Neutral Citation Number: [2023] EWHC 2897 (Ch)

Case No: BL-2022-000847

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
London EC4A 1NL

Date: 16 November 2023

Before :

David Mohyuddin KC sitting as a Judge of the Chancery Division

- -

Between :

The Burke Partnership (a firm)	**Claimant**
- and -	
The Body Shop International Limited	**Defendant**

- -
- -

Simon McLoughlin (instructed by **Leathes Prior Solicitors**) for the **Claimant**
David Cavender KC (instructed by **Womble Bond Dickinson LLP**) for the **Defendant**

Hearing dates: 23 and 24 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 11.15 am on 16 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

DAVID MOHYUDDIN KC:

Introduction

1. This is a claim for declarations, brought by The Burke Partnership (a firm) ('**TBP**') against The Body Shop International Limited ('**TBSI**'), which makes a counterclaim for alternative declarations.

2. The dispute is in respect of two franchise agreements pursuant to which TBSI is the franchisor and the current partners in TBP are the franchisee. The earlier of the franchise agreements is dated 10 April 1981 and was entered into in respect of a territory in Norwich ('**Norwich Agreement**'). The latter is dated 30 September 1982 and was entered into in respect of a territory in Cambridge ('**Cambridge Agreement**'). TBSI operates the brand "The Body Shop" and is well-known. TBP operates three stores under that style, one in the Norwich territory and two in the Cambridge territory.

3. Put shortly but as will be addressed in more detail below, the parties' dispute is whether the Norwich and Cambridge Agreements (together, '**Agreements**'), which are in materially identical terms, are capable of being extended for ongoing 5-year periods or whether they are terminable by TBSI on reasonable notice. There are questions of the true meaning of the Norwich and Cambridge Agreements and whether any term or terms ought to be implied into them.

Proceedings

4. These proceedings were commenced by Part 8 Claim Form dated 20 May 2022 which is verified by a statement of truth signed by James Bercovici. The claim is supported by the witness statement of Mr Bercovici dated 5 May 2022 ('**Bercovici 1**'). Mr Bercovici is one of the present partners in the Claimant firm.

5. On 7 June 2022, in its acknowledgment of service, TBSI indicated that it intended to contest the claim and that it objected to the use of the Part 8 procedure because the claim "involves a substantial dispute as to the facts".

6. On behalf of TBSI, Zara Tamsin Owen made a witness statement dated 21 June 2022 ('**Ms Owen**'). Ms Owen is TBSI's UK and Ireland Retail Operations and Sustainability Manager.

7. On 2 December 2022, TBSI issued an application which, although I have not seen it, I infer sought orders (i) that the claim should be transferred to continue as if issued under CPR Part 7; (ii) that TBP should be required to confirm whether it admits or denies certain factual matters asserted by TBSI; and (iii) giving permission for expert evidence.

8. On 8 December 2022, the claim came before Deputy Master Hansen who gave directions and dealt with TBSI's application. Amongst other things, he:

   (i) ordered that the claim remain as a Part 8 claim;

   (ii) gave permission to TBSI to bring a counterclaim;

(iii) directed that TBSI should set out, in a statement of facts, the facts and matters on which it relies at trial as part of the admissible factual background relevant to the construction of the Agreements and the implication of the terms for which it contends and that TBP should respond to that statement, setting out which facts it admits or denies or is unable to admit or deny and setting out any other facts on which it relies;

(iv) directed that the parties disclose any documents on which they rely and any known adverse documents;

(v) refused permission for expert evidence and instead laid down a timetable for an exchange of factual evidence;

(vi) gave directions for trial including for the exchange of skeleton arguments.

9. TBSI's Counterclaim is dated 14 December 2022. It is verified by a statement of truth signed by Donna Hynes, its Director of Retail and Property.

10. TBSI's Statement of Facts and Matters is dated 16 December 2022. It, too, is verified by a statement of truth signed by Ms Hynes.

11. TBP's Statement of Facts and Matters is dated 12 January 2023. It is verified by a statement of truth signed by Mr Bercovici.

12. TBSI also relies on a witness statement made by Paul William Davies dated 8 March 2023 ('**Mr Davies**'). Mr Davies' career has been in franchising. Had TBSI succeeded in obtaining permission for expert evidence, it was Mr Davies whose report it would have served although, as was explained to the Deputy Master, the expert evidence intended was not opinion evidence but rather factual evidence about franchise agreements in the early 1980s, so as to inform the factual matrix against which the questions of construction and implication should be answered. That much can be seen from page 16 of the transcript of the hearing before the Deputy Master where some of the submissions made by Mr Cavender are recorded.

13. Mr Bercovici made a second witness statement dated 23 March 2023 ('**Bercovici 2**').

14. The trial of the claim and the counterclaim came on before me on 23 May 2023 and lasted two days. TBP was represented by Mr Simon McLoughlin of Counsel and TBSI was represented by Mr David Cavender KC. I am grateful to both of them for their helpful written and oral submissions which I have borne in mind.

Parties

15. The partners in TBP are Mr Bercovici and his sisters, Rachel Cooper and Sarah Way. The original partners in TBP were their parents, Henry and Elizabeth Jane Burke.

16. The business carried on under the name 'The Body Shop' started in 1976 when Anita Roddick opened a single store in Brighton. TBSI used to be called Nunglen Limited and for some of its life has been a public limited company although it is presently a private limited company.

Agreements

17. The Agreements are in materially identical terms. The Norwich Agreement is dated 10 April 1981 and has a commencement date of 20 March 1981. The Cambridge Agreement is dated 30 September 1982 and has a commencement date of 28 January 1982.

18. The Agreements are headed:

> "FRANCHISE AGREEMENT for the supply and sale of Body Shop Products"

19. They each bear TBSI's logo on the front page where the Particulars of the parties, the Territory, the Franchise Fee, the Operating Fee and the following text also appear:

> "AGREED that the Company GRANTS and the Operator takes an exclusive licence or franchise to sell its Products as the Operators' [sic] business in accordance with the Method in the Territory from the Operators' [sic] Premises under the Trade Name subject to the conditions endorsed hereon and to the Special Conditions annexed so far as the conditions are not inconsistent with the Special Conditions and the Surety (if any) joins in in the manner hereinafter appearing"

20. Clause 1 of the Agreements sets out definitions, the relevant ones being:

> "'The Company' means Nunglen Limited [i.e. TBSI]
>
> 'The Operator' means the person firm or body corporate named in the Particulars
>
> 'The Method' means the plan or system developed by the Company for conducting the business of the preparation and sale of cosmetics body oils perfumes and similar products whereof full particulars are set out in the Schedule
>
> 'The Products' means the products necessary for the method as the Company shall from time to time specify in its price lists
>
> 'The Trade Name' means the trade name 'The Body Shop'
>
> 'The Territory' means the Territory specified in the Particulars

> 'The Business' means the business which the Operator is licenced to carry on under the terms of this Agreement
>
> 'The Commencement Date' means the date specified in the Particulars
>
> 'The Franchise Fee' means the sum stated in the Particulars and no additional fee shall be payable if the business is condected [sic] from more than one premises in the Territory
>
> 'The Operating Fee' means the sum stated in the Particulars commencing immediately upon the signing of this Agreement unless otherwise stated in the Particulars payable monthly in arrears by Bankers Order on the First day of every month for the continuation of this Agreement such sum to be increased on the First day of January in each year by such sum as shall be equal to the percentage by which the Index of Retail Prices as published by the Department of Employment shall have increased such increase to be certified by the Company's Accountant and to be final and binding on all parties. Such Operating fee shall continue to be paid during the continuation of the Agreement whether extended by further agreement of the parties or otherwise but no additional fees shall be payable if the business if conducted from more than one premises in the Territory"

21. Clause 2 provides:

> "THE Company hereby grants and gives unto the Operator during the continuance of this Agreement the exclusive franchise or licence to operate in the Territory a retail business for the sale of the Products under the Trade Name in accordance with the Method on the terms and conditions herein contained"

22. Clause 3 provides:

> "(a) This Agreement shall come into force on the Commencement Date and shall continue in force for a period of Five Years thereafter (subject nevertheless to prior determination in accordance with the Clause 11 hereof) provided that the Operator shall be entitled to terminate this Agreement on any anniversary of the Commencement Date by giving to the Company at least one month's prior written notice of termination and any such termination shall be without prejudice to the rights of either party hereto in respect of any antecedent breaches of the terms of this Agreement PROVIDED ALWAYS in the event of the Company's industrial property rights being declared invalid the Operator may give one months [sic] prior written notice of termination

> (b) The Operator shall be entitled to extend the term of this Agreement on the same terms and conditions as are herein provided including the provisions of this Clause for a further period of Five Years from the expiration of the term of this Agreement by giving to the Company a written notice at least three months before the expiration of the term of this Agreement requiring such extension and subject to the Operator having complied with its obligations hereunder in all respect this Agreement shall be extended for a further period of five years from the expiration of the current term"

23. Clause 4 provides:

> "THE Company will not during the continuance of this Agreement operate or licence or permit any other person with its Agreement to operate within the Territory any business using the Method under the Trade Name involving the sale by retail or otherwise of all or any of the Products"

24. Clause 7 sets out TBP's covenants and provides, amongst other things that:

> "DURING the continuance of this Agreement the Operator will…
>
> (iii) Conduct the Business in an orderly and businesslike manner and in compliance with all such policies and operating standards contemplated by the Method and generally maintain the standards of quality of the Method…"

25. Clause 11 provides:

> "THE Company shall be entitled to terminate this Agreement and all licences and permissions given hereunder by not less than twenty eight days [sic] notice in writing in any of the following events
>
> (i) If the Operator shall fail to pay to the Company within seven days of the due date any sums due and owing to the Company hereunder or shall fail in any material respect to perform any of its obligations hereunder or shall commit any other material breach within twenty eight days of notice from the Company requiring such payment or remedy
>
> (ii) If the Operator if a limited company shall go into liquidation either voluntary or compulsory save for the purpose of reconstruction or amalgamation or otherwise if not a company be adjudged bankrupt or if a receiver shall be appointed in respect of the whole or any part of its or their assets or if the

> Operator shall make an assignment for the benefit of its or their creditors generally"

26. Clauses 14 and 15 provide:

> "14 THE Company may from time to time improve the Method or any part thereof PROVIDED such improvements or developments to the Methods shall be as from time to time mutually agreed by the Company and the Operator such agreement not to be unreasonably withheld and the Method so changed or amended from time to time shall be for all purposes the Method referred to in this Agreement
>
> 15 ANY improvements to the Method either by the Company or the Operator shall be deemed to be included and be incorporated in the Method under this Agreement"

27. Clause 19 provides:

> "(i) This Agreement and all rights hereunder may be assigned or transferred by the Company and shall enure for the benefit of the Company's successors in title provided that if the Company ceases to carry on or be concerned or interested in the business in such circumstances where all or any of the obligations on the part of the Company herein contained are not assigned or transferred to or accepted by a third party then the Company shall forthwith disclose to the Operator full details of the formula and materials used in the manufacture of the products
>
> (ii) This Agreement and all rights and licences granted to the Operator hereunder may be assigned transferred mortgaged charged or sub-licenced with the consent of the Company such consent not to be unreasonably withheld or delayed
>
> (iii) This Agreement and the said Schedule hereto and any special conditions therein contained is the entire agreement between the parties hereto as to the subject matter hereof and no amendment hereto shall be effective unless in writing and signed by or on behalf of each of the parties"

28. Each Agreement required the payment of a Franchise Fee of £1,000. The Operating Fee under the Norwich Agreement started at £13.28 per week. Under the Cambridge Agreement it started at £14.87 excluding VAT per week.

Extensions of the Norwich Agreement

29. It is common ground that, until the present dispute arose, the Norwich Agreement had been extended for successive five-year terms.

30. By letter dated 3 December 1996, addressed to John Seymour at Seymour Burke Limited, TBSI's in-house solicitors Nigel Wigin said:

> "**RE: NORWICH**
>
> Further to my letter to you yesterday and our subsequent telephone conversation this morning I can confirm that this Company recognises the current partners in the Burke Partnership namely HC Burke, EJ Burke, RH Woolterton, SJ Way and JD Burke as the Operator in the Franchise Agreement for the above territory dated 10th April 1981 in substitution for Mr and Mrs H Burke.
>
> As confirmed to you in my letter of 2nd February 1996 the current franchise term is for a period of five years from 20th March 1996.
>
> Since only Henry Burke signed the original Franchise Agreement could you please arrange for the enclosed copy of this letter to be signed by all the current partners of the Burke Partnership in recognition of the fact that the Operator has changed and that they are jointly and severally liable for the obligations of the operator under the Franchise Agreement. Once the duplicate of this letter has been signed could you please return it to me."

31. There was space for Henry Burke to sign the letter, which he did. I have not seen the other partners' signatures. The reference to JD Burke is a reference to how Mr Bercovici was known at the time.

32. Then, dated 5 August 1998, there was a further, one-page written agreement which read as follows:

> "**Re: Franchise Agreement Dated 10th April 1981**
>
> Whereas The Body Shop International plc ('BSI') entered into a Franchise Agreement with Mr. and Mrs. H. Burke on the 10th April 1981, which such Agreement is now held by H.C. Burke, E.J. Burke, R.H. Hall, S.J. Way and J.D. Burke as the Operator specified therein. The Franchise Agreement specified the Territory as 'Norwich' and the exact boundaries of such Territory have never been mutually agreed.
>
> BSI and the Operator now wish to acknowledge their agreement as to the extent of the Territory specified in the Agreement as 'Norwich'. BSI and the Operator now acknowledge that the Territory comprises the postal code areas of NR1, NR2, NR3, NR4, NR5, NR6, NR7, NR8, NR9, NR10, NR11, NR12, NR13, NR14, NR15, NR18, NR26, NR27 and NR28 shown for identification only edged red on the plan annexed hereto."

33. The document was signed on behalf of TBSI and by each of the then partners in TBP.

34. On 6 December 2005, TBSI wrote to TBP, naming all the partners as the Operator, in the following terms:

> "**Norwich Franchise Agreement**
>
> We are in receipt of your letter of 1 December 2005 and can confirm that the term of the Franchise Agreement dated 20 March 1981 (as amended by the letters dated 3 December 1996 and 5 August 1998) between The Body Shop International plc and the Operator (as defined above) is extended for a further period of 5 years from 20 March 2006."

35. As I understand it, it has not been possible to find a copy of the letter of 1 December 2005.

36. On 1 December 2010, TBP wrote to TBSI requiring the extension of the Norwich Agreement:

> "**Norwich Franchise Agreement**
>
> Please extend the term of the above agreement by a further period of five years in accordance with Clause 3 (b) of our agreement dated 20th March 1981.
>
> We shall be obliged if you will confirm this in writing at your earliest opportunity."

37. TBSI replied on 14 December 2010, addressing its letter to the then partners:

> "**Norwich Franchise Agreement**
>
> We are in receipt of your letter of 1st December 2010 and can confirm that the term of the Franchise Agreement dated 20th March 1981 (as amended by the letters dated 3rd December 1996 and 5th August 1998) between The Body Shop International plc and the Operator (as defined above) is extended for a further period of 5 years from 20th March 2011."

38. The next available document is the letter from TBSI to TBP dated 10 December 2015:

> "**Franchise Agreement between The Body Shop International plc ('we'; 'us'; the 'Company') and The Burke Partnership ('you'; the 'Franchisee') dated 20th March 1981 (the 'Agreement')**

> I refer to your letter of 2nd December 2015. I am pleased to confirm the extension of the term of the Agreement by a period of five years pursuant to clause 3(b) thereof."

39. Most recently, TBP requested a further extension of the Norwich Agreement, by letter dated 1 December 2020:

> "**Norwich Franchise Agreement**
>
> Please extend the term of the above agreement by a further period of five years in accordance with Clause 3 (b) of our agreement dated 20th March 1981.
>
> We shall be obliged if you will confirm this in writing at your earliest opportunity."

40. TBSI refused by letter dated 6 June 2021:

> "**Norwich Franchise Agreement of 20th March 1981 ('Agreement') – NOTICE OF TERMINATION**
>
> The agreement was entered into between the parties, The Body Shop International Limited, originally Nunglen Limited, (the 'Company'), and The Burke Partnership, originally Mr and Mrs H. Burke, (the 'Partnership'), over forty years ago. It has been renewed over the years by the Partnership providing the Company with notice that it wished to renew for periods of five years. Earlier this year, the parties agreed to extend the current term for a period of three months, until 20th June 2021, in order to consider the terms of a new Franchise Agreement and/or a 'buy-back' of the Franchise business.
>
> The Company considers that the Agreement is no longer fit for purpose, as it no longer properly reflects the System of operating The Body Shop business, as it has been developed over decades, and can no longer serve as a contractual basis for trading under The Body Shop brand.
>
> The Company had hoped that the parties could mutually agree terms of a new Franchise Agreement, but it was made it clear [sic] that the Partnership was not prepared to change any terms relating to the Territory, nor to the fact that the current terms enabled the Agreement to be renewed, on unilateral notice from the Partnership, for periods of five years. The difference in expectation between the parties also means that there is little prospect of an agreement on the value of the Franchise business and so no possibility of a buyback.
>
> There is no contractual provision in the Agreement for the Company to be able to serve notice on the Partnership (other than

> those set out in clause 11), nor to be able to refuse to accept the renewal provided that the relevant notice was provided. Therefore, the term of the Agreement has been rendered indefinite, subject to termination under English law principles, on reasonable notice. Taking into consideration the long association between the Company and the Partnership, the Company believes that an appropriate and fair period of notice would be three years.
>
> We hereby give you three year's [sic] notice of termination of the Agreement, with the effective date of termination therefore being the 10th June 2024."

Extensions of the Cambridge Agreement

41. Likewise, it is common ground that, until the present dispute arose, the Cambridge Agreement had been extended for successive five-year terms.

42. There is a letter dated 3 December 1996 which reads as follows:

> "**RE: CAMBRIDGE**
>
> Further to my letter to you yesterday and our subsequent telephone conversation this morning I can confirm that this Company recognises the current partners in the Burke Partnership namely HC Burke, EJ Burke, RH Woolterton, SJ Way and JD Burke as the Operator in the Franchise Agreement for the above territory dated 30th September 1982 in substitution for Mr and Mrs H Burke.
>
> In specific response to your letter of 28th October 1996 I confirm that the Franchise Agreement is renewed for a further period of five years from 28th January 1997.
>
> Since only Henry and Jane Burke signed the original Franchise Agreement could you please arrange for the enclosed copy of this letter to be signed by all the current partners of the Burke Partnership in recognition of the fact that the Operator has changed and that they are jointly and severally liable for the obligations of the Operator under the Franchise Agreement. Once the duplicate of this letter has been signed could you please return it to me."

43. As with the similar letter in respect of the Norwich Agreement, there was space for Henry Burke to sign the letter, which he did. I have not seen the other partners' signatures. The reference to JD Burke is, again, a reference to how Mr Bercovici was known at the time.

44. Then, dated 5 August 1998, there was a further, one-page written agreement which read as follows:

> "**Re: Franchise Agreement Dated 30th September 1982**
>
> Whereas The Body Shop International plc ('BSI') entered into a Franchise Agreement with H.C. and E.J. Burke on the 30th September 1982, which such Agreement is now held by H.C. Burke, E.J. Burke, R.H. Hall, S.J. Way and J.D. Burke as the Operator specified therein. The Franchise Agreement specified the Territory as 'Cambridge' and the exact boundaries of such Territory have never been mutually agreed.
>
> BSI and the Operator now wish to acknowledge their agreement as to the extent of the Territory specified in the Agreement as 'Cambridge'. BSI and the Operator now acknowledge that the Territory comprises the postal code areas of CB1, CB2, CB3, CB4, CB5 and CB10 (Sector 10) shown for identification only edged red on the plan annexed hereto."

45. The document was signed on behalf of TBSI and by each of the then partners in TBP.

46. Next is a letter from TBSI addressed to the current members of TBP which reads as follows:

> "**Cambridge Franchise Agreement**
>
> We are in receipt of your letter of 4 October 2016 and we can confirm that the term of the Franchise Agreement dated 30th September 1982 (as amended by the letters dated 3rd December 1996 and 5th August 1998) between The Body Shop International plc and the Operator (as defined above) is extended for a further period of 5 years from 28th January 2017."

47. On 13 September 2021, TBP wrote to TBSI requesting a further extension:

> "**Cambridge Franchise Agreement**
>
> Please extend the term of the above agreement by a further period of five years in accordance with Clause 3 (b) of our agreement dated 28th January 1982.
>
> We shall be obliged if you will confirm this in writing at your earliest opportunity."

48. That was met with a refusal dated 27 September 2021:

> "**Cambridge Franchise Agreement of 28th January 1982 ('Agreement') – NOTICE OF TERMINATION**
>
> Thank you for your letter dated 13th September 2021, seeking an extension of the Agreement.
>
> However, further to our recent discussions regarding the franchise agreement for Norwich and the possibility of entering into a more up-to-date agreement or the potential of a 'buy-back' of the franchise for both Norwich and Cambridge, we do not agree to extend the Agreement.
>
> As previously stated, the Company considers that the Agreement is out of date and no longer fit for purpose.
>
> There is no contractual provision in the Agreement for the Company to be able to serve notice on the Partnership (other for breach of contract [sic]), nor to be able to refuse to accept the renewal provided that the relevant notice was provided. Therefore, the term of the Agreement has been rendered indefinite, subject to termination under English law principles, on reasonable notice. Taking into consideration the long association between the Company and the Partnership, the Company believes that an appropriate and fair period of notice would be three years.
>
> We hereby give you three year's [sic] notice of termination of the Agreement, with the effective date of termination therefore being the 27th January 2025."

Issues between the Parties

49. I turn to the issues as identified by the Parties.

50. The first is as to the true construction of clause 3(b) of the Agreements. Does it provide for an initial period of five-years with one, single five-year extension or does it provide for repeated five-year extensions?

51. This issue arises from the way in which TBP put its claim in the Claim Form. It was not until its solicitors' letter of 10 May 2023 that TBSI suggested that clause 3(b) limited TBP to only one renewal of the term of the Agreements. Even though that was done very close to the start of the trial, TBP did not seek an adjournment. TBP and TBSI were content for me to decide the construction question. TBP raised in its skeleton argument the possibility that there would need to be a further trial, with other evidence, if I decided the question of construction in TBSI's favour, about a possible estoppel. Whilst TBSI did not agree that there would need to be a further trial, it confirmed that it would not object to the court giving directions for such a further trial.

52. The second is whether it is a term of the Agreements, whether upon their true interpretation or by reason of implication, that after the expiry of a reasonable time, the Agreements are terminable by TBSI on reasonable notice.

53. This issue comes from paragraph 3(a) of TBSI's Counterclaim. I return in paragraphs 89 and 95 to 98 below to the way in which this issue was developed in Mr Cavender's skeleton argument, which contemplates the implication of such a term into a different agreement.

54. TBP denies that the Agreements contain the implied term for which TBSI contends but, if they do, concedes that the three-year periods given by the letters of 6 June 2021 and 27 September 2021 are reasonable notice periods.

Evidence

55. There were witness statements from:

    (i) Mr Bercovici, dated 5 May 2022. He is one of the current partners in TBP;

    (ii) Ms Owen dated 21 June 2022. She is presently TBSI's UK and Ireland Retail Operations and Sustainability Manager;

    (iii) Mr Davies, dated 8 March 2023. His working life since 1984 has been in franchising and he now operates his own business called Brand Mark Franchising which assists would-be franchisors;

    (iv) Mr Bercovici, dated 23 March 2023.

56. None of these witnesses were able to give me any direct evidence of the factual circumstances at the time the Agreements were entered into.

57. Mr Bercovici was able to provide some history about his parents' experience and the availability of premises in Cambridge and Norwich. He candidly explained that he placed particular reliance on what he had been told by his parents whilst he was growing up. Mr Cavender did not wish to cross-examine Mr Bercovici. I therefore took his unchallenged evidence as read.

58. Ms Owen started her employment with TBSI as an assistant manager of a franchise store in Worthing which was bought back by TBSI; she had been working in the same role for the former franchisee since 1998. She worked her way up to starting her present role in April 2022. Since 2018, whatever her role, she has acted as a point of liaison with franchisees. She acquired her knowledge of TBSI's business prior to her joining in 1998 from what she was told by others. Her evidence has not assisted me in resolving the dispute between the parties.

59. As mentioned in paragraph 7 above, it appears that, by an application notice dated 2 December 2022, TBSI sought permission to rely on expert evidence. I have not seen the application notice itself, or any supporting evidence. I have, however, seen the parties' skeleton arguments for a directions hearing on 8 December 2022 before Deputy Master Hansen, as well as the transcript of those proceedings.

60. As recited in Mr McLoughlin's skeleton argument for that hearing, TBSI sought an order granting permission for each party to adduce oral expert evidence "on the state of the retail and franchising markets in the early 1980s." Mr Cavender's skeleton argument for that hearing suggests that:

> "the background available to the Court to determine the issue of implied terms is likely to be improved if supplemented by an expert in franchise agreements with experience of the market when the Agreements were executed. This is because there is a hole in the evidence – in terms of the corporate memory on either side going back to the early 1980's. Such experts do exist and he/she would, for example, be able to give factual evidence about the state of the franchise market back in the early 1980's and opinion evidence on matters such as bargaining position of the parties in the circumstances that then existed."

61. At the hearing on 8 December 2022, Mr Cavender changed tack somewhat, saying that he was not "wedded to necessarily the expert evidence element" but rather could simply adduce evidence in support of TBSI's counterclaim, for which permission was given at the hearing.

62. When I asked Mr Cavender whether Mr Davies was being proffered as a factual or expert witness, Mr Cavender confirmed that he was a witness of fact: he had expertise in franchising in and around the time the Agreements were entered into, which was at the early inception of franchising. Mr Cavender told me that I could infer from Mr Davies' evidence what was going on at the time, what was known to businesspeople at the time. He rightly accepted that Mr Davies' opinion was not admissible.

63. Nonetheless, Mr Davies' witness statement has the flavour of an expert's report. Mr Davies has no knowledge of the particular circumstances relevant to the parties' entry into the Agreements. He was unable to give any general evidence about the franchising market at the time the parties entered into the Agreements because he did not start working in franchise businesses until 1984 and his knowledge has been built up over the forty years thereafter.

64. Mr McLoughlin was able to demonstrate, through his cross-examination of Mr Davies, that Mr Davies' experience was in different sectors (primarily food and beverage) and that, by way of example, his experience was with organisations that were more established than TBSI when the Agreements were entered into and that TBSI's messaging and branding were particularly important beyond simply making money. Whilst Mr Davies was doing his best to assist me and gave his evidence in a straightforward manner making sensible concessions during cross-examination, ultimately his evidence did not assist me to determine the issues between the parties.

65. Included in the bundle for the hearing before me were extracts from a book by Ms Anita Roddick, the founder of TBSI, entitled "Body and Soul". The index to the trial bundle suggests that the book dates from 1991. It is, therefore, a commentary from the founder of TBSI written some ten years after the parties

entered into the Norwich Agreement. The accuracy of what is recorded in the passages included in the trial bundle has not been challenged. They are the only documentary evidence put before me of the situation in TBSI's early days, which was when the Agreements were entered into. I treat the extracts from "Body and Soul" as or akin to hearsay evidence and nothing has been suggested to me which would undermine its reliability, even though it has not been subjected to cross-examination. I have taken it into account when considering the factual matrix which pertained at the time the Agreements were entered into.

Construction before implication

66. In *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 71 [2016] AC 742, Lord Neuberger PSC said at [27]-[28]:

> "… that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing the words, as the words to be implied are ex hypothesi not there to be construed … In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term … Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point … to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of interpretation."

67. This approach was endorsed in the Court of Appeal in *Bou-Simon v BGC Brokers LP* by Asplin LJ (with whom the other members of the Court agreed) at [13] and in the Supreme Court in *Duval v 11-13 Randolph Crescent Ltd* [2020] UKSC 18 [2020] AC 845 by Lord Kitchin at [26].

68. There was a debate before me as to whether this distinction applied when considering whether to imply a term for termination on reasonable notice. That debate originated in a distinction between the approach taken in *Lewison on the Interpretation of Contracts*, 7th ed. (which supported the distinction between construction and implication) and *Chitty on Contracts*, 34th ed. (which suggested that the question was better regarded as depending on the true construction of the agreement in question).

69. Mr McLoughlin preferred to maintain the distinction. Mr Cavender declared himself relatively agnostic about it but preferred the approach taken in *Chitty* and pointed out that the authorities relied on in *Chitty* were not cited in the *Marks and Spencer* case.

70. For my part, I consider that I am bound by the decisions in *Marks and Spencer* and *Duval* to approach the questions separately even where the term sought to be implied is for termination on reasonable notice and I do so.

71. The factual matrix is relevant to both issues and so I turn to that next.

Factual matrix

72. At the hearing on 8 December 2022, Deputy Master Hansen directed that TBSI should set out in a statement of facts, the facts and matters on which it relies as part of the admissible factual background relevant to the construction of the Agreements and the implication of the term for which it contends. TBP was directed to respond.

73. In its statement of facts and matters, TBSI asserts that it "intends to prove these facts and matters at trial by adducing witness evidence … by relying on documentary evidence, by seeking acceptance of them in cross-examination of the Claimant's witnesses, by averring that they are obvious or of common knowledge at the time of the Agreements were entered into, and/or by averring that they can be inferred from other proven facts or matters."

74. Having considered the evidence available to me, I find the factual matrix for the Norwich Agreement to be as follows:

    (i) franchising was in its infancy when the Norwich Agreement was entered into;

    (ii) neither party had much if any experience of franchising;

    (iii) neither party contemplated how the franchising arrangement might develop;

    (iv) the partners in TBP (as then constituted) had retail experience but not in the sale of TBSI's products;

    (v) TBSI was a relatively young company with a limited track record but with a commercially attractive proposition, having been going for about 5 years;

    (vi) there had been no stores trading as "The Body Shop" in Norwich or Cambridge prior to TBP being granted the relevant franchises to operate them;

    (vii) TBSI's attitude was not one motivated solely by income; its desire was to expand its brand and spread its message;

(viii) the name "The Body Shop" belonged to and was ultimately controlled by TBSI;

(ix) there was risk to both TBSI and TBP in entering into the Norwich Agreement: TBSI put its brand at risk; TBP bore the financial risk in setting up the Norwich store and then running it.

75. The only difference by the time the Cambridge Agreement was entered into was that the Norwich store had been operating for a little more than one year.

76. In my judgment, the evidence does not entitle me to make any further findings of fact about the background against which the Agreements were entered into.

Construction of clause 3(b) of the Agreements: principles

77. The proper approach to the construction of contracts appears in a series of recent cases including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36 [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [2017] AC 1173. A "simple distillation" of the principles, to which both Mr McLoughlin and Mr Cavender referred me, was set out by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [18]-[19]:

> "18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean [sic]. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subject evidence of any party's intentions;
>
> ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties

meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again, save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court things they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

> vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.
>
> 19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean [sic]. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

78. In support of the proposition that the exercise is an iterative process, Mr Cavender drew my attention to the decision of the Supreme Court in *Re Sigma Finance Corp (in administrative receivership)* [2009] UKSC 2 [2010] 1 All ER 571, a case about the meaning of a particular clause of a security trust deed. At [12] Lord Mance said:

> "… the resolution of an issue of interpretation in a case like the present is an iterative process, involving 'checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences' …"

79. Mr Cavender also reminded me that, where there are two possible constructions of a clause the court should choose the one which properly reflects the factual matrix and commercial common sense, rejecting the one which would produce extreme and unexpected results; the more extreme the result the more easily the court will reject it: see Lord Reid's speech in *Schuler AG v Wickman* [1974] AC 235 at 251E and Lord Diplock's speech in *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)* [1985] 1 AC 191 at 201D-E.

80. Mr McLoughlin reminded me that there is a limit to any appeal to commercial common sense. He referred to Lord Neuberger's speech in *Arnold v Britton* at [17] and following, the points made there being included in Carr LJ's simple distillation set out above.

81. Mr Cavender also pointed out that, if there is uncertainty about the meaning of a clause, it should be construed against the party seeking to rely on it: see the

words of Moore-Bick LJ in *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] 2 Lloyd's Rep 216 at 223, col 2. If the case of the party seeking to rely on the clause in question would result in a departure from the obligations that might ordinarily be assumed under a contract of the kind in question, the more significant that departure the more difficult it would be to persuade the court that the parties intended that result.

Construction of clause 3(b) of the Agreements: parties' competing cases

82. TBP's case was that the ordinary and natural meaning of clause 3(b) is clear. The parties agreed that TBP should be entitled to extend the term of the Agreement "on the same terms and conditions as are herein provided including the provisions of this clause". That meant, in effect, that by giving the requisite notice and assuming TBP had complied with its other obligations under the Agreement, it was entitled to a further five-year term. Because the terms and conditions applicable to that extended term were the same as set out in the Agreement "including the provisions of this clause," it followed that each extension was on terms that entitled TBP to a further extension as long as it had given notice and complied with its obligations. TBP was not entitled to renew in perpetuity because it had to comply with its obligations under the Agreements. If, for example, TBSI changed the Method that TBP was required to follow but TBP did not do so, it would not be entitled to an extension of the term.

83. TBSI's case was that clause 3(b) provides for one single five-year extension and no more. It said that it was not expected that parties to commercial contracts expected them to run in perpetuity. The wording of clause 3 referred to an extension of the term in the singular sense and referred expressly to "extending the term" rather than using the word "renewal".

84. As for the words "including the provisions of this Clause" TBSI said that they were aimed at ensuring, during any extended term, the preservation of TBP's rights to terminate either on the anniversary of the Commencement Date on one month's notice or if TBSI's industrial property rights were declared invalid, but no more. They were not, TBSI said, aimed at providing a perpetual right of renewal and, because that would have been an extraordinary right to grant, would have said so expressly had that been the parties' intention using words such as "including the right to extend". That was supported, on TBSI's case, by the reference in the clause requiring the payment of the Operating Fee by the reference to "further agreement of the parties" which phrase was at odds with a right repeatedly to renew for five-year terms. Further, the absence of an express right on TBSI's part to terminate was explicable: where the total length of the Agreement could be no greater than five years (the initial term) plus five years (the single extension) there was no need for TBSI to be able to terminate without cause. Thus, said TBSI, there were rival constructions of clause 3(b) and in particular the words "including the provisions of this clause" and the court should choose the one which properly reflected the factual matrix and commercial common sense, rejecting the one that would produce extreme and unexpected results; the more extreme the result, the more easily it would be rejected by the court. When the rival interpretations were considered, that contended for by TBP was uncommercial and unreasonable should be rejected;

no objective person in 1981 could have thought that the parties intended that TBP could renew the Agreements in perpetuity whilst also being able to terminate on the anniversary of the Commencement Date on one month's notice. If clause 3 is ambiguous then it ought to be construed against TBP because it is TBP which seeks to rely on it and the result for which TBP contends is a very significant departure from the obligations that might ordinarily be assumed under franchise agreements.

85. As for TBSI's right to alter the Method, Mr Cavender said that that was aimed at making relatively minor changes and was not aimed at enabling TBSI to make "big changes" for example to move the business entirely online and do away with physical shops.

Construction of clause 3(b) of the Agreements: conclusion

86. In my judgment, on its true construction, the Agreements do not limit TBP to one single extension of its original five-year terms. Rather, TBP was entitled to give to TBSI a written notice at least three months before the expiration of the original term of the Agreements, requiring an extension for a further five years. It was then entitled to do likewise towards the end of the second five-year term of the Agreements, and so on.

87. I reach that conclusion for the following reasons:

(i) TBP is not entitled to renew the Agreements in perpetuity. Rather, there is a mechanism which must be followed (the giving of notice at least three months before the expiry of the current term) and TBP must have complied with its obligations under the Agreements in all respects. The Agreements themselves are not perpetual but rather last for a five-year term which TBP might seek to extend;

(ii) the phrase "including the provisions of this Clause" was included in clause 3(b) by TBSI's solicitor and must have been included for a reason. The phrase cannot be read as referring solely to clause 3(a) of the Agreements, as Mr Cavender contends. Rather, on their natural reading those words refer to either clause 3 as a whole or clause 3(b). I disagree that, in order to confer a repeated right to seek to extend, the Agreements would have to have included some wording making that express. The words "including the provisions of this Clause" make it clear that the right to seek to extend the term of the Agreements is repeated upon each successive extension. The natural meaning of those words is clear and even were it to be said to be commercially disadvantageous to TBSI that is not a reason to depart from that meaning. It may (and I express no view either way) now have turned out to have been imprudent for TBSI to enter into the Agreements but that is not a reason in this case to reject the natural meaning of the words used;

(iii) there was no purely commercial imperative for TBSI to enter into the Agreements. Its desire was to expand its brand and message. Neither TBSI nor TBP had contemplated the development of their arrangements when they entered into the Agreements. There is therefore nothing

uncommercial from either party's perspective of TBP having the right to seek to extend each successive five-year term. Whilst it might now be said that a franchising agreement would not be subject to the possibility of repeated extensions, the position was different when these parties entered into the Agreements in 1981 and 1982 as can be seen from the factual matrix;

(iv) Mr Cavender's argument, that parties to commercial agreements would not intend them to run in perpetuity (and were the Agreements to be construed as such that would be uncommercial and unreasonable), falls down because the Agreements were not intended to run in perpetuity;

(v) TBSI was not left without any ability to bring the Agreements to an end. It had express rights under clause 11 to do so and was able to alter ("improve") the Method (see clauses 14 and 15) with which TBP was obliged to comply (see clause 7(iii)). Changes to the Method might provoke a further dispute but that does not mean that TBSI is not (subject to agreeing the changes with TBP) entitled to alter it or faces limitations in the scope of the changes it might make;

(vi) That the Agreements may no longer be "fit for purpose" (that being TBSI's purpose) is by the by and TBSI's reliance on that point illustrates that, despite having agreed several extensions, it has now decided that it no longer wishes to be bound by the Agreements. That, no doubt, is for commercial reasons. But that does not absolve it of the bargains it made with TBP when it entered into the Agreements on terms its own solicitor had drafted.

88. If I am wrong to reject Mr Cavender's characterisation that the Agreements could be renewed in perpetuity then I would still reach the same conclusion as to their true construction. It might be said now that, ordinarily, commercial parties would not enter into franchising agreements where the extension and termination provisions were not well-balanced (or even where they failed to favour the franchisor) and that it is surprising that TBSI has only limited ability to bring the Agreements to an end. But that would be to construe the Agreements with hindsight or, put another way, retrospectively to invoke commercial common sense. Looking at the factual matrix at the time, it is clear, on the wording of the Agreements that the parties intended for TBP to be able repeatedly to seek their extension.

89. It follows that I do not need to consider TBSI's position as set out in paragraph 16 of Mr Cavender's skeleton argument:

> "…the subsequent extensions (after the expiry of the original 5-year term and a 5 year extension) have been extensions for periods of five years on the mistaken understanding of the legal rights of the parties under the Agreement. When the Claimant recently sought to extend the Agreements for further periods of 5 years that request was denied by The Body Shop. Accordingly, the proper analysis is that:

(1) the Agreements are currently operating at will for an undefined period, which contract is capable of being terminated on reasonable notice – as set out in the Termination Notices; or

(2) the 3 year notice given by The Body Shop in its letters of 6 June 2021 (Norwich) and 27 September 2021 (Cambridge) is tantamount to the grant of a fixed term of 3 years which automatically expires at the end of that term - by effluxion of time."

90. For completeness, however, had I been required to make a decision about the arrangements which currently pertain, I would have preferred the former analysis because it most comfortably reflects the parties having reached an accord that there should be successive five-year terms and even though to have done so would have required a further inquiry into the terms of the agreement between the parties.

Implication of terms: principles

91. Conveniently, the relevant principles were recently considered in *Yoo Design Services Limited v Iliv Realty PTE Limited* [2021] EWCA Civ 560 by Carr LJ at [47]-[51]:

"**The law on implied terms**

47. The implication of contractual terms involves a 'different and altogether more ambitious undertaking' than the exercise of contractual interpretation which identifies the true meaning of the language in which the parties have expressed themselves: the interpolation of terms to deal with matters for which, ex hypothesi, the parties have themselves made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of the 'extraordinary' power so to intervene (see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 ('*Marks & Spencer*') at [29] (citing Sir Thomas Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 481)).

48. Those constraints have been the subject of well-known scrutiny by the courts (see the classic statements in *The Moorcock* [1889] 14 PD 64 ('*The Moorcock*') at 68 per Bowen LJ; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at 605 per Scrutton LJ and *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227 per Mackinnon LJ). The later Privy Council decision in *BP Refinery (Westernport) Pty Ltd v*

The President Councillors and Ratepayers of the Shire of Hastings ('*BP Refinery*') (1977) 180 CLR 266 deserves particular mention. There Lord Simon (delivering the majority judgment) stated (at 283):

> '…for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract'.

49. The leading authority from recent times is *Marks & Spencer*, where the Supreme Court approved the remarks of Lord Simon in *BP Refinery*, albeit subject to qualification and observation. Amongst other things, (at [21]) Lord Neuberger questioned whether a requirement that the term to be implied had to be 'reasonable and equitable' would usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Lord Neuberger also commented that he suspected that, whilst the requirements of business efficacy and obviousness could be alternatives in the sense that only one need be satisfied, it would be a rare case where only one of those two requirements would be satisfied.

50. Since the analysis of Lord Neuberger in *Marks & Spencer* (at [15] to [31]) the Supreme Court and Privy Council have consistently made it clear that whether or not a term falls to be implied is to be judged by reference to the test of business efficacy and/or obviousness (see for example *Hallman Holding Ltd v Webster* [2016] UKPC 3 (at [14]); *Airtours Holiday Transport Ltd v HMRC* [2016] UKSC 21; [2016] 4 W.L.R. 87; [2016] 4 All ER 1 (at [38]) and *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] UKSC 57; [2016] 3 WLR 1422; [2017] AC 73 (at [31]). *In Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2 at [7], Lord Hughes commented:

> 'It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the

> contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.'

51. In summary, the relevant principles can be drawn together as follows:

i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;

ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;

iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;

iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;

v) A term will not be implied if it is inconsistent with an express term of the contract;

vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by

reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;

vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;

viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

92. In paragraph 66 of his skeleton argument and paragraph 48 of his closing note, Mr McLoughlin also referred me to a number of other principles arising from the relevant authorities:

(i) where a contract has no express provision for termination, the Court may be willing to imply a power to determine it on reasonable notice: *Staffordshire AHA v South Staffordshire Waterworks Co.* [1978] 1 WLR 1387;

(ii) where the contract is not for an unlimited time, but is for a fixed term, there is no room implying further terms as to the termination of the agreement: *Kirklees Metropolitan BC v. Yorkshire Woollen District Transport Co Ltd* (1978) 77 LGR 448 at 453-4 and *Jani-King (GB) Ltd v. Pula Enterprises Ltd* [2007] EWHC 2433 (QB) at [60] to [66];

(iii) even if a contract is expressed to endure for an unlimited time, that does not necessarily mean that it is terminable on reasonable notice: *Harbinger UK Ltd v. GEI Information Services Ltd* [2001] 1 All ER (Comm) 166, CA at [16] to [20];

(iv) where an agreement already contains express terms for termination – and the parties have therefore given careful consideration to defining the circumstances in which the agreement should be terminated – it will be

especially difficult to imply further such terms: *Jani-King* at [64]; *ServicePower Asia Pacific Pty Ltd v. ServicePower Business Solutions Ltd* [2009] EWHC 179 (Ch) at [23] to [31]; and *Colchester & East Essex Co-op Ltd v. Kelvedon Labour Club & Institute Ltd* [2003] EWCA Civ 1671 at [8] to [12].

93. Mr McLoughlin went on, in paragraph 67 of his skeleton argument and paragraph 49 of his closing note, to illustrate the application of those principles in the *Jani-King* case in the specific context of franchising. In particular, he pointed to [60]-[64] of HHJ Coulson QC's decision.

94. I was also referred to other cases in which terms were implied: *Winter Garden Theatre (London) Limited v Millenium Productions Limited* [1948] AC 173 and *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556. Those cases turn on their facts and I did not find them of assistance.

Implication: the parties' cases

95. TBSI says that the need to imply a term arises if TBP's case as to the true construction of clause 3 of the Agreements succeeds or if TBSI's construction is correct but the present arrangement represents a contract at will which requires a notice of termination to bring it to an end. This is set out in paragraph 44 of Mr Cavender's skeleton argument.

96. I note that TBSI's counterclaim asks only for a term to be implied into the Agreements. No doubt that is because the counterclaim pre-dates by about six months TBSI's decision to run a case as to the true construction of clause 3(b) as set out in its solicitors' letter of 10 May 2023.

97. TBP did not suggest to me that TBSI was not entitled to put its case the way it is expressed in Mr Cavender's skeleton argument in the light of the way it pleaded its Counterclaim or by reason of Mr Cavender's oral submission that the term sought by TBSI was set out in paragraph 3(a) of its Counterclaim.

98. However, because I have rejected TBSI's case on construction and with it the suggestion that there was some other arrangement which currently governs the parties' relationship, it is only into the Agreements themselves that any term could be implied.

99. TBSI contends that a term should be implied that upon the expiry of a reasonable time TBSI is entitled to give TBP reasonable notice to terminate the Agreements. It says that such a term ought to be implied on the basis that it is obvious and/or necessary for business efficacy because otherwise it would lack commercial coherence. Two points were made in support of that proposition. First, it was said that that without the term the parties' commercial relationship would be "hugely imbalanced" and that it is needed to prevent the Agreements running in perpetuity, in conflict with the balance of power at the inception of the Agreements and contrary to the factual matrix. Second, it was said that the Agreements lacked machinery to enable the updating of their core terms. TBSI says that the Agreements are "hopelessly out of date" (lacking terms necessary for a modern franchise agreement e.g. those necessitated by recent legislation

on data protection or bribery and failing to reflect the "multi-channel way that the business of The Body Shop is delivered in 2021"). It acknowledges that that is the problem which has provoked the parties' dispute; the fact that they have been unable to agree terms for an up-to-date franchise agreement "clearly demonstrates the necessity of implying the reasonable notice term."

100. Mr Cavender then referred me to the decision of Buckley J in *Spenborough* at 146G-147F as cited with approval by the Court of Appeal in *Colchester and East Essex Co-Operative Society Ltd v The Kelvedon Labour Club and Institute Ltd* [2003] EWCA Civ 1671 at [9]. I would observe that the Agreements are not "silent about determination" given the existence of clauses 3(a) and 11. It does not seem to me that Buckley J's decision is relevant for present purposes.

101. As for the decision in *Jani-King*, Mr Cavender submitted that it was of limited assistance because it was a decision in a different context, reached after hearing from only one party and where only one of the relevant authorities was cited.

102. TBP's resisted the implication of the term sought by TBSI. It made five points, set out in most detail in Mr McLoughlin's closing note:

(i) the Agreements are for fixed, five-year, extendable periods and they are not perpetual such that there is no scope for the implied term sought by TBSI which would make a nonsense of the fixed term commitment they had made to one another;

(ii) the Agreements provide for determination prior to the expiry of the fixed period with which the implied term sought by TBSI would be inconsistent;

(iii) the Agreements include express and detailed provisions as to duration, extension and termination which points away from the implication of a further term entitling TBSI to terminate on reasonable notice;

(iv) the Agreements do not lack commercial or practical coherence (given the terms which Mr McLoughlin set out in detail) and therefore the implied term is not necessary to give them business efficacy; and

(v) the term sought is not so obvious that it goes without saying.

Implication: conclusion

103. I reject TBSI's case that a term should be implied into the Agreements that upon the expiry of a reasonable time they are terminable by TBSI on reasonable notice for the following reasons:

(i) there is already express provision for the determination of the Agreements, which do not continue in perpetuity (see paragraph 87(i) above), with which the term sought would conflict. It cannot therefore be implied;

(ii) the Agreements do not lack commercial or practical coherence in the absence of the desired term which is not necessary in order to give them

business efficacy. The parties are committed to their respective obligations under the Agreements including TBSI's ability to amend the Method with which TBP is obliged to comply;

(iii) against the factual matrix existing at the time the Agreements were entered into, the term sought is not so obvious that it goes without saying; and

(iv) TBSI's case that the terms of the Agreements are now "hopelessly out of date" such that there must be implied a term enabling it to terminate on reasonable notice is not one that it could have advanced when the Agreements were entered into.

Disposition

104. For these reasons, I will make the declarations sought by TBP and dismiss TBSI's Counterclaim.