



Neutral Citation Number: [2026] EWHC 2787 (BP)

BL-2025-000471

Case No: BL-2025-000471

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
BUSINESS LIST

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

Date: 30/10/2026

Before:

MR JUSTICE RICHARD SMITH

Between:

ZENNAR LIMITED

Claimant

- and -

MOLSSI FASHION SHANGHAI LIMITED
(A company registered in the People's Republic of
China)

Defendant

Benet Brandreth KC and Miruna Bercariu (instructed by Bird & Bird LLP) for the Claimant
William Edwards KC (instructed by Wiggin LLP) for the Defendant

Hearing dates: 7, 8 & 9 July 2026
Draft judgment circulated: 15 October 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE RICHARD SMITH:**A. INTRODUCTION**

1. The Claimant, Zennar Limited (**Zennar** or **the Claimant**), is a company incorporated in England and Wales. The Defendant, Molssi Fashion Shanghai Limited (**Molssi** or **the Defendant**), is a company incorporated in the People's Republic of China (**PRC**). The Claimant and the Defendant entered into a licence agreement dated 13 January 2020 governed by English law (**2020 Agreement**). The 2020 Agreement concerns the licensing of certain trademarks and copyright registered in China, Taiwan and Hong Kong comprising variants of the word 'Rockfish'.
2. In February 2024, the Claimant was acquired by the Korean company, AU Brandz Co Limited (**AU Brandz**), part of the AU Group (of which AU Commerce Ltd was also a member (**AU Commerce**)). In December 2024 and January 2025, AU Brandz sought to sell 'Rockfish Weatherwear' branded goods in physical 'pop-up' stores in China. The Defendant sent 'cease and desist' letters to AU Brandz and to the operator of the Chinese malls where the pop-up stores were to be located, alleging infringement of its rights under the 2020 Agreement (**Letters**). The Letters were sent to Jiayoujia Trading (Shenzhen) Limited, Shanghai Branch on 21 December 2024 and 18 January 2025 and to AU Brandz on 9 January 2025.
3. The Claimant contends that, by sending the Letters, the Defendant committed irremediable breaches of certain express and implied terms of the 2020 Agreement which it went on to terminate on 4 April 2025. On the same day, the Claimant issued proceedings, seeking a declaration as to the validity of such termination. The Defendant denies that the 2020 Agreement has been terminated and counterclaims for a declaration that it (i) remains in effect (ii) is 'relational' in nature and (iii) relatedly, contains certain implied terms that each party owed the other an obligation to act in good faith, including by refraining from conduct which would be regarded as commercially unacceptable. The Defendant also claims that the Claimant was itself in breach of, and therefore not entitled to terminate, the 2020 Agreement. The Claimant denies these matters, including that the 2020 Agreement is relational, contending that an implied term of good faith would be contrary to both its arm's length commercial nature and its express provisions.

B. WITNESSES OF FACT

4. Two witnesses of fact gave evidence at trial. Mr Jerry Taekyun Kim gave evidence for the Claimant. He was formerly managing director of AU Brandz and has been a director of Zennar since its acquisition by AU Brandz in 2024. He gave evidence through an interpreter. The Defendant suggested in submission that this was a deliberate tactic to make cross-examination difficult and to shield him from difficult questions. I disagree. Mr Kim clearly has command of English to a certain level but I accept that he was meaningfully assisted by the interpreter. Overall, I found Mr Kim to be a careful but responsive and straightforward witness. He did, however, overreach somewhat in his written evidence by commenting on certain matters, particularly on some of the documents pre-dating his tenure at Zennar.
5. Mr Jimmy Ching Man Cheung gave evidence for the Defendant. He is the founder and Chief Executive Officer of Molssi. Mr Cheung was a generally fair and straightforward

Approved Judgment

witness, albeit his oral evidence did tend to show that elements of his written evidence, particularly with respect to his relationship with the (present and former) owners of Zennar, were somewhat overstated.

6. The Defendant invited the court to draw adverse inferences by reason of the Claimant's failure to call the previous owners of Zennar, Marcus and Jules Aldred, to give evidence as to the events pre-dating the acquisition of Zennar by AU Brandz in February 2024. I did not consider such inferences to be appropriate. It was far from clear that Zennar would have been in any better position to secure the Aldreds' attendance than Molssi. Nor, as I come on to explain, and without intending any disrespect to those witnesses who did testify, did I gain much assistance from the factual evidence in deciding the disputed issues in this case. I apprehend that the same would have been the case if either party had put forward the Aldreds as witnesses.

C. EXPERT EVIDENCE

7. The parties also exchanged expert reports on Chinese law, albeit they agreed that related oral evidence was not required. The Claimant instructed Professor Huanqing Yao (**Professor Yao**), an Associate Professor at Renmin University Law School in the PRC since 2003 who teaches and undertakes research in the intellectual property field. The Defendant instructed Ms Aijie Liu (**Ms Liu**), a PRC qualified lawyer since 2008 who works in the intellectual property department of FenXun Partners, a law firm based in Beijing. I have considered their respective expert reports and their joint statement. The Claimant did suggest a doubt as to Ms Liu's independence with respect to certain aspects of her evidence. However, when the Defendant challenged this suggestion, the Claimant clarified that this was not intended, but rather that it was pointing out a suggested failure to address certain matters in her report despite acknowledging their potential importance. The Court makes clear that it has no reason to doubt the independence of either expert witness.

D. CONFIDENTIALITY OF THE PROCEEDINGS

8. At the pre-trial review on 9 June 2026, I made an order pursuant to CPR, Part 31.22(2) that the documents designated 'confidential' in the hearing bundles would not be used except for the purposes of these proceedings even though they may have been read to or by the court or referred to in open court.
9. During the trial, the court sat in private for a few hours at the end of the first day, on the morning of the second and for the entire third day. I was obviously concerned to ensure that the Court should sit in public for as much of the trial as possible. However, given the considerations of commercial confidentiality arising on the claim and in the documents considered by the Court, I was satisfied that publicity would damage that confidentiality and defeat the object of the hearing such that the Court should sit in private during those times to secure the proper administration of justice.

E. PRELIMINARY DISPUTES

10. Following exchange of skeleton arguments, an issue arose as to whether the Defendant was advancing new unpleaded arguments which had not been the subject of disclosure and/ or witness evidence. The Claimant submitted a supplemental skeleton on the issue which was also explored in oral opening submission. Having heard argument, I did not

rule definitively on the matter then. Rather, I made clear that if, after considering the position more fully, I came to the view that relevant factual matters now relied on by the Defendant had not been properly pleaded, I might not permit the related arguments to be advanced. I address those points below where they arise on the relevant claim or defence.

F. FACTUAL CHRONOLOGY

11. I summarise immediately below aspects of the factual chronology emphasised by the parties. I do not set out what the documents and evidence show as to the entirety of their dealings or all the related arguments developed by the parties in light thereof. I have considered these matters, albeit they were of somewhat limited assistance given the issues arising in the case.

(a) Early dealings with respect to Rockfish

12. The ‘Rockfish’ brand was established by the Aldreds prior to 2013 as part of their business which they conducted from Cornwall through Zennar until 2024 when they sold it to AU Brandz.
13. On 25 January 2013, AU Commerce purchased four ‘Rockfish’ Korean registered trademarks from Zennar. These marks were later transferred to AU Brandz.
14. Mr Cheung of Molssi and Mr Aldred subsequently explored a collaboration to launch the ‘Rockfish’ brand in China. On 10 November 2014, Mr Aldred provided Mr Cheung with an authorisation letter (in the name of Molssi’s predecessor, Shanghai Kupeng), confirming its role as exclusive distributor and licensee of the ‘Rockfish’ brand in China. Mr Cheung explained in his written evidence that the use of authorisation letters was common in Chinese business dealings and that, once issued, Shanghai Kupeng was free to share them with any third party that might question its right and authority to carry on business in China under the ‘Rockfish’ brand. Mr Kim also testified as to his familiarity with authorisation letters and how, even if described as ‘generic’, the recipient does not have the right to use it for any purpose. Rather, such use is limited or controlled at the direction of the licensor.
15. Towards the end of 2014, Mr Cheung arranged for Molssi to be incorporated as a holding company for his brand-focused businesses, including ‘Rockfish’. Zennar issued a further authorisation letter to Molssi on 4 February 2015.
16. In 2015, Zennar and Molssi formalised their arrangement by entering into a written licence agreement effective from 1 January 2015 relating to the ‘Rockfish’ brand (**2015 Agreement**). The licence granted various rights to Molssi in the PRC for an initial term of ten years, with a break clause at five years.
17. Mr Cheung’s written evidence was that Zennar and Molssi operated together not as a typical licensor and licensee rather than as a partnership in ‘start up’ mode. Although Molssi sought to develop the market for ‘Rockfish’ rainboots in China, his collaboration with Zennar went deeper. Molssi undertook these steps even though not of direct financial benefit to itself. Mr Cheung also noted that Zennar would often refer to Molssi as its Chinese ‘partner’ and sometimes direct enquiries to Molssi from the wider Asia region. Mr Cheung said that his relationship with Zennar was based on a handshake

Approved Judgment

and trust and mutual respect in working together, albeit acknowledging that Molssi and Zennar also operated under a formal licence agreement.

18. On 26 May 2016, Mr Aldred wrote to AU Commerce stating that Zennar was “looking for a suitable partner for the China licence, with a brand partner, that can be relied upon to protect the brand, and drive business and support significant growth. And - importantly - with the scale, resources and commitment to respond quickly to growth. As a result, I am now undertaking serious market-testing for that partner.” Mr Aldred invited AU Commerce’s reaction. In cross-examination, Mr Cheung said that he did not view AU Commerce as a commercial competitor. In any event, 2016 was early days in the partnership with Molssi which was loss-making in its first few years.
19. In around 2020/ 2021, AU Brandz launched a new ‘Rockfish Weatherwear’ brand in Korea, initially in respect of footwear, later scarves and hats.

(b) Alleged infringing activity by AU Commerce/ AU Brandz in China

20. Rather than seeing AU Commerce as a competitor, Mr Cheung said that he viewed it as an ‘infringer’. In the early years, Molssi encountered third party products infringing the ‘Rockfish’ mark in China from time to time. However, this was generally not problematic, save for product coming into the Chinese market from Korea, as to which, Mr Cheung said in his written evidence:-

“Despite AU having no rights under the ‘Rockfish’ mark in China, ‘Rockfish’ branded products from Korea would appear on the Chinese market from time to time. There were also instances when we (Molssi) encountered AU Commerce displaying its products at trade fairs in China.”

21. Mr Cheung said that, in view of Zennar’s prior relationship with AU Commerce, he would complain to Zennar about its product appearing in China and ask Zennar to resolve this. In mid-October 2016, Zennar wrote to AU Commerce, the former noting information received that the latter were exhibiting at Shanghai Fashion Week with Korean ‘Rockfish’ products presented next to other brand lines sold from China. Zennar asked AU Commerce to cease presenting ‘Rockfish’. AU Commerce denied having done so, explaining that it had participated at the exhibition with other brands and sending pictures showing this. Mr Cheung repeated his allegation in cross-examination. As noted below, Molssi’s complaints about infringing activity increased over time, albeit AU Commerce continued to deny that it was responsible.

(c) The 2020 Agreement

22. On 15 July 2019, Mr Aldred wrote to Mr Cheung concerning a proposed new licence between Zennar and Molssi, explaining that “[t]he licence will be a very robust document, all payments would have to be adhered to, in a timely manner. (unlike our previous agreements)”. The Defendant also points to other such communications which indicate Zennar’s ‘softening’ of the terms.
23. In any event, the 2020 Agreement was dated 13 January 2020 and is in materially different terms from the 2015 Agreement. At around the same time, Mr Cheung had requested Zennar to issue a renewed “generic authorisation letter”. I address the terms of the 2020 Agreement below.

(d) Subsequent developments with AU Commerce

24. On 2 August 2021, Mr Yu of AU Commerce wrote to Mr Cheung indicating that it had been turning down business offers from China but believed that they could now “do something together” and grow the ‘Rockfish’ brand.
25. In 2021, AU Brandz registered the ‘Rockfish Weatherwear’ mark in Korea.
26. In 2022, AU Brandz made the strategic decision to discontinue selling ‘Rockfish’ wellington boots to focus fully on the single ‘Rockfish Weatherwear’ brand. That year, AU Commerce also ‘spun off’ AU Brandz, later transferring to it its entire ‘Rockfish’-related business (including ‘Rockfish’ trade mark rights in Korea).
27. Mr Cheung testified that the volume of ‘Rockfish Weatherwear’ product on the Chinese market became quite significant. The documents indicate that, in early 2022, Zennar sought a UK government grant to take enforcement action against AU Commerce and that it went on to instruct Korean counsel with a view to presenting legal proceedings. Mr Cheung’s written evidence also noted that, by 2023, Zennar was telling him that the product was appearing in other markets, including the USA, Russia and Japan. Zennar was said to be expending considerable effort filing takedown notices with online platforms in relation to ‘Rockfish Weatherwear’ products.
28. Mr Kim testified that he met Zennar in the UK in July 2022 to discuss the issue. Although Zennar had raised concerns about ‘Rockfish Weatherwear’ products entering the Chinese market, Mr Kim explained at the meeting that such sales were not made by AU Brandz. The products were resold through Chinese resellers by unauthorised third party purchasers of the products in Korea. According to Mr Kim, AU Brandz and AU Commerce did not sell ‘Rockfish’ or ‘Rockfish Weatherwear’ products in China prior to 2025. Not dissimilarly, AU Brandz had, itself, experienced the sale of ‘Rockfish Weatherwear’ products in Korea which it had not authorised but later found out originated from Zennar’s Indian partner.

(e) Zennar’s dealings with Molssi after 2024

29. There was quite some focus at trial on the parties’ actions in relation to the acquisition of Zennar by AU Brandz and their subsequent conduct.
30. On 7 May 2023, Mr Aldred informed Mr Cheung that a company (which could not be identified due to non-disclosure obligations) had offered a substantial sum to purchase the shares in the Zennar business. The potential buyer was AU Brandz.
31. On 4 May 2023, AU Brandz indicated its requirement to operate directly in China following the acquisition due to Molssi’s unreliability and its long-term agreement hindering AU Brandz’s prospective business. On 26 May 2023, AU Brandz also indicated that, practically, it required the termination or withdrawal of the “china licence”.
32. On 26 June 2023, Zennar provided AU Brandz with the full version of the 2020 Agreement. Although AU Brandz had executed a non-disclosure agreement, the Defendant says that this is remarkable given Zennar’s current complaint of breach of

Approved Judgment

clause 7.1 of the 2020 Agreement through Molssi's despatch of the Letters which contained minimal information about its terms.

33. AU Brandz later proposed a deed of variation to vary the 2020 Agreement, including by replacing Molssi's exclusive licence with "a non-exclusive and non-sublicensable licence". Molssi did not agree but Mr Cheung did agree to a buy-out of the 'Earn-Out Reward Agreement'. This was achieved by the Deed of Waiver executed in 2023.
34. In January 2024, Mr Kim joined Zennar as director. AU Brandz acquired Zennar the following month.
35. On 17 April 2024, Mr Aldred messaged Mr Cheung indicating that Mr Kim seemed willing to look positively at working together with Molssi and that he was "keen to consider Weatherwear with you."
36. Mr Cheung continued raising concerns about licence infringements in China by AU Brandz. To that end, on 29 April 2024, Molssi's legal advisor, Mr Kim Low, wrote to Mr Kim in the following terms:-

"Jimmy has involved me in the discussions and communications from the outset, between him and Marcus Aldred, the previous owner of Zennar (Zennar), prior to the outright sale of Zennar to Au Brandz in Jan this year.

I am writing to you as the current CEO of Zennar and as the main representative of Zennar's new owner, AU Brandz.

I understand that discussions took place recently amongst all of you in mid April in Shanghai but that unfortunately, nothing transpired during the meeting that you or Zennar were interested in pursuing any form of collaborative partnership, as was the impression given to Jimmy by Marcus Aldred, with regard to the 'Rockfish' brand name in the territories concerned ie China, Taiwan, Hong Kong and Macau (collectively, the China Territories).

That being the case, I had advised Jimmy against agreeing to any further meetings with you whilst you were in Shanghai. Therefore, my advice to Jimmy is that until and unless the situation changes with constructive proposals being put forward by you, all future discussions on the matter are pointless and a waste of time.

Without wishing to involve ourselves in protracted correspondence with you or anyone else on the subject, we, however, would like to take the opportunity of stressing that any commercial or marketing activities by Zennar or any third party or parties in the China Territories with regard to the use of the 'Rockfish' brand name in respect of the same or similar classes of goods, particularly in China, will be in direct violation of Molssi's rights under the current Licence Agreement signed with Zennar in Jan 2020.

Our legal stance remains steadfast notwithstanding the purported registration of the mark 'Rockfish Weatherwear' by Zennar subsequent to its [sic] by AU Brandz.

It is, indeed, unfortunate that we have found ourselves in the position we are in but I am sure that you will not disagree that in the commercial world when deals are

Approved Judgment

formally agreed upon with the execution of Agreements, the intentions of the contracting parties at the material time as encapsulated in such Agreements, should be respected. Sadly, it does not appear to have been the case here.”

37. On 6 May 2024, Mr Kim responded in the following terms:-

“Firstly, you must have misunderstood about the last meeting with Jimmy in Shanghai. So I’d like to clarify the facts as follows.

1. The purpose of the last meeting was to explain the change in control of Zennar (Licensor) and introduce myself as its new director. It should be also the meeting as the new owner of Rockfish to understand the business of Molssi (Licensee) in territory. In my experience this is an extremely common and reasonable meeting for both companies in license partnership. I went to the meeting to help Jimmy.
2. During the meeting, in response to my question about what to hope from the new owner, Jimmy replied that has been struggling because there were little cooperation and support for a brand marketing from the previous owner. and I mentioned that I will actively and fully cooperate ‘Rockfish’ business in territory, such as marketing materials and supports. also emphasized repeatedly, in order to support and help, we need to know about Molssi company and business in Territory. So, you are totally incorrect in saying that there were not any discussion to seek a collaborative partnership in meeting.
3. However, It doesn’t matter to me whether you advised Jimmy not to see us. As a licensor, we are willing to make a constructive suggestion for you. But prior to that, we have a right to ask and know your business where go forward to our brand strategy. Unfortunately Jimmy rejected it at the last meeting and even though we agreed to visit Molssi office after meeting, he ignored to my official request to visit the office the next day. Also it made my visit to China pointless and a waste of time. Unfortunately It was really bad and disrespectful to me and Marcus. Marcus has already told Jimmy that he felt the same.
4. Therefore, I’d like to officially request again Jimmy and you regarding the follow questions. as a licensee, kindly ask to provide the related information faithfully and sufficiently.”

38. On 13 May 2024, Mr Low responded:-

“What is important, though, is whether the new owner of Zennar can demonstrate its willingness in complying with the terms and conditions of the Licensing Agreement currently in place. Once this is shown to be the case, we are, on our part, willing to consider any constructive proposals from Zennar regarding the possibility of a workable partnership with Zennar in the China Territories.

With regard to the earlier question of Zennar’s willingness to respect the exclusive rights of [sic] Molsis in the China Territories, it is disappointing to note that your response has not in any way addressed the central question raised in my mail to

Approved Judgment

you of 29th April concerning the direct and/ or indirect violations of the Licensing Agreement concerned. This is indeed, a serious concern and does not fill us with confidence that your intentions are sincere. Therefore, in order to allay our concerns, we would like to repeat our request to you to state whether any violation(s) of Molssi's rights have taken place in the China Territories, either before and/ or after the acquisition of Zennar by AU Brandz.

In normal circumstance, we would not, until we receive a response from you concerning the issue of violation of Molssi's exclusive rights, be prepared to respond to your request for the information outlined in your mail below. However, in the interest of moving things forward, appended below is our response to some of the information requested by you. ..."

39. Mr Low and Mr Kim held a video call on 24 May 2024 to resolve some of the issues between the parties. On 29 May 2024, Mr Low wrote to Mr Kim:-

"I refer to our video call on the 24th of May which I found fairly constructive as I felt that you managed to give me the distinct impression that AU Brandz/ Zennar is willing and open to commence discussions concerning the possibility of collaborating with Molssi in the China Territories in respect of the Rockfish brand name in respect of which, as you are no doubt aware, Molssi is the exclusive licensee in the China Territories.

I would therefore, be grateful if you could reaffirm if this is indeed the intention of AU Brandz/ Zennar as it would provide a useful basis for all parties concerned to begin the process of discussing the structure of the collaboration etc."

40. On 1 June 2024, Zennar entered into a License and Distribution Agreement with AU Brandz with respect to the 'Rockfish Weatherwear' mark in East and Southeast Asia. The Defendant suggested in cross-examination and submission that this purported to extend to the 'Rockfish' marks as well. However, even though the agreement listed Zennar's other trade marks registered in the territory, that suggestion was not borne out by its terms.
41. On 11 June 2024, Mr Cheung e-mailed Mr Kim to notify further suspected infringements of Molssi's exclusive rights in China, Taiwan and Hong Kong on various platforms featuring the 'Rockfish Weatherwear' name. He sought Zennar's support to ensure that the necessary legal actions were taken against such third parties and demanded the cessation of their activities.

(f) The Letters

42. In December 2024 and January 2025, AU Brandz was seeking to sell 'Rockfish Weatherwear' branded goods in physical pop-up stores in China. Molssi sent the Letters to AU Brandz and to the operator of the Chinese malls alleging infringement of its rights under the 2020 Agreement. The Letters identified certain matters relating to the agreement, including that (i) Molssi had the exclusive licence rights within China to all registered trademarks, trademarks under application and all trademarks to be applied for owned by Zennar relating to the 'Rockfish' brand series, including Zennar's trademark registration no. 17176720 for 'Rockfish' in class 25 in China (ii) Molssi was consequently the sole and lawful exclusive licensee of the 'Rockfish' brand, possessing

Approved Judgment

the exclusive right to sell and operate branded goods within China (iii) the territorial scope of the licence was the PRC, including Hong Kong, Macau and Taiwan and (iv) the licence start date was 1 January 2020.

43. Towards the end of January 2025, Zennar and Molssi met to discuss the Letters. Mr Kim summarised that meeting in an email dated 23 January 2025:-

“I’d like to let you know what I understood in last meeting based on my notes.

1. We both understand that ZN (Zennar) and MS (Molssi) have different legal stance about license contract and TM right. We agreed that the resolution in UK court must be bad for both companies’ time and money. Both are prepared to go to litigation but want to avoid if possible.
2. I received a copy of the letter from your lawyers to Shanghai mall and threatening to take action. This will make AU consider taking legal action for a business interruption and damage. That is only going to result in more argument and litigation between ZN and MS again. (You will remember I drew a cyclical diagram about litigation at our meeting)
3. You claimed that Rockfish brand business is hurt due to Rockfish Weatherwear brand. But I disagreed because they are clearly and legally different business and brands. also mentioned that it could have a positive effect rather contrarely then you didn’t denied it, as i remember.
4. Anyhow, eventually it is important for Rockfish business to go well. ZN wants that as good for Molssi and ZN if Rockfish business go well. So we agreed that just leave AU to do a short-term pop-up because this does not affect Rockfish business and pause to take legal actions each other until reaching resolution and agreement. At the same time, we also agreed to discuss rapidly and deeply about how to sort our dispute and support your business. ...”

44. On 4 April 2025 the Claimant wrote to the Defendant to terminate the 2020 Agreement.

(g) The parties’ motives for their actions

45. It is fair to say that the Claimant and the Defendant hold very different views about these events and the motives of the other. The Defendant says that AU Brandz obviously wished to enter the Chinese market but knew that its ‘Rockfish Weatherwear’ brand would infringe the ‘Rockfish’ marks. It therefore sought to acquire the Chinese marks by acquiring Zennar. However, during the negotiations, AU Brandz realised that Zennar had granted a licence to Molssi. AU Brandz first sought to pressurise Zennar into terminating that licence, then sought its variation to Molssi’s obvious disadvantage. In the end, AU Brandz bought Zennar with the 2020 Agreement in place. Following the acquisition, it became clear that Mr Cheung would not tolerate the continuing infringements, causing Zennar to alight on the Letters as a means of termination.
46. The Claimant accepts that it sought commercial advantage in the negotiations for the acquisition of Zennar, including in relation to the existing licence arrangements in China. However, with Molssi remaining as PRC licensee of the ‘Rockfish’ marks

Approved Judgment

following the acquisition, it sought to make the best of the arrangement and to be open and collaborative. Despite this, Molssi was resentful of the new owner's attempts to put matters on a proper footing under the 2020 Agreement. AU Brandz was a commercial rival which Molssi had previously sought to get into trouble with Zennar. Molssi was clearly unable to reconcile itself to a rival now stepping in as licensor. Molssi's resistance to Zennar was not about the different treatment or prior successful operation of the business with the Aldreds as Mr Cheung had sought to suggest in his witness statement. As he accepted in cross-examination, the Aldreds had not, in fact, supported him.

47. The Claimant also says that Molssi failed to co-operate by, for example, not providing the marketing and budgeting information requested under the 2020 Agreement. Mr Cheung testified that he had tried to co-operate and to adhere to the new owner's requirements. He also welcomed a more structured approach. The impasse was due to the difference of opinion concerning the infringement of Molssi's rights in China. This made him cautious in his approach to the partnership and suspicious of AU Brandz's new and out of the ordinary requests. He questioned whether it was reasonable to provide the information now requested by Zennar which he considered went beyond Molssi's obligations under the 2020 Agreement. Mr Cheung also explained in his statement how he began to suspect that Zennar's new product approvals process was an attempt to hamper Molssi's ability to make sales and meet the guaranteed minimum royalty requirements. He denied having a 'beef' that he now had to deal with a more sophisticated company, AU Brandz.

(h) The Chinese infringement proceedings

48. Molssi has brought legal proceedings in China, not against the mall operator which received two of the Letters, but against two different Chinese companies exploiting the 'Rockfish Weatherwear' marks. Molssi contends that their actions infringed the 'Rockfish' marks, including in relation to the 'pop-up' stores. Judgment was given in those proceedings on 29 May 2026. The Chinese Court held that the use of the 'Rockfish Weatherwear' mark complained of infringed the 'Rockfish' marks licensed to Molssi under the 2020 Agreement. Molssi relies on that decision to support its argument that Zennar breached clause 2.1 of the 2020 Agreement.

G. AGREED ISSUES FOR DECISION

49. Drilling down into the detail of the dispute, the parties identified the agreed issues for the Court's determination as follows:-
- “1. Was there an implied term of the 2020 Agreement that the Defendant would not take any steps itself to enforce any trade mark or copyright licensed under the Agreement unless and until the Claimant had consented that it do so?
 2. Is the 2020 Agreement properly to be characterised as 'relational'? If so, what are the consequences?
 3. Was there an implied exception to the obligation of confidentiality in clause 7.1 of the 2020 Agreement? If so, what is the nature and extent of such exception?

Approved Judgment

4. Are there exceptions to the obligation in clause 3.7 of the 2020 Agreement to notify of threatened or suspected infringement? If so, what is the nature and extent of such exceptions?
5. As a matter of Chinese law, did any of the recipients of any of the Letters infringe any of the rights licensed to the Defendant by the 2020 Agreement?
6. Is there an estoppel by convention precluding the Claimant from asserting that the “Rockfish Weatherwear” branded goods the subject of the Letters do not infringe the marks licensed to the Defendant by the 2020 Agreement?
7. Has the Defendant breached clause 7.1 or clause 3.7 of the 2020 Agreement or the alleged implied term referred to at issue 1 above? If so, was any such breach irremediable?

[.....]

9. Is the Claimant in breach of:
 - a. An implied obligation of good faith if the 2020 Agreement is found to be ‘relational’?
 - b. Clause 2.1 of the 2020 Agreement?
10. If so, what are the consequences of such breach(es)?
11. What declaratory relief should be granted?”

50. The live issues of Chinese law were issue 5 above and the following:-

- “1. May an exclusive licensee of a Chinese registered trade mark bring infringement proceedings in its own name? If so, what conditions or limitations are placed on its ability to bring such proceedings?

[.....]

5. Did the use made or threatened to be made by the Letter Recipients of the Pop-up Shop Marks in principle infringe the Licensed Chinese Marks?”

51. The claim therefore engages various issues of English law, including contractual interpretation, as well as Chinese trade mark law. There was significant common ground as to the relevant principles of both, if not their application to this case. I summarise some of the overarching English law principles immediately below, addressing those aspects more closely argued under the issue(s) concerned.

H. LEGAL PRINCIPLES

(a) Contractual construction

52. As to the principles of contractual construction, the Claimant cited the helpful summary by Popplewell J (as he then was) in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The “Ocean Neptune”)* [2018] EWHC 163 (Comm) at [8]:-

“ ... The court’s task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. 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 the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; 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; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. 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.”

(b) Implied contractual terms

53. The principles governing the implication of contractual terms were summarised in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 (in particular, [23] and [26]-[27]) as follows:-
- (i) Terms are to be implied only if it is necessary to do so to give the contract business efficacy or the term is so obvious as to go without saying. This is a rigorous test. Reasonableness does not suffice;
 - (ii) It is a necessary but not sufficient requirement that the term that a party seeks to imply appears fair or is one that the court considers the parties would have agreed if it had been suggested to them;
 - (iii) Construing the words that the parties have used in their contract and implying terms into the contract both involve determining the scope and meaning of the contract;
 - (iv) Construing the words used and implying additional words are different processes governed by different rules;

- (v) In most, possibly all, disputes about whether a term should be implied, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Only then can the question of necessity and whether the term sought to be implied contradicts the express terms of the contract be answered.

(c) Relational contracts/ implied contractual obligations of good faith

54. In *Bates v Post Office* [2019] EWHC 606 (QB), Fraser J (as he then was) considered the question of relational contracts, citing (at [717]) the following from *Myers v Kestrel Acquisitions* [2015] EWHC 916 (Ch):-

“[50] In assessing whether to imply the good faith term I remind myself that, as Lord Hoffman said in *Belize* [2009] UKPC 10, [2009] 2 BCLC 148, [2009] 2 All ER 1127, at [16], the court has no power to introduce terms to make the instrument it is asked to construe fairer or more reasonable and that the most usual inference, if the instrument does not expressly provide for what is to happen when some event occurs, is that nothing is to happen and that where the event causes loss, the loss lies where it falls.”

55. Fraser J went on (at [725]) to identify the following non-exhaustive list of characteristics expected to be present in determining whether a contract between commercial parties ought to be considered a relational one:-

- i) There must be no specific express terms that prevent a duty of good faith being implied into the contract;
- ii) The contract will be a long-term one, the mutual intention of the parties being that there will be a long-term relationship;
- iii) The parties must intend that their respective roles be performed with integrity and fidelity to their bargain;
- iv) The parties will be committed to collaborating with one another in the performance of the contract;
- v) The spirit and objective of their venture may not be capable of being expressed exhaustively in a written contract;
- vi) They will each repose trust and confidence in one another but of a different kind to that involved in fiduciary relationships;
- vii) The contract will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and expectations of loyalty;
- viii) There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment; and
- ix) Exclusivity of the relationship may also be present.

56. Despite this list, the issue of whether a contract contains an implied obligation to act in good faith is ultimately a question of the implication of terms to be addressed within the framework identified by the UK Supreme Court in *Marks & Spencer*. In *UTB v Sheffield United Limited* [2019] EWHC 2322 (Ch), Fancourt J summarised the development of the law on relational contracts (at [196]-[204]) in the following way:-

“201. The ratio of the decisions in *Yam Seng* and *Sheikh Tahnoon* are ones that any first instance judge must follow unless he or she were satisfied that they were wrong. I shall follow them. In other recent cases, there has been a tendency to substitute for the question whether a reasonable reader of the contract would consider a term to be necessary or obvious the question of whether the contract is a “relational” contract: see, e.g., the decision of Fraser J in *Bates v Post Office* [2019] EWHC 606 (QB). At para 725, Fraser J asked what the characteristics are that are expected to be present that will determine whether a commercial contract ought to be considered a “relational contract”. The Judge set out nine relevant factors, of which only the first was determinative, namely that there must be no express term of the contract that prevents a duty of good faith being implied.

202. If by “relational contract” it is clear that one means a relational contract of the kind described by Leggatt LJ in *Sheikh Tahnoon* and not all relational contracts in a broader sense, then there is no difficulty and the characteristics identified by Fraser J may assist to identify such a contract. But there is a danger in using the term “relational contract” that one is not clear about what exactly is meant by it. There is a great range of different types of contract that involve the parties in long-term relationships of varying types, with different terms and varying degrees of detail and use of language, and to characterise them all as “relational contracts” may be in one sense accurate and yet in other ways liable to mislead. It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith. As Beatson LJ said (obiter) in *Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at para [68]:

“[...] as seen from the Carewatch Care Services case, an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract.”

203. Rather than seek to identify and weigh likely indicia of a “relational contract” in the narrower sense used by Leggatt LJ, it is, I consider, preferable to ask oneself first - as Leggatt LJ did in the *Sheikh Tahnoon* case - whether a reasonable reader of the contract would consider that an obligation of good faith was obviously meant or whether the obligation is necessary to the proper working of the contract. The overall character of the contract in issue will of course

Approved Judgment

be highly material in answering that question but so will its particular terms, as recognised by the principle that (as restated in the *Marks and Spencer* case) no term may be implied into a contract if it would be inconsistent with an express term.”

57. More recently, Coulson LJ considered the issue of relational contracts in *Candey v Bosheh* [2022] EWCA Civ 1103 (at [29]-[32]), citing Fancourt J with approval, noting that there has been a large number of claimants in light of the decision in *Yam Seng* who have attempted to argue that their contracts are relational, thereby implying an obligation of good faith, and that “*the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law*”. As Andrews J also said in *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch) (at [150]):-

“150. So far as the ‘good faith condition is concerned’, there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms’ length. Leggatt J’s judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2011] EWHC 111 (QB); [2013] 1 CLC 662, on which *Greenclose* heavily relies, is not to be regarded as laying down any general principle applicable to all commercial contracts. As Leggatt J expressly recognised at [147] of that judgment, the implication of an obligation of good faith is heavily dependent on the context.”

(d) Estoppel by convention

58. The legal test for estoppel by convention was summarised by the UK Supreme Court in *Tinkler (Respondent) v Commissioners for Her Majesty’s Revenue and Customs (Appellant)* [2021] UKSC 39 (at [45], [49] and [51]-[52]) in the following terms:-

“45. Having referred to a number of the leading cases on estoppel by convention examined above, including *The Indian Endurance*, *The Vistafjord* and *Keen v Holland*, but not *The August Leonhardt*, Briggs J set out the following very important statement of principles at para 52:

“In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings ... are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own

independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

[...]

49. However, it was unfortunate that Briggs J’s first principle made no reference to the need for conduct to have “crossed the line”. Soon after *Benchdollar*, Briggs J was presented with the opportunity to make that refinement. In *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* (“Stena Line”) [2010] EWHC 1805 (Ch); [2010] Pens LR 411 (upheld on appeal without discussing this point at [2011] EWCA Civ 543; [2011] Pens LR 233) Briggs J accepted the submission of counsel that, by reference to *The August Leonhardt*, his first principle should be amended to include that “the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred” (at para 137).

[...]

51. It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as “C”) must know that the person against whom the estoppel is raised (who I shall refer to as “D”) shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C’s reliance on the common assumption.

52. It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D’s affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from Spencer Bower, *The Law Relating to Estoppel by Representation*, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:

“In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their

common view (as opposed to each, keeping his own counsel, being responsible for his own view).”

I. THE 2020 AGREEMENT

59. The 2020 Agreement is governed by, and to be construed in accordance with, English law. The parties also agreed to submit to the exclusive jurisdiction of the English Court (clause 15.1).
60. The 2020 Agreement is also expressed to be the entire agreement between the parties with respect to its subject matter and to supersede all previous agreements and understandings between the parties (third recital; clause 13.3). The 2020 Agreement therefore replaced the 2015 Agreement.

(a) Key definitions

61. Turning to the specific provisions, Molssi is referred to in the 2020 Agreement as “MFSL” and Zennar as “ZL”.
62. The “**Marks**” are identified in Schedule 1, Part 1. These comprise different marks covering different countries in the Territory and classes of goods and services. Most include class 25 relating to clothing, footwear and headgear. The definition also encompasses the China registered copyright(s) owned by Zennar used under the agreement as identified in Schedule 1, Part 2.
63. The “**Territory**” is defined as the PRC, including Macau, Hong Kong and Taiwan.
64. The “**Products**” are defined as the range of products bearing the Mark(s) as approved by Zennar from time to time, being rainboots, casual footwear, apparel and associated products within all products listed in Class 18 and 25 that may be manufactured by or on behalf of Molssi by “**Approved Manufacturers**” and sold by Molssi in the Territory in accordance with, and subject to the terms of, the 2020 Agreement.
65. “**Approved Manufacturers**” are defined as any third party person, firm or company approved by Zennar to manufacture the “Licensed Products”, an apparently erroneous reference to the “Products”.

(b) Exclusive licence

66. The first recital records the agreement of Molssi and Zennar as to Molssi’s “sole and exclusive right to have manufactured under the Mark(s) ... the Products” and Zennar’s agreement to grant Molssi a “licence to use the Mark(s) in relation to the manufacture, promotion and sale of Products” on the terms set out therein.
67. That recital is reflected in the operative provisions, clause 2.1 providing that:-
- “ZL grants MFSL, subject to the terms and provisions of this Agreement, a licence to use the Mark(s) in the Territory in the manufacture, promotion, distribution and sale of Products. Such licence shall be on a sole and exclusive basis and shall, for the avoidance of doubt, extend to precluding ZL, or any ZL

Approved Judgment

affiliates, partners and licensees from other Territories, from selling the Products in the Territory.”

(c) Intellectual property rights in respect of the Mark(s)/ Products

68. Importantly for this case, clause 3 contains more detailed provisions about the intellectual property rights subsisting in the Territory in respect of the Products and the Mark(s) (“IPR”).
69. The starting point is clause 3.1 in which Molssi acknowledges Zennar’s ownership of the IPR and of the Mark(s).
70. Clause 3.3 authorises Molssi to use the Mark(s) in the Territory on or in relation to the Products for the purpose only of exercising its rights and performing its obligations under the 2020 Agreement. Zennar is precluded from authorising any other person, firm or company to use the Mark(s) in the Territory.
71. Clause 3.5 provides relatedly that, save as expressly provided in clause 3, Molssi has no rights in respect of the Mark(s) used by Zennar in relation to the Products or the associated goodwill other than as detailed in the ‘Earn-Out Reward Agreement’.
72. Molssi agreed not to affix any other trade mark or logo to the Products which were also required to indicate Zennar’s ownership of the Mark(s) (clause 3.2).
73. In relation to the validity, enforceability and potential infringement of the IPR (or the rights of any other person), clause 3 provides that:-
 - i) Molssi shall not use the Mark(s) in any way which might prejudice its distinctiveness or validity or Zennar’s goodwill therein (clause 3.4.2);
 - ii) Molssi shall at Zennar’s expense take all such steps as Zennar may reasonably require to assist Zennar in maintaining the validity and enforceability of the IPR during the term of the 2020 Agreement (clause 3.6);
 - iii) Molssi shall promptly and fully notify Zennar of any actual, threatened or suspected infringement in the Territory of any IPR which comes to Molssi’s notice and of any claim by any third party so coming to its notice that the sale of the Products in the Territory infringes any rights of any other person (clause 3.7);
 - iv) Molssi shall at Zennar’s request and expense do all such things as may be reasonably required to assist Zennar in taking or resisting any proceedings in relation to such infringement or claim (clause 3.7); and
 - v) Zennar will take appropriate action against any entity (other than Molssi) that uses the Mark(s) in the Territory (clause 3.3).

(d) Manufacture and sale of the Products

74. Clause 2 contains various requirements with respect to the manufacture and sale of the Products, including:-

Approved Judgment

- i) all Products made and sold under the 2020 Agreement having to carry the Mark and Molssi's strict compliance with Zennar's directions as to the form and manner of its application (clause 2.2);
 - ii) the provision of brand guidelines by Zennar to Molssi (clause 2.2);
 - iii) subject to Zennar's express written approval to the particular contractor, Molssi's ability to contract with another person, firm or company for the manufacture of the Products, with Molssi remaining liable for ensuring that manufacturer's strict compliance with the 2020 Agreement (clause 2.3);
 - iv) Zennar's notification of the quality standards and specifications to be adopted by Molssi or any Approved Manufacturer in the manufacture, promotion, distribution and sale of the Products, with Zennar being responsible for ensuring that it is satisfied the Products meet such standards and specification (clause 2.4);
 - v) Zennar giving Molssi written notice of any modification or change to the quality standards or specification, with Molssi implementing such modification or change as soon as reasonably practicable (clause 2.4);
 - vi) Zennar having access, at its own expense, during normal business hours to any premises of Molssi and its Approved Manufacturers used for the manufacture, storage and distribution of Products to inspect samples and the methods of manufacture, storage and distribution (clause 2.5);
 - vii) Zennar's right to remove a reasonable number of samples (not exceeding two) at no charge during any such inspection (clause 2.5); and
 - viii) Molssi not supplying, marketing or promoting the Products to customers in any territory not within the Territory (clause 2.6).
75. Tying in with clause 2.3, clause 12.2 also permits Molssi to sub-contract the manufacture of the Product to a third party Approved Manufacturer, with Zennar providing contact details of recommended and pre-approved manufacturers.

(e) Payment and invoicing

76. Clause 4 concerns "Royalty Payments in Respect of Licensed Products". After setting out at clause 4.1 the method of calculation of the royalty across the term of the 2020 Agreement, including the minimum royalty, net purchase target value and royalty rate, clause 4 then sets out requirements for Molssi's provision of quarter end statements showing the quantity of Products purchased in the relevant quarter, the price paid, the aggregate net purchase value of all purchases, the royalty calculated to be due and "any other particulars ZL may reasonably require" (clause 4.3). As noted above, there was some dispute as to whether Molssi had complied with this last aspect or whether Zennar's requests for information were excessive, albeit this does not fall for determination.
77. Clause 4.4 also required Molssi to keep separate and detailed records of all purchases of Products to enable Zennar to check the accuracy of the information due from Molssi.

Approved Judgment

Zennar also had the right, after giving prior notice, to inspect Molssi's records during normal business hours and to take away copies to verify the accuracy of the information provided by Molssi. That right persisted for a year after the termination of the 2020 Agreement.

78. Clauses 4.5-4.8 contain provisions for invoicing and payment, including interest on late payments.

(f) Marketing and budget

79. Clause 5.1 requires Molssi to use reasonable endeavours to promote the sale of, and satisfy market demands for, the Products in the Territory.
80. Clause 5.2 provides that Zennar and Molssi will meet annually to agree a marketing plan and budget.

(g) Confidentiality

81. Also importantly in this case, clause 7 contains provisions relating to the confidentiality of information. Clause 7.1 is concerned solely with the terms of the 2020 Agreement:-

“7. CONFIDENTIALITY

7.1 Each Party agrees to keep the terms of this Agreement confidential.”

82. Clause 7.2, by contrast, is concerned with a different category of information, namely “**Confidential Information**”, itself defined by reference to “**Technical Information**”, which encompasses “all know-how, experience, drawings, designs, manufacturing instructions, computer programmes and all other technical information relating to the design, manufacture or supply of the Products”
83. Clause 7.2.1 requires Molssi to keep secret and confidential Technical Information obtained from Zennar, whether before or pursuant to the 2020 Agreement, as well as all other information that it may acquire from Zennar in the course of the agreement.
84. Clause 7.2.2 requires Molssi to use the Confidential Information for the purpose of the 2020 Agreement and to disclose it only to those employees and permitted sub-contractors or sub-licensees to whom, and to the extent that, such disclosure is reasonably necessary for the purposes of the agreement and to procure that any disclosure is made under obligations of confidence at least equivalent to Molssi's obligations under clause 7.
85. Clause 7.3 requires Zennar to keep secret and confidential all Technical Information obtained from Molssi pursuant to the 2020 Agreement and to use it only as permitted thereby.
86. Clause 7.4 also contains certain exceptions to clauses 7.2 and 7.3 (but not 7.1) with respect to Confidential Information or Technical Information which (i) prior to receipt from one party was in the possession of the other and at its free disposal (clause 7.4.1) (ii) is subsequently disclosed to the recipient without any obligation of confidence by any third party who has not derived it directly or indirectly from the other party or in

Approved Judgment

breach of any duty or obligation of confidence (clause 7.4.2) or (iii) is or becomes generally available to the public in the UK or the Territory through no act or default of the recipient.

87. The provisions of clause 7 are expressed to survive the termination of the 2020 Agreement for any reason (clause 7.5).
88. Zennar and Molssi also warrant that they will keep confidential the identity of, and any dealings with, the Approved Manufacturers, and will therefore treat such information in accordance with their confidentiality obligations under clause 7 (clause 12.3).

(h) Improvements

89. Clause 6.1 provides for the mutual disclosure (in confidence) of improvements to Technical Information acquired or developed during the term of the 2020 Agreement. Clause 6.3 affords Zennar a non-exclusive licence to use all such improvements disclosed to it by Molssi. Such improvements belong to the party which acquired or developed them save for those relating to “Core Products”, being all products listed in class 18 and 25, which belong to Zennar.

(i) Duration and termination

90. Clause 9.1 establishes the duration of the 2020 Agreement by reference to the “**Initial Term**”, defined as an initial period of 20 years with no break clause. That definition also envisages the possibility of a further term, subject to agreement on minimum royalties. If Molssi wished the agreement to continue, it could give notice thereof and the parties would then meet in good faith within a reasonable time thereafter to discuss the terms on which it might be renewed. In the absence of agreement, it would expire at the end of the Initial Term.
91. Also importantly in this case, clause 9.2 is concerned with termination and provides most relevantly here that:-

“9.2 Either party shall be entitled to terminate this Agreement with immediate effect by notice in writing to the other if:

9.2.1 the other commits an irremediable breach of this Agreement, or commits any remediable breach and fails to remedy it within thirty (30) days of receipt of notice of the breach requiring its remedy; ..”

92. Clause 9.2 also sets out other circumstances in which both parties or Zennar alone may terminate the 2020 Agreement. Save to note that Molssi’s persistent repetition of a *remediable* breach would entitle Zennar to terminate, I do not summarise them here. Clause 10 sets out various consequences of termination.

(j) Nature of the 2020 Agreement

93. Clause 13 contains various provisions said to concern the ‘nature’ of the 2020 Agreement. This includes the entire agreement clause at clause 13.3 which I have already mentioned above.

Approved Judgment

94. Also potentially relevant here is clause 13.2 which provides that nothing in the 2020 Agreement shall create, or be deemed to create, a partnership or the relationship of principal and agent or employer and employee between the parties.
95. Clause 13.4 too is relevant. This contains a non-reliance clause but then goes on, less conventionally, to exclude all conditions, warranties or other terms implied by statute or common law to the fullest extent permitted by law. Given that both parties sought to imply terms into the 2020 Agreement, I invited them to explain the meaning and effect of this provision.
96. The Defendant submitted that, being a conventional non-reliance provision which prevents a possible collateral contract, the first part of the clause does not preclude the court from considering the usual background material as an aid to construction of the terms of the 2020 Agreement or for the purpose of implying a term. As to the latter part of the clause, such a provision is usually seen in contracts for the sale of goods and/or services, with clauses of this type added to make a contract operate to exclude terms implied at common law which correspond to those implied by statute, for example the Supply of Goods and Services Act 1982. The second half of the clause is likely a relic of drafting. It does not exclude implied terms more generally and it has no relevant impact on this case.
97. The Claimant, by contrast, submitted that the second half of clause 13.4 was more meaningful and that the exclusion engaged those terms implied by law as opposed to those terms implied by fact or custom as that distinction was drawn by Mr Andrew Burrows QC, sitting as a Judge of the High Court (as he then was), in *Federal Republic of Nigeria v JP Morgan Chase Bank, N.A.* [2019] EWHC 347 (Comm) (at [37]). As such, terms implied automatically by operation of the common law such as the *Quincecare* or *Braganza* duties would be excluded but not those arising as a matter of business efficacy or obviousness on the specific facts in a particular case. If, however, that was wrong, then the second part of clause 13.4 operated to exclude the possible implication of any terms at all such that this Court need only consider whether the express terms at clauses 2.1, 3.7 and 7.1 of the 2020 Agreement had been breached.

J. ALLEGED BREACH OF CLAUSE 7.1 - CONFIDENTIALITY

98. With that long introduction, I turn to the parties' arguments, starting with the claim that Molssi has breached clause 7.1 of the 2020 Agreement by sending the Letters to AU Brandz and the operator of the Chinese malls.

(a) Preliminary controversies

99. The Claimant points to the Defendant's acceptance that the Letters contained information about the terms (Defence at [34.1]) and its denial that, but for the express obligations of confidentiality in that agreement, any confidentiality obligation would attach to the information contained in the Letters (Defence at [34.4]). The Claimant says that the Defendant therefore accepted that the matters disclosed in the Letters were confidential as a matter of contract, if not generally at law or in equity. The agreed case summary too states that "[t]he Letters disclosed some of the terms of the 2020 Agreement." However, the Claimant says that the Defendant now appears to be resiling from that position, arguing in its skeleton that writing the Letters "did not amount to a disclosure of "the terms" of the 2020 Agreement, as opposed to an explanation of its

Approved Judgment

general effect, and without specificity.” The Defendant says that the Defence admits that the Letters contain “information about” the terms of the 2020 Agreement, not that they disclosed “the terms” thereof. In any event, whether something is a term of that agreement is a pure point of law; it does not require any factual investigation.

100. I found the Defendant’s position unpersuasive. It seems clear from the scheme of paragraph 34 of the Defence (and that part of the Claimant’s pleading to which it responded, including the Claimant’s “information about” language) that the Defendant was accepting that the Letters disclosed matters subject to the express obligation of confidence in clause 7.1, albeit that this was said to be subject to the implied exception pleaded later in the Defence. That was also borne out by the agreed case summary. That summary may only have been a precis of the parties’ pleadings but, by agreeing it, the Defendant confirmed that it accurately encapsulated its position. Although I accept that this issue is one of legal argument, turning largely on a comparison of clause 7.1 with the Letters, if the Defendant was to advance a positive case that the Letters did not disclose “the terms” of the 2020 Agreement, it should have explained this in its Defence, not in its skeleton argument shortly before trial.
101. In any event, I found the Defendant’s argument unavailing. Even if the relevant parts of the Letters did explain its “general effect”, they also failed to keep confidential the key terms of the 2020 Agreement. The point was rather reinforced by the Defendant saying that it only provided this information to AU Brandz and the mall operator to establish its position as exclusive licensee of the ‘Rockfish’ mark to be able to assert infringement. However, that licence, its subject matter, exclusivity and territorial scope were core elements of the 2020 Agreement. The Letters also disclosed the effective date and date of execution of that agreement.
102. In this regard, I accept Mr Kim’s evidence in his first witness statement as to the commercial sensitivity of such information, including its value to competitors and other licensees and the potential impact of its disclosure on Zennar’s market strategy and bargaining power. As such, I would also accept that such information was properly regarded as confidential in its own right. However, even if that were not the case, parties can still agree by contract that confidence attaches to information (see Toulson & Phipps 2026 ed. at [3-019]-[3-023] and the cases cited there, including *Ministry of Defence v Griffin* [2008] EWHC 1542 (QB) (at [26]) and *Salt Ship Designs AS v Prysmian Powerlink Srl* [2022] F.S.R. 16 at [337]-[341]). That is what the parties did here by agreeing clause 7.1 of the 2020 Agreement.
103. The Claimant says that the Defendant was also now arguing that the information disclosed in the Letters had ceased to be confidential. The factual basis for that contention was the issue by Zennar of authorisation letters to Molssi, both ‘generic’ and as specifically requested. In particular, the Defendant relies on the ‘generic’ authorisation letter for disclosure to third parties issued shortly before the execution of the 2020 Agreement. This identified Molssi as exclusive distributor and brand licensee in the countries making up the Territory and it confirmed Molssi’s responsibilities with respect to the Products and their market channels as well as the authorisation (and, therefore, licence) end date. Unlike the Letters, it did not identify the 2020 Agreement itself nor the specific IPR licensed. The Claimant complains that reliance on the authorisation letter to contend for the cessation of confidentiality was a further unpleaded argument which had not been the subject of disclosure or witness evidence. The Defendant says that the authorisation letters are discussed at some length in Mr

Cheung's statement. This factual material cannot have come as a surprise to anyone and, since it is relevant to the question of construction, it did not need to be pleaded.

104. This argument assumed (contrary to the Defendant's prior argument addressed above) that the matters disclosed in the Letters had been confidential within the meaning of clause 7.1 but that they had gone on to lose that quality on account of the use of the authorisation letters. In this regard, I accept the Claimant's related submission that the question of whether information is confidential, and remains so following disclosure, is not a binary one. As Arnold LJ put it recently in *Illiquidx Limited v Altana Wealth & others* [2026] EWCA Civ 874 (at [60]) in the context of whether certain information was in the public domain:-

"It is not in dispute that, in the law concerning equitable obligations of confidence, the expression "public domain" has a well-established meaning, namely as referring to information which is, in the words of Lord Goff of Chieveley in *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 282, "so generally accessible that, in all the circumstances, it cannot be regarded as confidential". This reflects the fact that confidentiality is a relative, not an absolute, concept: see in particular *Franchi v Franchi* [1967] RPC 149 at 152-153 (Cross J). As I put it in *Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300, [2021] Ch 233 at [67], "the true criterion [of confidentiality] is not secrecy ... but inaccessibility". Relative inaccessibility can suffice to make information confidential rather than in the public domain."

105. The "relative" nature of confidentiality indicated in these cases was rather emphasised by the 2020 Agreement itself, the *confidential* terms of that agreement contrasting with the *confidential and secret* Technical Information addressed later in clause 7. On any view, the question of whether the information disclosed in the Letters had ceased to be confidential is a fact sensitive one. Relevant considerations will include the information disclosed, the particular use of the information disclosed, with whom it has been shared and on what basis. Even though Mr Cheung did address the authorisation letters in his written evidence, and Mr Kim responded to that evidence, if reliance was to be placed on them to advance this argument, that point needed to be properly pleaded. The Claimant was entitled to know the case it had to meet in this regard so that it could properly investigate the position. The Defendant's additional reliance on the authorisation letters as informing the proper construction of the 2020 Agreement and the possible implication of terms (considered below) engaged a somewhat different point. I agree that this argument as to the suggested cessation of confidentiality is not open to the Defendant.
106. Nor, in any event would the Defendant's evidence concerning the authorisation letters issued by Zennar to Molssi have been sufficient to make good its contention as to cessation of confidentiality. Mr Cheung's witness statement referred to the issue of the original generic authorisation letter in favour of Shanghai Kupeng and how he says he was free to share it with anyone who might question its right and authority to carry on business under the 'Rockfish' brand in China. He also explains his understanding of the use of authorisation letters and certificates more generally in China to demonstrate the right to deal with a certain brand or product line and how some third parties will require specific information or evidence of authority in a particular format and how Zennar was happy to issue such certificates as required. Finally, he explains how Mr

Kim himself issued a new authorisation letter in response to a request by a specific e-commerce retailer shortly after they met in January 2025.

107. Despite these matters, the Defendant's related evidence was couched in such general terms that it did not meaningfully illuminate the argument as to cessation of confidence. For example, there was an absence of detail in the Defendant's evidence as to how the generic authorisation letter dated 1 January 2020 was actually deployed by Molssi, to whom it was provided and on what terms, including as to confidentiality. That was the position even ignoring the somewhat less specific terms of the authorisation letters compared to the Letters or Mr Kim's related evidence (confirmed in cross-examination) that a "generic authorisation letter ... does not actually mean that it can be used in any way the recipient [sic] want". Accordingly, even if the argument had been open to the Defendant, I would have been unable to conclude on the evidence that the former had lost its confidential character on account of the authorisation letters, 'generic' or specific.

(b) Implied exception

(i) Default implied term at law

108. The Defendant also submits that the contractual obligation of confidence is subject to an implied exception, namely that confidentiality is waived "where disclosure is reasonably necessary to protect the legitimate interests of either party to the 2020 Agreement and/ or reasonably necessary for the establishment or protection of the legal rights of either party to the 2020 Agreement...". As such, Molssi also says that it could not have been in breach of clause 7.1 by sending the Letters to AU Brandz and the mall operator.
109. That implied exception is said to arise in one of two ways: first, as one of those terms implied into a class of contractual relationship or obligation where, as a matter of policy, the courts have implied the term as a necessary incident of the relationship or obligation concerned, unless expressly excluded by the parties. The Defendant says that an absolute contractual obligation of confidence would belong to such a class into which a qualification is implied as the law's default position. Second, there are those terms which are implied into a particular contract based on the familiar principles indicated in *Marks & Spencer* because, on its proper construction, the parties must have intended to include them.
110. As to the first category, the Defendant referred to the series of cases concerning the obligation of confidentiality as it relates to arbitration and banker/ customer relationships. Such an obligation is recognised at law but so too are certain exceptions. In *Ajayi v Ebury Partners Ltd* [2020] EWHC 166 (Comm), Henshaw J referred to those authorities in a case concerning an express confidentiality obligation, stating (at [131]):-

"I would accept that where the parties have express agreed terms of confidentiality, including express exceptions, the court should proceed with caution before finding implied further exceptions. However, a term may be implied provided that it passes the ordinary tests for implication of terms, in particular that (1) it is reasonable and equitable; (2) it is necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it is so obvious that 'it goes without saying'; (4) it is capable of clear expression; and (5) it does not

Approved Judgment

contradict any express term of the contract (*Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 §§ 18 and 21). As noted earlier, Scrutton LJ contemplated in *Tournier* that exceptions might be implied even where there is an express agreement for confidentiality. By extension, the same can be true where such an agreement contains limited exceptions, provided the conditions for implication of a term can be satisfied.”

111. The Defendant says that *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132 is also instructive in this context although the Court of Appeal does not appear to have been referred to the arbitration and banking authorities. *Kason* concerned a confidentiality provision in a licence agreement which, like the 2020 Agreement, contained an absolute obligation to keep its terms confidential. According to the Defendant, Lewison LJ appears (at [55]) to have proceeded on the basis that some implied exception was required. However, it was not necessary to consider exactly how wide because the disclosure in that case was to a potential competitor to whom disclosure could not be necessary to give business efficacy to the contract.
112. The Defendant says that the modern approach to implied terms treats some situations engaging broader policy considerations as giving rise to default implied terms. In arbitration and bank/ customer situations, the law has long since developed a default answer which may be applied in this context too, as was the approach in *Ajayi*. An express and apparently absolute obligation of confidentiality should be regarded as in this category because, without an implied exception, the 2020 Agreement is unworkable.
113. I found the Defendant’s extrapolation from the arbitration and banking cases problematic, rather underlined by the warnings in some of them (as highlighted in *Ajayi* at [127]-[128]) as to the potential over-reliance in an arbitration context on the duties of confidentiality owed by a banker to its customer and, more pointedly, as to the sensitivity of confidentiality to the nature of the information or documents in issue and how they might have been obtained. In any event, although *Ajayi* did refer to confidentiality obligations in an arbitration and banking context, *Ajayi* and *Kason* were both concerned with express contractual terms as to confidentiality and were resolved by applying conventional principles for the implication of contractual terms. Finally, I did not read Lewison LJ in *Kason* as saying (at [55]) that a term had to be implied rather than repeating the appellant’s contention to that end and going on to hold that the ‘twin’ tests for implication were not satisfied on the basis of the term contended for in that case. I therefore see no basis for applying such a ‘default rule’ here.
114. Moreover, even if it had been appropriate to do so, to the extent the Defendant’s proposed implied term was suggested to arise as a necessary incident of the absolute obligation of confidentiality, I would have found that this was excluded by clause 13.4. I would accept that, without more, the entire agreement clause in clause 13.3 would not operate to exclude implied terms. However, it seemed clear that the second part of clause 13.4 does supply more, its language being concerned with the exclusion of terms which would arise by operation of statute or the common law. As noted, the Defendant suggested that this was a relic of drafting, likely an incorrect reference to terms implied by statute and at common law in a supply of goods and/ or services context and, therefore, not meaningful here. However, although the dual purposes of clause 13.4 are perhaps unusual ‘bedfellows’, the provision is clearly drafted and, on its terms, it is not limited in the manner suggested by the Defendant. As such, it cannot be ignored. That

said, being concerned with those terms which arise by operation of law, the clause 13.4 exclusion does not appear to encompass those implied terms which the parties must have intended based on the proper construction of the agreement. Indeed, clause 10.3 seems to confirm, if somewhat indirectly, that terms implied in that manner are expressly contemplated by the 2020 Agreement.

(ii) Implication based on conventional principles

115. If, as I have found, the term contended for does not fall to be implied as a matter of law, the Defendant says that it is nonetheless to be implied based on conventional principles. Such a term is said to be necessary to give business efficacy to the 2020 Agreement, without which, it would be unworkable. To undertake and perform all the steps envisaged by the agreement, including the manufacture, distribution, promotion and sale of the Products over a 20-year term, inevitably requires Molssi to inform third parties of some, and in certain cases all, of the terms of the 2020 Agreement. For example, if a manufacturer or wholesaler wished to know on what basis Molssi was entitled to use the ‘Rockfish’ mark, it could only explain its right by reference to the 2020 Agreement. Either party would also need to be able to take professional advice in relation to the 2020 Agreement from lawyers, accountants, and auditors.
116. Molssi also says that the term is so obvious as to go without saying. In addition to the above matters, the same materials as are admissible as an aid to construction may be admitted in deciding if a term should be implied (*Golden Fleece Maritime Inc v St Shipping & Transport Inc* [2007] EWHC 1890 (Comm) (at [24])), including documents executed contemporaneously and forming part of the same transaction (see *The Interpretation of Contracts* (at [3.06] et seq.)). The authorisation letters, including the ‘generic’ authorisation letter dated as at the effective date of the 2020 Agreement, inform the reader of the key effect of that agreement. Both parties intended that Molssi would provide this to third parties (such as manufacturers, retailers, wholesalers and on-line platforms) when necessary and no limit was placed on Molssi’s use of the document. As such, it was not the intention of the parties that clause 7.1 would be absolute. If it was contractually permissible to provide the information in the 2020 generic authorisation letter to third parties, clause 7.1 can only be read as subject to the implied limitation contended for.
117. Moreover, the IPR licensed by the 2020 Agreement includes Chinese trade marks, the licensing of which had to be recorded with the trade mark bureau. That necessarily involves disclosure in relation to the terms of the 2020 Agreement to third parties. Addressing this last point first, the Defendant relies on Ms Liu’s expert evidence. As both experts point out, Article 43(3) of the PRC Trademark Law provides that, for the licensed use of a registered trade mark, the licensor shall file record of such licensing which shall be ‘gazetted’ by the trade mark bureau. However, Ms Liu’s evidence on this point was focused on arguments about the effect of an unrecorded licence and how Article 43(3) limits reliance on such a licence against a protected class of (good faith) third party. I did not understand her to be saying that ‘recordal’ was a mandatory requirement of Chinese law as such. In the context in which she was addressing it at least, her evidence rather suggested otherwise.
118. Of greater significance to whether the parties must have intended the implied term contended for by the Defendant is the contractual scheme of the 2020 Agreement and its proper construction. Starting with Clause 7 itself, clause 7.1 contains a (mirror)

Approved Judgment

mutual obligation of (only) confidentiality with respect to the terms of the 2020 Agreement. By contrast, clauses 7.2-7.4 contain an (inexactly) mutual obligation of (both) secrecy and confidentiality with respect to Technical Information. Only the latter expressly admits of certain exceptions by way of (i) Molssi's disclosure to permitted employees, sub-licensees or sub-contractors (on equivalent terms as to confidence) where such disclosure is reasonably necessary for the purpose of the agreement (clause 7.2.2) and (ii) certain limited exceptions where the information is or becomes available to the recipient party or to the public without fault by the former (clause 7.4).

119. Given these express exceptions, the caution indicated by Henshaw J in *Ajayi* (at [131]) about finding further implied exceptions is appropriate here as well, perhaps more so given that the former operate to qualify only confidentiality (and secrecy) obligations not engaged in this case. That said, it still seems to me that the extension to *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 contemplated in *Ajayi* (also at [131]) could in principle also reach here if the conditions for implication of a term are satisfied. I also agree that Zennar's issue of the authorisation letters, including of the 'generic' letter contemporaneously with the conclusion of the 2020 Agreement, is potentially relevant to its proper construction and, therefore, whether the term contended for can be implied. However, even on the limited evidence before the Court, it seems clear that the circumstances in which the authorisation letters came to be issued and deployed were different from those pertaining to the Letters. The authorisation letters and their contents were agreed by Zennar and Molssi. As noted, their terms were more limited than the Letters in what they said about the 2020 Agreement. They were prepared to be shown to the likes of wholesalers and retailers. If an exception might fall to be implied on account of the parties' related intentions, it would seem more likely to be an exception for disclosure with the consent of the parties rather than one directed to the protection or advancement of their "legitimate interests" or "legal rights". Zennar, of course, did not consent to Molssi sending the Letters.
120. The Defendant does posit the necessity and obviousness of the implied term contended for on the more general basis of the need for the parties to disclose the terms of the 2020 Agreement to third parties for its proper performance, including to wholesalers or manufacturers as well as to lawyers, accountants and auditors. However, these further examples again engage somewhat different considerations from those with which the implied term contended for is concerned. The recipients of the Letters were not persons dealing with Molssi in the ordinary course of its business. They were alleged infringers of the 'Rockfish' mark. As to the latter, the 2020 Agreement makes specific provision for how potential infringements are to be addressed by the parties. As noted, clause 3.3 provides that Zennar will take appropriate legal action against any entity other than Molssi that uses the Mark(s) in the Territory. Molssi is also required by clause 3.7 to notify Zennar of any actual, threatened or suspected infringement in the Territory of any IPR which comes to Molssi's attention. It also requires Molssi to do all such things at Zennar's expense and request as may be reasonably required in taking any proceedings in relation to such infringement.
121. Given the scheme laid down in the 2020 Agreement for the protection of confidential (and secret) information and the express exceptions thereto, coupled with the requirement for Zennar to pursue enforcement action, I agree with the Claimant that the term contended for does not fall to be implied. Molssi's "legitimate interests" or "legal rights" as exclusive licensee of the 'Rockfish' marks with respect to potential

Approved Judgment

infringements were already protected. Should Zennar fail to take appropriate legal action in the face of any infringement so notified by Molssi, the latter has recourse against Zennar under the 2020 Agreement. As such, it cannot be said that the term contended for by Molssi is either necessary or obvious.

122. In light of the above matters, I find that Molssi was in breach of clause 7.1 of the 2020 Agreement by sending the Letters to AU Brandz and the mall operator.

K. ALLEGED BREACH OF CLAUSE 3.7 - NOTIFICATION

123. Given that I have addressed above clause 3.7 briefly, it is convenient to consider here in more detail Zennar's allegation that Molssi was in breach thereof. As noted, this requires Molssi "*promptly and fully*" to notify the Claimant of actual, threatened or suspected infringement in the Territory. In cross-examination, Mr Cheung accepted that he was aware of this requirement. Indeed, Molssi had previously notified Zennar of suspected breaches. The Defendant also accepts that it did not notify the Claimant of the matters contained in the Letters. However, Molssi says that, on a proper construction of Clause 3.7, there is no obligation to notify a threatened or suspected infringement in the Territory of IPR by Zennar or with Zennar's consent or licence, or by a person owning a controlling shareholding in Zennar or of which Zennar is already aware. The purpose of Clause 3.7 is to keep Zennar apprised of infringing conduct. The clause cannot sensibly be construed as requiring Molssi to "notify" Zennar of an infringement for which Zennar was itself responsible and/ or to which it was already alive. In any event, Molssi did, in fact, notify Zennar when it complained about the presence of 'Rockfish Weatherwear' branded goods on the Chinese market from May-July 2024.
124. The Claimant says that the opening words of Clause 3.7 are a complete answer to the wide-ranging exceptions put forward by the Defendant, namely that "MFSL shall promptly **and fully** notify ZL of **any** actual, threatened or suspected infringement..." (**emphasis added**). Moreover, the Defendant's construction does not make commercial sense, each of the exceptions posited by Molssi assuming a state of affairs as to the fact of infringement, the infringing party and the Claimant's knowledge. Those matters may be unknown at the outset or disputed. These uncertainties are expressly catered for by the duty to notify *suspected* infringements, bringing the issue to Zennar's attention so that it can determine what, if anything, needs to be done. In this case, it was not enough to say that Zennar already knew about the opening of the 'pop-up' shops in China. Molssi was required to tell Zennar that it considered these to constitute acts of infringement. If, as here, Zennar's assessment of the position was disputed by Molssi, it could then be addressed within the context of the 2020 Agreement.
125. As to whether the Claimant had, in fact, already been notified, Zennar says that the matters complained about in May-July 2024 related to unauthorised re-sellers and thus were different from, and independent of, the matters complained of in the Letters. It cannot plausibly be suggested that the objective of Clause 3.7 is met by treating notice of suspected infringement by person A in year X as notice of suspected infringement by person B in year X+1.
126. Having considered the parties' submissions, I am satisfied that Molssi breached clause 3.7 by failing to give notice to Zennar of the suspected infringement of its rights under the 2020 Agreement through the opening of the 'pop-up' shops and sale of 'Rockfish

Approved Judgment

Weatherwear’ products therefrom. The language of the clause is unqualified and unequivocal. It does not admit of the construction placed on it by Molssi. Clause 3.7 simply required an actual, threatened or suspected infringement to have come to Molssi’s notice for the notification requirement to arise. It does not require a fact sensitive assessment concerning whether it has been undertaken by or without the consent or knowledge of a particular person. This would introduce potential uncertainty and would not make commercial sense. For example, a suspected infringement may have come to Molssi’s attention but it may have scant information about who was behind it. Given its interest in the IPR, Zennar would still obviously want to know about it. Likewise, if Molssi considered that Zennar’s own actions were infringing, or that Zennar had authorised infringing activity within the Territory, Zennar would want to know this as well so that it could discuss the position sensibly with its licensee.

127. Finally, I accept Mr Kim’s evidence that AU Brandz and AU Commerce did not sell ‘Rockfish’ or ‘Rockfish Weatherwear’ products in China prior to 2025. As such, I agree that Molssi’s reliance on prior suspected infringements by ‘Rockfish Weatherwear’ goods coming onto that market in mid-2024 to excuse it from compliance with clause 3.7 is wide of the mark. The proposed opening of the ‘pop-up’ shops was a different suspected infringement and needed to be notified by Molssi in its own right. As such, Molssi was in breach of the 2020 Agreement on this account as well.

L. BREACH OF IMPLIED TERM OF NON-ENFORCEMENT

128. I have already mentioned clause 3 in the context of the alleged breach of clause 7.1 and my finding that the scheme of the 2020 Agreement did not leave room for the implied term contended for by the Defendant. The Claimant itself positively relies on that scheme to say that it was an implied term of the 2020 Agreement that the Defendant would not take any steps itself to enforce the Mark(s) unless and until the Claimant had consented to this. The Claimant relies, in particular, on the following:-
- i) Clause 3.1, which acknowledges that the Claimant retains ownership of the IPR and of the Mark(s) notwithstanding Molssi’s exclusive licence in the Territory;
 - ii) Clause 2.1, which (consistent with the first recital) explains that, subject to the other terms of the 2020 Agreement, the licence is granted for Molssi’s use of the Mark(s) in the Territory in the manufacture, promotion, distribution and sale of the Products. The function and subject matter of the licence are therefore limited in their scope;
 - iii) Such “other terms” including the first part of clause 3.3, which also makes clear that the Defendant’s use of the Mark(s) on or in relation to the Products is “*for the purposes only of exercising its rights and performing its obligations under this Agreement*”. Such rights do not include the taking of related enforcement action;
 - iv) Clause 3.5, which states that, except as provided in clause 3, Molssi “shall have no rights in respect of the Mark(s) (or other trade names)” other than as set out in the ‘Earn-Out Reward Agreement’. None is identified in that agreement, let alone the right to take enforcement action;

Approved Judgment

- v) Clause 3.4.2, which prohibits the Defendant from making any use of the Mark(s) in a way which might prejudice their distinctiveness or validity or the goodwill of the Claimant, such prohibited use said to encompass the taking of enforcement action by Molssi with its inherent risk of the alleged infringer bringing a related counterclaim;
 - vi) Clause 3.7, which requires the Defendant “promptly and fully” to inform the Claimant of “any” anticipated need for enforcement action, such obligation only being necessary if it is envisaged that the Claimant alone, and not the Defendant, has the right to take enforcement action;
 - vii) The second part of clause 3.3, which identifies the Claimant as the person that “will take appropriate legal action against any entity, other than MFSL that uses the Mark(s) in the Territory”, anticipating that it is the Claimant, not the Defendant, which assesses what might amount to “appropriate legal action” before going on to take the relevant steps;
 - viii) The second part of clause 3.7, which requires Molssi to do such things as Zennar reasonably required to assist it in taking any infringement proceedings, confirming that it is the Claimant which will take such action; and
 - ix) Clause 3.6, which requires Molssi to take such steps as Zennar may reasonably require to assist Zennar in maintaining the validity and enforceability of the IPR, with no corresponding provision operating the other way.
129. Based on these express provisions, the Claimant says that Molssi’s permitted use of the Mark is highly circumscribed. Moreover, Zennar alone is identified as the party that will take action to maintain the enforceability of the IPR, including enforcement action. The Claimant also says that it would be incoherent for the 2020 Agreement to have provided in these terms if the Defendant were permitted to take independent enforcement action of its own. Such a right would render a number of those provisions pointless. Nor is it any answer to say, as is common ground, that an exclusive licensee has the right under Chinese law to bring proceedings for the infringement of the licensed marks. Unless the licensor has decisive control over its deployment and enforcement, it runs the risk of a licensee taking action of its own and putting the IPR in jeopardy. However, the implied term does not leave the Defendant exposed because of the mandatory requirement under clause 3.3 of the 2020 Agreement for the Claimant to take appropriate legal action against a third party using the Mark(s). If Zennar fails to do so, Molssi has recourse under that agreement.
130. Finally, the Claimant says that, if the Defendant had considered itself entitled to act independently in the enforcement of the Mark(s), it would have insisted on ‘recordal’ in China of its licence to avoid the constraints on the taking of enforcement steps indicated by the experts in the event of non-recordal. It also begs the question why the Defendant agreed to a confidentiality provision which prevented them from taking such steps. However, these matters require no explanation in light of the implied term. The Claimant also says that the term contended for is consistent with how the parties conducted themselves, Molssi deferring to Zennar for enforcement purposes save in certain limited cases where they agreed that Molssi could take the relevant steps.

Approved Judgment

131. The Defendant advances a number of counter-arguments based on its rights as exclusive licensee of the Mark(s) under the laws of their place of registration. Even though the 2020 Agreement is governed by English law, the question of which party may take proceedings in respect of an infringement of the Mark(s) in those countries is a matter solely for those other laws (to some of which I was taken by the Defendant). These provide that, as exclusive licensee, Molssi is entitled, at least in some circumstances, to take enforcement proceedings in its own name in those countries. Since the 2020 Agreement confers an absolute and unqualified exclusive licence, with all the attendant rights under those other laws, the implied term for which Zennar contends is necessarily inconsistent with the express terms of the 2020 Agreement.
132. Nor is it not necessary or obvious that Molssi should be excluded from taking enforcement action in its own right if the law applicable to the relevant IPR permits this. To the contrary, the implication of the term contended for by the Claimant would amount, impermissibly, to a substantial derogation from the grant for which the 2020 Agreement provides (see, for example, in the copyright context *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd* [1986] AC 577). Put a different way, the implied term would exclude, also impermissibly, valuable rights conferred on Molssi as exclusive licensee under the law applicable to the relevant trade marks. Contracting parties do not forego valuable rights without clear words (*MUR Shipping BV v RTI Ltd* [2024] UKSC 18, [2025] AC 675, at [44]-[46]). If the contractual intention had been to deprive Molssi of that entitlement, this would need to have been set out clearly in the 2020 Agreement. It was not. However, the agreement works perfectly well without it, with Molssi's ability to pursue enforcement action to be determined by the law governing the IPR it seeks to enforce.
133. The implied term is also said to be inconsistent with other parts of the 2020 Agreement, Molssi having a 20-year exclusive licence and Zennar having no right during that period to exploit the relevant IPR in the Territory. Clause 2.1 makes clear that Zennar and its affiliates and licensees have no right to sell the Products in the Territory. Clause 3.3 prevents Zennar from authorising any other person to use the Mark(s) in the Territory. Zennar's suggested ability, apparently for any reason, to refuse consent for Molssi to take any enforcement action is not only not "obvious", it is unfair and inequitable, effectively depriving Molssi of much of the value in the IPR exclusively licensed to it.
134. Moreover, if Zennar's proposed implied term were express, it would amount to a contractual discretion in light of the consent proviso and be subject to an implied term that it be exercised honestly and rationally and for the purpose for which it was conferred (*Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661). The Defendant points to *Torre Asset Funding Ltd v The Royal Bank of Scotland plc* [2013] EWHC 2670 (Ch) which stated (at [152(x)]) that "[t]he proposed implied term must be capable of being defined with sufficient precision to give reasonable certainty of operation". Since an implied term must be capable of clear expression, a term cannot be implied which, if express, would be subject to an implied limitation.
135. As a preliminary matter, the content and scope of Molssi's exclusive licence are governed by the terms of the 2020 Agreement. This falls to be construed under English law. The licence granted by the 2020 Agreement is a sole and exclusive licence to use the Mark(s) in the Territory. Subject to clause 2.1, the agreement precludes Zennar from authorising anyone else to use the Mark(s) in the Territory (clause 3.3). Clause 2.1 precludes Zennar, its affiliates and licensees in other territories from selling the

Approved Judgment

Products in the Territory and establishes the scope of the licence as the use of the Mark(s) in their manufacture, promotion, distribution and sale. The Products are those products within classes 18 and 25 approved by Zennar from time to time (clause 1.1).

136. Clause 3.3 also explains the limits of Molssi's authority to use the Mark(s) for the purpose "only of exercising its rights and performing its obligations under this Agreement". Consistent with the parties' agreement recorded at the first recital and clause 2.1, such right is to have the Products manufactured under the Mark(s) and to use the Mark(s) in their manufacture, promotion, distribution and sale. Those limits are further emphasised by clause 3.5 which provides that Molssi has no rights in respect of the Mark(s) used by Zennar beyond those in clause 3 or set out in the 'Earn-Out Reward Agreement'. However, the latter concerns Molssi's potential equity position in the company holding the 'Rockfish' IPR in the Territory rather than directly in the IPR itself.
137. Molssi's rights "under this Agreement" in relation to the IPR are not expressed as extending to the taking of enforcement action in respect of the use of the Mark(s). Rather, the second sentence of clause 3.3 makes clear (in mandatory terms) that Zennar will "take appropriate legal action against any entity, other than [Molssi] which uses the Mark(s) in the Territory." Zennar's role in the enforcement of the IPR is further emphasised by clause 3.7 which requires Molssi to notify Zennar of any actual, threatened or suspected infringement in the Territory of any IPR (including the Mark(s)) which comes to Molssi's notice. Molssi, in turn, is required to do all such things as may reasonably be requested by Zennar, at its expense, to assist Zennar in taking proceedings in relation to any such infringement. Consistent with clause 3.3, Zennar is singled out again as the party which will be taking (and paying for) infringement action, Molssi's role being to support Zennar.
138. The other clause 3 provisions help explain why Zennar is identified as the enforcing party. Clause 3.1, for example, confirms Zennar's ownership of the IPR and the Mark(s), highlighting its broader interest compared to Molssi's more limited interest in, and permitted use of, the Mark(s). That is reinforced by clause 3.6 which obliges Molssi to take such steps, again at Zennar's expense, as are reasonably required to assist Zennar in maintaining the validity and enforceability of the IPR. This provision too emphasises Zennar's control of, and financial responsibility for, any related enforcement steps (which I accept are encompassed by the concept of enforceability). Specifically in relation to the Mark(s), clause 3.4.2 reflects the concern that Molssi might act in a way prejudicial to their distinctiveness and validity. This could, of course, arise through Molssi itself taking enforcement action and, in doing so, risking a related counterclaim challenging the distinctiveness and validity of the Mark(s). All these matters support Zennar, as owner of the IPR and licensor of the Mark(s), being the person to decide and take the "appropriate legal action" in response to the unauthorised use thereof as envisaged by clause 3.3.
139. Given this comprehensive scheme set out in clauses 2 and 3, I have concluded that it was an implied term of the 2020 Agreement that Molssi would not take any steps to enforce the Mark(s) unless and until Zennar consented thereto. Although there is no express term positively preventing Molssi from taking such steps, clause 3 clearly identifies Zennar as the party required to take legal action against others using the Mark(s) and Molssi supporting related infringement proceedings. Matters are not expressed the other way round, deliberately so in my view for the reasons explained.

Approved Judgment

Moreover, if Molssi did have the ability to take enforcement action in its own right, this would set up tension with and/ or the potential breach of, the terms of the 2020 Agreement, including clauses 3.3, 3.4, 3.6, 3.7 and 7.1. By contrast, the implied term contended for is consistent with those terms. Finally, although an exclusive licensee may have standing to enforce the Mark(s) under the different laws of the Territory countries, Molssi's rights as licensee are governed by the 2020 Agreement, including the comprehensive scheme described. No question of derogation from grant or the relinquishment of valuable rights arises. Accordingly, I accept that the implied term contended for is so obvious as to go without saying and necessary to give the agreement business efficacy.

140. I do accept that there may well be situations in which the parties would agree that Molssi can and should take "appropriate legal action", at least in the first instance, for example by sending 'take down' notices to on-line retailers. However, that is catered for by the consent proviso. In this regard, I did not find compelling the Defendant's argument that the implied term was not clearly expressed because it would require the implication of a further term with respect to the exercise of Zennar's discretion to give consent. I did not see any difficulty in principle with that proposition but the point does not appear to arise in any event given the effect of clause 13.4.
141. Finally, I do not agree that this outcome is unfair or inequitable. Zennar is subject to the obligation to take appropriate legal action against other entities using the Mark(s). If Zennar fails to do so and/ or, as here, there is a dispute as to whether there has, in fact, been unauthorised use of the Mark(s) in the Territory, Molssi can seek appropriate relief against Zennar under the 2020 Agreement.
142. Accordingly, I find that the term contended for by the Claimant was an implied term of the 2020 Agreement. Molssi was in breach thereof by sending the Letters.

M. ALLEGED BREACH OF CLAUSE 2.1

143. The Defendant asserts that the Claimant breached clause 2.1 of the 2020 Agreement such that the Claimant could not terminate the 2020 Agreement when it was itself in breach. This engages the question of whether the Defendant has properly invoked the 'prevention principle' in the circumstances in which it came to send the Letters. I address this below but consider first the prior breach question, as to which, Molssi relies on the License and Distribution Agreement dated 1 June 2024 by which Zennar granted AU Brandz an exclusive licence to use the 'Rockfish Weatherwear' mark in connection with the manufacture, marketing, distribution and sale of apparel, bags and accessories in the relevant territory, including China. Although that mark was not licensed to Molssi under the 2020 Agreement, the Claimant accepts that the exclusivity of the licence in favour of Molssi would extend to the use of signs in the Territory that would infringe the Mark(s). If use of the 'Rockfish Weatherwear' mark in China had that effect, the Claimant therefore accepts that this would constitute a breach of clause 2.1 of the Agreement.
144. In anticipation of the opening of the 'pop-up' stores, the Defendant wrote the Letters to AU Brandz and the mall operator complaining about the use of the 'Rockfish Weatherwear' mark to sell products on the Chinese market. I have been shown in the trial bundles images and photographs of those stores and products as well as related social media posts from which it is clear that the 'Rockfish Weatherwear' mark was

Approved Judgment

used on the related products, packaging and promotional materials. It is common ground that whether such use of the ‘Rockfish Weatherwear’ mark amounted to the infringement of the Mark(s) is a matter of Chinese law, as to which, there is a significant degree of agreement between the experts. As they note in their joint statement, Article 57(2) of the PRC Trade Mark law provides in terms that:-

“Article 57

Any of the following conducts shall constitute an infringement of the exclusive right to use a registered trademark:

...

2. Using a trademark that is similar to a registered trademark on the same goods, or using a trademark that is identical with or similar to a registered trademark on similar goods, which may be easily confusing, without the licensing of the trademark registrant.”

145. Ordinarily, the Chinese Courts will consider cumulatively and holistically whether (i) the impugned sign constitutes trade mark use (ii) the impugned sign and the registered trade mark are identical or similar in appearance, pronunciation, and meaning (iii) the relevant goods or services are identical or similar (iv) there exists a likelihood of confusion under the ordinary level of attention of the relevant public and (v) the relevant use has been authorised by the registered trade mark proprietor. As the experts also agree, relevant factors informing the infringement analysis will include consideration of:-
 - i) The perspective of the “relevant public” which ordinarily includes consumers of the relevant goods;
 - ii) How the level of attention exercised by the relevant public is influenced by the nature of the goods, their sales channels and purchasing processes;
 - iii) The context of use of the signs to establish what source identifying information such use conveys to the relevant public within a real commercial environment; and
 - iv) The overall commercial comparison, the principal distinctive components of the signs, their degree of distinctiveness and the actual context of use.
146. Finally, the experts agree that resolution of issues of infringement under Article 57(2) requires a comprehensive factual analysis, their opinions limited to legal analysis based on the available materials.
147. The Defendant says that there are three principal reasons why the Court should find infringement in this case and, therefore, a breach of clause 2.1. First, the Mark(s) and ‘Rockfish Weatherwear’ mark fall within the same class, class 25 relating to clothing, footwear and headwear.
148. Second, the Chinese court has held that there was infringement. Although Zennar itself was not party to those proceedings and no related estoppel arises here, this Chinese-speaking tribunal was well placed to assess questions such as the overall likelihood of

confusion on the part of a Chinese consumer in China. This Court should follow the same approach.

149. Third, this Court can, in any event, itself discern sufficient similarity between the Mark(s) and the ‘Rockfish Weatherwear’ mark. ‘Rockfish Weatherwear’ entered the Chinese footwear market on which ‘Rockfish’ was already present. The Chinese consumer would latch onto the first part (‘Rockfish’) and see that as the primary indicator of origin given its existing presence on the market. That is the case even if the Chinese consumer did not know what the English words meant as a matter of language. The Defendant accepts that the materials available are limited but says that the Court has the Mark(s) and the ‘Rockfish Weatherwear’ mark, together with the images and photographs provided. The Defendant also pointed to various aspects of these materials, highlighting, for example, the greater prominence attached to the ‘Rockfish’ element in some and how that element sometimes featured alone. As Ms Liu says:-

“In the current case, the composite sign “Rockfish Weatherwear”, one of the two groups of challenged uses, fully incorporates “Rockfish” as its leading and visually dominant element, with the additional word “Weatherwear”. In my opinion, “Rockfish” is likely to be taken as the core source identifier by the ordinary consumer, while “Weatherwear” may be perceived as a secondary descriptor or line/ positioning element (weather-related apparel/ footwear concept). In overall commercial impression, this structure tends to support a finding of similarity with the registered “ROCKFISH/RockFish” marks.”

150. The Claimant’s overarching position is that there was no breach by the Claimant because Clause 2.1 grants Molssi an exclusive licence to use the Mark(s) in the Territory as set out in Schedule 1 to the 2020 Agreement. ‘Rockfish Weatherwear’ is a separate mark registered in China and was not part of the 2020 Agreement. To the extent that the Defendant relies on use by third parties of the word ‘Rockfish’ alone, that is not a use to which Zennar consented or which it licensed. It cannot therefore found a breach of clause 2.1.
151. The Claimant says that there is a further important point arising from Zennar’s common proprietorship of the Mark(s) and the alleged infringing ‘Rockfish Weatherwear’ mark. Both experts appear to agree that such common ownership is a relevant factor in any assessment of infringement. Professor Yao considers it “an important factor substantially weakening the infringement claim”. Ms Liu considers that it may be important factual background to the case but that it does not automatically replace the need for the specific factual infringement analysis. The Claimant says that the difference between the experts appears to be one of weight but that Professor Yao’s view is to be preferred. Although this difference of emphasis features in the joint statement, Ms Liu did not consider the point in her first report. Professor Yao did so, stating that:-
- “4.4 It is important to note that Article 57 is premised on the absence of “licensing from the trademark registrant”. Where a trademark registrant uses two of its own trademarks, there is no issue of unauthorised use, nor is there a problem of confusion as to origin of the goods; consequently, infringement cannot be established because it does not fulfil the requirements under Article 57.

Approved Judgment

- 4.5 In the PRC, the court will not accept infringement proceedings against another registered trademark unless the claimant (the owner of the allegedly infringed trademark, or another party) first successfully invalidates the trademark registration through administrative proceedings.”
152. These points are developed in Professor Yao’s reply report in which he also explains that, where trademarks in common ownership are licensed to different licensees, the simultaneous use of both trademarks by their respective licensees will not be considered to satisfy the requirements of Article 57 and will therefore not give rise to trademark infringement. That is because goodwill and origin are considered to belong to, and remain with, the trademark owner, regardless of whether the trademarks are licensed to a third party. He supports that proposition with decisions of the Supreme People’s Court which, although not legally binding, are usually followed. The Claimant notes that Ms Liu does address the issue in her reply report, albeit not engaging there with the significance of common ownership of both earlier and later marks for origin confusion purposes.
153. Second, the Claimant says that there is no basis for the Defendant’s contention that the dominant element of both ‘Rockfish’ and ‘Rockfish Weatherwear’ is ‘Rockfish’. The suggested isolation of ‘Rockfish’ depends on the Chinese consumer recognising and understanding the meaning of ‘Weatherwear’. The comparison is of two signs of different length, containing a different number of words, and aurally different overall. ‘Weatherwear’ is a distinctive separate element that fundamentally alters the visual and aural perception of the signs.
154. I have already noted what Ms Liu says about this. Professor Yao opines that there is a distinction to be drawn between foreign language words that have become ‘loanwords’ in Chinese, which are treated as if they are Chinese words, and others where the question is one of evidence and assessment as to whether the Chinese public would understand it to have a meaning. He also explains how the Supreme People’s Court has issued guidance indicating that, where the relevant public has a “relatively low degree of awareness of the inherent meaning and is able to identify the source of goods with the sign, it may be identified that it has distinctive character.” Professor Yao explains his view as to the low similarity of the two marks visually and aurally and likely low level of awareness of the meaning of ‘Weatherwear’ to conclude that it could be determined to have distinctive (rather than descriptive) character.
155. Finally, the Claimant says that the Chinese judgment provides no real assistance because (i) it is a first-instance decision under appeal (ii) the Chinese law experts have not provided their related input (iii) there is no or little detail about what was in evidence or argument (iv) a number of points appear not to have been taken, including as to the Chinese consumer’s understanding of the words, the effect of an allegation of infringement against a later registered mark by an earlier registered mark or the significance of common ownership on the likelihood of confusion (v) there is no explanation for why these points were not taken and (vi) the Chinese judgment has no value in light of *Hollington v Hewthorn* [1943] KB 587. The Defendant accepts that the Chinese judgment is not binding and is not evidence of the facts found by the Chinese Court but says that this Court will be assisted by it as showing how the former assesses infringement.

Approved Judgment

156. Having considered carefully the expert opinions, the Mark(s), the ‘Rockfish Weatherwear’ mark and the limited evidence available as to its use, I have concluded that the Defendant has not made out its argument as to infringement. As appeared to be common ground, I agree that the two substantive issues highlighted by the Claimant on the expert evidence are important to that infringement question. Although Ms Liu does engage to some extent with the question as to the common ownership of marks, I agree that her related evidence is somewhat limited, at least as to its significance with respect to scope for a finding of confusion. By contrast, Professor Yao does explain his view more fully and he provides relevant Chinese law support. I preferred his evidence on this aspect.
157. Likewise, I preferred Professor Yao’s evidence on the question of whether ‘Rockfish’ was likely to be considered the ‘dominant’ element of both marks. I found his explanation for why this might not be the case to be more detailed and incisive, particularly as to the likely approach of the Chinese Courts to this aspect. Moreover, the difference in the experts’ views brought into sharp focus that this Court was ill-equipped to determine the question of how the Chinese consumer would perceive the marks in issue here and the scope for confusion on their part under their ordinary level of attention. As noted, it was common ground between the experts that whether there was an infringement required a comprehensive factual analysis. However, the limited evidence presented as to use of the marks told me little, if anything, about the key question of their perception by the Chinese consumer and did not assist in resolving the related issues revealed by the expert evidence.
158. Although the Chinese judgment is helpful to show how the Chinese Court might approach the question of infringement generally, it did not illuminate the specific arguments in this case. The scope of the arguments and evidence deployed before the Chinese Court is not entirely clear but it does not seem that the specific points canvassed before me were taken there. As such, I found that the judgment was of somewhat limited assistance here.
159. For all these reasons, I am unable to conclude that the Mark(s) were infringed as a result of the matters complained of by Molssi or that Zennar was in breach of clause 2.1 of the 2020 Agreement. I also agree that, to the extent the Defendant relies on the ‘Rockfish’ element featuring alone as the relevant infringing use, this cannot be attributed to Zennar for the purposes of clause 2.1 of the 2020 Agreement. I accept that Zennar did not authorise such use.

N. ESTOPPEL BY CONVENTION

160. The Defendant also pleads that, even if there has been no infringement, an estoppel by convention nevertheless operated such that Zennar is prevented from denying that use of the ‘Rockfish Weatherwear’ mark in China infringed the Mark(s). This is based on Zennar and Molssi operating since 2021 on the suggested common assumption that such use did infringe. As Mr Cheung’s witness statement explains, Zennar and Molssi kept each other informed of developments in relation to takedown requests and proposed legal action, with Zennar asking Molssi to assist in obtaining information to assist with proposed legal action. Molssi says that it relied on that shared belief, in particular by entering into the Deed of Waiver. That Deed allowed the acquisition of Zennar to be undertaken which, in turn, conferred substantial benefit on Zennar with new, better resourced shareholders than the Aldreds and detriment to Molssi which

Approved Judgment

relinquished its rights under the ‘Earn-Out Reward Agreement’. Having proceeded on this basis, it would therefore be unconscionable for Zennar to take the position that the ‘Rockfish Weatherwear’ mark does not infringe after all.

161. The Claimant denies that an estoppel arose here. To the extent that complaint was made by the Aldreds prior to 2024 about the use of the ‘Rockfish Weatherwear’ mark in China, this concerned unauthorised goods entering the Chinese market over which AU Brandz and AU Commerce had no control. As Mr Kim explains in his witness statement, this was made clear to Mr and Mrs Aldred on several occasions.
162. On this issue too, there was preliminary argument as to the formulation of the case being advanced at trial. The Claimant says that Molssi relied for the first time in its skeleton argument on the conclusion of the Deed of Waiver and Molssi’s waiver of its entitlement under the ‘Earn-Out Reward Agreement’ as affording the necessary detrimental reliance for estoppel purposes. I agree that, if this inherently factually sensitive argument was to have been advanced, it should have been pleaded. Again, it was not. The Defendant appeared to recognise this in opening submission when it indicated that the point was not being pressed. However, even if this argument had been capable of being pursued, I would have rejected it. Such evidence as there was as to Molssi entering into the Deed of Waiver did not support the position now asserted, Mr Cheung’s witness statement explaining that:-

“73. Eventually, Marcus presented me with a new document called a ‘Deed of Waiver’ by which Molssi would release the earn out obligations under the 2020 Agreement once the sale of Zennar to AU had concluded. I was happy to help Marcus and Jules with their sale of the business and, as the release of the ‘earn out’ arrangements did not conflict with the other terms of the 2020 Agreement, generally speaking I was happy to agree to that document in order to clear the way for the acquisition for them at that time.”

163. Accordingly, far from indicating detrimental reliance on the part of Molssi in entering into the Deed, Mr Cheung made clear that it did so because it was happy to help the Aldreds out. That would have been insufficient to establish this element of the estoppel by convention defence even if it had been pleaded by Molssi on that basis, which it was not. I reject this defence.

O. IMPLIED TERM OF GOOD FAITH

164. The Defendant did plead by way of defence and counterclaim that the 2020 Agreement is ‘relational’ and that each of the parties owed the other an implied obligation to act in good faith, including by refraining from conduct regarded as commercially unacceptable by reasonable and honest people. In this case, Molssi says that the Claimant’s suggested change of position regarding whether use of the ‘Rockfish Weatherwear’ goods infringed the Mark(s) and its related grant of the ‘Rockfish Weatherwear’ licence to AU Brandz and consent for the ‘pop-up’ stores in China was commercially unacceptable and a breach of Zennar’s implied duty of good faith.
165. The Defendant relies on various matters to support its argument, including (i) the parties’ existing relationship before and after the conclusion of the 2015 Agreement

Approved Judgment

which was close and not a conventional arm's length one (ii) the 20-year term of the 2020 Agreement with no break mechanism which envisaged that conditions would develop and change over the life of the agreement in ways which could not be expressly provided for in a detailed contract and (iii) the drafting of the 2020 Agreement which left a number of matters deliberately undefined or vague. This was intended to allow matters to develop based on a mutual, general obligation of good faith.

166. As to the first point, the Defendant gave numerous examples of the pre-existing relationship and its closeness, with Molssi assisting Zennar with trade mark registration, providing loans to Zennar to assist with cashflow and even helping prepare Zennar's detailed business plan. These matters are described in some detail in Mr Cheung's first witness statement where he explains that 2015-2018 were spent working closely together to try and build the market for 'Rockfish' rainboots in China. He goes on to say that, right up until Zennar's purchase by AU Brandz in 2024, they did not operate a typical licensor/ licensee arrangement but more like a partnership operating in 'start up' mode, the documents also indicating various references to Molssi or Mr Cheung as Zennar's 'partner'. The Defendant also pointed to messages from Mr Aldred to Mr Cheung from December 2019 to the effect that the former was attempting to 'soften' the terms of what became the 2020 Agreement and to remove much of the legal verbiage with a view to producing a document that was fair and balanced. However, the Defendant accepted that these were inadmissible as an aid to construction and to whether the good faith obligation should be implied.
167. It appeared to be common ground that the presence of the list of characteristics identified by Fraser J (as he then was) in *Bates* was not definitive and did not operate to displace the requirement for the analysis of the terms of the particular contract in issue and whether a term as to the parties' mutual good faith properly falls to be implied. Nonetheless, the Defendant emphasised here the absence of an express term in the 2020 Agreement preventing such an implied obligation, the long-term nature of that agreement (20 years), the parties' intention that it be performed with integrity and fidelity, the trust and confidence reposed by the parties and the high degree of communication, co-operation and predictable performance involved based on such mutual trust.
168. As to the 2020 Agreement itself, the Defendant described this as somewhat of a "home-brewed document", the parties evidently approaching matters in an "open textured way". Clause 2.3, for example, envisages that Molssi would contract with third parties for the manufacture of products and requires written approval from Zennar but did not spell out the criteria for such approval. Such an approval process could not have worked without a good faith obligation. Likewise, the fourth recital concerning supply contracts which Molssi had itself been unable to perform required the payment of a reverse royalty which was to be agreed in good faith.
169. The 'Earn-Out Reward Agreement' provided that Molssi would obtain an equity stake in a company which would own the IPR, the level of that stake dependent on the accumulated royalties earned. This was therefore much more than a mere licence, the agreement itself drafted in very general terms which could only work if the parties owed each other duties of good faith.
170. The Defendant also noted clause 13.2 which states that nothing in the 2020 Agreement would create, or be deemed to create, a partnership. Those responsible for the drafting

Approved Judgment

must have thought that the relationship was such that there was a risk it might be found to be a partnership. Although a relational contract and a partnership are mutually exclusive, the closer the former to the latter, the more likely it is to be relational.

171. Finally, the Defendant also highlighted that the “home-brewed” nature of the agreement had resulted in various errors in the drafting, including the absence of a provision for the agreed termination of the 2015 Agreement and its replacement by the 2020 Agreement. Likewise, the latter did not attach any “Licence Terms” despite the reference thereto in the first recital and elsewhere. Given the quality of the drafting, there is more scope for the implication of a term here.
172. In response, the Claimant emphasises the point made in *Myers v Kestrel Acquisitions* [2015] EWHC 916 (Ch) (at [50]) that the question is not one of whether the implied term makes the relevant contract fairer or more reasonable; rather, it is an issue of necessity. In the present case, the 2020 Agreement fully accounts for the relationship and role of the parties, unsurprisingly so given that it was the second contract they had concluded. In this regard, the Claimant too notes some of the communications prior to the conclusion of the 2020 Agreement, including references to the actual use of the agreement “this time” as a “management device” and it being “a very robust document”, with adherence to all payments in a timely manner now being required. In cross-examination, Mr Cheung agreed that, whatever the position in relation to the parties’ previous dealings, the intention in 2020 was that everything would be formalised and dealt with under the terms of the new agreement.
173. As to the 2020 Agreement itself, its arm’s length nature here is reflected in the entire agreement provisions in the third recital and clause 13.3. These confirm that prior understandings and agreements are a matter of history and that it is the content of their new agreement that governs their dealings. The fourth recital also envisages that the exclusivity granted in the Territory in respect of the use of the Mark(s) in the manufacture and sale of the Products may itself be somewhat elastic if Molssi finds itself unable to satisfy its supply agreements.
174. As to the factors identified by Fraser J in *Bates*, although there is no express term that is contrary to a duty of good faith, the other terms do not suggest an intention to treat the 2020 Agreement as relational. The relationship is one of commerce, not ‘pseudo partnership’, as clause 13.2 makes clear. The second, third and sixth factors identified are present but only in the sense that they are true of every agreement. As Lord Bingham said in *HIH Casualty v Chase Manhattan Bank* [2003] 1 CLC 358 at [15], “[p]arties entering into a commercial contract ... will assume the honesty and good faith of the other, absent such an assumption they would not deal” (cited in *General Nutrition Investment Company v Holland and Barrett and others* [2017] EWHC 746 (Ch) at [312] in which an exclusive trade mark licence was held not to be a relational contract). The Claimant says that there is nothing in such a licence which makes it inherently relational. Factors such as Fraser J’s fourth, eighth and ninth do not, without more, require a contract to be treated as such.
175. As a preliminary matter, I agree that the parties’ discussions concerning the terms of the 2020 Agreement, including whether Zennar may have taken a ‘harder’ or ‘softer’ line compared to what went before, are not admissible for construction purposes or for considering whether any good faith obligation should be implied. Likewise, the parties’ historic dealings seemed to add little, if anything, the 2020 Agreement reflecting the

Approved Judgment

parties' then current intention and the entire agreement provisions expressly 'wiping clean' the slate with respect to their prior understandings or agreements.

176. As to the suggested 'home-brew' nature of the 2020 Agreement, I agree that this contains various drafting infelicities, including incorrect reference to the attached "Licence Terms" and a number of definitional issues. However, the meaning of the relevant parts of the agreement was still perfectly comprehensible. Nor did it seem significant that the 2020 Agreement had not itself expressly brought the 2015 Agreement to an end. That it was no longer in force was rather obvious.
177. I also agree that, in a general sense, the conclusion of the 2020 Agreement indicated, at least at that stage, the mutual trust of the parties. Molssi continued to be entrusted with the use of the Mark, a central element of Zennar's 'Rockfish' brand. Collaboration and co-operation would, no doubt, be important in the performance of what was intended to be a long-term arrangement. However, these are somewhat obvious considerations not peculiar to this agreement. They did not require the implication of a duty of good faith. Nor did I discern the suggested 'open textured' nature of the 2020 Agreement. To the contrary, the express terms of the agreement represented a comprehensive scheme for the operation of the licensor/ licensee relationship. This was perfectly capable of operating on its own express terms without recourse to considerations of good faith.
178. As to those express terms, clauses 2 and 3 contain the core elements of the 2020 Agreement including in relation to the (i) grant, nature and scope of the licence to use the Mark(s) (ii) Zennar's ownership of the IPR and responsibility for its enforcement and (iii) Molssi's obligation not to act in a manner adverse to the IPR and to assist Zennar in maintaining its validity and enforceability, including in infringement proceedings. Although different enforcement issues are likely to be encountered across the period of the licence, this scheme clearly identifies the parties' respective obligations, with Zennar required to take such legal action against unauthorised users of the Mark(s) as is "appropriate" and Molssi providing such assistance as Zennar may "reasonably" require. There is no difficulty with these concepts which draw on relevant context.
179. The other important aspect of these provisions concerns the manner of manufacture and sale of the Products. These include the requirement for (i) the Products to carry the Mark(s) (ii) compliance with Zennar's direction as to its application, including in the related brand guidelines provided by Zennar (iii) the non-modification of the Products or their packaging (iv) compliance with Zennar's quality and specification standards in relation to manufacture, promotion, distribution and sale and (v) inspection of Product samples and manufacturing, storage and distribution facilities. These are straightforward provisions, reflecting Zennar's control over the permitted use for the Mark(s) through Molssi's adherence to Zennar's directions, guidelines and standards.
180. The Defendant highlighted the absence of criteria for the approval of manufacturers envisaged by clause 2.3. However, it seems clear from the express terms that this was informed by their ability to comply strictly with the terms of the 2020 Agreement, for which purpose Molssi remained liable (clause 2.3) and, specifically, compliance with the standards of quality and specifications which they too would be required to adopt (clause 2.4). In addition, Zennar was required to provide contact details of recommended and pre-approved manufacturers that Molssi could use (clause 12.2).

Approved Judgment

181. Likewise, there is no difficulty with the royalty provisions (clause 4). These fix the minimum guaranteed royalty and royalty rate for the duration of the 2020 Agreement and impose further obligations on Molssi in the form of invoicing, payment, record keeping, information provision and inspection requirements.
182. Although not drafted in ‘institutional’ terms, these key elements are set out in detail in the 2020 Agreement and they are consistent with a commercial arm’s length bargain. They do not reveal the need for a duty of good faith to be implied. As for the remaining terms, the Defendant suggests that the requirement for the parties to meet annually to agree a marketing plan and budget for the following year (clause 5.2) raises a number of questions not answerable by the agreement itself. Molssi says that this provides no detail as to how these matters should be prepared, their purpose and whether the budget is a marketing budget and, if so, whether it is for marketing spend and in respect of what markets, or some other type of budget. I found this point strained. Although clause headings (for clause 5, “Marketing of the Products”) are not to be used for interpretation purposes (clause 1.4), clause 5.2 is clearly talking about a marketing plan and a marketing budget. That is evident from clause 5.1 which concerns Molssi’s promotion of Product sales. The budget is concerned with Molssi’s marketing spend for the following year. These parties would well appreciate the purpose of a marketing plan and budget and what these should contain. The obligation in clause 5.2 is to meet annually to agree these matters. Clause 5 does not spell out the consequences if agreement is not reached at that meeting. However, that eventuality does not require a duty of good faith to be implied. Agreed marketing plan or not, Molssi remains obliged to use reasonable endeavours to promote the sale of the Products throughout the Territory and to satisfy market demand for them (clause 5.1).
183. Clause 6 is concerned with improvements. This clause sets out a scheme for their mutual disclosure between the parties, their deemed treatment as Technical Information (including for clause 7 confidentiality purposes), the licensing to Zennar of those improvements disclosed by Molssi and how property therein is enjoyed. The ability of clause 6 to encapsulate such treatment of an unknown number and variety of improvements across a 20-year term again rather indicates that a duty of good faith is not required here.
184. The remainder of the provisions did not seem to add to the debate. Both sides relied in different ways on clause 13.2 and its reference to partnership. Although partners owe certain duties to one another, including of good faith, it did not seem to me that the agreed non-creation of a partnership shed any particular light on whether such a duty might arise. Much more incisive in this regard were the express references to good faith in the 2020 Agreement itself. I have already mentioned clause 9.1 concerning the expiry of the Initial Term and any potential renewal, the latter to be discussed in good faith. In addition, the fourth recital refers to Zennar reserving the right to supply Products to a third party if Molssi is unable to do so, with Zennar paying a ‘reverse royalty’ on such sales, to be agreed in good faith. Clause 8.3 also envisages *bona fide* discussions with a view to alleviating the effects of a *force majeure* event or agreeing alternative arrangements which are fair and reasonable where the relevant event prevails for six months or more. These express requirements of good faith all arise in the context of contemplated discussions or agreements contingent on the occurrence of uncertain future events. The fact that the parties expressly agreed such duties of good

Approved Judgment

faith in those specific circumstances reinforces my view that good faith obligations were not intended more generally.

185. Finally, the Defendant relies in this context on the ‘Earn-Out Reward Agreement’ which provided for Molssi to receive ‘remuneration’ for the business it had grown. This was to be ‘paid’ by the issue of shares in a company to be established to hold the ‘Rockfish IP’ or a cash payment if this had not been created by the time of the sale of the Zennar business. Although a somewhat brief and perhaps the least well drafted part of the 2020 Agreement, I did not consider that the implication of a good faith duty was required on its account. Where there was scope for uncertainty in the ‘Earn-Out Reward Agreement’, this lay in the potential failure to agree the ‘earn-out’ amount upon any sale of Zennar’s business. However, this was to be resolved by independent valuations. Moreover, the ‘Earn-Out Reward Agreement’ is a standalone contract barely mentioned in the 2020 Agreement. Although any such additional remuneration payable was commensurate with the royalties generated under the 2020 Agreement, this additional ‘earn-out’ element did not require the licensor/ licensee relationship to be performed differently from that contemplated by its express terms. In any event, it was effectively compromised in 2023 by the Deed of Waiver, before the events in question here.
186. The 2020 Agreement was not a ‘relational’ contract and no duty of good faith fell to be implied.

P. PREVENTION PRINCIPLE

187. I now turn to the question of whether the 2020 Agreement has been terminated. Even though I have found that the Claimant was not itself in breach of the 2020 Agreement, such that the point does not strictly arise, I first consider the Defendant’s pleaded case that “the Claimant is not entitled to terminate for breach when itself in breach.” That was pleaded in response to the Claimant’s allegation that the Defendant’s actions in sending the Letters constituted a breach of clauses 7.1 and 3.7 as well as the implied term referred to above with respect to the Defendant (not) taking enforcement action.
188. This was another aspect of the Defendant’s case which attracted some criticism in the Claimant’s supplementary skeleton argument and oral submission. The Claimant says that Molssi was asserting for the first time in its skeleton argument that there was a causal connection between the Defendant’s breach and a prior breach by the Claimant. The Claimant says that this is patently a factual allegation, albeit a legally insufficient one on the proper application of the ‘prevention principle’ under English law. However, that allegation has not been pleaded, the Defence merely stating that Zennar was not entitled to terminate for breach when Zennar was itself in breach. Again, the Defendant had declined to answer the related request for information, that request suggested to be one requiring the Defendant to “set out legal arguments” and, therefore, impermissible.
189. The Defendant says that the ‘prevention principle’ is well known. It does not need to be spelt out in a pleading. The choice facing the Defendant in light of the Claimant’s authorisation of AU Brandz’s infringing activity in China came down to putting up with the wrongdoing, taking steps in England under the 2020 Agreement against Zennar without any remedy against the people committing the wrongdoing or taking steps in China against those people. The idea that this gives rise to some complicated factual

Approved Judgment

causation enquiry is wrong. Ultimately, it is a simple question of common sense, not one of fact.

190. I accept that, strictly speaking, the Defendant's argument at trial went further than its pleaded case by denying an entitlement to terminate, not merely by reference to the Claimant's own alleged breach, but also to the Defendant acting upon the same. That said, I found the Claimant's related complaint somewhat overblown, Zennar having correctly apprehended that the Defendant was invoking the 'prevention principle' by reference to the Claimant's own alleged breaches and causation being inherent in the application of that principle.
191. The Defendant submitted that, if Zennar was in breach in one of the ways asserted, the writing of the Letters by Molssi was the consequence of such breach, and was a step taken by Molssi in response thereto and an attempt to mitigate its effects. To allow Zennar to terminate by reference to those steps would be to allow Zennar, impermissibly, to take advantage of its own wrongdoing.
192. The 'prevention principle' was summarised by Phillips J (as he then was) in *TMF Trustee Ltd (and others) v Fire Navigation Inc (and others)* [2019] EWHC 2918 (Comm) (at [27]) as the common law principle that a party in breach of contract cannot rely upon his own wrong. The corollary was stated to be that the party in breach was excused if such breach was caused by a prior breach by the other party. He also explained (at [42]) that this gives rise to a defence to liability for the breach itself. The Claimant says that the need for a causal connection was acknowledged in the authorities cited in *TMF* (at [28]-[31]):-

"28. Thus in *Roberts v The Bury Improvement Commissioner* [1870] L.R. 5 C. P. 310 a contractor's failure to begin works on time was caused by failure of the employer supply plans and lay out the land within a reasonable time, in breach of an implied obligation to do so. The majority of the Court of Exchequer Chamber held that the contractor's breach was not actionable. Blackburn and Mellor JJ stated that:

"...it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself .. and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract".

29. Kelly CB and Channell B expressed the principle as follows:

"... the rule of law applies which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party."

193. In *TMF*, there was some discussion as to whether the claimants' alleged breaches could properly be considered as having 'prevented' the borrowers from repaying the loan, as opposed to merely causing their impecuniosity and making it difficult for them to fulfil their repayment obligations. However, given the assumed basis of the summary

Approved Judgment

judgment application on which the issue arose, the judge considered sufficiently arguable the contention that the claimants had accepted (for that purpose) that their breach had prevented the borrowers from repaying the loan at maturity.

194. In this case, with ‘Rockfish Weatherwear’ products now coming onto the Chinese market with Zennar’s authority, Molssi may well have considered that Zennar and AU Brandz were acting in a co-ordinated fashion in a manner adverse to its interests. It may also have thought that, taking the approach required by the 2020 Agreement and giving notice of infringement to Zennar and requesting it to seek cessation of the activities of the ‘pop-up’ stores, would have been pointless and met with a flat refusal. Direct action or ‘self-help’ in China may well have appeared a more attractive option. However, even in these circumstances, the breaches asserted by Molssi would not have prevented it from giving notice of suspected infringement in accordance with clause 3.7. Nor would it have caused Molssi to disclose confidential information or to take enforcement steps - as it did both - by sending the Letters.
195. If Zennar’s reaction to these contractually agreed steps had been as Molssi might have expected, the latter had recourse under the 2020 Agreement. Invoking the jurisdiction of the English court with a view to compelling its desired outcome in the Territory might have seemed a circuitous, inexpedient and/ or expensive path but that was the route it was required to follow. However, Zennar did not stop it acting in accordance with the agreement, a point rather emphasised by the Defendant’s articulation in submission of the three choices open to it upon learning about the opening of the ‘pop-up’ stores.
196. Accordingly, having considered the parties’ arguments, I am satisfied that the ‘prevention principle’ would not have been engaged here even if the Defendant had made out its case that the Mark(s) had been infringed by the sale of ‘Rockfish Weatherwear’ products through the Chinese ‘pop-up’ stores and that Zennar was in breach of clause 2.1 by having authorised that activity and/ or that the Claimant had breached a duty of good faith by such authorisation and/ or by changing its position.

Q. (IR)REMEDIABILITY

197. Finally, I turn to the question of whether the Defendant’s breaches I have found were irremediable within the meaning of clause 9.2.1 such that Zennar brought it to an end by the notice of termination dated 4 April 2025. On this issue too, there was some debate as to whether Molssi was presenting a new case, the Claimant saying that the Defendant now appeared to be equating the irremediability of the alleged breaches with their ‘materiality’, those breaches said to be “minor” or “trivial” because they only involved (i) the Defendant’s despatch of three letters (not the commencement of legal proceedings) (ii) the disclosure of only limited information about the 2020 Agreement and (iii) the failure to inform the Claimant about matters which it had caused and of which it was already aware. However, in its pleading, the Defendant had denied irremediability on the basis of the proper construction of that word in the context of the 2020 Agreement. The Claimant had sought further information on that pleading but this too was rebuffed.
198. The Defendant says that the Claimant has never itself pleaded why the alleged breaches are irremediable in terms, for example, of some consequence or position having followed from the alleged breaches said to be impossible to reverse. Rather, matters

Approved Judgment

are put in the Claimant's pleading in terms that the sending of the Letters by the Defendant was *ipso facto* irremediable. The point is therefore put as a legal, not factual one. The Claimant having stated matters in such general or hypothetical terms, it is unsurprising that the Defendant would itself respond by way of blank denial. However, that does not preclude the Defendant from positing in argument different matters that could be undertaken to remedy the breach. That is an appropriate interrogation of the Claimant's case, the Defendant posing a counterfactual, not advancing some new factual question which might need to be pleaded and investigated in disclosure and the written evidence.

199. I found the Defendant's position difficult for two principal reasons: first, although succinctly stated, the Claimant's pleading does set out in its related particulars the basis for the irremediability of the breaches; second, the focus of the Defendant's arguments was on materiality considerations, including the harm said to have followed, rather than possible cure. So, in this case, the Defendant says that the breach of clause 7.1 was minor and remediable, the information provided as to the 2020 Agreement was extremely limited and there is no basis to suggest that it caused harm to Zennar. As for clause 3.7, it says that Zennar complains that Molssi did not "inform" it of matters of which it was not merely already aware but which it had actually caused. However, there is no basis for thinking that such a trivial breach can be characterised as irremediable. Finally, in relation to the implied term, it says that Molssi's breach was minor. It did not commence legal proceedings but merely sent the Letters. Of those, one went to AU Brandz which cannot have been influenced by it. The others went to the mall operator. There is no evidence of its reaction. As such, the sending of the Letters was "remediable". I agree that the framing of matters in this way was susceptible to factual enquiry and should have been pleaded. I apprehend that, had such arguments been canvassed earlier, they would have elicited more evidence, at least from the Claimant's side, as to the impact of the breaches. To the extent that they pray in aid the suggested absence of evidence of harms to, or the reactions of, those involved, I consider that such arguments are not open to the Defendant.
200. As for the legal principles, the Defendant relies on *Kulkarni v Gwent Holdings Ltd* [2025] EWCA Civ 1206 to the effect that "remedy" means "cure so that matters are put right for the future", the Court required to take a "practical rather than technical" approach. The fact that a breach is repudiatory does not mean it is irremediable ([76]; [79]). Moreover, "[t]he fact that, in a sense, '[t]he moving finger writes and cannot be recalled' (to quote Staughton LJ) does not mean that either a failure to comply with an obligation on time or a past breach of a negative obligation will necessarily, or even normally, result in irremediability" ([112]). In short, in the case of clause 9.2.1, whether a breach is "remediable" or "irremediable" is to be resolved by applying a "practical rather than technical" approach with no pre-conception that a breach of a negative covenant, however trivial, cannot be remedied. In considering that question, the Defendant says that it is highly relevant to ask in the case of each alleged breach (i) how serious it was (ii) what harm it caused to the other party and (iii) what, practically, could be done by way of remediation.
201. The Claimant says that *Kulkarni* was concerned with whether a repudiatory breach was perforce irremediable. The whole focus of the discussion was therefore materiality, the Court of Appeal itself citing (at [103]-[105]) *Phoenix Media Ltd v Cobweb Information Ltd* (16 May 2000, unreported, at [60]) to the effect that, although there may be a degree

Approved Judgment

of overlap between them, materiality and irremediability are different concepts. The Claimant also referred to *Leofelis SA & Anor v Lonsdale Sports Ltd & Ors* [2008] EWCA Civ 640 (at [47]) in which the Court of Appeal addressed a preliminary point that the relevant clause “only applied to a material or substantial breach, in effect to a breach which, apart from the clause, would be regarded as repudiatory.” The Court rejected that contention, noting that:-

“... However, the proviso makes it clear that the clause applies to breaches which can be remedied, and also requires TMLC to give Leofelis the opportunity to remedy the breach. I cannot see that the clause can properly be construed as limited to repudiatory breaches. If it were, the clause would add nothing to the position under the general law.”

202. Specifically, the Claimant submits that a breach of confidentiality is, by its nature, irremediable. Once disclosed, information cannot be withdrawn. To that end, Lord Reid noted in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (at [249]-[250]) that “... a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again.” Lewison LJ made a not dissimilar observation in *Kason* (at [58]) that “as Mr Mill put it, a breach of confidentiality lets the cat out of the bag” as did, by analogy, Rix LJ in *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051; [2011] E.T.N.R. 10 (at [108]).
203. Finally, the Claimant also says that, even if materiality were relevant here, Mr Kim explains in his witness statement how Zennar suffered more than minor or trivial harm, including lost sales and additional costs arising from the delay to the opening of the ‘pop-up’ stores (made worse given the time of year), commercial distrust between Zennar and its partners as well as difficulties in opening new stores in China given concerns as to potential legal disputes.
204. Drawing some of these threads together, I agree that the Court’s approach to the question of remediability should be a practical rather than technical one, the focus being on whether matters can be put right for the future. The fact that a breach is repudiatory does not mean it is irremediable. Remediability and materiality are different concepts, albeit the latter may be relevant to, and potentially inform, the former depending on the nature of the obligation and circumstances of the breach.
205. As to the (ir)remediability of Molssi’s breach of clause 7.1, Molssi disclosed to the mall operator, an unconnected third party, the core elements of Zennar’s licensing arrangements for the Mark(s) in China. I have accepted Mr Kim’s evidence as to the commercial sensitivity of such information, including its value to competitors and other licensees and the potential impact of its disclosure on Zennar’s market strategy and bargaining power. Molssi had brought about these consequences by passing that confidential information to an apparently unknown third party without any ability to restrict or control its subsequent use. Approaching matters on a practical and non-technical basis, I agree that this breach was not capable of cure to put matters right for the future. The ‘genie could not be put back in the bottle’. As such, it was irremediable and Zennar was entitled to terminate the 2020 Agreement on this account. I accept that the position could potentially be different with respect to the Letter to AU Brandz. Zennar had itself already disclosed that agreement to AU Brandz, albeit on a

Approved Judgment

confidential basis under the auspices of a non-disclosure agreement. However, this point was not developed before me.

206. I have also found that Molssi failed “promptly and fully [to] notify [Zennar] of any actual, threatened or suspected infringement in the Territory of any IPR which comes to [Molssi’s] notice” in breach of clause 3.7 of the 2020 Agreement. In one sense, this breach could be said to be remediable by Molssi notifying Zennar about the proposed opening of the ‘pop-up’ stores at any time after this came to its notice even if it had failed to do so “promptly”. In another, it could be said that there was nothing to put right for the future since Zennar was already aware of the actions proposed by AU Brandz in China and evidently did not share Molssi’s view about the ‘Rockfish Weatherwear’ mark being infringing. Such points, however, do not engage meaningfully with the purpose of this notification provision or the nature and circumstances of the breach.
207. Having become aware of a suspected infringement, clause 3.7 required Molssi to share this information with Zennar so that it could assess the position and decide on the appropriate response, including whether and in what manner any legal action should be taken against another person using the Mark(s) in the Territory and/ or to take possible infringement proceedings and to consider what assistance might reasonably be required from Molssi for that purpose. In doing so, Zennar might decide that it should bring legal proceedings. However, it might decide that such legal action was inappropriate. As here, it might form the view that there was no infringement. It might assess the risk of such action as too great if, for example, this exposed the Mark(s) to challenge. It might agree that Molssi should take any proposed enforcement steps itself. Such notice might also reveal differences between Zennar and Molssi as to whether and/ or what legal action was appropriate. In that case, either party could seek, or possibly compel, recourse under the 2020 Agreement.
208. In this case, Molssi failed to give notice to Zennar under clause 3.7. Instead, it sent the Letters requiring AU Brandz and the ‘pop-up’ store malls immediately to cease, and refrain from any further, infringement, indicating legal action without further notice if this did not occur. By acting in this manner, Molssi prevented Zennar from being able to consider, discuss and direct the appropriate response to this suspected infringement, it created the difficulties for Zennar with its commercial partners described in Mr Kim’s evidence and it effectively revealed that licensor and licensee were at loggerheads on an important and market sensitive issue. These matters could not be put right for the future. Even though it ultimately did not follow through with the threatened legal action against the recipients of the Letters, as opposed to certain other market actors, Molssi had already let the enforcement ‘cat’ out of the ‘bag’. Molssi’s breach of clause 3.7 was irremediable. For essentially the same reasons, I come to the same view with respect to the breach of the implied term that the Defendant would not take any steps itself to enforce the Mark(s) unless and until the Claimant had consented thereto.
209. Since the breaches I have found were irremediable, Zennar became entitled to terminate the 2020 Agreement and did so by its notice dated 4 April 2025.

R. CONCLUSION/ DISPOSAL

210. For the above reasons, Zennar succeeds on its claims. Molssi’s counterclaims are dismissed.