Neutral Citation Number: [2023] EWCA Civ 52

Case No: CA-2021-000205

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)
His Honour Judge Pearce (sitting as a Judge of the High Court)
[2021] EWHC 2295 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 January 2023

Before :

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between :

ZYMURGORIUM LTD	**Claimant/ Respondent**
- and -	
HAMMONDS OF KNUTSFORD PLC	**Defendant/ Appellant**

- -
- -

William Edwards (instructed by **Pannone Corporate LLP**) for the **Appellant**
Steven Reed and Lois Norris (instructed by **Napthens LLP)** for the **Respondent**

Hearing dates: 7 and 8 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 30 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This litigation arises out of the breakdown of a commercial relationship between the Claimant, Zymurgorium Ltd (**"Zymurgorium"**), a manufacturer of drinks, particularly gin and gin liqueurs, and the Defendant, Hammonds of Knutsford plc (**"Hammonds"**), a drinks wholesaler. From late 2015 Hammonds had acted as Zymurgorium's wholesaler, during which time its business expanded very dramatically. But in late 2018 the relationship came to an end after Hammonds discovered that Zymurgorium had started supplying a major customer, J D Wetherspoon (**"JDW"**), without going through Hammonds.

2. That led to a claim by Zymurgorium for unpaid invoices, and a counterclaim by Hammonds for damages for breach of contract. The basis of the counterclaim was the contention that, although not reduced to writing, there was an overarching agreement between the parties which required Zymurgorium not to supply its products except through Hammonds, that Zymurgorium had acted in repudiatory breach of that contract, and that Hammonds had accepted the repudiation.

3. Following a trial on liability in Manchester over 9 days in May and June 2021, HHJ Pearce, sitting as a Deputy High Court judge, (**"the Judge"**) handed down a long and careful judgment on 13 August 2021 at [2021] EWHC 2295 (Ch). References below to numbers in square brackets are, save where otherwise apparent, references to paragraphs of his judgment. So far as the claim was concerned, the invoices themselves were not disputed and the only issue he had to decide was a question of interest, against which there is no appeal. So far as the counterclaim was concerned, I will have to look at his conclusions in detail, but in summary he rejected the case that there was an overarching or master agreement between the parties, but found that there were individual contracts in relation to 5 particular customers, including JDW, and that by supplying JDW other than through Hammonds, Zymurgorium acted in repudiatory breach of that contract and renounced the others. He held that a reasonable notice period for these contracts was 3 months, and that Zymurgorium was therefore liable for damages for breach of those 5 contracts for that period.

4. Hammonds appeals the Judge's conclusion that there was no overarching agreement, and also his conclusion that the individual contracts were terminable on 3 months' notice, contending that a reasonable notice period would be 12 months. Permission for the appeal was granted by Arnold LJ on 18 January 2022.

5. Zymurgorium cross-appeals the Judge's conclusion in relation to one of the individual contracts, and also his conclusion that by supplying JDW as it did, it not only acted in breach of the contract in relation to JDW but also renounced the other 4 contracts. Permission for the cross-appeal was granted by Arnold LJ on 12 May 2022.

6. Despite the able submissions of Mr William Edwards, who appeared for Hammonds, in support of the appeal, and those of Mr Steven Reed, who appeared with Ms Lois Norris for Zymurgorium, in support of the cross-appeal, I would dismiss both appeal and cross-appeal and uphold the Judge's conclusions in their entirety.

Facts

7. There were many factual issues canvassed at trial, and the Judge not only had a large amount of documentary evidence but also heard from a fair number of witnesses, notably the two protagonists, Mr Aaron Darke, the founder and Managing Director of Zymurgorium, and Mr Jonathan Hammond, the Managing Director of Hammonds. (Mr Darke was subsequently joined in the business by his brother Mr Callum Darke, but when I refer to Mr Darke I mean Mr Aaron Darke.) The Judge gave a detailed account of the effect of the evidence at [45] to [106], gave his assessment of the witnesses at [107] to [117] and then dealt in turn with each of the issues, making relevant findings of fact where relevant to each issue. No challenge is made to his findings of primary fact, and I can summarise the relevant facts quite briefly from the judgment. At this stage I merely identify the outline of the story and the issues which arise; I give more detail as necessary when considering each of the individual grounds of appeal or cross-appeal.

8. Mr Darke left university in 2012. He had by then already some experience in crafting a variety of drinks, and the Judge said that it was apparent from Zymurgorium's success that he had a talent for it, which the evidence tended to indicate was borne of a passion about the products [46]. He set up a business, initially making drinks in his parents' kitchen and shed, and set about promoting it in the Greater Manchester area. The business, then unincorporated, was renamed Zymurgorium in 2013, and subsequently continued by the Claimant company after its incorporation in 2016 [1].

9. Like many start-ups the business started slowly. In the 11 months to November 2015 there were only 42 sales to 8 customers [47]. Mr Darke was anxious to expand and in mid-2015 approached Hammonds, a long established wholesaler which had been founded in 1960 by Mr Hammond's father and which traded both with the on trade (pubs, bars, restaurants and the like) and the off trade (retailers, from small off licences to national chains and supermarkets, as well as online retailers) [49]-[50]. A meeting was eventually held between Mr Darke and Mr Hammond on 16 November 2015 at Hammonds' offices [53]. Mr Hammond was enthusiastic about Zymurgorium's products, which included both gin and gin liqueurs; the latter (which were then novel) are typically sweeter and less strong than full strength gin, often with highly innovative flavours – Zymurgorium's then included Sweet Violet, and later Turkish Delight, Cherry Bakewell, and (in a product called Realm of the Unicorn) marshmallow – that appeal to some younger drinkers (millennials and generation Z) [45.1]. The next day Mr Hammond sent Mr Darke an e-mail saying he had some great products; he went on to ask him to fill in a new supplier information form and said that they would be looking to take 12 bottles of each of 8 products on their first order [57.3].

10. Quite what was agreed at this November meeting was the first, and one of the main, issues on the counterclaim. Mr Hammond's evidence was that he was happy for Mr Darke to continue looking after the small accounts he already had, but that apart from that it was agreed that all sales would go through Hammonds [55]. This formed the basis for Hammonds' contention that there was an overarching or master agreement between the parties from the outset containing a term that Hammonds would be Zymurgorium's exclusive wholesaler. The Judge however found that although Mr Hammond was in general a credible witness, he could not accept his evidence that there was at this meeting any express discussion of Hammonds having

exclusivity (at [112]-[113]); and when he came on to make findings on the particular issues, repeated that he was not persuaded that there was any express agreement to that effect at the meeting (at [132]). In those circumstances he was not satisfied that there was any contract made between the parties at all at the November meeting (at [135]). Hammonds challenges this latter conclusion in Ground 1 of its appeal.

11. Over the following months and years the relationship between the parties developed. The Judge found that there was a personal friendship between Mr Darke and Mr Hammond that went beyond that strictly necessary for their business relationship [58]. Zymurgorium's business also developed: the Judge referred to Hammonds having secured a central listing for it with a pub chain, Amber Taverns, in 2016, and to Zymurgorium enjoying gradual growth during 2017 [61]. But in late 2017 and early 2018 the sale of Zymurgorium products took off. A chart reproduced in the judgment shows the dramatic increase in sales, with the Judge noting that just over 60,000 bottles were sold in 2017 but over 540,000 in 2018 [73]-[74]. It was common ground that a major cause of the expansion was a social media posting on LADbible in February 2018 which praised Zymurgorium Manchester Sweet Violet Gin Liqueur, describing it as *"bloody delicious"* and *"the perfect treat"*, followed by a similar posting on UNILAD referring to its *"luscious, floral, gently nostalgic taste"* [74]-[75].

12. Hammonds had a secondary case that if the overarching agreement at the outset did not include a term as to exclusivity it was later varied to include one. The Judge rejected this on the basis that it did not arise as there had not on his finding been an overarching agreement at all [136]; but he also said that even if there had been an overarching agreement, he would not have found it to have been varied to include a term as to exclusivity [152], nor would he have found (had it been pleaded, which it was not) that an overarching agreement came into existence at some later time than November 2015 [153]. Hammonds challenges the latter two conclusions in Ground 2 of its appeal.

13. Hammonds also had an argument that the overarching agreement was, or became, a "relational contract" as that term has come to be understood in the authorities. The significance of this is that if the contract were a relational one as so understood, each party would owe each other duties of good faith, and Hammonds contended that Zymurgorium acted in breach of such duty by supplying JDW other than through it. On the Judge's finding that there was no overarching agreement, this did not arise either; but for the sake of completeness he considered whether the overarching agreement proposed by Hammonds was relational and concluded that it was not [168]-[172]. Hammonds challenges this conclusion in Ground 3 of its appeal.

14. During 2018 Hammonds made a number of individual or bespoke arrangements with particular customers, involving individually negotiated discounts or rebates (known as "retros"). This formed the basis for Hammonds' contention that in relation to 5 specific customers (Booths, JDW, Greene King, Bargain Booze and Booker) not only did Hammonds enter into a bespoke agreement with the customer, but Zymurgorium entered into a specific agreement with Hammonds (referred to in the pleadings and judgment as "Specific Supply Agreements" or "SSAs"). The Judge concluded that this was so in relation to each of these 5 customers [162]. He considered whether Bargain Booze fell into a different category but held that there was a contract here as well [163]. Zymurgorium accepts his conclusion for the other 4 customers but

challenges his conclusion that there was an individual agreement in relation to Bargain Booze in Ground 1 of its cross-appeal.

15. The Judge held that it was an implied term of each of the 5 individual agreements that for the duration of the agreement Zymurgorium would not supply the customer concerned except through Hammonds [159.1]; and that it was an implied term that such agreement could be terminated on reasonable notice [159.2]. He found the reasonable notice period to be 3 months [165]. Hammonds challenges this in Ground 4 of its appeal, contending that a reasonable notice period would have been 12 months.

16. Zymurgorium's sales continued to grow rapidly through 2018; by July 2018 Hammonds' monthly sales of Zymurgorium products exceeded £1m, and in November 2018 alone they exceeded £1.7m [2]. But in the second half of 2018 problems arose in the relationship between Zymurgorium and Hammonds, and in a short space of time in October 2018 a series of incidents occurred which demonstrated the deterioration of the relationship [88].

17. The Judge referred to some of these but said that he did not need to make findings as to the underlying reason for the breakdown [88]. On the one hand Hammonds from early in 2018 began to be involved in developing, or at least investigating the possibility of developing, a range of gin liqueurs itself with "Victorian sweet shop" flavours (such as sherbet lemon, and liquorice and blackcurrant), the original proposed name being Imaginarium [71]. There was evidence from November 2018 that this plan was being treated as extremely confidential (and in particular kept from Zymurgorium), and that the intention was to have the product made in the week beginning 10 December 2018, although in fact production and sales of Imaginaria (as it was in the event called) commenced in January 2019 [94]-[95].

18. On the other hand Zymurgorium had started to have direct contact with JDW. JDW had a preferred supplier, Matthew Clark Bibendum (**"MCB"**), so any supply had to take place through MCB [83.3]; and negotiations between Hammonds and JDW for the terms of supply through MCB took place in March and April 2018. JDW insisted on a retro of £7 per bottle, of which Hammonds agreed to contribute £6 and Zymurgorium £1 [83.7], and thereafter Zymurgorium contributed £1 per bottle for sales of its products to JDW through Hammonds [83.8]. In October 2018 however there were discussions between Zymurgorium and JDW about a more direct supply chain [96]-[100]. There was a dispute about which side initiated this, but the Judge did not find it necessary to resolve it; the upshot was that MCB stopped ordering from Hammonds in November 2018 [101].

19. On 14 December 2018 Hammonds discovered that Zymurgorium was now supplying its products to JDW by selling them to MCB direct, and on 20 December Mr Hammond wrote a letter to Mr Darke. This asserted that there was an agreement between them which precluded the changing of the arrangements for supply to JDW without Hammonds' consent; that Zymurgorium's actions were a serious breach, and repudiation, of the agreement; and that Hammonds accepted that repudiation as bringing the agreement, and the parties' commercial relationship, to an end [104].

20. The Judge found that Zymurgorium's action in supplying JDW through MCB direct was undoubtedly a repudiatory breach of the individual contract in relation to JDW;

and that it also amounted to a renunciation of each of the other individual contracts [174]. Zymurgorium does not challenge the former conclusion but challenges the latter in Ground 2 of its cross-appeal.

Ground 1 of the appeal: overarching agreement in November 2015?

21. Hammonds does not challenge the Judge's finding that there was no express discussion at the meeting of 16 November 2015 about Hammonds having exclusivity (paragraph 10 above), but does contend in Ground 1 of its appeal that he erred in concluding that no contract was entered into at the meeting at all. This was an important stepping stone to Hammonds' argument under Ground 2 of the appeal that the contract was subsequently varied to provide for exclusivity.

22. On this issue it is convenient to start with the pleaded cases. Hammonds' case was pleaded at paragraph 17 of its Re-amended Defence and Counterclaim under the heading *"Master Wholesale Agreement"* as follows (where "HOK" means Hammonds and "ZL" means Zymurgorium):

> "17. In or about November 2015, during a meeting at HOK's premises between Jonathan Hammond acting on behalf of HOK and Aaron Darke acting on behalf of ZL, it was orally agreed:
>
> 17.1 that HOK would promote ZL's drinks products generally to the marketplace;
>
> 17.2 that HOK would act as ZL's wholesaler purchasing ZL's drinks products from ZL and reselling them to HOK's customers;
>
> 17.3 that ZL would supply its drink products to HOK to meet the demand for those drink products that HOK generated and received.
>
> For the avoidance of doubt, Mr Hammond is unable to recall the precise words used by himself or those used by Mr Darke. The particulars pleaded represent the gist of the words used.
>
> 17A. Shortly after the said meeting, Mr Darke emailed a completed 'New Supplier Information' to Mr Tim Dunlop (then HOK's Sales Manager for the UK On Trade) which included a list of prices at which ZL offered to sell its products to HOK. These prices were subsequently varied from time to time. From on or about 7 November 2016, ZL set the price for gin liqueur to £11 per bottle and the price stayed at that level thereafter."

Paragraph 17 is a conventional way to plead an oral contract and although it does not in terms assert that the agreement was a legally binding contract, this is implicit in the heading, and made explicit by paragraph 18 which pleads that it was a term to be implied *"in the agreement referred to at 17 above ("the Master Wholesale Agreement")"* that the agreement would be terminated only on reasonable notice, this being put at 12 months.

23. In subsequent paragraphs it was pleaded that the Master Wholesale Agreement was varied by conduct by adding a term that Zymurgorium would not supply customers who were the subject of a specific agreement direct so long as the Master Wholesale Agreement was in force (paragraph 19B.1); that Zymurgorium's act in selling products for JDW direct to MCB was a repudiatory breach and renunciation of the Master Wholesale Agreement (paragraph 23), which was accepted by Hammonds (paragraph 24); and that Hammonds' loss was the profit it would have made from the continuation of the Master Wholesale Agreement until its termination in accordance with proper notice (paragraph 25.1).

24. The significance of this issue therefore is that if Hammonds can establish that there was an overarching agreement it can recover damages for loss of profits on *all* sales of Zymurgorium products, not just on sales to the 5 specific customers. The Judge was not concerned with quantum, and nor are we, but we were told that this would make a significant difference to the damages that Hammonds could recover, and even more so of course if the reasonable notice period for terminating such an agreement was longer than the 3 months which the Judge found to be the reasonable notice period for the 5 individual contracts.

25. Zymurgorium's response to the pleading at paragraph 17 is found in its Reply and Re-re-amended Defence to Counterclaim at paragraphs 3 and 4. In paragraph 3.1 it was objected that the pleading was deficient in not setting out the words used but only the gist, and that Zymurgorium could not therefore plead fully to the allegation. In paragraph 3.2 it was pleaded:

> "3.2 Insofar as it is able to plead to the allegations but without prejudice to paragraph 3.1 above, the Claimant pleads as follows:
>
> 3.2.1 It is admitted that the Defendant agreed to act as a wholesaler of the Claimant's drink products by purchasing drink products from the Claimant and reselling them to the Defendant's customers.
>
> 3.2.2 It is admitted that the Defendant agreed to promote the Claimant's drink products generally to its customers.
>
> 3.2.3 It is admitted that the Claimant agreed to supply its drink products to the Defendant.
>
> 3.2.4 It is denied that the Claimant agreed to supply drinks products to meet the demand that the Defendant generated and received.
>
> 3.2.5 The applicable prices for the Claimant's products were provided to the Defendant by email sent on 18th November 2015 at 14.40hrs from Aaron Darke, for and on behalf of the Claimant, to Tim Dunlop, for and on behalf of the Defendant. In response, by email sent on 19th November 2015 at 10.18hrs Tim Dunlop, for and on behalf of the Defendant, stated "Will come back to you ASAP with a Purchase Order." …

> 3.2.6 It is admitted that the price at which the Claimant sold its drinks products to the Defendant was varied over the course of time.
>
> 3.2.7 It is denied that from on or about 7th November 2016 the price for all gin liqueurs was set at £11 per bottle and continued at that level thereafter."

26. Paragraph 4, so far as material, pleaded as follows:

> "4. In relation to paragraph 18,
>
> 4.1 It is denied that the agreement between the parties for the sale and purchase of the Claimant's drinks products constituted a "Master Wholesale Agreement" either as alleged or at all. As set out in the Particulars of Claim, the Claimant's drink products were supplied to the Defendant pursuant to various purchase orders whereby the Defendant offered to purchase various cases of gin and vodka at the units price stated therein, and by its conduct in booking in the delivery of the various cases of gin and vodka with the Defendant, the Claimant accepted the Defendant's offers. There were therefore numerous agreements between the parties rather than a single "Master Wholesale Agreement".
>
> 4.2 It is denied that it was an implied term that any agreement between the parties was terminable upon giving a reasonable period of notice. In the absence of an overarching agreement for the sale and purchase of the Claimant's drinks products, there is no agreement upon which notice could be given."

27. This pleading, read together, therefore makes it clear that Zymurgorium's case was that despite the matters admitted in paragraphs 3.2.1 to 3.2.3 to have been agreed at the meeting on 16 November 2015, there was no legally binding contract entered into at that meeting, nor any overarching agreement at all; all that there were were successive contracts for the sale of goods.

28. On the list of issues, this question was Issue 2.1: *"Was there a MWA [Master Wholesale Agreement] between ZL and HOK?"* The Judge dealt with it at [123] to [135]. He first considered whether there was any express agreement at the November 2015 meeting that Hammonds should have exclusivity. (It will be seen from the extract from the pleadings that this was not in fact alleged in the Re-amended Defence and Counterclaim, but it was asserted by Mr Hammond in his witness statement, and then incorporated into further information provided by Hammonds.) At [132] he expressed his conclusion that he was not persuaded that there was. He then continued:

> "133. However, the further issue arises as to whether an over-arching agreement on any terms was reached at that meeting or is to be

> inferred from its circumstances. HOK has not pleaded that there was [a] term as to exclusivity to be implied at the time of forming the so-called MWA, but does plead that it was agreed that HOK would promote ZL's drink products generally to the marketplace, that HOK would act as ZL's wholesaler purchasing ZL's products from ZL and reselling them to HOK's customers; and that ZL would supply its drink products to HOK to meet the demand for those drink products that HOK generated and received. Absent an express or implied term as to exclusivity, such obligations might be thought to have no content, but the question whether a MWA was formed in 2015 becomes relevant to the issue of variation subsequently – if there was no MWA, then there is no agreement to be subject to variation as pleaded in paragraph 19B and/or 19C of the RDCC.
>
> 134. The difficulty with the case advanced by HOK in this respect lies in understanding precisely what the agreement of 16 November 2015 is said to comprise if there was no exclusivity. The Claimant concedes that there was always an expectation that it would try to produce sufficient of its products to meet the demand created by HOL. It is possible to contemplate a contract that obliged the Claimant to use its best endeavours to produce enough to meet the demand. But such a contract would have very little content. One can reasonably assume that people involved in manufacture would generally wish to meet the demand for their products. The pressure to do so arises naturally from the profit motive that underlies the commercial world. But I do not see that such a contract could be implied from the words used in [November] 2015. Rather it would have to arise from the conduct of the Claimant beginning to manufacture products for HOK and selling them to HOK. A contractual obligation to use best endeavours to produce the necessary goods might theoretically be an adjunct to such an arrangement, but it is difficult to see that it could be thought necessary to imply such a contract…
>
> 135. Accordingly I am satisfied that the Defendant has failed to prove the existence of a contract on the terms asserted by it or any terms in November 2015. This resolves issue 2.1."

29. Mr Edwards accepted that there were limited findings of fact on which he could rely. He accepted, in answers to questions from the Court, that the Judge's reference in the second sentence of paragraph 134 to Zymurgorium conceding an expectation that it would try to produce sufficient products to meet the demand created by Hammonds was not a finding that there had been a promise or undertaking by Zymurgorium to do so: expectations are not promises. He also accepted that he could not rely on any finding that there had been an express discussion about such an obligation; he had sought such a finding at trial but had not obtained one.

30. Nevertheless he contended that what was admitted to have been agreed in fact amounted in law to a binding contract. He said that the Judge's references to

implying a contract were inapposite in this context as what he was contending for was an express contract; all that was required was offer and acceptance, and an intention to create legal relations.

31. He suggested that what the Judge meant by reference to *"content"*, although he did not say so expressly, was that the terms agreed were too vague or uncertain. I do not myself think this is quite what the Judge had in mind. I think it was a more fundamental point. A contract (or at any rate a bilateral contract which is entirely executory) consists in essence of the exchange of mutual promises which are intended to be legally enforceable. So one needs to find that the parties have undertaken *obligations* to one another. When the Judge says that what the parties agreed to do *"might be thought to have no content"*, or that it is difficult to understand *"what the agreement … is said to comprise"* I think what he meant is that the things which were admitted to have been agreed did not in fact involve any substantive obligations or commitments at all.

32. To take an example, it is admitted that Hammonds agreed that it would act as a wholesaler of Zymurgorium's products. That means that it was no doubt anticipated, on both sides, that it would place orders with Zymurgorium. And of course this is exactly what it did, in increasing quantities, to the mutual benefit of both parties. But it was not expressly committed to ordering any particular quantities, or indeed, it seems to me, to placing any order at all. If Mr Hammond had sent an e-mail in response to Zymurgorium's price list saying that on reflection he had decided not to go ahead, would Zymurgorium have had a claim for breach of contract? It could only have had one if it could assert a binding obligation on Hammonds to order *some* quantity of its products. But nothing to this effect was expressly agreed. This is what I understand the Judge to have meant by saying that it is difficult to see what the content of this *"obligation"* was – what enforceable obligation was Hammonds undertaking by agreeing that it would be a wholesaler for Zymurgorium's products, beyond the obligation to pay for such of Zymurgorium's products that it chose to order?

33. A similar analysis can be applied to the admitted fact that Zymurgorium agreed to supply its drinks products to Hammonds. If Hammonds was going to place orders, which is what both sides anticipated would happen, Zymurgorium would naturally supply products to meet the orders if it could; as the Judge points out it is little more than a statement of the obvious to say that Zymurgorium would expect to try to produce sufficient products to meet the demand. The question therefore is what enforceable obligation was Zymurgorium undertaking? Suppose in a particular month Hammonds placed an order and Zymurgorium declined to accept it for whatever reason, would Hammonds have a claim? Only if the agreement that Zymurgorium would supply its products was an enforceable promise. It could scarcely have been an absolute promise to meet whatever quantity Hammonds ordered; as the Judge recognised, one could have an express contractual obligation to use best endeavours to do so, but the Judge did not find any such express agreement, nor any reason to imply such an obligation. In this way it can be seen that the agreement that Zymurgorium would supply its products, although it sounds like a promise, is in fact empty of any specific commitment that could be sued on.

34. Similarly the agreement that Hammonds would promote Zymurgorium's products adds little if anything to the agreement that it would act as a wholesaler for

Zymurgorium. If it was going to buy Zymurgorium's products and resell them, it would have to, as a minimum, include them in its price list for its own customers in order to resell them at all. But that would be a form of promotion and there was no specific agreement as to what it would do beyond that.

35. At this point it is worth standing back and looking at the question in the round. The question is not whether the parties intended their relationship to be a commercial relationship with legally enforceable obligations on each side. They were each in business and acting as commercial parties, and there is no doubt that they intended to undertake legally enforceable obligations. The question is whether they envisaged those being found only in the purchase orders that it was anticipated would be placed by Hammonds and accepted by Zymurgorium, or whether they agreed that over and above the contracts that would be created every time an order was placed and accepted, they were undertaking, right at the outset, further enforceable commitments to each other.

36. Seen in this way, I think the Judge was entitled to come to the conclusion that he did, and made no error of law in doing so. He was of course immersed in the evidence in a way we cannot be, and where what is in issue is the effect of an oral meeting (inevitably dependent on witness evidence) rather than a written agreement, considerable deference has to be given to his assessment. It is therefore difficult to challenge his conclusion that what was admittedly agreed at the meeting did not amount to promises that were sufficiently fleshed out to be intended to be enforceable as binding contractual obligations.

37. In effect the three matters that were admitted amounted to little more than an agreement by the parties to take matters forward. The significance of the meeting was that Mr Hammond was keen on Zymurgorium's products and agreed to act as a wholesaler for Zymurgorium instead of, as he could have done, saying that he was not interested. If Hammonds did go ahead and place an order, it naturally followed that on the one hand Zymurgorium would try to supply the products it wanted, and on the other that Hammonds would try and resell them to its customers, which would involve including them on its price list. But that is all explicable by the parties' own commercial interests. It is not necessary to elevate the parties' agreement that this is what would happen into enforceable legal obligations, and in the absence of any definite commitment by Hammonds to place orders of any particular amount, or indeed a promise to do so at all, or any definite commitment by Zymurgorium to accept and fulfil such orders, it is indeed difficult to see that they amounted to the kind of legally enforceable obligations that are needed to make a contract. As Mr Reed said, the account of the meeting that Zymurgorium accepted in its Reply amounted to little more than Mr Darke asking "Are you willing to be a wholesaler for me?" and Mr Hammond answering "Yes", with the rest naturally following. That is not enough, or at any rate the Judge was entitled to conclude that that was not enough, to make a contract.

38. That is sufficient to dismiss this ground of appeal. But in deference to Mr Edwards' careful argument I will address the specific points he made. He relied on six principles of law. The first was that all that was needed to make a contract was agreement on the essential terms, sufficient certainty and an intention to create legal relations. I agree, but as I have sought to explain the essential terms that must be agreed must have sufficient content in the way of specific promises to be intended to

be legally enforceable as obligations.

39. The second principle was that in the case of commercial parties there is a presumption that if they reach an agreement they intend to create legal relations, for which he cited *Edwards v Skyways Ltd* [1964] 1 WLR 349 at 354-5. There the plaintiff was a pilot employed by the defendant airline company who was entitled to a return of his own contributions to the company pension scheme if he left employment. It was agreed at a meeting, and subsequently confirmed in a newsletter, that pilots made redundant would also be entitled to what was described as an *ex gratia* payment equivalent to the company's own contributions to the scheme. The defendant then decided not to make this payment after all and defended the action on the basis that it had merely a moral and not a legal obligation to do so, there being no intention to create legal relations. Megaw J rejected that, saying (at 355):

> "In the present case, the subject-matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds – an intention to agree. There was, admittedly, consideration for the company's promise. I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one."

I accept that principle. What the company agreed to was a promise to pay a specific amount in specific circumstances. It is not surprising that Megaw J thought that such a promise made in a commercial context was *prima facie* intended to be legally enforceable, not just a moral obligation. But I do not think it assists Hammonds in the present case. As I have already referred to, the parties here did intend their commercial dealings to be contractual. The argument is not over whether they were undertaking enforceable legal obligations or not, but whether those obligations were only to be found in the orders placed by Hammonds and accepted by Zymurgorium, or whether there were further legally enforceable obligations undertaken at the initial meeting before a single order was placed. That seems to me a different type of case.

40. Mr Edwards' third principle was there can be a contract even though the agreement is only in outline terms. For this he cited three judgments of this Court. The first was *Pagnan S.p.A. v Feed Products Ltd* [1987] 2 Ll Rep 601. There the trial judge (Bingham J) had found that an fob contract for the sale of corn gluten feed pellets had been made in an exchange of telexes notwithstanding that they said nothing about certain things which were normally part of such a contract (loading rate, demurrage and the like). He concluded that the parties regarded these as relatively minor details which could be sorted out once a bargain had been struck (at 613 col 2). His decision was upheld on appeal. Lloyd LJ (with whom Stocker and O'Connor LJJ agreed) said (at 619 col 2) that the parties may intend to be bound even though there are further terms still to be agreed, provided that the failure to reach agreement does not render the contract as a whole unworkable or void for uncertainty (at (4)-(5)), and that so long as the parties were agreed on the essential terms (in the sense of terms without which the contract could not be enforced), it was up to them to decide whether they wished to be bound and if so by what terms (at (6)), continuing:

> "There is no legal obstacle which stands in the way of agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of

agreement"."

Again I have no quarrel with the principle but I do not think it assists Hammonds here. The basis on which the Judge declined to find that a contract was entered into at the inaugural meeting was not so much that other terms remained to be agreed, but that he was not persuaded that the parties had agreed anything in the way of enforceable commitments to each other at all.

41. The second decision of this Court was *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Ll Rep 25 (***"Trentham"***). Steyn LJ (with whom Ralph Gibson and Neill LJJ agreed) said (at 27 col 1) that where a transaction has been performed on both sides, that will often make it unrealistic to argue that there was no intention to enter into legal relations, and difficult to submit that the contract is void for vagueness or uncertainty. Again I have no issue with that statement but I do not think it assists Hammonds here. There the distinctive feature was that the defendant denied that there was any contract between the parties at all, despite the fact that it had carried out work designing, supplying and installing windows and the like, and the plaintiff had paid it for doing so. Here by contrast there is no doubt that the parties' relationship was contractual: the question is a different one, namely whether that relationship was found solely in the individual contracts formed every time Hammonds placed and Zymurgorium accepted an order, or was also found in an overarching or master agreement. There was nothing unrealistic or difficult in the argument that it was the former rather than the latter (or indeed in the Judge's actual conclusion that the relationship was not in fact to be found in either, consisting instead of the individual contracts for the sale of goods, supplemented by certain specific contracts in relation to particular customers).

42. Mr Edwards' third case under this head was *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] 2 Ll Rep 76 (***"Mamidoil"***). At [69] Rix LJ (with whom Schiemann LJ and Sir Ronald Waterhouse agreed) set out a number of principles deduced from the authorities, of which the fourth was that, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where parties have acted in the belief that they had a binding contract, the Courts are willing to imply terms where that is possible to enable the contract to be carried out; and the sixth was that, particularly in the case of contracts for future performance over a period where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the Courts will assist the parties to do so, so as to preserve rather than destroy bargains. But that was again a different type of case. There the parties had undoubtedly entered into a contract in the form of a written agreement signed in March 1993 which was expressed to last for 10 years from signature, with a provision expressly contemplating that the parties might by mutual agreement extend it for a further 10 years, or indefinitely. Under the contract the plaintiff was to handle crude oil for the defendant refinery, receiving it off ships and transferring it to rail, in return for a fee. The legal problem was that the contract only stipulated what the fee would be up until the end of 1994 with no provision as to what it should be thereafter or contractual mechanism for ascertaining it. On this ground Thomas J had held that the contract was, beyond the end of 1994, a mere agreement to agree and unenforceable. This Court allowed an appeal, Rix LJ concluding at [73] that the contract should be viewed as a contract for at least 10 years and that a term should be implied that in the absence of agreement reasonable fees

should be determined for the period after 1994. That does not, with respect, seem a very surprising decision in the circumstances, but it can be seen that the question the Court had to decide there, namely whether an agreement which on its face was intended to last for at least 10 years, and which was admittedly contractual until the end of 1994, had nevertheless ceased to be contractually binding thereafter, was rather different from the question here, which is whether what was orally agreed at the November 2015 meeting had sufficient content to amount to mutually enforceable promises or commitments at all. Indeed the very first of the principles laid down by Rix LJ was that each case must be decided on its own facts, and I do not find the decision in that case, or Rix LJ's statement of the principles, of any real assistance in the present case.

43. Mr Edwards' fourth principle was that there is no difficulty with a contract that evolves over time, citing *Carmichael v National Power plc* [1999] 1 WLR 2042 (***"Carmichael"***). There the question was whether two individuals, who were engaged to act as part-time tour guides at a power station, had contracts of employment and Lord Hoffmann said at 2050C that it was open to the industrial tribunal to find as a fact that the parties did not intend an exchange of letters (in which National Power offered, and the individuals accepted, the positions) to be the sole record of their agreement but intended that it should be contained partly in the letters, partly in oral exchanges at interviews or elsewhere and *"partly left to evolve by conduct as time went on"*. That is all very interesting and a valuable reminder that contracts can change over time, but I do not think that it has any direct relevance to the present issue. The case pleaded by Hammonds, and, as the Judge records at [124], the case advanced by Hammonds at trial, was that the master contract was made as a result of the express agreement of the parties at the meeting on 16 November 2015. Whether that was so was the issue addressed, and decided, by the Judge in this part of his judgment. The fact that a contract may evolve over time could not as far as I can see affect *that* question: either a contract was made on 16 November 2015 or it was not.

44. The fifth principle relied on by Mr Edwards was that where a contract has been performed, the Court does all it can to uphold the parties' bargain. For this he relied again on what Steyn LJ said in *Trentham* (see paragraph 41 above). He also referred to *F & G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 2 Ll Rep 53 where similar statements were made (see per Lord Denning MR at 57 col 2 and per Danckwerts LJ at 59 col 1), but in fact that was another case, very similar to *Mamidoil*, where there was undoubtedly a contract at the outset, expressed to last for at least 5 years, and it was suggested that it ceased to be binding after the end of the first year because it did not stipulate contractual quantities. I have already said that a case of that sort is rather different from that here. Nor, for reasons already given, do I think this is a case like *Trentham*. Mr Edwards said that where the behaviour of the parties as reasonable commercial people cannot be explained without there being a contract, that was a good reason for the Court to find a contract, but here the actions of the parties are perfectly explicable without there being any overarching contract. Hammonds' decision to become a wholesaler of Zymurgorium products is explained by Mr Hammond's enthusiasm for its drinks and his belief, amply borne out in fact, that he could make a profit from reselling them, and, that decision having been made, Hammonds' promotion of the products was in its own interests and indeed really necessary if it was going to place orders; Zymurgorium's decision to accept the orders is equally explained by its own commercial interests, and once it had accepted the

orders it would of course seek to fulfil them.

45. Mr Edwards' sixth principle was that the Court would only hold a contract void for uncertainty in limited circumstances. The fact that the parties argued about the effect of what had been agreed was not enough to mean that the agreement was too uncertain to be a contract: see *Scammell v Dicker* [2005] EWCA Civ 405 at [30] per Rix LJ, who said:

> "… it is simply a non sequitur to argue from a disagreement about the meaning and effect of a contract to its legal uncertainty. Parties are always disagreeing about the contracts they make. They take those arguments, if necessary to the courts, or to arbitration, for their resolution: and sometimes the resolution is very difficult indeed to arrive at. … None of that makes a contract uncertain."

Once more I have no difficulty with the principle, but I do not think that it is of any relevance here. The Judge's conclusion that there was no overarching contract made at the November 2015 meeting was not premised on the parties' disagreement about the effect of what was agreed. It was premised on his assessment that what was agreed did not amount to enforceable promises of any substance, which is a quite different point.

46. Having now examined the various principles relied on by Mr Edwards, I can return to my conclusion which is that the appeal on this ground should be dismissed as the Judge, who was immersed in the whole sea of evidence, did not err in principle and was entitled to reach the conclusion that he did.

Ground 2 of the appeal: variation to introduce exclusivity?

47. The remaining issues on the list of issues under the heading *"2. Master Wholesale Agreement"* were all prefaced by *"If there was an MWA,"* and were as follows: (2.2) *"What were its terms (including as to notice)?"*; (2.3) *"Was it varied?"*; (2.4) *"If it was varied, when was it varied?"*; and (2.5) *"If it was varied, what were its terms as varied?"*.

48. As the Judge recognised, on this formulation of the issues none of them in fact arose as his conclusion on Issue 2.1 (was there an MWA?) was that there was not. Thus at [136] he said *"As to the remainder of the issues under 2, these become hypothetical"*. He nevertheless thought it helpful to consider them. At [137] he introduced this consideration with *"If I were wrong on issue 2.1 and a contract did come into existence as of November 2015…"*. He identified three possible scenarios, and dealt very briefly with the first two, namely (i) if there were an MWA with an express term of exclusivity (in which case he said that there would undoubtedly be a term requiring reasonable notice to be given to terminate [138]); and (ii) if there were an MWA with an implied term as to exclusivity (in which case he did not feel able to resolve the question as it would depend on what express terms had been agreed [139]). The third scenario was that whatever the terms of the MWA it was subsequently varied to include a term as to exclusivity. This he dealt with at rather greater length, introduced by another reference to it being hypothetical and not in fact arising; *"If I were wrong about the creation of a contract but correct that there was no term as to exclusivity, the question of variation of the contract would arise under issue 2.3."* [140]. He

described this question as *"far less easily answered"* [140] and the case advanced by Hammonds as to variation as one that *"requires some careful analysis"* [142]. He then conducted this analysis in some detail from [142] to [152].

49. In [143] he accepted that there was no conceptual difficulty with a contract being varied by conduct, but it was more difficult to identify the conduct which was said to amount to, or be capable of being treated as, an offer and acceptance. In [144] he detailed various strands of evidence relied on by Hammonds in support of its argument that the parties came to a position in which they each assumed that Hammonds was acting as Zymurgorium's exclusive distributor, describing the evidence as *"powerful"* and *"strongly point[ing] towards such a common understanding gradually developing"*. It included, for example, Hammonds describing itself as Zymurgorium's *"master wholesaler"* without query from Mr Darke; Zymurgorium's own description of Hammonds as its *"primary wholesaler"*, *"partner wholesaler"* and *"primary distributor"*; and Zymurgorium's creation of labels referring to its products as *"distributed by Hammonds of Knutsford"*, *"supplied by Hammonds"* or *"supplied by the awesome Hammonds of Knutsford"*. In [145] he referred to an e-mail of 5 January 2017 from Mr Hammond to Mr Darke and his brother in which he thanked Zymurgorium for having the confidence in them to *"distribute your product, exclusively in the UK"*. This was not queried by Mr Darke and the Judge said that he was satisfied that this was because by this time, if not before, Mr Darke did believe that Hammonds was acting as Zymurgorium's exclusive distributor for all save a small number of legacy arrangements. At [146] he referred to other matters which supported this conclusion; at [147] he referred to various matters relied on by Hammonds which he found less convincing. At [149] he addressed an argument by Zymurgorium that this was simply an assumption on the part of Hammonds, and said that there was clear evidence of the assumption crossing the line of communication between the parties and becoming the common assumption of both of them.

50. But despite these factual findings, at [150]-[152] he declined to find that there was (or more accurately would have been) a contractual variation, as follows:

> "150. But notwithstanding my conclusion that, by the beginning of 2017 at the latest, both parties believed that they had a relationship in which HOK was the exclusive distributor for [ZL] [this] does not resolve the issue of contractual variation. The specific problem for HOK here on its argument about contractual variation is in showing any intention to vary the relationship in the manner pleaded in paragraphs 19B.1-19B.3 of RDCC. It would be one thing if it were able to plead and prove some conduct which showed an intention to vary the relationship so that ZL was obliged to market its products exclusively (save for certain defined small parts of the market) through HOK, and associated conduct by which this intention was made known and accepted. But what HOK pleads is evidence that the parties assumed that there was such an obligation in existence already rather than events from which an intention to vary an existing contract could be inferred so as to achieve the obvious intention of the partes and/or to give the agreement business efficacy.

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

51. Finally at [153] he added this:

> "153. I should add that, whilst HOK has not pleaded a case that an overarching agreement came into existence after the original discussion in November 2015, such an argument would have failed for the same reasons that the argument as to variation would have failed, namely the absence of circumstances from which an intention to enter into such a contract can be inferred."

52. These conclusions are challenged by Hammonds in Ground 2 of its appeal. Hammonds contends that in the light of his factual finding that by the beginning of 2017 at the latest the parties believed that they had a relationship in which Hammonds was the exclusive distributor for Zymurgorium, the Judge erred in concluding that there was not after that date a contractual agreement to that effect. Mr Edwards argued this point in two alternative ways. The first was that the Judge should have found that there was a variation to the original overarching contract. The second was that he should have found that an implied contract for exclusivity came into existence.

53. My conclusion on Ground 1 means that the first way of putting it is not open to Hammonds. As the Judge recognised, once Hammonds' case that there was an overarching contract reached at the November 2015 meeting was rejected, it follows that Hammonds' case that such a contract was later varied to incorporate an obligation of exclusivity cannot succeed either. One cannot have a variation to a contract that does not exist.

54. That means that Hammonds needs to rely on the second way in which Mr Edwards put the case, namely that although there was initially no overarching contract between the parties, a contract was later to be implied (it not being suggested that there was

any later *express* agreement that might be contractual). For this he referred to the principles as summarised by Vos LJ (as he then was) in *Heis v MF Global UK Services Ltd* [2016] EWCA Civ 569 (***"Heis"***) at [36], and applied by him at [46]. Mr Edwards said that, just as there, in the present case the relationship between the parties was *"only explicable on the basis that it had a contractual foundation."*

55. Mr Reed however objected that this was a new way of putting the case which was not open to Hammonds. Such a case had never been pleaded (as the Judge recognised at [153]). That I think was not disputed. Nor had such a case been opened. We were shown Hammonds' written opening submissions and they are largely, as one would expect in a factual trial, an introduction to the facts and the disputes the Judge would have to resolve. They do not refer to an implied contract.

56. We were also shown Hammonds' closing submissions. These (at paragraph 207) summarise the core issue as being whether there was by Q4 2018 an overarching agreement between the parties under which Zymurgorium was not entitled to supply directly to those to whom Hammonds was supplying, and identified three ways in which Hammonds put its case. These were: (1) that there was an express obligation of exclusivity from the start; (2) that if there was no obligation of exclusivity at the start, there was a variation implied from conduct to that effect; and (3) that the agreement between Hammonds and Zymurgorium became, if it was not from the beginning, a relational contract. It is true that at paragraph 208 reference was made to the principle that a contract may be implied by conduct and at paragraphs 209-210 reference was made to the judgment of Vos LJ in *Heis*, but the conclusion drawn (at paragraph 211) was that if it was not agreed at the outset that Hammonds would have exclusivity, the parties' consistent conduct thereafter *"leads to an implied variation of what was agreed at the outset"*. Consistently with the three ways in which Hammonds' case was put in paragraph 207, this analysis rests on there having been an initial agreement at the outset which was later varied by conduct, not on the relationship having originally been non-contractual but having impliedly become contractual at some later date. Mr Edwards very fairly accepted that the former was how the case was put before the Judge. I therefore accept Mr Reed's submission that the case sought be to be run on appeal is indeed a new way of putting the case that was not deployed at trial.

57. Mr Edwards said that this did not matter. There was in his submission no substantial difference between a case in which A asserted that he had a contract with B which was later impliedly varied by conduct to include an obligation of exclusivity, and a case where A asserted that although there was initially no contract with B, such a contract, including an obligation of exclusivity, was later impliedly formed by conduct. This was simply a different legal analysis founded on the same facts, and hence was open to him to argue: see *re Vandervell's Trusts (No 2)* [1974] Ch 269 at 321G-322B per Lord Denning MR.

58. I do not accept this submission. Whether a contract was made at the meeting in November 2015 is a question of fact: see the account given by Lord Hoffmann in *Carmichael* at 2048D to 2050D of what he referred to as *"the troublesome distinction between questions of fact and questions of law."* As he there explained, although the construction of a written instrument is, for historical reasons, treated as a question of law, this only applies where the parties intend all the terms of their contract to be contained in a document or documents. It does not apply when the intention of the

parties *"has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case the terms of the contract are a question of fact."* To that I would add that whether a contract was entered into at all on the basis of oral exchanges is equally clearly a question of fact.

59. It follows that a case that there was a contract made in 2015 which was later impliedly varied by conduct involves different *factual* allegations from a case that a relationship that was in 2015 non-contractual was later replaced by a contractual relationship, implied by conduct.

60. In those circumstances the relevant principles are well established. They were summarised by Snowden J (as he then was) in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337 at [21] to [28]. An appellate court has a discretion to allow new points to be taken on appeal. But it will not generally allow a new point to be taken if, had it been run below, it would have resulted in the trial being run differently (*Singh v Dass* [2019] EWCA Civ 360 at [17] per Haddon-Cave LJ). This is very well settled law and dates back to at least *The Tasmania* (1890) 15 App Cas 223 where Lord Herschell said at 225 that a point not taken at trial should be *"jealously scrutinised"* and that:

> "a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial…".

61. That may be stated in more absolute terms than is now applicable, but it remains the case that in general an appellate court will not permit a new point to be taken unless confident that the trial would not have been run differently had the point been taken below. I do not think we can be confident of this. Had the case now put forward been in play at trial, it seems to me not only possible but probable that the cross-examination of Mr Hammond would not have taken precisely the same form as it would have been in Zymurgorium's interests to attempt to get him to accept that on the question whether the parties' relationship was contractual or not, nothing changed between November 2015 and December 2018; other points might have been raised as well.

62. In those circumstances I do not think we should permit Hammonds to rely on the new argument that even though the relationship was non-contractual at the outset it is to be implied from the parties' conduct that it became contractual at some later (unspecified) date.

63. That means that neither way in which Mr Edwards put Ground 2 is open to Hammonds, and it is unnecessary to express any views on the substance of the point. I would dismiss Ground 2 accordingly.

Ground 3 of the appeal: relational contract?

64. Ground 3 of Hammonds' appeal is that the Judge erred in concluding that the relationship between the parties was not at the outset, and did not become, "relational". Mr Edwards accepted that if he lost on both Grounds 1 and 2 this did not

arise. I therefore say no more about it.

The individual contracts

65. The remaining questions before us all arise out of the Judge's conclusions in relation to the individual contracts for particular customers. These were that there were 5 such contracts, including one in relation to Bargain Booze, that they were all repudiated or renounced by Zymurgorium, and that each was subject to an implied term that they could be terminated on 3 months' notice. Each of these conclusions is challenged, by Grounds 1 and 2 of the cross-appeal and Ground 4 of the appeal respectively.

66. The Judge set out the facts in relation to the 5 customers at [82] (Booths), [83] (JDW), [84] (Greene King), [85] (Bargain Booze) and [86] (Booker) and then gave his conclusions on the 5 contracts at [154]-[166]. It is not necessary to set out all his findings of primary fact, none of which was challenged. In summary, these 5 customers were all of some size and hence significance, and in each case Hammonds had discussions with the relevant customer to persuade them to list Zymurgorium's products. These involved bespoke arrangements as follows:

(1) Booths is a retail grocery chain with around 28 stores, mostly in the north-west [12]. Hammonds discussed with Booths both a bespoke price and "listing fees" [82.4]-[82.7]. Mr Darke was kept informed of the discussions [82.8]-[82.10].

(2) JDW is a national pub chain [12]. As referred to in paragraph 18 above, discussions with JDW involved a retro to which Zymurgorium agreed to contribute [83.7]-[83.8].

(3) Greene King is a large pub chain with over 1600 outlets [12]. Mr Darke agreed with Hammonds that he would contribute to a retro on similar terms as with JDW if needed, but it was not in fact necessary [84.4]-[84.5].

(4) Bargain Booze is a discount off-licence chain with around 600 stores in England and Wales operated by franchisees [12]. There were discussions between Hammonds and Bargain Booze about a discounted price.

(5) Bookers is a wholesale cash and carry chain with 200 branches in the UK [12]. There were discussions between Hammonds and Bookers about the inclusion of Zymurgorium's Sweet Violet product in a multibuy promotion which would involve a retro [86.2].

These arrangements were all made in the course of 2018.

67. At [156] the Judge set out the reasons for inferring a broader contractual relationship between Zymurgorium and Hammonds in respect of these customers than just a series of *ad hoc* agreements for the purchase of Zymurgorium's products as follows:

> "156.1 By the time of the negotiations with each of the SSA customers leading to a central listing, the assumption was shared by the parties that a relationship of exclusivity existed.
>
> 156.2 In each case, there is evidence of extensive discussion between

HOK that achieved the listing by the respective customers of ZL's products. Absent some obligation of exclusivity, HOK would have been investing its time and money in developing relationships that might have to come to an end at any time because of ZL's freedom to deal directly with the customer.

156.3 ZL was kept informed about pricing arrangements. It must have been aware that price was a sensitive issue for the customer and that therefore HOK would need to know that there was a commitment from ZL that prices would not be changed arbitrarily.

156.4 HOK was purchasing large quantities of ZL's goods, for a while virtually everything that ZL was able to produce. It was therefore committing large scale funding to the development of ZL's range of products. It would be natural to think that it would not do this without at least some agreement as to exclusivity.

156.5 Further the relationship between HOK and the SSA customers in each case involved some commitment as to price or discount by HOK, as set out above and as known by ZL save in the cases of Bargain Booze and Booker, and in the second of these, AD was made aware of HOK's commitment to the multibuy option. It would not be in accordance with business efficacy to expect HOK to enter into such arrangements without some corresponding commitment on price from ZL, at least in so far as price rises would not be applied without reasonable notice being given.

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

68. After referring at [157] to *Heis*, at [158] the Judge said that he had not found the question of the mechanism of offer and acceptance to be easy to discern; the Court must be careful to guard against a casual finding of a contract coming into existence, but where the parties had traded over a number of months in the belief that they had a contractual relationship and committed resources to their dealings in that belief, the Court can safely apply a rather laxer principle (referring to *Trentham*). At [159] he said that it would not be safe to reach a conclusion without identifying the terms said

to bind the parties. He identified a number of terms that met the test of necessity. These were that for the duration of the agreement in relation to a particular customer, (a) Hammonds would pay the agreed price for Zymurgorium's products, subject to a right on the part of Zymurgorium to change the price on reasonable notice; (b) Hammonds would seek to promote Zymurgorium's products; (c) Zymurgorium would pay any contribution towards a retro that had been agreed; (d) Zymurgorium would use its best endeavours to supply sufficient of its products to Hammonds to meet the customer's orders; and (e) Zymurgorium would not supply the customer other than through Hammonds. In addition the parties could terminate the arrangement on reasonable notice.

69. At [162] he expressed his conclusion as follows:

> "162. In my judgment, the court can and ought to infer the existence of SSAs, given the relationship that had developed between HOK and ZL and the underlying assumptions upon which they operated. The minimum terms of such agreements can be clearly identified as set out above and, whilst it may be argued that other terms ought properly to be implied, I am satisfied that to do so would not undermine HOK's central argument that the SSAs were not terminable without reasonable notice being given."

70. With this introduction it is now possible to turn to the remaining issues.

Ground 1 of the cross-appeal: was there an individual contract in relation to Bargain Booze?

71. It is logical and convenient to start with the question raised by Ground 1 of the cross-appeal, namely whether there was an individual contract in relation to Bargain Booze.

72. The Judge dealt with this question at [163] as follows:

> "163. I have considered whether the relationship with Bargain Booze lies in a different category, given that there is no evidence that the price at which HOK was to sell or any discount to which it was to contribute was known in this case. Whilst this makes the case less compelling in the individual case, given that this negotiation took place in the course of a series of negotiations where the creating of a SSA can be inferred, it is in my judgment more apt to infer a corresponding contract in this case as well."

73. Mr Reed's oral submissions in support of this ground were very brief, simply referring to his written submissions. There he made two points. One was that there was a conflict of evidence about the existence of any negotiation between Hammonds and Zymurgorium and the Judge failed to make clear which account he preferred. The other was that, as the Judge said, there was no evidence that the terms agreed between Hammonds and Bargain Booze as to price (discount and retro) were known to Zymurgorium, but the Judge failed to apply this to the terms that he implied.

74. As to the first point, the Judge set out at [85.2] the evidence of Mr Danny Appleton

for Hammonds. Mr Appleton said that after agreeing a price with Bargain Booze he called Mr Darke to discuss this, referring to it as *"obviously yet another exciting opportunity"*. His evidence was that although he thought he may well have told Mr Darke that Bargain Booze were looking for a discounted price, he did not necessarily tell him what price they were looking for as he was not asking Zymurgorium to contribute to it, but he was clear that for the arrangements to work it was necessary that Zymurgorium should not be free to decline orders from Hammonds to meet orders from Bargain Booze, or change its prices, or supply Bargain Booze direct. The Judge also set out at [85.3] Mr Darke's evidence denying that any such agreement was reached. Mr Edwards submitted that when in these circumstances the Judge referred at [163] to "this negotiation", he must have preferred the account given by Mr Appleton to that of Mr Darke.

75. It is fair to say, as Mr Edwards accepted, that the Judge's reasoning here is very compressed. But I accept that he evidently concluded that there was a negotiation between Hammonds and Zymurgorium in relation to Bargain Booze as one of a series of negotiations in relation to individual customers. In the light of the evidence from Mr Appleton that he recited, it cannot be said that he had *no* evidence before him to that effect, and with some hesitation I am willing to accept that he must have accepted Mr Appleton's evidence. His reasoning could undoubtedly have been spelt out more fully, but it is well established that a judge's reasons can always be better expressed, and that it is difficult to challenge a purely factual conclusion reached by a trial judge unless either there is literally no evidence on which he could have acted, or there is some error of logic or inconsistency or the like. I do not think that can be said.

76. As to the second point, the question is whether it makes a difference that there was no evidence that Zymurgorium knew what the terms agreed between Hammonds and Bargain Booze were. I do not see that it does. The essential point, which the Judge had well in mind, is that if Hammonds was reaching a specific deal with a significant customer in order to persuade the latter to take Zymurgorium's products and give them a listing, it would require a certain minimum level of commitment from Zymurgorium to Hammonds in turn. That explained the terms he found at [159] to the effect that Zymurgorium would give reasonable notice to change its prices, use best endeavours to supply Hammonds, not supply the customer direct, and give reasonable notice to terminate the arrangements. None of those needed Zymurgorium to know the precise details of the terms agreed between Hammonds and the customer, only that Hammonds was taking on some commitment to the customer.

77. In those circumstances I do not think that the conclusion reached by the Judge can be said to have been one that was not open to him, and I would dismiss this ground of the cross-appeal.

Ground 2 of the cross-appeal: was there a renunciation of the other 4 contracts?

78. The other ground of the cross-appeal concerns the Judge's conclusion that by supplying JDW (through MCB) without going through Hammonds, there was not only a repudiatory breach by Zymurgorium of the contract in relation to JDW, but also a renunciation of each of the other specific contracts. Zymurgorium does not challenge the conclusion in relation to the JDW contract but contends that he erred in his conclusion in relation to the others.

79. The Judge dealt with this question as Issue 5 and did so very briefly at [174] as follows:

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

80. The Judge was careful in this passage to distinguish between a repudiatory breach and a renunciation. He had explained the difference at [37] by reference to the judgment of Popplewell J (as he then was) in *Spar Shipping AS v Grand Logistics Holding (Group) Ltd* [2015] EWHC 718 (Comm) at [208], the essential difference being that conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for the performance of his future obligations under the contract, and renunciatory if it would lead a reasonable person to conclude that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory.

81. Mr Reed also referred us to *Donovan v Grainmarket Asset Management LLP* [2021] EWCA Civ 686 at [58] per Males LJ, where he said that repudiation by renunciation arises where a party *"evinces an absolute intention not to perform its duties under a contract"* (citing *Spettabile Consorzio Veneziano v Northumberland Shipbuilding Co* (1919) 121 LT 628). But he accepted that there may be no real difference between this and what Popplewell J said in *Spar Shipping*, and I proceed on the basis that Popplewell J accurately summarised the law.

82. Mr Reed submitted that the Judge had erred. There was no finding that Zymurgorium intended to break the other individual contracts, let alone that it was obvious to a reasonable person that it was going to do so; there was nothing to suggest that it was planning to supply Greene King direct, or Booths direct, for example. And in oral evidence Mr Darke had said in cross-examination that he would continue to use Hammonds to supply Greene King. (Mr Edwards confirmed that Mr Darke did say in cross-examination that he would meet the orders in place, although he pointed out that this was an answer given at trial: there was no contemporaneous document in which he had said as such.) Mr Reed's submission was that in these circumstances there was no clear and unequivocal renunciation by Zymurgorium of the other 4 contracts. The fact that it might have done the same with those customers as it did with JDW, seeking to cut out Hammonds, was not enough. It had not in fact done so or threatened to do so.

83. In my judgment however the Judge was entitled to reach the conclusion he did. It is again significant that the real dispute between the parties was not whether they had contractual obligations to each other but what these consisted of. Zymurgorium's position was that it was bound only by each contract for the sale of goods formed when Hammonds placed an order and Zymurgorium accepted it, and under no further contractual commitment to Hammonds; Hammonds' position was that over and above this Zymurgorium owed further obligations to it, either under an overarching contract or in the alternative under at least contracts for the 5 specific customers, and that those contracts contained obligations on Zymurgorium under which it could not supply the

relevant customer direct.

84. When therefore Zymurgorium did exactly that with JDW, I consider that the Judge was entitled to regard that as conduct which would lead a reasonable person in the position of Hammonds to conclude, correctly, that Zymurgorium did not recognise any obligation of exclusivity, or indeed any contractual obligation to Hammonds at all over and above the obligation to fulfil the orders it accepted. As Mr Edwards put it, Zymurgorium was quite clearly treating itself as free to supply direct to the customer – and it may be noted, not only doing so without obtaining Hammonds' consent but also without even notifying Hammonds that that was what it was doing, the first Hammonds knew of the position being when the orders from MCB for JDW dried up. Since there was nothing distinctive about JDW in this respect, that would naturally be understood as applying to the other customers as much as JDW.

85. Seen in this light, this is not so much a case of a contracting party threatening a specific breach of contract, but of a contracting party denying that it is under any contractual obligation at all. That seems to me well within the concept of a renunciation of the contract.

86. I would therefore dismiss this ground of the cross-appeal as well.

Ground 4 of the appeal – length of notice for individual contracts

87. The final question before us is raised by Ground 4 of the appeal, which is that the Judge erred in concluding that as at 20 December 2018 a reasonable period of notice for the 5 individual contracts would have been 3 calendar months.

88. The Judge set out the relevant principles at [33]-[36] as follows:

> "33. HOK's case is that there were implied terms in the MWA and/or the SSAs that they were each only terminable on giving reasonable notice. The basic principle as to the implication of a duty to give reasonable notice is summarised in *Reda v Abdul-Jali* [2002] UKPC 38 at §57:
>
> > "The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that it is determinable by reasonable notice: see *Chitty on Contracts* (28th Ed.) at para. 13-025. The implication is made as a matter of law as a necessary incident of a class of contract which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision to the contrary."
>
> 34. In assessing what is reasonable, the Court must consider the circumstances as they were at the time that the notice was (or would have been) given:

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

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

    35.1 The degree of formality in the relationship is important. A completely formal agreement may itself provide for the necessary notice, but the more relaxed the relationship, the less likely it is that the court will imply a lengthy notice period;

    35.2 Where a distributor has spent considerable capital in the early stages of the relationship to build up the business with lesser expenditure thereafter, this may militate in favour of a lengthier notice period in the early years of the relationship;

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

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

Mr Edwards accepted that the Judge's statement of the principles at [33]-[34] was irreproachable, and that [35] contained a fair summary of *Alpha Lettings Ltd v Neptune Research & Development Inc* [2003] EWCA Civ 704 (***"Alpha"***).

89. The Judge considered the application of these principles at [164]-[165] as follows:

> "164. I turn to the question of what was an appropriate notice period in this case. In my judgment there are several important factors:
>
> 164.1 The relative informality of the relationship between the

parties is a pointer towards a shorter period of notice. If the parties had really intended a long period, it is more likely that they would have formalised the relationship.

164.2 Whilst I accept that HOK invested time and money in developing the SSAs, and indeed the market for ZL's products more generally, I do not accept that they did this on the kind of scale that was considered for example by the Court of Appeal in *Decro-Wall v Practitioners in Marketing Ltd* [1971] 1 WLR 361. The Defendant was promoting products which were very much the brainchild of AD and it was as much his skill in product development as HOK's skill and efforts in marketing which led to the phenomenal success of ZL's products.

164.3 The Defendant's obligation to promote the Claimant's products was a burden that a reasonable distributor would only wish to bear for a limited period.

164.4 Whilst there was no express prohibition on the Defendant selling competitor goods to the Claimant, the Defendant indicated that it considered itself obliged not to do so.

164.5 HOK was in fact able to develop an alternative product and get it on the market within about 3 months. Admittedly it was not profitable to the extent that ZL's products were, but that was the simple consequence of the fact that it was following the established product from ZL – as JH made clear in evidence, it is rare for an imitator to match the success of an original product.

165. Bearing in mind these factors, the reasonable notice period in this case has to be a short one. Whilst not even 12 months was sufficient to enable HOK to develop and market an alternative product that was successful to the same degree as those of ZL, this factor is of limited significance where, during the notice period, the distributor would be restricted from (or at least would consider that it should not) taking steps to market competitive products and where in any event it would be duty bound to continue to promote the manufacturer's products. In my judgment, any notice period in excess of three months would have imposed unreasonable obligations from the point of view of both parties. Their failure to expressly agreed terms of their relationship is consistent with an approach that there was only a small limitation on the parties' rights to disengage. In my judgment, the appropriate notice period that gives effect to these considerations is three months."

He went on to hold that the notice period ran from the date of acceptance of the repudiation, namely 20 December 2018 [166]. That is not challenged before us.

90. Mr Edwards referred us by way of comparison to *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) (***"Hamsard"***) where Norris J found that the reasonable notice period in a contract governing the supply of childrenswear was 9 months. He said that by contrast the Judge's conclusion here that the reasonable notice period was only 3 months was really far too short. But I do not myself find Norris J's decision in *Hamsard* of any assistance. As he himself said at [64] the reasonable length of notice must always depend on the particular facts of the case so that other cases are of limited assistance. (The Judge of course said much the same here at [36]). A particular consideration in *Hamsard* was the period required to arrange for the manufacture and supply of the next season's stock (see at [17]-[20] and [70]). That meant that the period turned on facts that are obviously very specific to that particular case. But quite apart from that, Boots had in fact given 9 months' notice. Hamsard's case was that this was too short and that it should have been 18 months. So the only question was whether 9 months was enough or not: see at [2]. Norris J's conclusion at [69] that *"the 9 months' period of notice given was reasonable"* therefore tells one nothing about whether there might have been an argument for an even shorter period, something that was simply not in issue.

91. On the facts of the present case Mr Edwards made effectively two points in support of his submission that the period of 3 months was too short. The first was that one of the factors pointing towards a longer period is the need for someone in the position of Hammonds to recoup its initial outlay: see *Alpha* at [32] per Longmore LJ. But (as he accepted) in the present case this was more a question of Hammonds investing management time in developing the relationship with the customer than of being out of pocket in cash terms. It is not suggested that Hammonds incurred substantial capital expenditure which it would need to recoup, and although it did agree individually negotiated deals with the customers, it was presumably still making a profit on its sales. The Judge cannot be said to have ignored this factor as he recognised it at [164.2] and I do not think his treatment of it there has been shown to be flawed.

92. Mr Edwards's second point was that the drinks market is cyclical. There was evidence before the Court that the last quarter of the calendar year leading up to Christmas was the busiest, and the first quarter very much less so. That is no more than one would expect. His submission was that that meant that a longer period was needed for a notice given in December 2018 because it would take Hammonds longer to make a return and clear through its stock. But Mr Reed told us that this point was not advanced before the Judge, and it does not appear in Hammonds' closing submissions. I do not think we can in those circumstances assess the point now. Not only do we not know what the Judge would have thought of the point, but we do not have the necessary factual findings to assess it ourselves. For all we know for example a wholesaler's stocks might be expected to be much lower at the end of December after the busy run-up to Christmas than at other times of the year. I do not think this point is sufficient to enable us to conclude that the Judge was wrong.

93. For Zymurgorium, Mr Reed laid particular emphasis on two points. The first is that Hammonds was able to develop an alternative product (Imaginaria) within 3 months, as referred to by the Judge at [164.5]. That does seem to me a relevant consideration. In *Alpha*, which concerned an exclusive agency agreement for the supply of specialist valves used in medical and scientific equipment, the trial judge had found the

reasonable notice period to be 12 months but this Court held that this was outside the reasonable range of notice periods open to him, which would have been between 3 and 6 months, and substituted a period of 4 months, Longmore LJ saying that that should have provided ample time to bring the business to an orderly conclusion and, if this was wanted, to make substantial progress towards obtaining another supplier: see at [38]. As I have said, all such cases turn on their own facts, but that does seem to me to justify the Judge in finding support for his conclusion in the fact that it took about 3 months for Hammonds to develop and market Imaginaria.

94. Mr Reed's other point was also drawn from *Alpha* at [33], where Longmore LJ referred to the fact that if the supplier (Neptune) terminated, the distributor (Alpha) would continue to be obliged to promote Neptune's valves during the notice period, something which he described as a difficult concept that must also militate in favour of a shorter rather than longer period. Again this was a point picked up by the Judge here at [164.3] and then at [165], and again I think this was a relevant consideration that supported his conclusion.

95. Overall I am wholly unpersuaded that the 3 month period identified by the Judge was outside the range of periods reasonably open to him. A decision of this sort is not of course an exercise of discretion; it is, rather, an assessment or exercise of judgment. There is however some similarity in what is required before an appellate court can disturb it. Here the Judge has not been shown to have left relevant considerations out of account, or taken into account irrelevant ones, or to have erred in principle; nor has he been shown to have reached a conclusion that is demonstrably wrong. Indeed I think he was right.

96. I would therefore dismiss this ground of appeal as well.

Conclusion

97. I have now considered, and rejected, all the grounds both of the appeal and of the cross-appeal. If the other members of the Court agree, the result will be that both appeal and cross-appeal will be dismissed.

Lady Justice Falk:

98. I agree.

Lady Justice Nicola Davies:

99. I also agree.