot were it not for AML's repudiatory breach in failing to make the necessary MCMP payments for 2019 and 2020. AMMENA accepted that breach and terminated but, as a result of the breach, lost the MCMP due for 2021.

59. The Defendant objected that this point has not been pleaded.

60. The Claimant referred to paragraph 29 of its Particulars of Claim and the claim for damages in the prayer:

> "*MCMP was due to be paid until the end of the transition period on 30 September 2021. In the premises, AML is indebted to AMMENA, and AMMENA is entitled to and claims from AML, the further sum of £3,875,162.15 due in respect of Manager Committed Minimum Profit from 1 January 2021 to 30 September 2021*."
>
> "*AND the Claimant claims:*
>
> *(1) The sum of £5,734,006.70;*
>
> *(2) The sum of £3,875,162.15;*
>
> *(3) Further sums becoming due under the Agency Agreement after the date hereof;*
>
> *(4) An account;*
>
> *(5) Damages;*
>
> *(6) To the extent necessary, a declaration.*
>
> *(7) Interest*.
> *(8) Such further or other relief as the Court thinks fit*
> *(9) Costs*"

In its Closing Submissions AMMENA stated that it would be content to amend its claim to "*clarify"* the pleadings if the Court thinks it is necessary.

61. In my view this alternative claim was not pleaded and it is too late to seek an amendment in closing. The claim for damages for the MCMP in respect of 2021 therefore fails.

Conclusion on MCMP

62. For the reasons discussed above I find that:

    62.1 In the absence of an agreed Business Plan for any year, AML is not obliged to pay MCMP to AMMENA in respect of such year.

62.2 In the absence of an agreed Business Plan, the Projected AMMENA Net Profit and/or MCMP do not continue to be those forecast in respect of the preceding 12 months.

63. Accordingly I find that AMMENA was not entitled to MCMP for 2021 until the termination of the Agency Agreement.

64. Further for the reasons discussed above, I find that there was no basis for the payment of MCMP by AML to AMMENA between the termination of the Agency Agreement and the end of the Transition Period on 30 September 2021.

Counterclaim

65. Clause 5.1 of the Agency Agreement provided:

> "*AMMENA will indemnify and hold [AML] harmless against any and all damages, costs, expenses (including legal fees), losses, and liabilities incurred in the course of, or as a result of, or in connection with: (a) any and all historic liability arising out of or in connection with [AMMENA's] provision of services under the Sub-distribution Agreement and/or the Amended Agreements howsoever arising, including without limitation claims for breach of contract, negligence and/or fraud, whether arising before or on the date of [the Agency Agreement], in each case whether known or unknown to AMMENA; and (b) [AML's] appointment as agent on [AMMENA's] behalf pursuant to the terms of [the Agency Agreement].*"

66. Clause 5.2 provided:

> "*For the avoidance of doubt, in either case, as provided for in clause 5.1 above, this includes any damages, costs, expenses (including legal fees), losses, and liabilities incurred in connection with the assignment or termination of the existing dealership arrangements with Haji Husein Alireza & Co. in Saudi Arabia and any other Existing Dealerships' dealership arrangements.*" [emphasis added]

67. Clause 5.3 provided:

> "*The indemnity in clause 5.1 shall not apply to: (a) any acts of AML in breach of its obligations under this agreement…*".

Background

68. By the HHA Dealer Agreement between AML and HHA, AML appointed HHA on a non-exclusive basis to import, sell and service Vehicles and Parts in Saudi Arabia. Although the version of the HHA Dealer Agreement as executed said that the contract was for an "*indefinite period unless and until terminated by not less than [90] days' prior notice*" HHA registered an Arabic version of the HHA Dealer Agreement with the Ministry of Commerce and Investment in Saudi Arabia ("MOCI") which contained a ten-year term starting from 19 August 2008.

69. From around late 2009 AMMENA was granted exclusive distribution rights in the MENA region.

70. A Deed of Agency Appointment was entered into between AML and AMMENA dated 16 August 2017 (the "2017 Agency Deed") pursuant to which AMMENA formally appointed AML as its agent in respect of certain aspects of its operations in the MENA region.

71. The 2017 Agency Deed contained the following provisions concerning indemnities:

    i) Clause 5 provided that AMMENA "*will pay any damages, costs, expenses (including legal fees), losses and liabilities incurred by [AML] in the course of the Agency. For the avoidance of doubt, this includes any damages, costs, expenses (including legal fees), losses and liabilities incurred in connection with the assignment or termination of the existing dealership arrangements with [HHA] and any other Existing Dealerships' dealership arrangements*".

    ii) Clause 6 provided that AMMENA "*will indemnify and hold [AML] harmless against any and all damages, costs, expenses (including legal fees), losses and liabilities incurred in the course of, or as a result of, or in connection with the Agency*".

72. A side letter (the "HHA Side Letter") dated 18 August 2017 provided, *inter alia*, that in respect of the indemnity given by AMMENA to AML in the 2017 Agency Deed, AML agreed to share with AMMENA, on a ratchet basis up to a maximum of US$750,000, all direct "Costs" resulting from the termination of arrangements with HHA.

73. "*Costs*" were defined as "*damages (including those arising out of a statutory termination compensation claim), cost, expenses (including legal fees), losses and liabilities … incurred by AML in connection with the assignment or termination of certain dealership arrangements, including assignment or termination of the existing dealers arrangements with [HHA]*".

74. On 24 August 2017 the HHA Termination Letter was sent.

75. It is common ground that HHA disputed AML's termination of the HHA Dealer Agreement on various grounds and threatened litigation.

76. On 19 April 2018 the Agency Agreement and the 2018 Side Letter were executed. The 2017 Agency Deed was terminated by a Deed of Termination dated 19 April 2018.

77. The 2018 Side Letter provided:

> "*We refer to (a) the letter agreement dated 18 August 2017 between AMMENA and Aston Martin Lagonda Limited about costs in connection with the assignment or termination of the existing arrangements with HHA (the "HHA Side Letter") and (b) the agency agreement between AMMENA and AML entered into today (the "New Agency Agreement").*
>
> *We agree that the HHA Side Letter will be honoured by AML and AMMENA notwithstanding clause 5.2 of the New Agency Agreement.*"

The effect of the 2018 Side Letter was to preserve the agreed contribution of up to US$750,000 to be made by AML whenever the indemnity was validly engaged.

78. On 16 August 2018 a letter was sent from AML to HHA formally withdrawing the HHA Termination Letter, and confirming that the HHA Dealer Agreement would not expire and would instead continue for a further 12 month period until 19 August 2019.

79. A settlement was entered into between AML and HHA (the "HHA Settlement"). Both the existence and the terms of the HHA Settlement were expressed to be confidential. The Court has determined that reference should be made in this judgment to the existence of the HHA Settlement in order for this judgment to be comprehensible to readers. The Court is therefore of the view that disclosure of the fact of the HHA Settlement is in the public interest for the administration of justice. However, for reasons which should be apparent from the judgment below, it is not necessary for the Court to disclose details in this judgment of the HHA Settlement which remain confidential.

Issues

80. The first issue that falls for determination by the Court in relation to HHA is whether AMMENA is liable to indemnify AML in respect of the costs of the HHA Settlement.

Submissions

81. It was submitted for the Claimant (paragraph 73 of its Closing Submissions) that the costs of the HHA Settlement are not covered by the express terms of the indemnity in Clause 5 since the indemnity relates only to the expenses and costs which AML incurred in connection with the "*assignment or termination*" of the existing relationship with HHA. However, no assignment or termination has taken place. It is common ground that HHA remains in place as the retail dealer in Saudi Arabia to this day. Therefore, it is impossible to say that there has been, or ever was, any "*termination*" of HHA's role.

82. It was submitted for the Defendant that:

    82.1 The letter of non-renewal had to come from AML as the contractual counterparty.

    82.2 It was the parties' clear common intention (when entering into the 2017 Agency Deed and thereafter the Agency Agreement given that the Agency Agreement replicated the indemnity provisions from that deed) that AML was to be indemnified for any costs, expenses and losses incurred in connection with the sending of the HHA Termination Letter (or any termination letter sent to any other retail dealer).

    82.3 In light of the factual matrix, the parties' common intention in agreeing Clauses 5.1 and 5.2 was for AML to be indemnified in connection with the sending of the HHA Termination Letter whatever its content or precise characterisation and irrespective of whether the HHA Dealer Agreement was in fact terminated and/or not renewed.

    82.4 It makes no commercial sense for AML to be indemnified only if termination actually takes effect.

Discussion

83. The principles of construction have been set out above. As stated by Lord Hodge (and referred to above):

> "*10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…*".

84. As also stated by Lord Hodge*:*

> "*…it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*"

Language of Clause 5.2

85. Looking at the language of Clause 5.2 it refers to "*any damages, costs, expenses (including legal fees), losses, and liabilities incurred in connection with the assignment or termination of the existing dealership arrangements with Haji Husein Alireza & Co…*". (emphasis added)

86. It was submitted for the Defendant (paragraph 62(2)) that the words "*in connection with*" are to be given their plain and ordinary meaning such that it is sufficient that there be "*some connection*" between the losses incurred and the sending of the HHA Termination Letter.

87. In my view the natural meaning of the language is that it covers *"damages, costs, expenses (including legal fees), losses, and liabilities"* ("Losses") which are linked to the *"termination"* of the existing dealership arrangements. In my view the language of the relevant clause *"incurred in connection with*" indicate that there must be a link between the Losses which are incurred and the *"termination"*. The language used does not refer to a link between the Losses and the sending of the HHA Termination Letter.

88. On the Defendant's case the language *"incurred in connection with …termination"* has to be read as extending to Losses incurred in connection with *"the sending of the HHA Termination Letter*". The key plank of the Defendant's case is thus the link between the fact of sending the HHA Termination Letter or the giving of notice of non-renewal and the Losses resulting from the HHA Settlement. On the Defendant's case the words "*in connection with …the termination…of the dealership arrangements*" have to be read as extending to *"threatened termination"* or *"the giving of a notice of termination, irrespective of whether termination actually takes place"*. Such an interpretation is not obvious on the language.

89. It seems to me that *"termination"* is capable of extending to non-renewal of the dealership agreement although this cannot be said to be clear from the word *"termination*".

Context

90. The Court has to balance the indications given by the language against the factual background and the implications of rival constructions.

91. The Defendant places reliance on (what it says was) the parties' intentions when entering into the 2017 Agency Deed and thereafter the Agency Agreement that AML was to be indemnified for any costs, expenses and losses incurred in connection with the sending of the HHA Termination Letter.

92. AML relied on the following matters:

    92.1 AML was not willing to send the HHA Termination Letter until the 2017 Agency Deed and the HHA Side Letter had been agreed.

    92.2 When it sent the HHA Termination Letter AML made expressly clear it was doing so as AMMENA's agent.

    92.3 The parties knew that the HHA Termination Letter had to come from AML as the contractual counterparty and based on Saudi Arabian legal advice (the contents of which otherwise remain privileged) the non-renewal option was chosen.

93. AML submitted (Day 5 p99) that the HHA Termination Letter was not sent until AML had received the indemnity and AML had made it clear that that meant compensation in full "*from any fallout from HHA*". AML referred the Court to an email sent by the then President and CEO of AML to AMMENA on 3 August 2017. AML submitted this email made clear the position AML was taking at the time that AML "*should not bear any liability relating to AMMENA's instruction to terminate [the HHA Dealer Agreement]"*.

94. However when that statement quoted from the email is read in context it is clear that the entire thrust of the discussions between the parties was in relation to termination and AML was seeking an indemnity for AML terminating the dealership as agent for AMMENA:

> "*As I understand the situation under the AMMENA distribution agreement, AML should not be liable for HHA termination costs regardless of the time of assignment…*
>
> *AMMENA's right to choose assignment or termination, and our duty to do so for the benefit of, and as directed by, AMMENA, reflects the agency relationship between AML and AMMENA.*
>
> *I have been advised that under English agency law, AMMENA is under a duty (as principal) to indemnify AML (its agent) for all costs, expenses, damages, and liabilities the agent incurs in acting for the benefit of and as directed by the principal.*
>
> *Therefore regardless of whether the HHA dealership agreement has been assigned to AMMENA (or AMMENA instructs AML to terminate the HHA dealer agreement), AMMENA has a duty to fully indemnify AML for acting as AMMENA's agent for the region.*

> *Whilst AML should not bear any liability relating to AMMENA's instruction to terminate HHA's dealer agreement, in the interests of moving this matter forward, we are prepared to consider the following on a without prejudice basis:*
>
> *(a) AMMENA signs the agency agreement assuring full indemnity with respect to all future matters relating to all AMMENA territories;*
>
> *(b) AML will offer to share costs relating directly to the termination of HHA, on a ratchet basis as below (we assume that the actual amount will be in the region of $1m to $2m and ultimately this will be returned through better sales performance in Saudi. We also assume this liability is likely to arise in 2018) …*"
> [emphasis added]

95. In my view none of these factual matters relied on by AML assist the Court in providing relevant context to the rival interpretations which hinge on whether the language of "termination" should be interpreted to extend to the sending of a notice of termination (non-renewal) even where the appointment is not subsequently terminated.

96. It has not been submitted that the factual context when entering into the Agency Agreement is that the parties had in mind that the HHA Termination Letter could or would be withdrawn or that Losses would be incurred if the HHA Termination Letter was withdrawn and the HHA Dealer Agreement was not terminated. The only submissions from AML in this regard were that:

    96.1 it made no commercial sense for AML to be indemnified only if termination actually takes effect (paragraph 62 (2) of its Closing Submissions).

    96.2 the Court cannot find that it was unreasonable to settle on the basis that HHA remained a dealer as AMMENA's position was that this was the deal they wanted (Day 5 p110).

97. The issue of commercial sense is addressed below. The question of the reasonableness of the settlement only arises if AML are correct on the construction of the indemnity.

98. It was submitted for AML that the indemnity provisions from the 2017 Agency Deed were replicated "*almost to the letter*" in Clauses 5.1 and 5.2 of the Agency Agreement.

99. Whilst the provision referring expressly to the assignment or termination of the existing dealership arrangements are substantively identical, it is notable that there were in fact differences between the indemnity provisions in the two agreements and the indemnity in Clause 5.1 of the Agency Agreement is arguably more specific as to its scope. This is notable as part of the factual context because it suggests, as one might expect in a professionally drafted contract, that the indemnity in the Agency Agreement was carefully considered at the time it was drawn up in 2018. The parties did not merely reproduce the indemnity in the 2017 Agency Deed and this supports the conclusion that the natural meaning of the language reflects the intention of the parties.

100. In my view there is nothing in the factual matrix relied upon by AML which supports the Defendant's interpretation that the indemnity would extend to Losses incurred in connection with the HHA Termination Letter even if it was withdrawn and/or no termination took place.

101. The only other document which is part of the factual matrix is the 2018 Side Letter. Whilst it could be said that this merely refers back to the 2017 Side Letter, it was another document which was entered into at the time the Agency Agreement was entered into and in a professionally drafted set of contracts one would expect the language used to be precise and to reflect the intention of the parties. By confirming that the ratchet arrangement would remain in force the parties confirmed the intention behind the 2017 Side Letter and made express reference to its scope as "*about costs in connection with the assignment or termination of the existing arrangements with HHA*". That was a further opportunity to focus on the scope of the indemnity and to clarify its scope if in fact it did not reflect the intention of the parties.

Commercial common sense

102. The Defendant submitted that it makes no commercial sense for AML to be indemnified only if termination actually takes effect. It gave by way of example the situation where AMMENA could have ordered AML to withdraw the notice or a Saudi Court could find that termination was unlawful and so never took effect as a matter of law. In closing it also submitted that it made no commercial sense because, for example, AMMENA could have insisted that a settlement be entered into on terms that HHA must remain as a retail dealer or that was the only basis on which the parties were willing to settle.

103. Lord Hodge acknowledged that:

> "*where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense*".

104. These examples postulated by AML can in my view be distinguished as examples where a termination does not take effect by reason of the act of AMMENA itself or by operation of law. Those examples in my view may give rise to different commercial considerations (and different claims). They do not show that a conclusion that the express language used of "*termination*" should be limited to the actual termination of a dealership is contrary to commercial common sense: I note that in the email relied on by AML of 3 August 2017 (referred to above) the commercial rationale for the indemnity is in effect spelt out:

    104.1 AML would be indemnified because it was only acting as agent of AMMENA in terminating the dealership.

    104.2 AMMENA should benefit from the termination because it was assumed that the anticipated costs of termination would *"ultimately … be returned through better sales performance in Saudi"*.

105. In any event,

> "*in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause*".

This is a professionally drafted contract. It would have been open to the parties to refer to a purported termination or a termination which was subsequently withdrawn. However such words were not included.

106. AML also advanced an argument in Closing Submissions (paragraph 62(3)) that Clause 5.2 was "*just by way of clarification of the indemnity in Clause 5.1*" which was in wider language.

107. Clause 5.2 does start with the words:

> "*For the avoidance of doubt, in either case, as provided for in clause 5.1 above, this includes*…" [emphasis added]

AML did not set out in its submissions how the costs claimed in respect of the HHA Settlement fell into either of the two scenarios which are expressly set out in Clause 5.1 but it would in my view, be contrary to the overall structure of the indemnity in Clauses 5.1 and 5.2 to conclude that notwithstanding the express language of Clause 5.2 referring to the "*termination*" of the dealership, Clause 5.1 was intended to cover any dispute with an existing dealer even if the relationship was not terminated. It is difficult to see why the language in Clause 5.2 would have been included and expressed to be limited to "*termination or assignment*" if the parties intended that the indemnity in Clause 5.1 extended to any costs incurred in relation to an existing dealer or any dispute with an existing dealer.

Conclusion on counterclaim in respect of HHA Settlement

108. Lord Hodge in *Wood* said that:

> "*…in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause … and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest…*".

109. This was a professionally drafted contract. There is no case advanced for rectification based on the common intention of the parties.

110. The contract does not expressly provide that the indemnity would extend to any dispute with HHA or a purported termination. The indemnity in Clause 5.2 was expressly tied to a termination (or assignment). There is nothing in the factual context to the Agency Agreement which leads to a different conclusion. An indemnity which covered termination of the HHA dealership accorded with the commercial rationale that AMMENA as Distributor in the region could choose to remove a retail dealer in the hope and expectation that it would improve sales but would have to indemnify AML for any costs given that AML was the contractual counterparty and acting as its agent (and subject to the operation of the ratchet arrangement in the 2018 Side Letter).

111. Balancing the indications given by the textual analysis against the context as discussed above, I find that AMMENA is not liable to indemnify AML in respect of the costs of the HHA Settlement.

Alternative defence to Counterclaim-HHA Settlement not reasonable

112. The Claimant alleged that: (a) the costs of the HHA Settlement were unreasonable in all the circumstances and therefore outside the relevant indemnity; and (b) if the indemnity is engaged, the proper sum recoverable is lower than that claimed by the Defendant.

113. In light of my findings above I do not need to determine whether the alternative defence to the Counterclaim is made out and I do not propose to do so.

Duty of good faith

114. The Claimant alleges that the Defendant was subject to a duty of good faith during the Transition Period (either expressly under the Agency Agreement or by necessary implication) and that the Defendant breached this duty in various ways.

115. The Defendant denies that there was any express or implied duty of good faith during the Transition Period (which the Defendant alleges was not a mandatory transition period but one agreed between the parties). Even if there was any such duty, the Defendant contends that it fully discharged such duty and that none of the alleged breaches constitute bad faith or a breach of any alleged duty**.**

116. Issues of causation and quantum of damage resulting from any breach of the duty of good faith found by the Court have been remitted by the parties' consent to arbitral proceedings that are also on foot between AMMENA and AML, which primarily concern breaches of the Distribution Agreement after the Transition Period. Accordingly, while the Court may determine whether AML breached duties owed to AMMENA during the Transition Period, it does not need to determine if those breaches caused loss, or the amount of that loss.

117. Issues 9-11 of the Agreed List of Issues are as follows:

> "*9. Did AML owe a duty to cooperate in good faith during the Transition Period(either expressly under Clause 2.3 of the Agency Agreement or by implication)?*
>
> *10. If AML did owe a duty to cooperate in good faith during the transitional period, did AML breach this duty, as alleged by AMMENA in RRAPOC paragraphs 26BB to 26D?*
>
> *11. Did AML breach Clause 3.2 of the Agency Agreement as alleged by AMMENA in RRAPOC paragraph 26BA?*
>
> *Paragraph 26BA stated*
>
> *26BA Further to AMMENA's termination notice, and in breach of Clause 3.2, AML took no substantive actions to ensure that AMMENA would obtain the benefit of the experiences and structures developed by AML during the term of the Agency Agreement. As pleaded at paragraph 20A above, AML had in fact failed properly to develop such structures. Nonetheless, AML did not take all reasonable steps to assist AMMENA with commencing operation of the business under the Distribution Agreement.*"

Relevant contractual provisions of the Agency Agreement

118. Clause 2.2 and 2.3 of the Agency Agreement provided as follows:

> "*2.2 This Agreement shall come into force on the Commencement Date and (subject to the provisions for earlier termination in Clause 6 below) shall last for an initial*

period of three years (the " Initial Period ") and shall continue in force thereafter for additional periods of three years each ("Additional Period(s)") unless and until either party gives to the other not less than 12 months' prior written notice of termination such notice to expire at the end of the Initial Period or one of the Additional Periods.

2.3 Once either party gives notice of termination, the parties will meet and confer to work out an orderly transition plan so that AMMENA can assume its duties under the AMMENA Distribution Agreement and to minimise insofar as practicable any losses incurred by the Manager in the course of, or as a result of, or in connection with termination of the agency. AMMENA and AML will (acting reasonably and in good faith) agree minimum sales targets for volume and mix for the two years immediately following termination of this Agreement based on the principles set out in Article 3(2) of the Distribution Agreement. ("Interim Targets"). For the two years following the termination of this agreement: (a) Article 3A(3) of the Distribution Agreement will not apply to any failure to meet the Interim Targets if AMMENA has used reasonable commercial endeavours to meet the Interim Targets; and (b) the remedies otherwise available to AML under the Distribution Agreement in respect of any default in compliance with the obligations of AMMENA under the Distribution Agreement in respect of retail dealers shall not apply insofar as AMMENA has used reasonable commercial endeavours to meet those obligations. Thereafter the Distribution Agreement shall apply in its entirety." [emphasis added]

119. Clause 3.2 and 3.4 of the Agency Agreement provided as follows:

"*3.2 The Manager will establish a regional presence and contemporary and benchmark operations in the Territory known as "Aston Martin Middle East "/" AMME". The proposed operational structure is set out in Schedule 1. On termination of this Agreement, the Manager shall in good faith take all reasonable steps to pass on to AMMENA the benefit of the experience and structures developed by the Manager in respect of such operations in order to assist AMMENA to commence and continue such operations itself with immediate effect.*

3.4 The Manager will comply with all reasonable and lawful instructions of AMMENA from time to time in respect of the appointment and the Manager will generally act in good faith and in such manner as it reasonably thinks best to promote the interests of AMMENA under the appointment." [emphasis added]

120. Clause 6.1 provided that:

"*6.1 Without affecting any other right or remedy available to it, either party may terminate this Agreement with immediate effect by notice to the other if:*

(a) subject to Clause 6.2 below, the other party commits a material breach of any of its obligations under this Agreement which is incapable of remedy; or

(b) subject to Clause 6.2 below, the other party fails to remedy (where it is capable of remedy) any breach of any of its obligations under this Agreement

> *after being required in writing to remedy or desist from such breach within a period of 60 days;*
>
> *(c) the other party becomes insolvent or bankrupt or go into liquidation, receivership or administration or is wound up or enters into a composition or arrangement with its creditors or takes or suffers any similar or analogous action in any jurisdiction; or*
>
> *(d) the AMMENA Distribution Agreement terminates for any reason whatsoever.*"

Express term under Clause 2.3

Submissions

121. The Claimant relied on the language of Clause 2.3 which applies once either party gives *"notice of termination"* to submit that it applies to a termination pursuant to a notice given for a material breach pursuant to Clause 6.1 as well as a termination notice pursuant to Clause 2.2 which applies where either party gives not less than 12 months' prior written notice of termination.

122. It was submitted for the Claimant that it is unlikely that the parties would have considered that if AMMENA terminated under Clause 6.1 (b) then AML would no longer be bound by Clause 2.3 to act reasonably in good faith to agree minimum sales targets. It was also submitted that there was no commercial logic in construing the Agency Agreement such that the obligations in Clause 3.2 survive but the obligations in Clause 2.3 do not.

Discussion

123. As referred to above, the interpretation of the contractual language requires not only a textual analysis but also a contextual one. Thus whilst the language "*notice of termination*" is capable of extending to notices under Clause 6.1 as well as notices under Clause 2.2, the indications given by the language have to be balanced by the indications given by the context.

124. In my view the fact that Clause 2.3 appears immediately after the provision for a 12 month notice of termination in Clause 2.2 and provides for a transition plan to be agreed would suggest that the obligations in Clause 2.3 apply to a termination notice pursuant to Clause 2.2 and not to a notice under Clause 6. On the Claimant's case Clause 2.3 would operate after the termination had become effective. It seems contrary to the structure of Clauses 2.2 and 2.3 which expressly contemplated an "*orderly transition plan*" being worked out during the 12 month notice period, for Clause 2.3 to extend to a termination under Clause 6 where termination is immediate and there is no provision for a transition period.

125. The interpretation that Clause 2.3 is limited to a notice under Clause 2.2 is also supported by other contextual indications: Clauses 6.3 and 6.4 provided:

> "*6.3 On termination of this Agreement, clause 5 will continue in force.*
>
> *6.4 Termination of this Agreement will not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination,*

> *including the right to claim damages in respect of any breach of the Agreement which existed at or before the date of termination.*"

Thus in Clause 6.3, even though the parties have apparently addressed their minds to the issue of what clauses should survive termination, there is no express preservation of the obligations under Clause 2.3.

126. Further, Clause 6.4 does not apply where there is an immediate termination by notice under Clause 6.1 since the obligations under Clause 2.3 arise only after the notice of termination has been given and accordingly at the date of termination there would have been no rights or obligations "*accrued*" under Clause 2.3.

127. It was submitted for the Claimant that it is unlikely that the parties would have considered that if AMMENA terminated under Clause 6.1 (b) then AML would no longer be bound by Clause 2.3 to act reasonably in good faith to agree minimum sales targets.

128. As stated in *Wood*:

> "*…where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause…*".

129. Whilst it might make sense as a commercial matter to extend Clause 2.3 to a termination for material breach, the Court takes into account that this would appear to be a professionally drafted contract. Further, whilst the Claimant submitted that Clause 2.3 should apply to a termination under Clause 6.1 (b), Clause 6.1 provides that a notice of termination may be given not only if there is a material breach of the Agreement but also where the other party was affected by an insolvency event or on termination of the Distribution Agreement. The obligation to work out an orderly transition plan and the duty of good faith to agree minimum sales targets would not appear to make commercial sense where the other party had become insolvent or where the Distribution Agreement was terminated. On the Claimant's interpretation one therefore has to imply a limit into the language of Clause 2.3 so as to apply it to a notice pursuant to Clause 6.1 (b) but not a notice pursuant to Clause 6.1 (c) and (d). There is no basis for such a limitation on the language of Clause 2.3 and nothing in the context to support this.

130. It was also submitted for the Claimant that there was no commercial logic in construing the Agency Agreement such that the obligations in Clause 3.2 survive but the obligations in Clause 2.3 do not. In construing Clause 2.3 the Court has to balance the indications given by the language against the context. Again as stated in *Wood*:

> "*… negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement.*.".

Conclusion on Clause 2.3

131. Balancing the context against the literal meaning of the words in Clause 2.3 I find that the objective meaning of the language of Clause 2.3 is that the duty of good faith in Clause 2.3 is limited to a notice of termination under Clause 2.2.

Clause 3.2

132. In the alternative, the Claimant relies on Clause 3.2 of the Agency Agreement which provided:

> "*3.2 The Manager will establish a regional presence and contemporary and benchmark operations in the Territory known as "Aston Martin Middle East"/ "AMME ". The proposed operational structure is set out in Schedule 1. On termination of this Agreement, the Manager shall in good faith take all reasonable steps to pass on to AMMENA the benefit of the experience and structures developed by the Manager in respect of such operations in order to assist AMMENA to commence and continue such operations itself with immediate effect.*"

Submissions

133. AMMENA submitted (Closing Submissions paragraph 151) that the following were clear breaches of the express duty to act in good faith:

133.1 actions taken to make it more difficult for AMMENA to assume the role of Distributor; and

133.2 actions taken to undermine the potential profitability of the business under the Distribution Agreement.

134. It was submitted for the Claimant (Day 5 p45) that the duty in Clause 3.2 covered all the breaches of the duty of good faith on which it relied with the exception of the setting of sales targets which is dealt with by Clause 2.3 or by the implied term.

135. AML accepted that the good faith obligation in Clause 3.2 applied, but submitted that all it required was for AML "*in good faith [to] take all reasonable steps to pass on to AMMENA the benefit of the experience and structures developed by [AML*]" and that it was not a freestanding duty of good faith.

Discussion

136. AMMENA accepted that what a particular good faith obligation requires depends on the intention of the parties construed objectively. In its written submissions it submitted:

> *"144. What a particular good faith obligation (whether express or implied) requires depends on the intention of the parties construed objectively from the contractual wording, the context of the contract as a whole and the admissible factual matrix (see Chitty at [2-055]). As Leggatt J expressed it in Yam Seng Ptd Ltd v International Trade Corp Ltd [2013] EWHC 111 QBD; [2013] Lloyd's Rep 526 a good faith obligation is an obligation to act honestly towards a contractual counterparty and not to act in a way which would frustrate the purpose of the contract or to act in a way which would be "regarded as commercially unacceptable by reasonable and honest people." As to this, see also Leggatt LJ's judgment at [175]-[176] in Al Nehayan v Kent [2018] EWHC 333 (Comm).*

> *145. This was recently confirmed by the Court of Appeal in Re Compound Photonics Group Ltd [2022] EWCA Civ 1371…*" [emphasis added]

137. The Claimant's submissions above referred to Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB). The relevant passage is as follows:

> [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 of Birkenhead in a different context in his seminal speech in Royal Brunei Airlines Sdn Bhd v Tan [1995] 3 All ER 97 at 106, [1995] 2 AC 378 at 389–390. This follows from the fact that the content of the duty of good faith is established by a process of construction which in English law is based on an objective principle. The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had*."
> [emphasis added]

138. In *Re Compound Photonics* Snowden LJ said at [147]-[149]:

> "*147. In approaching the interpretation of clause 4.2, the first, and most important, point to emphasise is that like any question of interpretation of a contract, an express clause in a contract requiring a party to act in "good faith" must take its meaning from the context in which it is used. That point has been made very clearly in many cases, including by Jackson and Beatson LJJ in Compass Group UK and Ireland Ltd (t/a Medirest) v Mid- Essex Hospital Services NHS Trust [2013] EWCA Civ 200 ("Compass Group") at [109] and [150]- [151].*
>
> *148. The second, and related, point is that when considering the interpretation and meaning of an express good faith clause in context, cases from other areas of law or commerce, which turn upon their own particular facts, may be of limited value and must be treated with considerable caution…*
>
> *149. Given that very clear warning, as Newey LJ observed at the hearing, apart from the very obvious point made by Auld LJ in Street that the core meaning of an obligation of good faith is an obligation to act honestly, it is very far from obvious why it is logical or appropriate to attempt to analyse other cases, decided on other facts, in order to deduce a number of further "minimum standards" of conduct that a defendant must be taken to have agreed to comply with in every case in which a good faith clause has been used in a contract.*" [emphasis added]

139. I note the reference by Snowden LJ to *Compass Group UK and Ireland Ltd (ta Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200 at [109]. The relevant passage read as follows:

> "*I turn next to the content of the duty to co-operate in good faith, limited as it is by the two stated purposes. It is clear from the authorities that the content of a duty of good faith is heavily conditioned by its context. In Manifest Shipping Co Ltd v Uni-*

> *Polaris Insurance Co Ltd [2001] UKHL 1, [2003] 1 AC 469 insurers alleged that shipowners had failed to observe "utmost good faith" (as required by s. 17 of the Marine Insurance Act 1906) in the presentation of a claim. The Commercial Court judge, the Court of Appeal and the House of Lords all rejected that defence. Lord Scott, with whom Lord Steyn and Lord Hoffmann agreed, held that in the particular context the duty of utmost good faith required no more than that the insured should act honestly and not in bad faith: see paragraph 111.*" [emphasis added]

140. Applying that approach it is clear that the scope of the express duty of good faith in Clause 3.2 is a question of construction in accordance with the principles of construction set out in the authorities including *Wood* and referred to above.

141. The language of Clause 3.2 is expressly limited to passing on to AMMENA "*the benefit of the experience and structures developed by the Manager in respect of such operations*." The reference to "*structures*" clearly includes in my view the "*operational"* structure referred to in the preceding sentence which in turn refers to Schedule 1. Schedule 1 is headed *Proposed Initial Operational Structure* and contained an organisation chart. The chart was preceded by the words:

> "*AML will implement an experienced team into the Middle East region immediately and proposes to establish head offices in either Abu Dhabi or Dubai. AML proposes to structure the team in line with the organisation chart below (names are indicative and for illustration purposes only). In the short term, Christian Marti will take temporary charge.*"

142. The Claimant submitted (paragraph 151.2 of its Closing Submissions) that actions taken to "*undermine the potential profitability of the business under the Distribution Agreement*" would fall to be assessed by reference to "*the 15% margin previously made and reflected in the Agency Agreement*." It was also submitted that the pricing structure AML operated as Agent "*which assumed a 15% margin*" fell within the term "*structures*".

143. Taking the latter submission first, on one interpretation of the language the pricing structure in operation during the Agency Agreement could be said to be a "*structure*". However it was not a structure "*developed by*" AML within the natural meaning of the language. The pricing structure in the Agency Agreement was not developed by AML but was a term of the agreement as to pricing which was set out in the Agency Agreement.

144. Further the Claimant's interpretation of Clause 3.2 would require the term "*structures developed by [AML]*" to be interpreted to refer not to the pricing structure under the Agency Agreement whereby AMMENA received 10% of the wholesale price for each sale of vehicles and parts in the MENA region but what AMMENA says was the underlying assumption between the parties. I do not accept that the natural meaning of the language of the Clause is that the reference to "*structures developed by AML*" can be interpreted as a reference to any assumed or previous margin.

145. As well as not being a structure "*developed by AML*", for the Claimant's interpretation of "*structure*" to extend to the "*pricing*" or "*profitability*" of the business and to fall within the express duty of good faith in Clause 3.2, would require on the language of the Clause that the pricing structure was to be passed on in order to "*assist AMMENA to commence and continue such operations itself with immediate effect.*"

146. The purpose of the obligation to take reasonable steps is expressly directed at the ability of AMMENA to commence and continue the operations "*with immediate effect*". AML did not need to "*pass on"* the pricing structure under the Agency Agreement to enable AMMENA to commence (or continue) operations under the Distribution Agreement. Once the Distribution Agreement was being operated by AMMENA, vehicles would be sold by AML to AMMENA and no longer directly by AML to retail dealers such that the pricing structure was different from the structure for the Agency Agreement.

147. As to the submission that actions taken to "*undermine the potential profitability of the business under the Distribution Agreement*" would fall to be assessed by reference to "*the 15% margin previously made and reflected in the Agency Agreement*" the Claimant appears to be relying on previous arrangements prior to the entry into the Agency Agreement and/or on the margin comfort letter executed in April 2018 (the "Margin Comfort Letter").

148. It was submitted for the Claimant (paragraph 146 of its Closing Submissions) that the contractual arrangements include the Margin Comfort Letter, which sets out how AML agreed that it would act in relation to the profits which AMMENA could generate in the MENA region. Although the Margin Comfort Letter does not create directly enforceable legal rights, it was submitted that it formed part of the context in which the content of the duty of good faith falls to be determined and the Margin Comfort letter expressly stated that AML's pricing to AMMENA assumed that AMMENA would make a 15% margin.

149. The Margin Comfort letter stated that it provided "*comfort on Aston Martin's margin strategy*". It referred to the margin which AMMENA earned as reflecting the price at which it sold products to dealers less the costs paid to Aston Martin for products and other operating and marketing costs. It expressly stated that AML was not able to guarantee a specific margin. It did state that its current pricing assumed a 15% margin on the wholesale price of products less costs.

150. The Margin Comfort Letter was clearly referring to the margin where vehicles were sold by AML to AMMENA and then sold by AMMENA to dealers. This was not the structure under the Agency Agreement and I cannot see that "*the 15% margin previously made"* has any relevance to the interpretation of Clause 3.2.

Conclusion on 3.2

151. As referred to above, AMMENA accepted that the setting of sales targets did not fall within Clause 3.2.

152. For the reasons discussed above, I find that the duty of good faith in Clause 3.2 to take steps to "*pass on to AMMENA… structures developed by AML…in order to assist AMMENA to commence and continue such operations…"* did not extend to actions alleged to have been taken *"to undermine the potential profitability of the business under the Distribution Agreement*" or to the "*pricing structure"* under the Agency Agreement.

153. In relation to the other allegations of detailed actions which are said to have been taken "*to make it more difficult for AMMENA to assume the role of distributor*" these are considered below.

Implied terms

154. The Claimant's pleaded case on implied terms, so far as the duty of good faith is concerned, was advanced in the alternative as follows:

    154.1 Alternative 1 (Paragraph 26B.1 of the Re-Re-Re-Amended Particulars of Claim): "*There was an implied duty to cooperate in good faith upon termination to ensure that no damage was done to the business under the Distribution Agreement as it was transferred back to AMMENA from AML.*"

    154.2 Alternative 2 (Paragraph 26B.2 of the Re-Re-Re-Amended Particulars of Claim): "*In the further alternative, having agreed to a transition period until 1 October 2021 to facilitate an orderly transfer of the business, AML was under an obligation to cooperate in good faith during the period of the transition to ensure that the business could be transferred on 1 October 2021*."

155. AMMENA pleaded nine instances of a failure to act in accordance with the implied duty of good faith "*to cooperate in good faith upon termination of the Agency Agreement*" of which eight were pursued at trial.

156. It would appear that the Claimant's pleaded case is that terms should be implied into the Agency Agreement in relation to the Transition Period.

157. In this regard AML pleaded in the Re-Re-Amended Defence and Counterclaim:

> "*40B.1. AML understands AMMENA to be making allegations about express and/or implied obligations contained in the Agency Agreement (not in the Distribution Agreement), and AML's response below is pleaded on that basis.*
>
> *40B.2. AMMENA has failed to particularise the basis on which it is said that the alleged duties to cooperate in good faith pleaded in paragraphs 26B.1 and 26B.2 are to be implied and/or to arise, including how it is said that any such duties can be implied and/or arise in circumstances where it is common ground that the Agency Agreement was terminated with immediate effect*." [emphasis added]

158. AMMENA replied in the Re-Amended Reply and Defence to Counterclaim:

> "*224D As to paragraph 40A to 40C.1:*
>
> *24D.1 It is admitted that AMMENA is making allegations of breaches of the Agency Agreement (express and implied) during the transitional period...*" [emphasis added]

159. However in the Claimant's oral closing submissions there appeared to be a suggestion (Day 5 p48) that the implied term not to damage the business during the Transition Period was to be implied "*in this contractual arrangement in the Transition Period*".

160. In its Closing Submissions AMMENA submitted (paragraphs 153 and 154) that a term (not to act to damage the distribution business between termination and AMMENA assuming the role of Distributor) "*needs to be implied*" and such a term falls to be implied "*to the arrangements in the Transition Period*".

161. AMMENA's pleaded case is that the implied terms were terms of the Agency Agreement and this is the case that I propose to address. Whilst it is common ground that a Transition

Period was agreed, there is no pleaded case as to any interim agreement reached between the parties pursuant to which AML continued to carry out certain functions during the Transition Period.

Relevant legal principles

162. The law on implied terms is referred to above. The Claimant referred to the summary in *Chitty on Contracts* at 16-012:

> "*In short, in order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract.*"

163. It is helpful to set out the passage at 16-012 in full:

> *"The Supreme Court in Marks & Spencer affirmed that it is not enough to show that the term is a reasonable one for it to be implied into the contract. Reasonableness may be a necessary requirement before a term will be implied but it is not sufficient of itself to lead to the implication of a term into the contract. Thus a term will not be implied into a detailed commercial contract merely because it appears fair or because the parties might have agreed to it had it been suggested to them. Nor will a term be implied simply because it would improve the contract or make the carrying out of it more convenient. As it has been observed, "[t]he touchstone is always necessity and not merely reasonableness". The test therefore remains one of necessity, albeit not "absolute necessity" but whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term "in order to make the contract work". In short, in order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. Given the strict nature of the test established by the Supreme Court it is now no easy task to persuade a court to imply a term into a contract, particularly a written contract of some length which has been negotiated with the benefit of legal advice, and a number of cases can now be found in which the courts have applied the approach of the Supreme Court in Marks & Spencer and, on that basis, have declined to imply a term into the contract between the parties. If the contract does not expressly provide for what is to happen when a particular event occurs or in a particular situation, the most usual inference to be drawn is that nothing is to happen and no term is to be implied."* [emphasis added]

Alternative 1

164. AMMENA's pleaded case (Alternative 1) was a duty "*to cooperate in good faith upon termination to ensure that no damage was done to the business under the Distribution Agreement*" [emphasis added].

Submissions

165. It was submitted for AMMENA (paragraph 154.1 of its Closing Submissions) that AMMENA was not alleging that a general duty of good faith falls to be implied but that

"*a limited duty not to act to undermine the business during the Transition Period applies*".

166. It was submitted for AMMENA (paragraph 153 of its Closing Submissions) that:

166.1 It was "*obvious*" that a term not to act to damage the distribution business between termination and AMMENA assuming the role of Distributor needed to be implied: AMMENA could not practically reassume its role as Distributor immediately upon termination. If AML could act upon termination to undermine the business with impunity until AMMENA could take on the role of Distributor, that would render the ability to terminate for material breach under Clause 6 a nugatory form of protection.

166.2 Without such an implied term, there would be no guarantee that a viable business would be returned and such a term is therefore necessary for the business efficacy of the contract.

166.3 The term also reflects the express requirement to act in AMMENA's interests during the period of the Agency Agreement at Clause 3.4 of the Agency Agreement.

167. In its Closing Submissions (paragraph 154.2) AMMENA sought to distinguish authorities relied on by the Defendant as concerned with "relational" contracts and submitted that the alleged implied term does not contradict any term of the Agency Agreement.

Discussion

168. AMMENA asked rhetorically why would there not be an implied term that AML would not damage the business in the Transition Period. It was submitted that the opposite would serve neither party's commercial interests. [Day 5 p48]

169. However applying the test as reflected in the passages quoted from the judgment in *Marks and Spencer* (above), I note that:

> "*a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term*".

170. As to the submission that such an implied term is "*necessary*" for the business efficacy of the contract, the test as referred to above is whether without the implied term the contract would "*lack commercial or practical coherence*".

171. It was submitted that AMMENA could not practically reassume its role as Distributor immediately upon termination and that without such an implied term, there would be no guarantee that a viable business would be returned and such a term is therefore "*obvious*" and necessary for the business efficacy of the contract.

172. As referred to above, it would have been open to AMMENA to give notice under Clause 2.2 of the Agency Agreement and thereby give itself a 12 month period to prepare for the resumption of its obligations under the Distribution Agreement.

173. In addition AMMENA controlled the timing of any notice under Clause 6 and could have made preparations to resume its obligations under the Distribution Agreement prior to terminating under Clause 6.

174. As stated by *Chitty* (above):

> "*If the contract does not expressly provide for what is to happen when a particular event occurs or in a particular situation, the most usual inference to be drawn is that nothing is to happen and no term is to be implied.*"

175. Further it is difficult to see that the proposed implied term is necessary for the business efficacy of the Agency Agreement; rather the implied term appears to be directed at protecting the business under the Distribution Agreement and thus the business efficacy of the Distribution Agreement and not the efficacy of the agency relationship under the Agency Agreement.

176. It was submitted for AMMENA that the alleged implied term does not contradict any term of the Agency Agreement.

177. Whilst the alleged implied term may not directly contradict any term of the Agency Agreement, the question for the Court is what notional reasonable people in the position of the parties at the time at which they were contracting would have agreed. It is in my view therefore relevant that Clause 3.4 of the Agency Agreement was directed at the role of AML as Agent during the Agency Agreement and contained an express duty on AML to act in a manner that promoted the interests of AMMENA. Once the Agency Agreement had been terminated, AML was no longer acting as agent with duties to its principal and therefore it is difficult to see how it is "*obvious*" that the parties would have included an obligation which applied after the relationship of agency had been terminated.

178. To the extent that the Claimant submitted that it is unclear whether AML was acting as agent during the Transition Period, as referred to above, it has not pleaded a case based on any interim agreement.

179. In my view for the reasons discussed above, the Agency Agreement does not lack commercial or practical coherence without the term and it is not "*obvious*" nor is it necessary to "*make the contract work*" that such a term should be implied into the Agency Agreement.

Alternative 2

180. In relation to Alternative 2 the alleged duty is expressed as follows:

> "*having agreed to a transition period until 1 October 2021 to facilitate an orderly transfer of the business, AML was under an obligation to cooperate in good faith during the period of the transition to ensure that the business could be transferred on 1 October 2021.*"

181. The pleaded case for an implied term seeks to imply a term into the Agency Agreement. Since no case has been pleaded that the parties had reached any agreement that governed the relationship during the Transition Period there can be no finding of any implied term in any interim agreement.

182. In my view it was not necessary for such a term to be implied into the Agency Agreement. There was no provision in the Agency Agreement for a transition period after termination of the Agency Agreement so it is difficult to see how it can be said to be "*obvious*" or "*necessary*" that if a transition period were to be agreed, a duty to cooperate should be implied. As referred to above, it is not sufficient for a term to be implied to establish that a term was fair or reasonable.

183. Again, whilst such an implied term would not contradict a term of the Agency Agreement, it would in my view be unlikely given the express and limited provisions of Clauses 2.3 and 3.2 that the parties would have agreed a general term to cooperate during any period of transition following termination.

Conclusion on implied terms

184. For the reasons discussed above I find that the requirements as set out in *Marks and Spencer* for a term to be implied have not been met. In particular neither of the pleaded implied terms is *"necessary to give business efficacy to [the Agency Agreement]"* nor has it been shown that "*without the term, the [the Agency Agreement] would lack commercial or practical coherence"*.

If AML did owe a duty to cooperate in good faith during the Transition Period, did AML breach this duty, as alleged by AMMENA in RRAPOC paragraphs 26BB to 26D? (Issue 10)

185. The issue of breach of duty does not arise given my findings above on Clause 2.3 and implied terms. However if I am wrong and there was a duty to cooperate in good faith during the Transition Period, I will consider the alleged breaches of duty. It is to be noted that, as referred to above, the only issue for the Court is the existence and content of the duty of good faith and whether there was any question of breach because the questions in relation to causation and damage have been by agreement stood over to the arbitral proceedings where they overlap with other allegations that are made by AMMENA.

186. This issue requires the Court to determine as a preliminary matter the content of any such duty of good faith.

187. It is then necessary to consider the individual breaches both in the context of the alleged failure to take reasonable steps to assist AMMENA with commencing operation of the business under the Distribution Agreement (the alleged breach of Clause 3.2) and in the context of the alleged breach of the duty of good faith (other than the setting of sales targets which is alleged to be a breach only of the duty of good faith).

The content of the duty of good faith

Submissions

188. As to the content of the express duty of good faith which supplements the obligation to take all reasonable steps, the Claimant's case was that the duty extended not only to actions that AML took which were "*commercially unacceptable in light of the nature of the contractual arrangements and the duties of good faith which existed*" but further that the duty extended to a requirement to "*have regard to the effect of its actions on AMMENA*".

189. Counsel for the Claimant submitted in oral closings that relying on *Compound Photonics* at [197] the concept of good faith in Clauses 2.3 and 3.2 and the duty of good faith in the implied term is that AML was bound to take account of AMMENA's financial interests in making its decisions.

190. It was submitted in the Claimant's written closings (footnote 278) that:

> *"this is precisely the kind of case where a party must have regard to the interests of the other party because of the duty of good faith. The contractual structure is what which Snowdon LJ described in Re Compound Photonics as the kind of case "concerning business decisions by one party which are capable of adversely affecting, or even depriving the other party of, the contractual benefit enjoyed by that other party." Snowdon LJ was declining to apply a need to have regard to another party's interests in the case of a shareholders' agreement, but was accepting that a need to have such a regard was required in situations where one party's actions can affect the other party's commercial prospects. That is exactly the case where the Agency Agreement is terminated and AML controls prices before AMMENA can assume the role of Distributor*." [emphasis added]

Discussion

191. In *Re Compound Photonics Group Ltd* [2022] EWCA Civ 1371 Snowden LJ accepted that a duty of good faith could be breached by conduct which "*would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest*". He said at [241]:

> "*In my judgment, therefore, the authorities do not support the proposition that a contractual duty of good faith can only be breached by conduct that is dishonest according to the explanation of that concept in Royal Brunei and Ivey. Depending on the contractual context, a duty of good faith may be breached by conduct taken in bad faith. This could include conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest*." [emphasis added]

192. That appeared to be accepted by AML (Closing Submissions paragraph 120 (4)).

193. However I do not accept the submission that Snowden LJ accepted that a need to have such a regard was required "*in situations where one party's actions can affect the other party's commercial prospects.*"

194. The Claimant relied on the following passage from the judgment in *Re Compound Photonics* at [197]:

> *"Secondly, the particular concept of a requirement to have regard to the interests of the other contracting party has largely been developed and applied in cases concerning business decisions by one party which are capable of adversely affecting, or even depriving the other party of, the commercial benefit expected to be enjoyed by that other party under their contract (e.g. Burger King, Overlook, Berkeley and CPC Group). It is far from obvious how or why the same approach is automatically to be applied in the context of voting by shareholders at general meetings of a limited company."* [emphasis added]

195. The Claimant cited a number of authorities in its written closings. Having referred to the authorities it then submitted (paragraph 150) that:

> *"ultimately all of these come to the same thing: whilst AML did not have to subordinate its interests to AMMENA's it did have to take AMMENA's interests into account during the Transition Period and should not have acted unilaterally without doing so"*.

196. The Claimant submitted that in *Berkeley Community Villages v Pullen* [2007] EWHC 1330 (Ch): "*Morgan J spoke of "reasonable commercial standards of fair dealing'*"".

197. I note first that the obligation in that case was an express duty of good faith in relation to "*all matters relating to this agreement*"*:*

> "*In all matters relating to this agreement the parties will act with the utmost good faith towards one another and will act reasonably and prudently at all times*".

198. Further, when the relevant passage at [95] of the judgment of Morgan J is read, it is clear that that the sentence quoted by the Claimant is not the conclusion of Morgan J in that case but merely part of the authorities which he considered in reaching his conclusion:

> "*In the Bropho case, the judgment of French J. contains a very detailed discussion of the concept of good faith. It is not necessary to set out the facts of the Bropho case but it is necessary to remind oneself that it was not a commercial case nor was it a case where there was an obligation to act in good faith. Good faith came into the matter because conduct which would otherwise be unlawful as contrary to a statute would not be unlawful if the conduct was for a particular purpose and was done "reasonably and in good faith". Notwithstanding the context, French J's judgment at paragraphs 83 -103 looked broadly at a great deal of material which offered guidance as to the meaning of good faith. He cited text books and legal articles and a range of decisions dealing with many different subject matters. At paragraph 90 he quoted from dictionaries and Mr Wood relied in particular on the quotation from Black's Law Dictionary, 7th Edition, West Group (1999) (at 701) and the reference to: "Observance of reasonable commercial standards of fair dealing in a given trade or business"...*"

199. The conclusion of Morgan J at [97], did not go so far as to conclude that there was a duty to take into account the interests of the other party*:*

> "*Mr Pymont did not suggest that these statements by French J. (and the material referred to by the learned judge) were not a useful attempt to describe the concept of "good faith". Nor did Mr Pymont refer me to any English authority, or any other authority, which adopted a different approach. In these circumstances, based on the material that has been put before me, I feel I am able to construe paragraph 33 of the Third Schedule to the Agreement as imposing on the Defendants a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the First Claimant*." [emphasis added]

200. The Claimant also referred to the Australian authorities analysed by Snowden LJ in *Re Compound Photonics*, specifically in *Overlook v Foxtel* [2002] NSWSC 17, where Barret J referred to actions which might leave contractual rights "*nugatory, worthless, or perhaps seriously undermined*."

201. It is important to note the context of that duty; namely that, in the Australian state, an additional term was implied by law into commercial contracts requiring the exercise of good faith in the performance of the contract.

202. Even for this statutory implied term the scope of the duty was not as far reaching as the Claimant contends. The duty was expressed as follows:

> *"65 If adherence to such standards of conduct is the predominant component of a separate obligation of good faith in performance of a contract, it becomes necessary to enquire about the extent to which selflessness is required. It must be accepted that the party subject to the obligation is not required to subordinate the party's own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become), in words used by McHugh and Gummow JJ in Byrne v Australian Airlines Ltd (1995) 185 CLR 410, "nugatory, worthless or, perhaps, seriously undermined*".

203. The reference in *Re Compound Photonics* at [197] to a requirement to have regard to the interests of the other contracting party has to be read in the context of the judgment in that case. As referred to above, the relevant section of the judgment in *Re Compound Photonics* which considered the meaning of the express duty of good faith commenced as follows:

> "*147. In approaching the interpretation of clause 4.2, the first, and most important, point to emphasise is that like any question of interpretation of a contract, an express clause in a contract requiring a party to act in "good faith" must take its meaning from the context in which it is used…*"

204. Further Snowden LJ made it clear that it cannot be said that a requirement to have regard to the interests of the other party is part of the duty of good faith merely because it has been found to exist in other cases where there is a duty of good faith. At [195] – [196] he addressed the authorities including *Overlook*:

> "*195. From this survey of the cases relied upon by the Judge, a number of points emerge relating to the concepts of fidelity to the bargain and a requirement to have regard to the interests of the other contracting party.*
>
> *196. The first, and general, point is that those specific concepts originated in a commentary on US contract law and were then adopted and developed in New South Wales in the context of the imposition of terms requiring good faith in the performance of contracts as a matter of general law. They were not developed in the context of the interpretation of individually negotiated contracts. It is entirely understandable that if a term is implied as a matter of law, it should have a single, clearly understood meaning. However, I see no sound juridical basis for saying that all of the same concepts should automatically be regarded as incorporated in a formulaic way whenever any contract governed by English law contains an*

> *express term requiring the parties to act in good faith. Put into the context of this case, I do not see why the parties to an English law governed contract concerning an English company should automatically be presumed to have intended to incorporate such obligations, irrespective of the context given by the other terms of their contract.*" [emphasis added]

205. I therefore reject any suggestion in the submissions of the Claimant [Day 5 p137] that there is a single legal test as to the content of the duty of good faith even if it is a case "*concerning business decisions which are capable of adversely affecting the commercial benefit expected to be enjoyed by the other party*". The task of the Court is to construe the particular clause in the context in which it is used.

206. Further, in my view even if the "*contractual structure*" of the Agency Agreement is the kind of case *"concerning business decisions by one party which are capable of adversely affecting, or even depriving the other party of, the contractual benefit enjoyed by that other party"* it is clear from the judgment of Snowden LJ that the exercise of construction is directed at the particular duty of good faith in the context of the particular contract and the scope of the duty is not determined by the type of contract:

> "*…I see no sound juridical basis for saying that all of the same concepts* [of fidelity to the bargain and a requirement to have regard to the interests of the other contracting party] *should automatically be regarded as incorporated in a formulaic way whenever any contract governed by English law contains an express term requiring the parties to act in good faith. Put into the context of this case, I do not see why the parties to an English law governed contract concerning an English company should automatically be presumed to have intended to incorporate such obligations, irrespective of the context given by the other terms of their contract…*" [emphasis added]

207. The express duty of good faith in Clause 3.2 is a limited one on the language. It is not a general duty to act in good faith. It relates to the obligation to take reasonable steps to pass on the benefit of AML's experience and structures in respect of the operations in the MENA region. The obligation to take reasonable steps is for the express purpose of assisting AMMENA to commence and continue those operations with immediate effect.

208. Given the limited scope of the obligation to take steps to assist AMMENA, the language of Clause 3.2 suggests that the duty of good faith was a duty to act honestly and in a way which did not negate the steps which were being taken. Since there was already an obligation to take "*all reasonable steps*" it is unlikely that the parties intended to import any broad requirement into the duty to act in good faith beyond a duty to act honestly. However it seems to me that importing into the duty of good faith a duty not to negate the steps is not dissimilar from an obligation in taking those steps not to act in a way which could be said to be commercially unacceptable even if not dishonest.

209. I note that at [276] Snowden LJ declined to specify what would amount to commercially unacceptable conduct:

> "*I do not consider that it is appropriate to try to be prescriptive in describing what conduct might fall into this category, given that to do so would necessarily involve recourse to synonyms or epithets (such as "improper" or "sharp practice").*"

210. In order to construe the duty in Clause 3.2 the Court also has to have regard to the context. The contract included an express obligation in Clause 3.4 on AML to "*generally act in good faith*" and in a manner "*as it reasonably thinks best to promote the interests of AMMENA*" but that was confined to the currency of the Agency Agreement. If the parties intended Clause 3.2, which expressly deals with termination, to have a similar broad duty to have regard to the interests of AMMENA post termination one would expect this professionally drafted contract to have so provided either by extending Clause 3.4 to apply post termination (either in Clause 3.4 or Clause 6.3) or in Clause 3.2. Further, the parties had expressly provided in Clause 2.3 that if either party terminated the Agency Agreement there was an obligation to meet and work out an orderly transition plan. There was an express obligation to act reasonably and in good faith to agree minimum sales targets but no general obligation to act in good faith. It is notable that the obligation which the parties included in Clause 2.3 to minimise any losses as a result of or in connection with the termination was expressly for the benefit of AML but there is no such equivalent to consider the interests of AMMENA.

211. I note that Snowden LJ at [205] observed:

> "*…although judges have, on occasions, used the expression "the spirit of the contract" in the context of a good faith clause, I do not read that as an open invitation to the court to interpret a good faith clause as imposing additional substantive obligations (or restrictions on action) outside the other terms of the contract. That must especially be so where (as in the instant case) the contract in question is professionally and comprehensively drafted, and contains an entire agreement clause.*"

Conclusion on the scope of the express duty of good faith

212. In my view for the reasons discussed above, the context supports an interpretation that the parties expressly addressed in the Agency Agreement the obligations that were to apply on termination and viewed in context, the express duty of good faith in Clause 3.2 did not extend to any wider or general duty to "*have regard to the effect of its actions on AMMENA*".

Scope of any implied duty of good faith

213. If (contrary to my findings above) there was an implied duty to cooperate that would require the Court to determine the content of the implied duty of good faith and whether such implied duty of good faith meant that AML was bound to take account of AMMENA's financial interests in making its decisions.

214. Although Snowden LJ was considering an express duty of good faith in *Re Compound Photonics*, the Claimant relies on that authority in relation to the alleged implied term as well.

215. Whilst such an implied duty would not be tied to Clause 3.2 it would still require the content to be determined having regard to the context:

> "*…I do not see why the parties to an English law governed contract concerning an English company should automatically be presumed to have intended to incorporate such obligations [the concepts of fidelity to the bargain and a*

requirement to have regard to the interests of the other contracting party], irrespective of the context given by the other terms of their contract…" (*Re Compound Photonics* above)

216. In my view the following matters discussed above provide the context in which the content of the alleged implied duty of good faith falls to be considered:

    216.1 Clause 3.4 contained an obligation for AML to "*generally act in good faith*" and in a manner "*as it reasonably thinks best to promote the interests of AMMENA*" but that was expressly confined to the currency of the Agency Agreement and was not included in Clause 6.3 as a clause which would survive termination.

    216.2 There was an express but limited duty of good faith in Clause 2.3 for AMMENA and AML to act reasonably and in good faith to agree minimum sales targets.

217. The Claimant submitted that the overall context of the Agency Agreement is that during the Transition Period AML controlled everything until AMMENA resumed its role under the Distribution Agreement and releasing Dealer Net Prices ("DNPs") at ex-factory prices [Day 5 p60], terminating the employees and setting the sales targets without reference to AMMENA are all things which were capable of affecting and adversely affected the business interests of AMMENA.

218. However, there was no provision in the Agency Agreement for a Transition Period after termination of the Agency Agreement or any provision as to the role of the parties if such a Transition Period were to be agreed after termination. I do not accept therefore that what subsequently happened during the Transition Period can be said to be part of the context in which the scope of the alleged implied duty of good faith is to be considered.

219. AMMENA relied on the Margin Comfort Letter as part of the factual matrix informing the content of the express and implied duties of good faith [Day 5 p61].

220. The Margin Comfort Letter (which was not legally binding) expressly stated that the margin would reflect the price at which AMMENA sold products to its dealers and AML did not control the price at which AMMENA would sell products or its operating and marketing costs. It further stated that it was prevented from guaranteeing a specific margin**.** On AMMENA's implied term, AML would be required to consider the interests of AMMENA in setting the prices. However, AMMENA was free to set the DNPs and the Margin Comfort Letter did not guarantee a specific margin. I do not accept therefore that the Margin Comfort Letter provides context to support a conclusion that the content of the duty of good faith was a general requirement to have regard to the interests of AMMENA.

Conclusion on the scope of any implied duty of good faith

221. For all these reasons I find that (had such terms as alleged been found to be implied) the scope of the alleged implied duties to cooperate in good faith did not extend to a requirement to "*have regard to the effect of its actions on AMMENA*".

The alleged breaches

222. It was submitted for the Claimant (Day 5 p45) that the duty in Clause 3.2 covered all the breaches of the duty of good faith on which it relied with the exception of the setting of sales targets which is dealt with by Clause 2.3 or by the implied term.

223. The following section of the judgment deals with the specific allegations of breach of the duty in Clause 3.2 and the implied term to cooperate in good faith during the Transition Period in relation to the alleged breaches. However it should be noted that the consideration of the alleged breach of Clause 2.3 and/or an implied term is only for completeness and in the alternative, given my findings that Clause 2.3 does not apply in the circumstances and that no such implied terms are to be implied into the Agency Agreement. Further the alleged breaches are considered in light of my findings as to the content of the duty of good faith and in particular that the duty in Clause 3.2 to take steps in good faith and the alleged implied duties to cooperate in good faith did not extend to a requirement to "*have regard to the effect of its actions on AMMENA*".

224. The Claimant pleaded nine matters which were said to be a breach of the duty of good faith of which the allegation that AML sought to poach staff from the business was not pursued at trial. The pleaded matters were:

    224.1 AML pushed to constrain the timetable by which the handover would take place, refusing reasonable requests for a reasonable transition period.

    224.2 AML terminated 5 employees such that there were only 4 employees at the time of handover, greatly reducing capacity to carry out business under the Distribution Agreement. This was contrary to Schedule 1 to the Agency Agreement and amounted to a failure to establish an effective operational structure. Further, prior to AMMENA reassuming its role under the Distribution Agreement and without AMMENA's knowledge, AML terminated the employment of the remaining 4 employees such that there would have been no staff in the business when it was handed over to AMMENA had AMMENA not reengaged them.

    224.3 AML sought to poach staff [not pursued]

    224.4 AML had let the lease expire on the offices being used to run the business.

    224.5 AML has insisted on the introduction of a new operating model under the Distribution Agreement, reducing AMMENA's margin as Distributor.

    224.6 AML refused to grant AMMENA permission to access and update the Dealer Net Prices. These prices are published to retail dealers via a system called Brandhub, and once they are published they can be seen by the retail dealers. As such, AML retained control over the published wholesale prices in the DCS and control over the margin which could be made. AML released wholesale prices into the DCS between 5 May 2021 and 7 July 2021 which reduced the long established margin for the Territory from 15% to 7-9%.

    224.7 AML has sought to artificially inflate AMMENA's sales targets for 2022 from 180 units to 273 units.

224.8 AML caused AMMENA's social media presence in the Territory to be offline for 45 days.

224.9 AML has set the DNP (Dealer Net Price) in their DCS system at a lower price than the Ex-Factory Price (The wholesale price at which they sell the cars to AMMENA), resulting in AMMENA getting no margin at all on all car sales in the following 5 Countries (Turkey, Egypt, Morocco, Lebanon, Israel).

225. In oral closings the Claimant focussed on the allegations of artificially inflating the sales targets and setting the DNP at a lower price than the ex-factory price. I therefore propose to consider those first.

AML has sought to artificially inflate AMMENA's sales targets for 2022 from 180 units to 273 units (26C.7)

226. AMMENA relied on the obligations under Clause 2.3 to submit (paragraph 195 of its Closing Submissions) that there was a duty to act in good faith during the Transition Period to set a realistic and sustainable sales target. It was submitted that this reflected Article 3(A)(2) of the Distribution Agreement pursuant to which the parties are to act reasonably and in good faith to agree sales targets for the Territory for each year.

227. Given my finding above that Clause 2.3 does not apply to a termination under Clause 6.1, this breach cannot be made out. However, if I am wrong on that I will consider whether, if Clause 2.3 did apply, the alleged breach would have been made out.

228. A considerable amount of evidence and submissions was directed to the issue of whether the sales target of 273 put forward by AML in July 2021 was unreasonable and unrealistic. However I accept the submission for AML that (if Clause 2.3 applied where the Claimant has given notice pursuant to Clause 6.1) the obligation was to act reasonably and in good faith in agreeing the targets and not to set a reasonable target. I do not therefore propose to consider the evidence as to what would have constituted a reasonable and/or achievable target.

229. In its Closing Submissions (paragraph 192) AMMENA moved away from the pleaded case of 180 units accepting that this was an internal figure for wholesale sales and not retail sales but submitted that "*nothing turns on this*" if it is shown that AML set the target at an artificially high number, moving from a figure that may have been achievable (whether 180 or 223) to one that was unachievable (273).

230. The Claimant also made reference to the obligation in the Distribution Agreement but to the extent that it submitted that the methodology was in breach of the provisions of the Distribution Agreement (paragraph 207 of its Closing Submissions) that is outside the scope of these proceedings. AML accepted that the principles to be followed in setting the level or methodology of the targets in Clause 2.3 were those in Article 3(A)(2) of the Distribution Agreement; however as stated above the issue is whether there was a breach of the duty to act in good faith in agreeing minimum sales targets and not whether the level set by AML was correct or reasonable or realistic.

231. The relevant part of Clause 2.3 provided:

> "*AMMENA and AML will (acting reasonably and in good faith) agree minimum sales targets for volume and mix for the two years immediately following termination of this Agreement based on the principles set out in Article 3(2) of the Distribution Agreement. ("Interim Targets").*"

232. AMMENA submitted that no attempt was made to agree a figure in good faith: AML provided a figure of 273 units by a letter of 23 July 2021. In circumstances where AML had achieved sales of only 108 units in the previous 12 months, this was clearly unreasonable, unrealistic and unachievable. The refusal to engage with AMMENA to agree a reasonable figure is apparent from Mr Bensouda's email to Mr Kipferler dated 28 March 2022, in which he highlights AML's refusal to engage with AMMENA's proposal for the target to be 190 units.

233. It was submitted for AML that:

    233.1 AMMENA refused to engage on sales targets during the Transition Period;

    233.2 Mr Kipferler believed that he was following the contractually prescribed methodology and he and the two other Berylls consultants involved calculated the target honestly and there was no attempt by Mr Kipferler to increase or inflate the target.

234. Mr Kipferler's evidence [Day 3 p78] was that the calculations were a proposal which was to be followed by a collaborative negotiation:

> "*The purpose of the exercise was to come up with a target that meets the requirement of the distribution agreement, and unfortunately there is analytical data availability problems on the way to that number, which then again brings me back to what I said before. <u>It is a proposal, and then you do a collaborative negotiation with the distribution partner</u>. I have done this over decades with dealers and it's a process where two people need to come together and find an agreement.*"

235. His evidence was:

> "*We submitted a proposal, and we never had any engagement from AMMENA's side to negotiate or agree, it was simply left at that.*" [Day 3 p70]

236. Although the oral evidence of Mr Kipferler acknowledged that there may have been flaws in the calculation, his evidence was that he had no intention of "*[coming up] with a number*" [Day 3 p86]. The relevant exchange in cross examination was as follows:

> "*Q. Whatever you put in -- if you want to get to a certain outcome you just change the numbers that you put in, you can change the competitor set, you can change various of the inputs, and <u>you could come up with a number that you want.</u>*
>
> *A. Yes, but <u>we had never any intention to come up with a number</u>. We wanted to do a calculation that is kind of, well, least faulty, because obviously correct does not exist in this circumstance.*

> *Q. Well, you came up with a number which, standing back, is obviously way out of step with AML's actual performance whilst it was running the agency agreement. We agree on that?*
>
> *A. Yes, but AML's performance while it was running the agency was sports cars only, and I think the sports car number exceeded the sales target for sports cars in every single year, and then the SUV was added, and that obviously made the overall number much bigger…"* [emphasis added] [Day 3, p86]

237. AMMENA did not appear to challenge the credibility of Mr Kipferler in this regard. AMMENA accepted in its written closings (paragraph 40) that Mr Kipferler was "*largely*" doing his best:

> "*…AMMENA simply notes that all of its own witnesses were obviously honest and doing their best to assist the court. This is also largely true of Mr Kipferler, who honestly admitted that AML was not acting with any consideration of AMMENA's interests during the Transition Period, which, on AMMENA's case, means that AML has breached the duty of good faith…*".

238. In my view Mr Kipferler was a witness who was trying to answer questions honestly. He was straightforward in his evidence and clearly understood the issues. For example when he was being asked about the termination of the employment of the employees he frankly admitted that the communication strategy with the employees could have been done better and did not seek to justify AML's actions in all respects:

> "*Q. Would you agree that AML's approach and communication strategy was terrible in relation to the transitioning of the four employees?*
>
> *A. I would not agree to "terrible" as a terminology, but it could have probably done slightly better, in hindsight.*
>
> *…*
>
> *Q. And the transition period was ending on 1 October 2021, only five weeks later, one of which is in August when people traditionally are on holiday.*
>
> *A. That is correct, yes. But five weeks was more than ample time to do what needed to be done. And I personally would have liked to do it a bit earlier, but the HR department didn't figure out the process earlier. I can only speculate…*" [emphasis added] [Day 3 pp107-108]

239. Similarly he was frank in acknowledging defects in the calculation of the sales targets but his detailed evidence did not suggest any bad faith in his approach:

> "*Q. It's just nonsensical, isn't it, to start with a global number that includes a forecast and then derive another forecast from that number?*
>
> *A. Correct, to the mathematical basis, yes. That's why I had assumed it would have been excluded.*
>
> *Q. Yes, that's right. So in your first and second witness statements –*

A. I had the pure maths in my mind.

Q. Yes, because on any mathematical statistical approach, it's nonsensical to include the Middle East target prediction in a data set, the start of a data set, which is itself meant to provide (overspeaking) –

A. I disagree with the terminology "nonsensical". It certainly introduces another margin of error, which in that case is fairly small, but it's not entirely correct, absolutely.

...

Q... I suggest it's inconceivable, isn't it, that there is not a similar spreadsheet in relation to the table on the left, the retails?

A. No, it's not inconceivable. Because if we remember where this data comes from -- data, these numbers -- from an internal planning process, where, for financial purposes, Aston Martin internally only needs wholesale figures, because this determines the revenue and the profitability, whereas on the market side, so regional distributors, they negotiate dealer targets, they are all about retail sales. So for the purpose of the business plan, retail figures are more or less irrelevant, and that's why they are not broken down in the same way.

Q. But how can you get to the total –

A. At least that's what was explained to me, asking the logic of the business plan. And I have done business planning for other car companies as an executive. You don't plan retails on that detailed level because wholesale drives your revenue and your financials.

Q. But how can you get precise figures for retail projections if you don't have those broken down in a spreadsheet like the one we were looking at for wholesales?

A. Simply through the stock link. Because you know the existing stock, you know the wholesale, and then you make an assumption if the stock goes up or down, and that gives you a retail number. The stock is the determining factor in this equation, and at that time Aston Martin came out of a period with far too high stocks, because they had produced more vehicles in '18, '19 and '20 than they could sell, so one of the policies was to bring down stock. And as we can see here for sports cars, the retail numbers are substantially higher than the wholesale numbers to bring the stock level down globally, whereas for SUV, which was newly launched, the retail numbers are slightly behind the wholesale, because the pipeline was just filling up and new territories were supplied with demo cars, showroom cars, so there was less vehicles available for retail than were pushed into the chain as a wholesale." [emphasis added] [Day 3 pp65-68]

240. As to whether AMMENA refused to engage during the Transition Period the contemporaneous correspondence supports the evidence of Mr Kipferler that there was no engagement from AMMENA to negotiate the sales target. In a letter from CMS to Slaughter and May dated 5 August 2021 CMS wrote:

> "*4.4 Accordingly, your client's decision to release wholesale prices into the DCS, without first consulting AMMENA, represents a further breach of the obligation to act reasonably and in good faith as set out in Article 3 (A) (2) of the Distribution Agreement. Furthermore, it also represents a breach of clauses 3.4 (obligation to act in good faith and promote the best interest of AMMENA) and 4.3 (AMMENA's right to receive 10% of the wholesale price) of the Agency Deed.*
>
> *4.5 To remedy this breach for the 2022 calendar year AML should reduce the ex-factory prices listed in the table below paragraph 10 of your letter of 30 June are reduced to the prices set out in the attached table that ensures that AMMENA is preserved for that year.*
>
> *4.6 Regarding paragraph 12 of your letter of 23 July and the Key Target for the 2022 calendar year if AML agrees to this reduction AMMENA will provide AML with its Key Target proposal for the 2022 Calendar Year*." [emphasis added]

241. This was reiterated in a further letter from CMS to Slaughter and May dated 10 September 2021:

> "*5.9 As previously advised in paragraph 4.5 of our letter dated 5 August AML, should reduce the ex-factory prices listed in the table below paragraph 10 of your letter of 30 June to the prices set out in the table enclosed with our letter of 5 August 2021 to ensure that AMMENA's margin is preserved for that year. AMMENA's experience over the previous 2-3 years in the Territory is that the Vantage Coupe and Roadster models will not be sold at the prices proposed by AML.*
>
> *Unless AML provides further marketing support for these two models AML's proposed prices will adversely impact on sales and this will need to be reflected in setting targets for the region.*
>
> *5.10 AMMENA will provide its Key Target proposals for the 2022 calendar year when this issue has been resolved.*" [emphasis added] [G/208/4]

242. The email from Mr Bensouda in March 2022 on which the Claimant relied as evidence of a refusal to engage by AML with AMMENA in fact makes reference only to a figure proposed during the fourth quarter i.e. after the Transition Period had ended.

243. Whatever the merits of AMMENA's approach in insisting during the Transition Period that the issue of prices be addressed before the issue of sales targets, there was an obligation in Clause 2.3 on both parties "*acting reasonably and in good faith"* to agree minimum sales targets. The evidence of Mr Kipferler and the contemporaneous correspondence leads me to conclude that AML carried out a calculation in good faith as to what AML thought the sales targets should be but AML expected AMMENA to negotiate the figure which they refused to do. The evidence does not support the allegation that AML sought to artificially inflate the sales targets.

244. I find on the evidence that AMMENA has not shown that AML was not acting in good faith in setting the sales targets and (had there been a duty in this respect) the allegation of breach in this regard is not made out.

AML refused to grant AMMENA permissions to access and update the Dealer Net Prices. These prices are published to retail dealers via a system called Brandhub, and once they are published they can be seen by the retail dealers. As such, AML retained control over the published wholesale prices in the DCS and control over the margin which could be made. AML released wholesale prices into the DCS between 5 May 2021 and 7 July 2021 which reduced the long established margin for the Territory from 15% to 7-9%. (26C.6)

AML has set the DNP (Dealer Net Price) in their DCS system at a lower price than the ExFactory Price (The whole sale price at which they sell the cars to AMMENA), resulting in AMMENA getting no margin at all on all car sales in the following 5 Countries (Turkey, Egypt, Morocco, Lebanon, Israel) (26C.9).

245. In Closing Submissions AMMENA took these 2 allegations of breach of the duty of good faith together and I shall therefore deal with them together by reference to the submissions although I note that the case advanced by AMMENA in its submissions in relation to these alleged breaches appeared to have moved quite considerably from the pleaded case set out above.

246. AMMENA submitted (paragraph 164 of its Closing Submissions) that the duty of good faith required that AML did not take steps to reduce the profitability of the Distribution Rights between notice being given that the Agency Agreement was coming to an end and AMMENA assuming the role of Distributor.

247. The following consideration of the alleged breach has to be read subject to the findings above that:

    247.1 The express duty of good faith in Clause 2.3 does not apply as it dealt only with setting sales targets.

    247.2 Clause 3.2 does not apply to the allegation of a "*reduction in profitability*". The release of DNPs does not relate to the "*structures developed by*" AML nor were they structures which needed to be "*passed on*" to AMMENA within the terms of Clause 3.2.

    247.3 If (contrary to my findings above) there was an implied term to cooperate, any implied duty to cooperate in good faith did not extend to a requirement to "*have regard to the effect of its actions on AMMENA*".

248. AMMENA relied in particular (paragraph 186 of its Closing Submissions) on the following in support of its allegation of a breach of the implied duty of good faith:

    248.1 the Margin Comfort Letter;

    248.2 the fact that pricing was in AML's control during the Transition Period;

    248.3 that AML's release of the DNPs left AMMENA commercially unable to increase them when it took over as Distributor.

249. As far as the release of the DNPs is concerned this was covered in the evidence of Mr Bensouda. Mr Bensouda worked for AML and then from 1 October 2021 for AMMENA.

250. The contemporaneous evidence shows an email from Mr Robinson to Mr Bensouda on 12 May 2021 which read:

> "*Please find attached the price lists for AM802 for your region.*
>
> *I will be looking to push these to Brand Hub for upload at the close of this week.*
>
> *Can you review and ensure any issues are highlighted as soon as possible prior to upload? Vehicle base price remains unchanged vs 21MY. Any query please don't hesitate to get in touch.*"

251. The evidence of Mr Bensouda (who was called by AMMENA as a witness) was that there was nothing unusual about Mr Robinson's request:

> "*Q. I think you said in your witness statement that you didn't think there was anything unusual about Mr Robinson's request for that year; there was nothing about that year that made it any different, frankly, to any other year?*
>
> *A. It's normal business to discuss pricing and establish them, yes*." [Day 2, p123]

252. Mr Bensouda also gave evidence that for the 22 model year, the vast majority of the DNPs were unchanged. There were only two exceptions: the DB11 V12 Coupé and the Vantage Coupé. For the DB11 V12 Coupé, its price had decreased globally as well as in the Middle East. It went from a DB12 -- V12 AMR version to non-AMR version. So to keep the price competitive globally, a global decision was made to reduce the pricing as it was also the last year of its life cycle. The price for the Vantage Coupé increased in just the US dollar MENA countries because the Vantage Coupé had lost the Sports pack, introduced in the 21 model year so it returned to its prior price point with the effect of increasing the price. Otherwise all 22 model year DNPs remained the same as the 21 model year DNPs. [Day 2, p125-126]

253. Mr Bensouda's evidence was that the prices were not set to harm AMMENA but were simply the normal setting of DNPs:

> "*Q. And the discussion that you had with Mr Robinson was on market competitiveness?*
>
> *A. Correct. With a correlation between pricing and volume, obviously.*
>
> *Q. Yes. <u>It wasn't a discussion about setting prices to harm AMMENA</u>, was it?*
>
> *A. <u>No.</u> As far as I'm concerned, at that point of time, I have no involvement with AMMENA or any other entity, I'm just focused on AML job.*
>
> *Q. Yes. AMMENA wasn't mentioned here, AMMENA's margin wasn't mentioned here?*
>
> *A. No.*
>
> *Q. <u>So far as you were concerned, this was simply the normal setting of DNPs</u>?*
>
> *A. <u>Correct.</u>*" [emphasis added] [Day 2 p128]

254. It was submitted for AMMENA (paragraph 177 of its Closing Submissions) that the prices released in 2020 are irrelevant to the question that the Court has to determine. These prices were released in 2020 when AML knew that AMMENA would be paid 10% of the DNP (and AML itself would be paid 5%). The prices for when AMMENA took over as Distributor, and would no longer be paid a fixed percentage by way of margin, should not have been released without negotiation with AMMENA, and certainly not in circumstances where the margin was going to be so significantly decreased.

255. In my view it is relevant to the pleaded case which is that AML breached the duty to cooperate in good faith during the Transition Period by releasing wholesale prices into the DCS between 5 May 2021 and 7 July 2021 which reduced the long established margin for the Territory from 15% to 7-9%. It is evidence that supports the conclusion that the release of the DNPs was not done in bad faith but was done honestly. It was not commercially unacceptable behaviour.

256. AMMENA submitted that the allegation at paragraph 26C.6 of the RRRAPOC relates to AMMENA's margin and once the Agency Agreement was terminated, AMMENA's margin was determined by the delta between the ex-factory price and the DNP and therefore directly engages the ex-factory prices that AML provided to AMMENA.

257. In my view this is not the natural meaning of the pleaded case. However in any event the alleged implied term was:

> "*an implied duty to cooperate in good faith upon termination to ensure that no damage was done to the business under the Distribution Agreement as it was transferred back to AMMENA from AML*."

258. The complaint concerning the margin did not relate to the business during the Transition Period but to the business once it had been transferred back to AMMENA: the ex-factory price would only be relevant once AMMENA started to purchase vehicles from AML under the Distribution Agreement instead of the direct sales by AML to retail dealers.

259. Further, although it was the case that pricing was in AML's control during the Transition Period, the evidence was that AMMENA was free to set the DNPs after 1 October 2021. The highest AMMENA can put its case is that AML's release of the DNPs left AMMENA "*commercially unable"* to increase them when it took over as Distributor. Given the evidence as to the "*normal setting*" of the DNPs in the Transition Period, any commercial constraints after 1 October 2021 do not change the fact that the evidence shows that the release of the DNPs during the Transition Period was not done in bad faith.

260. It was submitted for AMMENA that:

> "*182. AML has denied that prices were set in bad faith (whether to reduce AMMENA's margin or otherwise) but has not provided any explanation of why the prices were released at the level at which they were set, in combination with the Ex-Factory Prices that were provided…*
>
> *183. What is alleged is that AML set prices in bad faith, such that the profitability of the distribution business was undermined before AMMENA took over as Distributor on 1 October 2021. It is unclear from AML's pleaded case and evidence*

> *whether they even accept that was the effect of the actions that it took, but the numbers speak for themselves. In the absence of any explanation as to why AML would release figures which had such an effect without consulting with AMMENA, it is difficult to see how AML could have been acting in accordance with a duty of good faith to AMMENA, particularly in light of what AML said in the Margin Comfort Letter. Importantly, on AMMENA's analysis it would be no defence for AML to assert it was acting in its own commercial self-interest without regard to the interests of AMMENA in setting DNPs and Ex-Factory Prices in circumstances where it owed a duty of good faith to AMMENA*." [emphasis added]

261. I note the submissions of AML (paragraph 168 of its Closing Submissions) that the level at which AML sets the ex-factory price is subject to the Distribution Agreement and therefore subject to the arbitration agreement in the Distribution Agreement. This Court cannot therefore make any determination as to the propriety of the level at which the ex-factory prices were set.

262. AML submitted (paragraph 174 and 175 of its Closing Submissions) that:

    262.1 From 1 October 2021 AMMENA could raise the DNPs and had asked AML to do so.

    262.2 There is no evidence that the setting of DNPs or the proposing of ex-factory prices was done in bad faith.

263. The evidence of Mr Kipferler was that there was no bad faith in setting the ex-factory prices:

> "*Q… If you had thought at the time that AML owed a duty of good faith to AMMENA, then it would have been commercially unacceptable to behave like this and set the ex-factory prices at a level which would –*
>
> *A. No, I wholeheartedly disagree. There is no bad faith in this. This is simple commercial thinking.*
>
> *Q. Your position is AML was acting in accordance with its own commercial self-interests and without any regard to those of AMMENA?*
>
> *A. AML was acting in alignment with the distribution agreement, which was signed by both parties. That was the basis of our relationship at that time*." [emphasis added] [Day 3 p48]

264. Mr Kipferler's evidence was that the margin was a matter for AMMENA and they could adjust the DNPs accordingly:

> "*Q. You and Mr Moers, I suggest, would have both been aware that setting the ex-factory prices at this level in combination with the DNPs that had been released would adversely affect AMMENA's financial position?*
>
> *A. No, this is mixing two things, because the ex-factory prices were supposed to be in place after AMMENA took over the distribution management in the region and then they would set their own DNPs, so they can adjust it to whatever margin they need or want to achieve. The release of the DNPs in May was the normal model*

> *year release that did not assume any change in regional management or any contractual status.*
>
> *Q. But you knew that the ex-factory prices with the DNPs that had been released, taking those figures, that would adversely affect AMMENA's financial position compared with the agency agreement and compared with the situation before the agency agreement?*
>
> *A. Unless AMMENA adjusts the DNPs accordingly, yes.*" [emphasis added] [Day 3 p43]

265. Mr Kipferler acknowledged that in setting the ex-factory prices AML was acting "*in AML's own commercial self-interest without regard to the interests of AMMENA*" but said that he believed that was his "*legitimate role*" at that time.

266. As set out above I have found there was no requirement as part of any duty of good faith in this case to have regard to the interests of AMMENA. In my view there is no evidence to support a conclusion that AML acted other than in good faith in setting and releasing the DNPs and the ex-factory prices.

Other alleged breaches

267. In light of my findings above, the factual evidence concerning the other alleged breaches can be dealt with shortly:

AML pushed to constrain the timetable by which the handover would take place, refusing reasonable requests for a reasonable transition period (26C.1).

268. In December 2020 Mr Quinlan's view (in an email to Mr Kipferler) was that 6 months maximum would be required:

> "*As we agreed, I have sought out, as a hypothetical, an understanding of timing to transfer AML's responsibilities as agent of AMMENA back to us, if a transition were to take place. I have gone back to those involved in the transition 3 years ago and the view is as we discussed logically, that 1 year would not be needed, and that the 6 month timeframe you and I discussed would be the longest period required. More likely would be between 3 and 6 months, and closer to 3.*"

269. In a letter of 5 July 2021 from CMS to Slaughter and May during the Transition Period AMMENA sought a longer period of at least 12 months:

> "*To allow an orderly transition our client envisages that the transitional period will take a significant period of time of at least 12 months. This minimum period of time would allow AMMENA and AML to set the Key Target in October 2021 for the 2022 calendar year during the transition process and also allow further time for AMMENA and AML to agree sales and volume targets for 2022 and 2023 in accordance with Article 3 (A) 2 and 3 of the Distribution Agreement and Clause 2.3 of the Agency Deed respectively.*"

270. It was accepted for AML in oral submissions that it was "*hurrying them along*" to take over as Distributor [Day 1, p41].

271. The evidence of Mr Kipferler was that:

271.1 AMMENA had 18 months between when they decided to terminate and when finally the trade flow (i.e. the manner of sales to retail dealers) changed.

271.2 The responsibility was handed back to AMMENA with effect from 1 October 2021. However nothing of the underlying mechanics changed, so there was no technical infrastructure requirement for AMMENA to meet on 1 October 2021, it simply was a management responsibility, and the execution was very heavily assisted by AML.

271.3 The logic for targeting 1 October 2021was that as a Distributor, you need to negotiate annual business plans with your retail partners. So by switching responsibility on 1 October 2021, AMMENA had all of the fourth quarter to agree business plans with their retail dealers for the following year. If you take over January, the first quarter is lost, you can never recover.

272. Mr Quinlan confirmed in his evidence that on 1 October 2021, AMMENA became responsible for the management and the support of the regional dealer network, for the regional sales and the marketing activities and for regional after-sales support. However he accepted that the operational processes continued without any change, including vehicle and parts ordering. It was only from 1 July 2022 that AMMENA began to purchase vehicles from AML and then sell them to retail dealers and even after then the cars were still shipped directly by AML to retail dealers.

273. If AMMENA had wanted to have a 12 month transition period it could have given notice pursuant to Clause 2.2. For the reasons discussed above Clause 2.3 did not apply to a termination under Clause 6.1 and AML had no obligation to agree a Transition Period or to agree an orderly transition plan.

274. The initial proposal by AML of a month was extended following the exchange of correspondence to five months. In his oral evidence Mr Kipferler acknowledged there was a commercial pressure on AMMENA to agree the handover as AMMENA was not being paid for cars sold during the Transition Period. In my view that does not demonstrate a failure to cooperate in good faith (in breach of the alleged implied term) but merely reflects the nature of the *ad hoc* transitional arrangement pending resumption by AMMENA of its obligations under the Distribution Agreement.

275. On the evidence I find that AML did not refuse reasonable requests for a reasonable transition period and was not in breach of Clause 3.2 or any alleged implied term to cooperate in good faith by pushing to constrain the handover.

AML terminated 5 employees such that there were only 4 employees at the time of handover, greatly reducing capacity to carry out business under the Distribution Agreement. This was contrary to Schedule 1 to the Agency Agreement and amounted to a failure to establish an effective operational structure. Further, prior to AMMENA reassuming its role under the Distribution Agreement and without AMMENA's knowledge, AML terminated the employment of the remaining 4 employees such that there would have been no staff in the business when it was handed over to AMMENA had AMMENA not reengaged them (26C.2).

276. This alleged breach has two parts: reducing the number of employees to 4 and termination of the employment of the remaining 4 employees.

277. It was submitted for the Claimant (paragraph 229) that Schedule 1 to the Agency Agreement "*required that there would be 9 members of staff in the Territory*".

278. However that submission is not made out on the face of the Agency Agreement which refers only to the "*proposed*" structure and is not therefore an obligation or promise that the structure will continue. As set out above Clause 3.2 stated:

> "*The proposed operational structure is set out in Schedule 1.*" [emphasis added]

Schedule 1 is headed "*Proposed Initial Operational Structure*".

279. In relation to the reduction in the number of employees, the evidence of Mr Balmer (1st and 2nd witness statements) was that the number of employees was reduced as a result of Covid and the financial pressures on the business:

> "*In 2020-2021, due to the COVID-19 pandemic and lockdowns, sales were down and therefore there was an Aston Martin-wide redundancy programme to consolidate roles and functions and cut costs globally…"*
>
> *"…in 2020 Nomaan [Tahir] left AML to return to the UK and Souad El Baiz and Ayman Ghanem were made redundant as part of the Aston Martin wide redundancy programme that took place in 2020/2021 to consolidate roles and cut costs globally.*"

280. As to the termination of the employment of the remaining 4 employees, it is common ground that AML did terminate the employment of the remaining 4 employees on 26 August 2021.

281. AMMENA implicitly acknowledged that each of the employees were provided with contact details for Mr Zidan and Mr Quinlan but complained that AML had not been in touch with AMMENA to assist with the transfer of personnel and did not inform AMMENA of the termination.

282. AMMENA submitted (paragraph 238 of its Closing Submissions) that terminating the employees without notice to AMMENA and without providing assistance was clearly not assisting with an orderly transition, or acting in good faith trying to give AMMENA the benefit of the employment structures it was operating. It was therefore a clear breach of Clause 3.2 of the Agency Agreement, and the implied duty of good faith.

283. AML submitted that AMMENA was notified of the terminations on the same day as the termination notices were sent and that was more than enough time to reemploy them if it wished to do so.

284. The emails to the 4 employees from the HR person at AML did give them the contact details for AMMENA. The relevant passage read:

> "*As discussed in the announcement this morning, please see attached the letter confirming your end date with AML.*

The email addresses for the contacts at the Al-Roumi Group are below:

[…]

[…]

…"

285. Prior to those emails being sent there is evidence of contact between AML HR and the employer of record, BOTH HR, which supports a case that AML were taking steps to encourage the employees to approach AMMENA. In an email from Lyndsay Summers of AML to Philip Roberto of BOTH HR dated 25 August 2021 she wrote:

> "*We have a situation whereby we no longer need our employees in MENAT as we will be changing some relationships with have with distribution companies.*
>
> *The employees need to end with us on 30th September 2021 (they don't know this yet). The company taking their work over would be happy to take them on, so we will be encouraging them to approach this company.*
>
> *We will be announcing this to them in the next few days etc. Can you confirm who needs to do what between me and you?*
>
> *…*" [emphasis added]

286. Further, the evidence of the email sent on 26 August 2021 by Mr Kipferler to Richard Quinlan and Abdullah Zidan refers to contact with BOTH HR and steps that were being taken to assist AMMENA:

> "*…I can inform you that we informed our MENAT team this morning about the upcoming transition of regional responsibility. In that call we have also encouraged them to contact you about their employment options. I hope you will hear from them soon. We are exploring with our employment services provider ways to ensure gapless coverage of visas for the team from 30 September 2021*."

287. Philip Roberto of BOTH HR contacted Mr Quinlan and Mr Zidan on 1 September 2021 and the email is further evidence that AML did provide assistance to AMMENA by putting BOTH HR in touch with AMMENA:

> "*…My team is supporting the Aston Martin Lagonda employees in Dubai with HR, Payroll and Compliance provisions through our employer of record platform.*
>
> *We have been advised by Lyndsay Summers, HR Business Partner of AML in the UK that they are offboarding Dana, Larbi, Ramzi and Houssam with effect on 30 September 2021. My team will support them during this transition.*
>
> *We were further advised to connect with you for a possibility of employment continuity of the team with you through our employer of record platform.*
>
> *Please let us know if you are interested to discuss further…*" [emphasis added]

288. The contemporaneous correspondence shows that Mr Quinlan responded to this email and BOTH HR subsequently produced employment contracts and visas and were used as the employer of record.

289. The evidence of Mr Kipferler was that five weeks was more than ample time to do what needed to be done. He said that:

> "*I personally would have liked to do it a bit earlier, but the HR department didn't figure out the process earlier*."

290. Clause 3.2 required AML to take all reasonable steps to pass on the benefit of the structures in order to assist AMMENA to commence operations itself. I accept that AML could not transfer the employees so it was necessary to terminate the employment. Whilst, as Mr Kipferler acknowledged, the communications with the employees could have been handled better, AML in my view discharged its obligations under Clause 3.2: it gave the employees the details for AMMENA encouraging them to contact AMMENA and liaised with BOTH HR to assist the process by contacting the employees and AMMENA. The evidence is that not all the employees initially wanted to join AMMENA but all 4 employees did join and were engaged via BOTH HR. I find that in relation to this alleged breach there was no breach of Clause 3.2 or any implied term to cooperate in good faith to ensure the business could be transferred on 1 October 2021.

AML had let the lease expire on the offices being used to run the business (26C.4).

291. In its Closing Submissions (paragraph 244) AMMENA expressed the breach slightly differently from its pleaded case as a failure by AML to renew the lease such that there were no premises from which AMMENA could operate the Distribution Rights when it took back over the business in the Territory. Thus AMMENA appeared implicitly to accept that the lease had in fact expired in December 2020 before the Agency Agreement was terminated.

292. The evidence showed that during the COVID restrictions AML employees were unable to go to the office in the Yas Marina Circuit (a leisure facility) in Abu Dhabi and were working from home.

293. AMMENA were told in correspondence from AML's solicitors (Slaughter and May to CMS) on 30 June 2021 that there were no offices to be transferred:

> "*…our client notes that there is currently no rented office space that would need to be transferred to AMMENA all employees are currently working from home as a result of COVID-related restrictions.*"

294. On the evidence I reject the submission that this was "*symptomatic*" of any intent by AML to run down the business. I note Mr Bensouda's oral evidence that he was working from home until AMMENA acquired its new offices following the COVID restrictions i.e. post 1 October 2021.

295. In the circumstances no breach of the obligations of Clause 3.2 or any implied duty to cooperate in good faith has been established with regard to this allegation.

AML has insisted on the introduction of a new operating model under the Distribution Agreement, reducing AMMENA's margin as Distributor (26C.5).

296. This allegation relates to the fact that according to AMMENA, AML insisted that operations would change to enforce the terms of the Distribution Agreement so that retail dealers would deal with AMMENA rather than AML. (The reference to "operating model" appears to be understood by both parties as relating to the "trade flow" that is that under the Agency Agreement vehicles were sold by AML directly to retail dealers whereas under the Distribution Agreement vehicles were to be sold by AML to AMMENA and then by AMMENA to retail dealers).

297. It was submitted for AMMENA (paragraph 217 of its Closing Submissions) that whilst it is correct that this is what the Distribution Agreement provides, relying on the terms of the Distribution Agreement was a change in operating model both from that which had been in place between 2009 and 2018 and that which AML itself was operating when it was acting as Agent under the Agency Agreement. If AML had been acting in good faith, it would have assisted AMMENA with creating the infrastructure necessary to move to such an operating model. It is this which is the breach, not the reliance on contractual rights per se.

298. AML submitted (paragraph 146 of its Closing Submissions) that the failure to assist AMMENA with creating the necessary infrastructure is unpleaded-the pleaded case that was the subject of disclosure was whether AML sought to change the operating model under the Distribution Agreement from that which had operated under the Agency Agreement.

299. AML also submitted (paragraph 145 of its Closing Submissions) that AML continued to sell vehicles directly to retail dealers and to invoice them until 1 July 2022 and thus it is difficult to see how AML was acting in bad faith.

300. In his evidence Mr Kipferler was referred to an internal email of 12 July 2021 in which he asked for information about the structure:

> "*You might have heard that we are in the process of restructuring our approach to the MENA region. After having acted for over three years as AMMENA's agent our objective is now to hand responsibility back to AMMENA and revert to the Distribution Agreement (DA) which has 38 years left before expiration. This transition has two parts:*
>
> *" Management responsibility:*
>
> *AMMENA seems quite ready to take back management responsibility now, i.e.. before September, in order to be able to negotiate targets and business plans with the dealers for 2022. This responsibility is also quite easy to hand over from our POV.*
>
> *"Administrative responsibility:*
>
> *This is a lot more complex and time-consuming, since it involves systems and many external laws and regulations and here is where we need your help.*
>
> *…*
>
> *"Trade flow:*

> *The DA is very clear on how the trade flow should be: AMMENA buys vehicles from AML UK at ex-factory prices and wholesales them to their dealers. Obviously this is a big change from current practice, where vehicles are sold directly from AML to the MENA dealers. Question therefore: which disadvantages will we face from changing scheme? Can we separate this trade flow from the physical flow after all things would be very complicated if vehicles would have to be imported to a 3rd country before ending up in the dealer's market…*" [emphasis added]

301. It was put to Mr Kipferler in cross examination that AML did not assist AMMENA in developing a new operating model under the Distribution Agreement:

> "*Q. …In practice, we know that AML's position was that it left all of these things to AMMENA for AMMENA to do, and it didn't assist AMMENA in any way in developing a new operating model under the distribution agreement, it basically took the view that was AMMENA's problem?*"

His evidence was:

> "*I very much disagree. This email was part of my effort to find out as much as I could to help AMMENA, because I was obviously not an expert in Aston Martin's internal processes and how had this been done. I had all the conversations with Mr Quinlan and Mr Zidan, and they asked questions, and I tried to be as competent and informed as possible to answer their questions.*"

302. The evidence shows that on 30 June 2022 AML sent out its full proposals for the relationship with AMMENA and AML. However the evidence of Mr Kipferler was that that document had been "*in the works*" for months:

> "*As I said, we have been discussing these matters at least since probably August/September '21. There were various versions of the document that were sent back and forth between counsel…*"

He stressed that when responsibility was transferred to AMMENA on 1 October 2021 there was no technical infrastructure requirement for AMMENA to meet.

303. Clause 3.2 was an obligation to take all reasonable steps to pass onto AMMENA the structures developed by AML to assist AMMENA to commence such operations. The operating structure in the sense of the trade flow was not "*developed by AML*" but on AMMENA's case was a structure which pre-dated the Agency Agreement. There can therefore be no obligation under Clause 3.2 which was breached in this regard. Further, the Distribution Agreement had its own operating model and it was not necessary to transfer the existing structure (of direct sales) to ensure that the business could be transferred on 1 October 2021 (the alleged implied term) nor was AMMENA required by AML to adopt the new operating model until 1 July 2022. No breach of Clause 3.2 or any alleged duty to cooperate in good faith has been established.

304. Even if the Court was minded to accept the unpleaded case, the evidence shows that there was cooperation between the parties and AML allowed AMMENA a considerable period of time after 1 October 2021 before it insisted on changing the trade flow.

AML caused AMMENA's social media presence in the Territory to be offline for 45 days (26C.8).

305. The evidence was that Mr Atat was responsible for marketing at AML prior to joining AMMENA on 1 October 2021 in the same role.

306. On 27 August 2021 Mr Atat contacted Mr Quinlan and Mr Zidan. The email was headed "*Handover to Ammena*". It read:

> "*Dear Richard and Abdulla*
>
> *I write you to kick start the handover process for all topics related to marketing and PR which I have been managing for the past three years. This includes agency retainers, preferred suppliers, brand partners, Valhalla tour, upcoming three F1 races in the region etc.*
>
> *Happy to schedule a call during September to help onboard whoever will take over the Marcoms role*."

307. Mr Quinlan acknowledged the email on 30 August 2021 agreeing that a call be scheduled and indicating that AMMENA would respond with dates.

308. On 20 September 2021 Mr Atat sent a further email this time specifically about the social media accounts and recommending that AMMENA continue to work with the social media agency:

> "*Please find attached the contract we have in place with Adsense, our social media agency. We have a monthly retainer with them as they manage all our social accounts including community management, content creation, and media promotion. The contract has all the details*.
>
> *Below are the regional accounts they manage. We had built these accounts from scratch since taking on the region three years ago.*
>
> *Before that, the brands social presence was scattered bits and pieces that were off brand and poorly managed by the previous team. We had to close multiple pages down and build again properly.*
>
> *" https://www.instagram.com/astonmartinmena/*
>
> *" https://www.facebook.com/Aston-Martin-MENA-106941564774350*
>
> *" https://twitter.com/AstonMartinMENA*
>
> *During the process of hiring this agency, I looked into multiple proposals and pitches which I thoroughly analysed and compared to agree on this partner and these T&Cs. This was done as per AML procurement process and was approved by HQ back then.*
>
> *Happy to provide more details/documents if required. I recommend Ammena continue to work with this agency to ensure brand exposure consistency as they are properly briefed and staffed to support the AM brand*." [emphasis added]

309. On 17 October 2021 in an email from Mr Atat to Mr Quinlan, Mr Atat attached a spreadsheet which noted that all accounts were currently offline.

310. On 31 October 2021 Mr Atat sent another email to Mr Quinlan referring to a meeting which had occurred and headed "*Reactivating Social Media*":

> "*It was good seeing you last week, hope you had a safe journey back.*
>
> *As discussed, it's of utmost important to reactivate our regional social media pages on Instagram, Facebook, and Twitter. To do so we will require our social media agency to resume regional content creation, account moderation, and planning content calendars.*
>
> *I will ask them to revise the contract so we can kick off as of November after being offline for a month.*
>
> *Appreciate your input on:*
>
> *" Ammena s legal/finance name to update the contract*
>
> *" Ammena's supplier payment terms*
>
> *Once shared ill have them update the contract with the same scope to what we had negotiated after pitching the business last year to multiple agencies*." [emphasis added]

311. Mr Zidan's evidence in his first witness statement was as follows:

> "*In September 2021, I attended a meeting with Mr Kipferler and Ms. Dana Taleb, AMMENA's Marketing Manager. During the meeting, Mr Kipferler explained that AML would cut off all support and funding of marketing activities in the MENAT region following the conclusion of the transition period on 30 September 2021. All contracts between AMMENA and regional suppliers, including Adsense, were subsequently terminated on 30 September 2021.*
>
> *The termination of the contract with Adsense materially interrupted AMMENA's business operations and internet presence following the handover of the business, including by disconnecting AMMENA from all of its social media platforms and preventing AMMENA from carrying out important marketing activities...*"

312. In cross examination Mr Zidan's evidence was that the first time AMMENA knew the accounts were offline was 31 October 2021.

313. In my view the contemporaneous correspondence shows that it was open to AMMENA to take action to take over the social media contract and avoid any disruption arising from the termination of the contract with AdSense. I infer from the continuing involvement of Mr Atat that AMMENA would have been aware that the social media accounts were offline and given the evidence of the contemporaneous correspondence I do not accept the evidence of Mr Zidan that it was the termination by AML that led to material interruption as credible. Mr Atat contacted AMMENA whilst he was working for AML. He offered to provide information and continued to raise the issue once he was employed by AMMENA.

314. The allegation that there was a breach of the express obligations in Clause 3.2 in that "*AML caused the social media accounts to be offline"* is not made out on the evidence. If AML did owe an implied duty to cooperate in good faith during the Transition Period, I find that there is no evidence of AML acting other than in good faith and no breach of the duty by reason of the social media accounts going offline.

Did AML breach Clause 3.2 of the Agency Agreement as alleged by AMMENA in RRAPOC paragraph 26BA? (Issue 11)

315. In oral submissions the Claimant focussed on the issue of good faith and the individual alleged breaches. In its written closings (paragraph 155-160) the Claimant addressed the obligation to act in accordance with Clause 3.2 (as well as Clause 2.3 and/or the implied duty of good faith). The Claimant submitted that:

> "*…the defining feature of AML's approach was to push AMMENA to take over immediately, without providing the necessary practical assistance to allow AMMENA to take over the role of Distributor in an orderly fashion that would not disrupt the business in the Territory…*"

316. It was submitted for AMMENA that the lack of overall assistance to transfer the distribution business to AMMENA in good faith is clear from the communications to Mr Quinlan from the staff who were moving from AML to AMMENA after the termination of their employment and AMMENA was left to rely upon the knowledge of the employees that AML had terminated to provide the information to move forward as Distributor in the Territory, in circumstances where AMMENA was, as a result of AML's conduct, having to deal with the urgent visa and employment status of each of the employees during the final weeks of the Transition Period.

317. The Claimant relied on emails in September 2021 to Mr Quinlan from Mr Bakkour and Mr Bensouda setting out matters that needed to be resolved.

318. I have dealt with the individual alleged breaches above. I note firstly that there was no obligation to have a Transition Period. The Transition Period that was agreed was 5 months to 1 October 2021 and as referred to above, Mr Quinlan confirmed in his evidence that the "operational processes" including vehicle and parts ordering continued without any change such that vehicles still went directly from AML to the dealers and AMMENA did not have to put in place any systems or processes to run those operations on 1 October 2021. It was his evidence that it was only on 1 July 2022 when the new operational systems went live that AMMENA began to purchase vehicles from AML and sell them to retail dealers.

319. Further, although the employees of AML did not have their employment transferred until 1 October 2021, they were in communication with AMMENA and for instance, as found above, in relation to the social media it was a failure by AMMENA to take action in response to Mr Atat that resulted in the social media going offline.

320. The evidence of Mr Kipferler and the contemporaneous documents show that Mr Kipferler was seeking information internally from Mr Bensouda on a number of topics raised by AMMENA. In an email of 13 July 2021 Mr Kipferler wrote to Mr Bensouda concerning the "*substantial information request*" received from AMMENA:

> "*I am sorry to have to bother you continuously — I know you are busy enough running the region.*
>
> *However, we have received a rather substantial information request from AMMENA in the course of the transition discussions. Therefore I need to ask you a few more questions…*"

321. Mr Bensouda responded with a detailed response to the individual queries. In cross examination Mr Bensouda said that he was doing this to assist AMMENA (albeit that he regarded it as a request from his employer to which he was therefore obliged to respond).

322. I also have regard to the following evidence of Mr Kipferler in cross examination who was asked about an internal email he sent in July 2021. The email said in part:

> "*This transition has two parts:*
>
> *"Management responsibility:*
>
> *AMMENA seems quite ready to take back management responsibility now, i.e.. before September, in order to be able to negotiate targets and business plans with the dealers for 2022. This responsibility is also quite easy to hand over from our POV.*
>
> *"Administrative responsibility:*
>
> *This is a lot more complex and time-consuming, since it involves systems and many external laws and regulations and here is where we need your help.*
>
> *I do need your input on the following issues. Depending on the complexity of your POV, please just reply with comments to this email or let s set up a meeting to get into the details as needed…*"

323. It was put to Mr Kipferler that AML "*didn't assist AMMENA in any way in developing a new operating model under the distribution agreement, it basically took the view that was AMMENA's problem?"*

324. Mr Kipferler's response was as follows:

> "*I very much disagree. This email was part of my effort to find out as much as I could to help AMMENA, because I was obviously not an expert in Aston Martin's internal processes and how had this been done. I had all the conversations with Mr Quinlan and Mr Zidan, and they asked questions, and I tried to be as competent and informed as possible to answer their questions*." [emphasis added]

325. Under Clause 3.2. the obligation was to take all reasonable steps to pass on the benefit of the experience and structures developed by AML with the stated purpose to assist AMMENA to commence and continue such operations.

326. On the evidence I reject the submission that AML pushed AMMENA "*to take over immediately without providing the necessary practical assistance to allow AMMENA to take over the role of Distributor in an orderly fashion*". For completeness in relation to

the submissions of the Claimant on this section I note that there was no provision in Clause 3.2 for an orderly transition plan and no term relating to disruption to the business.

327. For the reasons discussed in this section and in the section dealing with the alleged individual breaches, I find on the evidence that AML discharged its duty under Clause 3.2.

Conclusion

328. The findings of the Court on the issues which required to be determined and the reasons for such findings are set out above in the relevant sections of the judgment.

329. In light of the Court's findings the issue arises as to whether AMMENA was entitled to give notice to terminate the Agency Agreement under Clause 6.1 on 19 April 2021.

330. The amount outstanding for 2019 was £749,307.62. The top up payment for 2020 was £4,984,699.08.

331. AML submitted that it was not in breach of the Agency Agreement on 25 January 2021 because:

    331.1 Any sum for 2019 was entirely extinguished by the indemnity due to AML following the HHA settlement; and

    331.2 Any additional payment for MCMP for 2020 only became due and payable at the end of January 2021.

    AML therefore submitted that there was no breach to remedy and no basis for AMMENA to give notice.

332. I accept that it appears to be common ground that any additional payment for MCMP for 2020 only became due and payable at the end of January 2021 (paragraph 33 of the List of Common Ground).

333. There was an issue between the parties as to whether there was a right of set off under the Agency Agreement but it was submitted for AMMENA that "*what AML says the consequence of the right of set off for these proceedings is … remains elusive*."

334. In my view it is not necessary to determine whether there was a right of set off under the Agency Agreement.

335. Assuming that there was a right of set off, in the light of my findings above, it follows that the sum for 2019 was not extinguished by reason of the amount claimed under the indemnity in respect of the HHA Settlement and sums remained owing in respect of the MCMP for 2019 as at 25 January 2021. (AMMENA has accepted that it is liable under the indemnity in respect of Bahrain. However, the total amount due from AMMENA in respect of Bahrain and (if payable by AMMENA) the Saudi legal costs does not exceed the amount due in respect of MCMP for 2019. I also note that at the time of the demand for unpaid MCMP in January 2021, only the costs of £38,725.50 had been incurred in relation to Bahrain and the additional costs were only demanded in June 2023).

336. Clause 6.1 provided that a notice to terminate could be given where:

> "*(b) subject to Clause 6.2 below, the other party fails to remedy (where it is capable of remedy) <u>any breach of any of its obligations</u> under this Agreement after being required in writing to remedy or desist <u>from such breach</u> within a period of 60 days*". [emphasis added]

337. It therefore follows (and appears to be implicitly accepted by AML at paragraph 91 of its Closing Submissions) that at the time when the 25 January letter was sent, by reason of the non-payment of the MCMP for 2019 (or alternatively, the amount net of the Bahrain costs at that time and the Saudi legal costs (if payable by AMMENA)) there was a breach by AML of "*any of its obligations*" under the Agency Agreement and the 25 January letter was a valid notice to remedy the breach.

338. It was submitted for AML (paragraph 92 of its Closing Submissions) that even if AML's counterclaim for the sum claimed in respect of the HHA Settlement Agreement is dismissed, it does not follow that the termination notice was valid:

    338.1 AMMENA accepts that a part of AML's counterclaim should be allowed, and so it follows that the sum claimed by AMMENA was not due in its entirety.

    338.2 on AMMENA's own pleaded case, both AMMENA's notice to remedy an alleged breach and AMMENA's termination notice referred to incorrect sums allegedly due from AML.

339. AML has not cited any authority for the propositions that where part only of the sum claimed in the notice of termination was due, the termination was wrongful or that the notice to terminate was invalid where the sums claimed were less than the amount actually due.

340. In my view AMMENA was entitled to terminate the contract for non-payment of the 2019 MCMP, or alternatively non-payment of the balance of the 2019 MCMP as referred to above, by the 19 April letter.

341. I note that submissions were made in the Defendant's written submissions concerning the basis on which interest should be payable and the appropriate rate (paragraphs 54-58). I agree with the Claimant's proposal that the parties should seek to agree the relevant figures and if any issue remains for determination this should be addressed by the Court at the consequential hearing.

ADDENDUM

342. After this judgment was sent out in draft to the parties, counsel for AMMENA has raised an issue concerning the Saudi legal costs referred to at paragraphs 335 and 337. The issue of whether these costs fell within the scope of the indemnity were not dealt with in the judgment as the Court had understood from AML's submissions that these had been conceded. Since AMMENA maintains that this is not the case, the issue of whether these costs fall within the indemnity will be dealt with at the consequential hearing, if not agreed and paragraphs 335 and 337 have been adjusted to reflect the current position.