Hewlett-Packard Singapore (Sales) Pte Ltd
v
Chin Shu Hwa Corinna

[2016] SGCA 19

Court of Appeal — Civil Appeal No 109 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang Boon Leong JA
25 February 2016

Contract — Contractual terms — Rules of construction

28 March 2016 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Corinna Chin Shu Hwa v Hewlett-Packard Singapore (Sales) Pte Ltd* [2015] SGHC 204 ("the GD"). It raises important issues with regard to the nature of a contractual ambiguity in general and the *contra proferentem* rule in particular. Whilst the actual facts of the present appeal are deceptively simple, they belie difficulties of *application* (see also, for example, the decisions of this court in *YES F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 especially at [2] and

Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd [2016] 1 SLR 1069, especially at [1]).

Facts

2 The respondent, Corinna Chin Shu Hwa ("the Respondent"), was employed as a product sales specialist by the appellant, Hewlett-Packard Singapore (Sales) Pte Ltd ("HP" or "the Appellant"), in its NonStop Enterprise Division ("NED") from 10 January 2005 to 22 June 2012. The NED sells NonStop servers, which are fault-tolerant servers designed for businesses that require continuous and undisrupted provision of their services. The Respondent was the plaintiff in the proceedings below. She brought a claim against the Appellant for certain sales incentive compensation she alleges is owed to her, particularly in respect of a $5.38m contract she helped the Appellant clinch with Network for Electronic Transfers (Singapore) Pte Ltd ("NETS") in March 2012. In order to understand the gravamen of the Respondent's claim, it is necessary to set out the Respondent's sales incentive compensation scheme in some detail.

The sales incentive compensation scheme

3 The Respondent's salary package comprised a basic salary as well as a variable salary in the form of incentive compensation. For sales employees like her, incentive compensation typically forms the bulk of their total salary package. The amount of incentive compensation that the Respondent would earn depended on the extent of her meeting her sales target for the financial year. The Respondent's sales targets were determined by her then country sales manager, Jacob Lieu Chiap Ling ("Jacob"), in consultation with the Respondent. Her sales targets for the financial year were communicated to her in the form of a sales letter. According to her sales letter for the financial year

2012 (commencing 1 November 2011) ("FY12"), the Respondent's sales targets were as follows:

Metric	Quota (USD $)	Weight %
NED Shipment Metric	2,142,000	50
NED Shipment New Business Metric	214,200	25
NED Technical Services Attach Orders Metric	471,000	25

4 As may be observed from the table set out in the preceding paragraph, the Respondent's sales targets were divided into three metrics, each having a specified quota of sales and weight. According to the FY12 HP Global Sales Compensation Policy ("SC Policy 2012"), the Respondent's incentive compensation was calculated in the following way: if the Respondent were to achieve 100% of her sales quota for the first metric, *ie*, US$2,142,000, she would obtain 50% of her target incentive amount ("TIA"). The TIA is a fixed amount that is paid if a sales employee manages to attain 100% of his or her sales quota requirements. If the Respondent were to exceed 100% of her sales quota for any given metric, she would receive a correspondingly higher percentage of her TIA.

5 The second metric in the Respondent's sales letter (above at [3]) was known as the "New Business Metric" ("NBM") and was introduced for the first time in FY12. It was to be fixed as a percentage of the first metric, *ie*, the percentage of business under the NED Shipment Metric that was expected to be "new business" (the Respondent's sales target for the NBM was 10% of her

sales target for the NED Shipment Metric). A guideline was also disseminated to the staff on 6 October 2011 via email to, *inter alia*, define what qualified as "new business" for the purposes of the NBM ("the Guidelines"). The Respondent only received this email on 7 December 2011, though she had already heard about the NBM and its impending introduction sometime in September 2011. The Guidelines provided as follows:

> Implementation Guideline
>
> …
>
> New Business definition
>
> - New end-user customer
> - New application and/or new area for the existing end-user customer
> - New NonStop system sale as pre-requisite to new business entitlement
> - To differentiate new biz from upsell

6 The Appellant's regional NED director, Sandeep Kapoor ("Sandeep"), was one of the developers of the NBM. According to Sandeep, the NBM was introduced to incentivise sales employees to "sell to new customers and to seed new customer accounts". There was a need to do so because the sales records for the previous financial year showed that a disproportionate percentage of the NED's total business came from existing customers through "technology refreshes" and/or "up-sells". "Technology refreshes" refer to the customer migrating from old HP servers to new HP servers and "up-sells" refer to the customer purchasing greater capacity loads or other upgrades on its existing HP servers. As the Appellant's servers had become more powerful, "technology refreshes" and "up-sells" were occurring less frequently; hence, the need to incentivise sales employees to source for "new business". In an email dated

26 July 2011 by Sandeep in relation to the development of the incentive compensation plan for FY12, Sandeep wrote:

> It's very critical to goal specialist on new business as our installed base revenues will continue to erode due to systems getting powerful and customers investing in platform refresh now have enough capacities to buy for next 4-5 years. Hence the need to incent [*sic*] the NED specs to hunt for new business to drive growth in FY12 and beyond.

7 As alluded to at [2] above, the claim brought by the Respondent was for outstanding incentive compensation in respect of a contract that she helped secure with NETS ("the NETS Contract"). One of the key issues in the present appeal is whether the NETS Contract qualified as "new business" pursuant to the Guidelines. If it did, then the NETS Contract, valued at S$5.38m, would go towards satisfying the Respondent's sales quota under the NBM, thus entitling her to additional incentive compensation to the tune of S$584,613.19, which formed part of her claim against the Appellant. We now turn to the facts surrounding the NETS Contract and the events that followed.

The NETS Contract

8 NETS operates an electronic payment system that allows ATM cards to be used to make payments island wide. NETS had been using the Appellant's servers known as the Tandem system, which it had purchased sometime in 2001, to support its e-payment services. These servers ran a software application known as Base24 Classic, which was provided by a company called ACI Worldwide Inc.

9 Sometime in 2010, NETS decided to replace its existing Tandem system because the Appellant had begun phasing out the Tandem system and would eventually discontinue all maintenance support for those servers by

31 December 2011. Besides the Appellant's servers, NETS was also considering using servers from International Business Machines Corporation ("IBM") (known as the AIX system) which ran a software application named 1st Switch from a company called FIS. Faced with this competition, the Respondent and her team presented "a very aggressive proposal" to NETS to purchase HP's new NonStop system to replace the old Tandem system. Despite their efforts, NETS decided, in late 2010, to purchase the IBM servers and eventually entered into an agreement with IBM which, according to Lau Soon Liang ("Soon Liang"), NETS' then director of technology and infrastructure, was worth S$5m to S$6m. In April 2011, NETS took delivery of the IBM servers. It also contracted with FIS for the 1st Switch software application.

10 The process of migration from the HP system to the IBM system was expected to take place over 18 months – commencing in 2011 and stretching through 2012. However, due to the critical nature of NETS' e-payment service to the general public, the existing HP system had to remain online until after the migration was completed. Hence, during this period of migration, NETS continued to use its old Tandem system to serve its critical business needs. Furthermore, the Appellant *continued to supply* maintenance services to NETS under a maintenance contract *and* NETS *continued to pay software licence charges* to the Appellant.

11 Notwithstanding NETS' decision to purchase IBM servers in late 2010, the Respondent and her team devised a strategy in January 2011 to place pressure on NETS to discontinue its migration to the IBM servers and to purchase new NonStop servers from HP instead. As mentioned at [9] above, HP's maintenance services for the Tandem system were slated to be discontinued by 31 December 2011, before the planned migration was expected

to be completed. According to Soon Liang, "the continual maintenance from the hardware vendor [was] very critical". Even after the new IBM system had gone live, NETS would still require maintenance for the old Tandem system for at least three months as the old system would be used by NETS as a fall back. Part of the Respondent's strategy was thus to refuse NETS' request to extend the Appellant's maintenance services for the Tandem system unless NETS purchased new HP NonStop servers, thereby placing pressure on NETS to abandon its migration to IBM. In response, NETS engaged a third party, Marshall Resources, sometime in August 2011 to maintain its old Tandem servers.

12 However, in addition to the pressure placed by the Appellant on NETS, problems and delays began surfacing in NETS' migration to the IBM servers. FIS was unable to provide NETS with a satisfactory system as of December 2011. Furthermore, key NETS personnel involved in the migration project had resigned in April 2011. Having gotten wind of this information, the Respondent began wooing NETS more aggressively. Active negotiations took place between October 2011 and March 2012 to explore the option of NETS using HP's NonStop Blades system instead. On 15 November 2011, the Respondent submitted a quote to NETS for the purchase of HP's NonStop Blades system. As an added incentive to NETS, the Respondent also offered an extension of the Appellant's maintenance services for the old Tandem system up to 31 March 2012. Further, if NETS issued their purchase order for the NonStop Blades system by March 2012, the maintenance services would be extended to June 2013. On 23 February 2012, the Respondent issued a finalised quotation and NETS issued a purchase order on 21 March 2012 worth about S$5.38m for the new HP servers.

The Respondent's claim for the NETS Contract as "new business"

13 As mentioned above at [3], the Respondent learnt of the introduction of the NBM sometime in September 2011, before the conclusion of the NETS Contract (though, as already noted, she was only provided the Guidelines on 7 December 2011). At this juncture, the Respondent was deep in the process of chasing the NETS Contract. On 27 September 2011, she sent an email to her then country sales manager, Koh Lian Chong ("Lian Chong"), seeking clarification on certain aspects of her FY12 sales compensation plan, including whether the NETS Contract would be considered "new [business] since it has been lost to IBM". This email was forwarded by Lian Chong to one Rocky Wong, an employee in HP's Asia-Pacific & Japan Sales Operations department, who responded to Lian Chong as follows:

> … The high level guideline to define "New biz" is New applications on existing customer Existing applications on new customer[.] For the real case, I will leave it to the biz managers (Thomas & Sandeep) to make the final call. …

14 Rocky Wong's email was only forwarded to the Respondent on 26 October 2011. On the same day, the Respondent emailed Sandeep and Thomas Lee (the then general manager of HP's Enterprise Group department) to ask whether selling new NonStop servers to NETS would be considered "new business". The relevant portions of the email read as follows:

> Hi, Thomas and Sandeep,
>
> Would selling new NonStop [hardware/software] to NETS be considered 'New Business' since NETS has already purchased [IBM's servers] … to run 1st Switch to replace Base24 on NonStop beginning of this year? NETS is currently in the process of migrating from one solution running on HP NonStop platform to another solution running IBM AIX platform.

However, neither Sandeep nor Thomas Lee replied to the Respondent.

15 On 17 February 2012, the Respondent again attempted to find out if the NETS Contract would qualify as "new business". She emailed Julie Shaw, a Sales Operations Manager in HP's Enterprise Group, stating as follows:

> … please seek clarification that winning back NETS as a NonStop account (lost to IBM when NETS decided to migrate out of Base24 to 1st Switch) is considered 'New Business' and that the NonStop product revenue for this deal will go towards fulfilling the quota for the [NBM].

Sandeep, who was copied in the above email, was the one who responded to the Respondent. In an email dated 22 February 2012, he wrote:

> Corinna,
>
> As I had mentioned during the [Sales Kick-Off event] and also during our call , the rules have been set for new business and I really want each every NED spec to overachieve their goal by drive new business. Julie will look into the definition of new business . We may have to take opinion from sales comp and few other [Enterprise Servers, Storage and Network] management people.
>
> In the meantime , could you reconfirm what is the quota for new business in your sales plan, that has been agreed with you and Jacob …

16 Having failed to receive a definitive response from the Appellant's management, the Respondent, in a reply dated 27 February 2012 to an email by Thomas Lee urging her to close the NETS deal, asked Thomas Lee for help in resolving the "[NBM] issue asap so [she has] clarity to [her] comp plan and our goal". To this, Thomas Lee replied on 1 March 2012 as follows:

> Corinna, I am a bit puzzled at reading your answer.
>
> Let me clarify. You/we have a must win deal [in NETS] to close in Q2. Let's make sure we close it. As sales rep, it's your job. It's my job.
>
> I am not aware of this sales comp issue. However, we will address it separately with your Manager. …

17 On 13 March 2012, eight days before the NETS Contract was entered into, Jacob told the Respondent (*via* an email) that he would be taking the NETS Contract as "new business". This was significant because the Guidelines provided that all incentive compensation claims for "new business" were to be made via a "new business" claim form, which had to be endorsed by the country manager *and* approved by the regional NED manager. Jacob was the Respondent's country manager and Sandeep was the regional NED manager.

18 On 20 April 2012, the Respondent submitted her claim form for the NETS Contract to be endorsed and approved as "new business". The claim form provided for two categories, *viz*, "New Customer" and "Existing Customer", respectively. In filling up the form, the Respondent highlighted the latter category and added the words "Win Back account" in parentheses next to it. She also stated that the NonStop system was replacing the IBM servers, and the applications used were Base24 and Base24-EPS. Jacob endorsed the Respondent's claim almost immediately upon receiving it. The claim was then forwarded to Sandeep on 7 May 2012 for approval.

19 Sandeep, however, did not approve the Respondent's claim. In an email dated 8 May 2012 to Jacob and Thomas Lee, he wrote as follows:

> Jacob,
>
> NETS deal is not a clear cut fit to be qualified for new business definition , yet is very important win at the same time
>
> …
>
> Areas that need discussion
>
> …
>
> 2. New business definition is either for a new customer or new application within customer . based on all known facts , NETS deal doesn't fall into this category (at least not clearly explained in the claim)

> I'd set up a meeting so that we can discuss this face to face to find an acceptable solution.

20 The meeting mentioned in the email referred to in the preceding paragraph took place a few days later. At the end of the meeting, Sandeep directed Jacob to check whether the new NonStop system was replacing the IBM system or the old HP Tandem system, and whether any new application ran on the new NonStop system. On 7 June 2012, Jacob confirmed that NETS had "moved from HP old NED system to HP new NED system" and that there was "[n]o new application running in the new system". Based on this information, Sandeep concluded that the NETS Contract did not qualify as "new business" under the Guidelines. He was of the view that this was corroborated by the low sales quota for "new business" set for the Respondent, *ie*, 10% of her total NED Shipment Metric quota – the minimum required. He thus rejected the Respondent's claim.

21 Dissatisfied with the outcome, the Respondent lodged a complaint with the Appellant's corporate compliance department for alleged unethical and discriminatory management practice on 8 June 2012. This led to an internal probe titled "Project Merlion". The Respondent also escalated the matter to various levels of HP's management, including the vice-president of HP NED Worldwide, and continued doing so even after she was retrenched on 18 June 2012 as part of the Appellant's Workforce Reduction Program. Despite the Respondent's efforts, HP's management eventually stood by Sandeep's decision. On 3 October 2012, the Appellant sent a letter ("the 3 October 2012 letter") to the Respondent (signed by the Vice President of Sales Strategy, Operations & TCE) informing her that after a comprehensive review, it was "satisfied that the NETS Contract does not amount to 'NED New Business'

(Metric 2) for the purposes of [her] sales compensation plan". The letter also set out the reasons for the Appellant's decision, which were as follows:

> (a) NETS had at all material times used HP's system and never migrated off them;
>
> (b) NETS had continued with support maintenance;
>
> (c) NETS was therefore not a new account or end-user customer; the new NonStop system was also being used for the same application/area as the previous system; and
>
> (d) Additionally, the sales engagement effort was to defend the installed base (*ie*, installed base tech refresh), rather than hunting for new business. This did not satisfy the "rationale" behind the NBM, which was for sales specialists to "hunt for new business and to increase penetration of new NonStop systems sales as the traditional installed base technology refresh sales approach was becoming very limited".

It is noteworthy that even though the NETS Contract was rejected as "new business", the Appellant had taken it as satisfying the other two metrics of the Respondent's sales plan, *ie*, metric one and three at [3] above, and the Respondent was accordingly compensated with a sum of S$229,370.60 upon her retrenchment.

22 The 3 October 2012 letter stated, further, that the amount of incentive compensation the Respondent was entitled to was to be calculated on an aggregate basis, *ie*, by measuring her sales performance against full-year targets. However, the Respondent was of the view that the calculation should have been based on pro-rated targets as her employment was terminated involuntarily. In

fact, the calculation for her incentive compensation was initially done on a pro-rated basis, but for some reason, this was changed to an aggregate basis as stated in the 3 October 2012 letter.

23 The Respondent thus brought an action against the Appellant claiming S$584,613.19 worth of incentive compensation in respect of the NETS Contract ("the NBM Claim") and S$42,756.35 on the basis that her final incentive pay should have been calculated based on pro-rated targets rather than full-year targets ("the Pro-Rated Quota Claim").

The decision in the court below

24 In so far as the NBM Claim was concerned, the Judge was of the view that the Guidelines' definition of "new business" and specifically, the definition of "new end-user customer" was objectively ambiguous (see the GD at [41]). The Judge found that it was unclear whether the parties had intended for "new end-user customer" to include a former customer who had returned to the Appellant to buy a NonStop product, *ie*, a "win-back" customer (see the GD at [57]). He thus construed the term *contra proferentem* against the Appellant, which had drafted the Guidelines, and found that the term "new end-user customer" included a "win-back" customer. On the facts, he found that NETS was a "win-back" customer and thus a "new end-user customer" when it signed the NETS Contract in March 2012. The NETS Contract therefore fell within the definition of "new business" under the Guidelines (see the GD at [59]). In the circumstances, the Judge did not decide on the other arguments the Respondent had proffered, *viz*, (i) that the NETS Contract was a "new application and/or new area for the existing end-user customer" and (ii) that the Appellant was estopped from claiming that the NETS Contract was not "new business". He

accordingly made no finding on them (see the GD at [23] and [62], respectively).

25 In so far as the Pro-Rated Quota Claim was concerned, the Judge relied on the SC Policy 2012 and HP's Global Sales Compensation Handbook for FY12 ("the SC Handbook 2012"). Specifically, he relied on the following provisions of the SC Policy 2012:

> **8.4 Terminations**
>
> • The Sales employee's final incentive pay will be calculated with full measurement plan period TIA, goals, and performance credit for the time spent in the sales role.
>
> …
>
> • For involuntary terminations and where applicable, liability due for performance level pay advances will be based on prorated goals (seasonality and weighted performance average factored where applicable) and performance credit for the time of active status in sales role.
>
> • For voluntary terminations and where applicable liability due for performance level pay advances will be based on full period quota and will not be prorated.

The first bullet point above shall be referred to as "Section 8.4 bullet point 1", whilst the following bullet points shall be referred to as "Section 8.4 bullet point 7" and "Section 8.4 bullet point 8", respectively.

26 The Judge found that the Terminations section referred the reader to additional information in the SC Handbook 2012, which contained the following scenario to illustrate the effect of the Terminations section (see the GD at [67]):

> **Scenario: Voluntary termination- Final incentive pay calculation example including a 60% performance level pay advance threshold liability**
>
> **Question:**
>
> Jack Black was on an annual Sales plan and decided to leave HP voluntarily at the end Q1 of his measurement plan period, would his final incentive payment be based on prorated measurement plan period quota and sales performance attainment?
>
> Jack's Sales plan also included a 60% performance level pay advance. Would his liability calculation be based on prorated quota and sales performance attainment?
>
> **Answer:**
>
> *Since Jack has left HP voluntarily policy states (Section 8.4) that the final incentive payment will be based on full measurement plan period quota and sales performance attainment. No proration will be used.* Moreover, Jack's Sales plan included a 60% performance level pay advance threshold and the liability calculation would not be based on prorated quota or sales performance attainment either. In this case, Jack would be liable to pay back the incentive payments made because the 60% performance level threshold limit was not satisfied.
>
> [emphasis added]

27 The Judge was of the view that the answer referred to in the preceding paragraph indicated that the proration method would be used if a sales employee left HP involuntarily (see the GD at [69]). Yet, Section 8.4 bullet point 1 of the SC Policy 2012 when read alone stated that incentive pay would be calculated with reference to full-year goals regardless of whether the termination was voluntary or not (see the GD at [73]). The Judge concluded that Section 8.4 bullet point 1, when considered together with the SC Handbook 2012 and Section 8.4 bullet points 7 and 8, was ambiguous as to whether it applied to *all terminations* or *only* to *voluntary terminations* (see the GD at [87]). He thus applied the *contra proferentem* rule against the Appellant and held that it applied only to voluntary terminations (see the GD at [88]).

Issues

28 There are, in essence, two issues before this court.

29 The first issue is whether the NETS Contract satisfied the definition of "new business" pursuant to the Guidelines such that the Respondent was entitled to the compensation she had claimed ("Issue 1").

30 The second issue is whether the Respondent's final incentive pay should be calculated with reference to full-year targets or to pro-rated targets instead ("Issue 2").

The parties' respective arguments

Appellant's arguments

31 In so far as Issue 1 was concerned, the Appellant submitted that there was no ambiguity in the Guidelines' definition of "new business". In particular, NETS was not a "new end-user customer" because NETS' critical business load remained on the Appellant's servers at all material times and there were extant maintenance and software licences between the Appellant and NETS in relation to these servers as well. The NETS Contract also did not satisfy the criterion relating to "new application and/or new area for the existing end-user customer" because the application that ran on the new NonStop system was the same as that which ran on the old Tandem system, *ie*, Base24, and the "area" which NETS employed the new NonStop servers in was the same area that the old Tandem system supported. Therefore, neither category of the Guidelines' definition of "new business" was satisfied.

32 In so far as Issue 2 was concerned, the Appellant submitted that Section 8.4 bullet point 1 of the SC Policy 2012 makes no distinction between voluntary and involuntary terminations and clearly provides that incentive compensation will be calculated on an aggregate basis for *all* terminations. Further, the SC Handbook 2012 was not intended to introduce ambiguity to the SC Policy 2012, and in any event, the SC Handbook 2012 contained a "supremacy clause" which stipulated that the SC Policy 2012 was to prevail in the event of any conflict between the two.

Respondent's arguments

33 In so far as Issue 1 was concerned, the Respondent submitted that the term "new end-user customer" was ambiguous and that the Judge was therefore correct in construing the term against the Appellant by interpreting it as including a "win-back" customer. NETS was a "win-back" customer because it had previously been "lost" by the Appellant as a customer when it signed an agreement with IBM to purchase their servers. The only reason why NETS' critical business load remained on the Appellant's servers and NETS continued to have maintenance and software licence contracts with the Appellant was because the migration process took time to complete. The Respondent also made two alternative arguments: (i) the NETS Contract would still qualify as "new business" under the other criterion of "new application and/or new area for the existing end-user customer"; and (ii) the Appellant was estopped from denying that the NETS Contract constituted "new business".

34 In so far as Issue 2 was concerned, the Respondent submitted that Section 8.4 bullet point 1 of the SC Policy 2012 was ambiguous, especially when viewed in the light of Section 8.4 bullet points 7 and 8, as well as the SC Handbook 2012. The Judge was therefore correct in construing Section 8.4

bullet point 1 against the Appellant by limiting it to voluntary terminations only. Alternatively, the Respondent submitted that the Appellant had a Human Resource ("HR") policy and practice to calculate incentive compensation on a pro-rated basis for involuntary terminations which would prevail over the SC Policy 2012.

Our decision

Issue 1

35 At the outset, it must be noted that the Guidelines define "new business" with reference to the *status* of the purchaser of new NonStop servers, *ie*, whether the purchaser was a "new end-user customer" or an "existing end-user customer". If it was the former, then the sale of new NonStop servers to it would *per se* constitute "new business". If it was the latter, the sale of new NonStop servers would amount to "new business" only if the servers were for a "new area" or if a "new application" ran on the servers. The focus of the inquiry should thus begin with determining what kind of customer NETS was.

36 The Appellant relied on two arguments which were also canvassed in the court below and which we have mentioned above at [31]. The first was that NETS did not fall within the first bullet-point of the Guidelines, *viz*, NETS was not a "new end-user customer" and, hence, there had been no "new business" which entitled the Respondent to the compensation claimed.

37 The second was that NETS, although an "existing end-user customer", also did not fall within the second bullet-point of the Guidelines, *viz*, the NETS Contract did not fall within the situation relating to a "new application and/or

new area for the existing end-user customer" and, hence, there had been no "new business" which entitled the Respondent to the compensation claimed.

38 We now turn to consider each argument in turn. We will then consider the Respondent's argument with regard to estoppel.

Was NETS a "new end-user customer"?

39 As alluded to at the outset of this judgment, the *precise facts and context* are of the first importance in arriving at a decision involving contractual interpretation. In this regard, before considering the specific facts and circumstances of this case, it is apposite to consider *the more (and extremely important) general question as to what the NBM was intended to achieve in the first place*. We have already mentioned above at [6] that the NBM was instituted to incentivise sales representatives to "sell to new customers and seed new customer accounts" and to "expand the footprint of the NonStop". The impetus for the NBM was two-fold: first, a disproportionate percentage of the total NED business had emanated from *existing* customers through "technology refreshes" and/or "up-sells", rather than from new customers; and second, "technology refreshes" and "up-sells" were slowing down due to the fact that the Appellant's servers were becoming more powerful. Hence, there was a need to incentivise sales employees to seek out "new business" (see the GD at [34]). With this general backdrop and context in mind, let us now turn to the specific facts and circumstances of the present case.

40 As set out above at [10], it is clear that, although NETS had entered into a separate contract with IBM with a view to leaving the Appellant, it nevertheless *continued in a contractual relationship with the Appellant*. At all material times, NETS continued to use the Appellant's servers. It also had, at

all material times, extant maintenance and software licence contracts with the Appellant in relation to those servers (despite, as noted above at [11], NETS having engaged Marshall Resources as a fallback in the event the Appellant terminated its maintenance services with NETS). Put simply, *at no time did NETS terminate its contractual relationship with the Appellant*. The fact that its *motive* was to ultimately migrate successfully to the IBM servers is beside the point (as, in fact, later events demonstrated). Hence, when the migration exercise that NETS had contemplated would take them exclusively to IBM servers (at which time NETS *would have terminated* its contractual relationship with the Appellant) *failed to come to pass*, at *that particular point in time*, NETS *was – and thenceforth continued to be – in a contractual relationship with the Appellant*. More importantly, this contractual relationship continued to persist *at the time the NETS Contract was entered into*. It is clear, in our view, that *on these facts*, NETS could *not* be said to be a "*new* end-user customer" *simply because it had always been in a contractual relationship with the Appellant*. However, could it be said that, *because NETS had already signed a separate contract with IBM*, this last-mentioned conclusion is *excessively technical* inasmuch as – as counsel for the Respondent, Mr P E Ashokan ("Mr Ashokan") argued – NETS had already been "*lost*" as the Appellant's customer as NETS had already decided to migrate to IBM servers and had in fact entered into a separate contract with IBM and even taken delivery of the IBM servers?

41 With respect, however, whilst Mr Ashokan's argument appears persuasive at first blush, his argument does not take into account the fact (as just noted) that NETS was *simultaneously* in a *contractual relationship with both the Appellant and IBM, and, indeed, never terminated the relationship with the Appellant*. Indeed, NETS had sound commercial reasons for *maintaining* its contractual relationship with the Appellant. As already noted, the nature of its

business was such that it could not brook any disruption to its servers and services. Hence, a period of migration where NETS continued to use the Appellant's servers was necessary. *However, that meant that any number of future scenarios was possible which might entail NETS not ultimately terminating its contractual relationship with the Appellant*. These included the unsuccessful attempt to migrate to IBM servers *and/or* (as it, in fact, turned out to be the case) *the Appellant managing to persuade NETS to continue in its existing contractual relationship with the Appellant*. It is clear, in our view, that NETS was, in these facts and circumstances, an *existing* customer who had, in the final analysis, *been persuaded not to leave the Appellant*. In other words, NETS had *never been "lost" as the Appellant's customer*.

42 It is true that, in a colloquial sense, by virtue of its entry into a separate contract with IBM, NETS had had *one* foot out of the door. However, it should also be noted that NETS *simultaneously* had the *other* foot in the *Appellant's door*. What is of first importance for the purposes of the present appeal is that *NETS never had both feet completely out of the Appellant's door*. It was *only in this last-mentioned situation that NETS could be said to have been "lost" as the Appellant's customer* – which was *not* the situation in the present case. In this regard, it is significant, in our view, that NETS had at all material times continued using the Appellant's servers, and that for all intents and purposes, the *contractual relationship* between NETS and the Appellant had *continued throughout* as had always been the case. Undoubtedly, the contractual relationship between NETS and the Appellant related to *maintenance* of the former's servers. However, in addition to such maintenance contracts being not insubstantial in value, this was, in fact, the *only* relationship that *could* exist between the parties once a purchase of the Appellant's servers was made and until such time NETS (as it subsequently did) purchased new HP servers.

43 There is a *further* reason as to why NETS could *not* be considered to be a "new end-user customer" within the NBM. This brings us back to the *general backdrop and context* referred to above (at [39]). To recapitulate, the general purpose of the NBM was to ensure revenue streams that emanated from completely new or fresh sources – as opposed to mere "technology refreshes" and "up-sells". Properly understood, the purpose of the NBM was to encourage sales employees to focus their efforts on selling HP NonStop servers to *businesses that were not using HP servers at all*. *Alternatively*, the purpose of the NBM was to encourage sales employees to persuade businesses that were *already using HP servers* for some applications/areas of their operations to purchase HP NonStop servers for the purpose of *other applications/areas that were hitherto utilising non-HP servers*. Looked at in this light, the concept of a "new end-user customer" referred to *the former* (*ie*, businesses that were *not using HP servers at all*), whereas the concept of a "new application and/or new area for the *existing* end-user customer" referred to the latter (*ie*, businesses that *were using HP servers* that could be *persuaded to purchase HP servers for some applications/areas that were hitherto utilising non-HP servers*). Indeed, the latter concept will be dealt with in the next part of this judgment and it will suffice for present purposes to note that this (second) concept *excludes* "technology refreshes" and "up-sells" (which, *ex hypothesi*, would *not* result in an *expansion of the NED "footprint"*). What, however, is clear is that NETS, *being an existing user of HP servers could not, in any event, be considered a "new end-user customer" for the purposes of the NBM*.

44 Mr Ashokan argued that from a "sales perspective", the fact that NETS continued to utilise HP servers during the migration period did not mean that NETS continued to be the Appellant's customer. Such utilisation was only *temporary* and was done *only* because the migration to IBM servers (due to its

complexity) happened to take a long time, and NETS could ill-afford to have its services disrupted. We point out, however, that from a "sales perspective", the fact that NETS continued (and in fact, needed) to utilise HP servers during this period of migration is critical. First, this meant that during migration, NETS was dependent on the maintenance services provided by the Appellant. From a sales representative's perspective, the Appellant thus continued to have influence and leverage over NETS. Secondly, according to Sandeep, it was "common for unforeseen problems arising in the migration process" (as the facts of the present case demonstrate). This is corroborated by an email exchange in August 2011 between the Respondent and the Appellant's Technical Services Department regarding the extension of the Appellant's maintenance services to NETS. Lian Chong stated as follows:

> … NETS signing on a 3rd party spells more opportunity for us in HP. There is no point to U turn our decision. This means
>
> 1) NETS is concerned enough to sign a non HP endorse support party. Anything happens, we are off the hook.
>
> *2) There are many risks in the migration from NonStop. Two incidents in the IOMF* [processors] *failing and things will start to fail, I can guarantee you.*
>
> Lets [sic] wait. …
>
> [emphasis added]

45 The fact that the migration period was long and that NETS continued to utilise HP servers during this period therefore presented sales representatives with a *window of opportunity to persuade NETS to stay with the Appellant*. During this period, from a "sales perspective", NETS would *continue* being viewed as a *customer* of the Appellant that sales representatives could potentially retain, notwithstanding that NETS had signed with IBM. Put simply, *before* NETS signed with IBM in late 2010, NETS was a "customer" of the Appellant, and it was expected of sales representatives like the Respondent to

retain such customers. Even *after* NETS signed with IBM, *the fact remained that the Respondent was expected to persuade NETS to stay with the Appellant as a customer*, at least *until NETS had successfully migrated to the IBM servers and terminated all contractual relationships with the Appellant*. Indeed, this is what the Respondent did in the present case. From as early as January 2011, just mere weeks after NETS had decided to purchase IBM servers and before there was any news of problems with NETS' migration, the Respondent and her team had begun planning a strategy to place "pressure on NETS to discontinue the migration to the [IBM] servers and to purchase a new NonStop hardware system from HP's NED".

46 In the light of the foregoing, it should also be noted that the phrase "new end-user customer" is *clear* and, as applied to the facts as set out in the preceding paragraphs, would (as just noted) *exclude* NETS as it was an *existing* customer who had *also hitherto been using HP servers*. In fairness to the Respondent, however, we note that the Judge had, *in contrast*, decided that the phrase "new end-user customer" was *ambiguous* and therefore applied the *contra proferentem* rule in the Respondent's favour. With respect, however, we are of the view that the *contra proferentem* rule was not applicable on the facts of the present case (and for valuable expositions on this rule (to which we are greatly indebted), see Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at paras 8.04−8.15; Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th Ed, 2011) at para 7.08; and J W Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) at paras 4-44−4-47). Let us elaborate.

47 It has been clearly established that, in order for the *contra proferentem* rule to apply, the ambiguity *must exist within the very term or terms of the contract itself*. The court is *not* permitted to locate (or, rather, "create") an ambiguity in the term or terms of the contract *where none had existed before*. However, could it be argued that Sandeep's delay in responding to the Respondent was *evidence of* the fact that the phrase "new end-user customer" was in fact *ambiguous*? Whilst we would not dismiss such an argument out of hand, we are of the view that there are serious difficulties with it.

48 It is important to first characterise Sandeep's delay in responding to the Respondent's queries over whether the NETS Contract qualified as "new business". To recapitulate, the question was first put to Sandeep in an email dated 26 October 2011. He did not reply to this email. The question was then put to him again in an email dated 17 February 2012. This time, he replied a few days later stating that the issue would be looked into and that he had to consult other sales operations personnel before he could give the Respondent a definitive reply. On 7 May 2012, the Respondent's claim for the NETS Contract to be considered "new business" was placed before Sandeep for approval. Sandeep, however, did not approve it. Instead, he wrote to Jacob stating that the NETS Contract was not a "clear-cut fit" into either definition of "new business" and arranged for a meeting to discuss the matter. At the conclusion of the meeting, he directed Jacob to check whether NETS had migrated from IBM servers or the old Tandem servers to the new NonStop servers, and whether any new application ran on the new NonStop servers. Upon Jacob confirming that NETS had migrated from the old Tandem servers and that no new application ran on the new NonStop servers, Sandeep then rejected the Respondent's claim.

49 Counsel for the Appellant, Mr Gregory Vijayendran ("Mr Vijayendran"), sought to argue that Sandeep's delay in responding to the Respondent could be explained on the basis that the NETS Contract, at the material time, had yet to be "scoped out". Whilst this may be a plausible explanation for Sandeep's lack of a reply to the Respondent's email of 26 October 2011 (given that it was approximately six months before the actual entry into the NETS Contract), we do not accept it as an explanation for why Sandeep did not give the Respondent a definitive reply to her email of 17 February 2012. At that time, the negotiations between the parties for the NETS Contract were in the final phase. A finalised quote was sent by the Respondent to NETS the very next day, and the NETS Contract was entered into about a month later. It appears to us unlikely that the NETS Contract had not been "scoped out" with sufficient certainty to enable Sandeep, at that time, to at least make a preliminary decision on whether it qualified as "new business". In our view, the more likely explanation for Sandeep's conduct (or lack of a definitive response) is that the situation of a customer signing with a competitor and yet staying on thereafter was never in the contemplation of Sandeep's mind when he had developed and promulgated the NBM. Indeed, according to Sandeep, the concept of a "win-back" customer was so hypothetical and remote in the business that it had not been factored in when the rules were set for generating new business. Mr Vijayendran also candidly accepted as much. Faced with a situation that he had hitherto not considered when he developed the NBM and the Guidelines, Sandeep thus needed time to first consult with others and then make a decision. There were therefore sound reasons for Sandeep not responding immediately (though we note that whether Sandeep's conduct impacts the issue of costs is (potentially at least) a somewhat different matter).

50 Understandably, one might conceivably argue that if the definition of "new business" or "new end-user customer" was in fact unambiguous, then there was no reason why Sandeep should have taken so long to come to a decision as to whether the NETS Contract qualified or not. However, we emphasise that difficulties of application *cannot* be equated (or conflated) with ambiguity of the contractual term itself. This was also underscored by Lord Wilberforce in the House of Lords decision of *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 ("*Wickman*") where the learned Law Lord observed thus in relation to latent ambiguities (at 261): "ambiguity … is not to be equated with difficulty of construction, even difficulty to a point where judicial opinion as to meaning has differed". It must be noted that Sandeep, having considered the matter, the purpose of the NBM and the information provided to him by Jacob, ultimately did come to the conclusion that the criterion "new end-user customer" excluded NETS.

51 At this juncture, it is apposite for us to reiterate that in order for the *contra proferentem* rule to apply, it is a necessary condition that there be an ambiguity in the contract which *cannot be resolved* (and *not merely* that it is *difficult* to resolve) by interpreting the term in the context of the overall contract. The rule cannot apply to create an ambiguity where one does not exist (see the Singapore High Court decision of *LTT Global Consultants v BMC Academy Pte Ltd* [2011] 3 SLR 903 at [56]). In the English Court of Appeal decision of *McGeown v Direct Travel Insurance* [2004] 1 All ER (Comm) 609, Auld LJ warned against too ready a recourse to the *contra proferentem* rule (at [13]):

> … *A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own.* And it *should not*, in any event, on such a finding, *move straight to the contra proferentem rule without first looking at the context and*, where appropriate, permissible aids to identifying *the purpose of the commercial document* of which the words form

> part. *Too early recourse to the contra proferentem rule runs the danger of 'creating' an ambiguity where there is none…* [emphasis added]

52 The cautionary words of Auld LJ are even more germane given this court's endorsement of the contextual approach to contractual interpretation in the decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") (at [114]). The first task of the court is always to construe the document based on the well-established principles of contractual interpretation, including looking at the surrounding context as well as at the purpose of the agreement. In the words of Kirby J in the Australian High Court decision of *McCann v Switzerland Insurance Australia Ltd and Others* (2000) 176 ALR 711 at [74(4)]:

> … Courts now generally regard the *contra proferentem* rule (as it is called) as one of *last resort* because it is widely accepted that it is preferable that judges should struggle with the words actually used as applied to the unique circumstances of the case and reach their own conclusions by reference to the logic of the matter, rather than by using mechanical formulae. … [emphasis added]

53 We also add that simply because the situation in the present case was not contemplated by the drafter (Sandeep) does not mean that the term "new end-user customer" was ambiguous. Neither does it mean that the term therefore did not apply to the present situation. This is also logical and commonsensical otherwise every dispute in the courts with regard to the interpretation of the term(s) of a contract could, *ipso facto*, be said to involve ambiguity and hence attract the application of the *contra proferentem* rule – which would be to turn the application of this rule on its head, so to speak. Indeed, it is also clear that when a contract is drafted, the drafter would not be able to foresee every possible factual permutation. Put simply, therefore, everything depends on an

objective interpretation of the term by the court itself. As Chadwick LJ aptly put it in the English Court of Appeal decision of *Bromarin AB and another v IMD Investments Ltd* [1999] STC 301 (at 310):

> … it is commonplace that problems of construction, in relation to commercial contracts, do arise where the circumstances which actually arise are not circumstances which the parties foresaw at the time when they made the agreement. If the parties have foreseen the circumstances which actually arise, they will normally, if properly advised, have included some provision which caters for them. What that provision may be will be a matter of negotiation in the light of an appreciation of the circumstances for which provision has to be made.
>
> It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'. *The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event 'B', which they did not contemplate.* That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. *It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them, and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee.*
>
> [emphasis added]

The exercise of ascertaining what the parties intended is not done in the abstract or in a vacuum but is, instead, to be anchored in the express contractual language, the internal and external contexts of the contract and, more broadly speaking, the contractual purpose (see, for example, Man Yip & Yihan Goh, "Dealing with Unforeseen Circumstances: Contractual Construction and Equitable Adjustment" [2014] 1 JBL 83 at 86). It may be the case that after the

court undertakes the objective inquiry as to the meaning of the term in question, it nevertheless comes to the conclusion that the term is ambiguous as to whether it provides for the unforeseen event. In such circumstances, the application of the *contra proferentem* rule *may then* be justified. However, as we have explained above, this is not such a case.

54 There is a further difficulty with relying on Sandeep's delay in responding to the Respondent – this evidence comprises *post-contractual conduct*. Such conduct must be viewed with the utmost scrutiny as well as concern. Although the Singapore courts have not ruled out such conduct as evidence that might aid them in the ascertainment of the relevant context, there has been no definitive view expressed by way of a positive endorsement (see *Zurich Insurance* at [132(d)]). This is because consideration of such conduct would tend to lead the court away from the *objective* exercise of interpretation and, *on the contrary*, tend to introduce a great deal of *subjectivity and uncertainty instead*.

55 Pursuant to the *objective* principle of interpretation, the court is concerned with the *expressed intentions of the parties*, and *not* their *subjective intentions*. The standpoint adopted is that of a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were *at the time the contract was formed*. The extrinsic material sought to be admitted must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. The conduct of the parties *post-contract*, in so far as they reveal the *subjective intention* of the parties, will generally be *irrelevant* in this exercise. It is for this reason, amongst others, that the courts have precluded the reference to subsequent conduct of the parties in the construction of contracts. In the House

of Lords decision of *James Miller & Partners Ltd v Whitworth Street Estate (Manchester) Ltd* [1970] AC 583, for example, Lord Reid made the following remarks (at 603):

> … I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

This was reinforced by the House of Lords in its subsequent decision of *Wickman* where Lord Wilberforce confirmed (at 261):

> … The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which *excludes evidence of statements, or actions*, during negotiations, at the time of the contract, or *subsequent to the contract*, any of which to the lay mind might at first sight seem to be proper to receive. … [emphasis added]

56 Indeed, this court has held in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 that subsequent conduct that was in direct contradiction of the terms of the concluded contract could not be admitted to interpret the contract concerned (at [88]). In *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624, this court also endorsed the principle that a contract must generally be interpreted as at the date it was made and in light of the circumstances prevailing on the date (at [11]). We emphasise, however, that by referring to these decisions, we are not endorsing a blanket prohibition on the use of subsequent conduct. Like the question of the admissibility of prior negotiations, the question of the admissibility of subsequent conduct remains an open one that should be decided on a more appropriate occasion (see the decision of this court in *Xia Zhengyan*

v Geng Changqing [2015] 3 SLR 732 at [62]). We do, however, reiterate that any such evidence must satisfy the tripartite requirements of relevancy, reasonable availability and clear and obvious context mentioned in *Zurich Insurance* before it may be admitted to interpret a contract. The requirements of civil procedure established in the decision of this court in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another appeal* [2013] 4 SLR 193 at [73] must also be borne in mind. What can be discerned from the two statements of the House of Lords cited above at [55] is that there is great subjectivity and uncertainty involved in considering post-contractual conduct in the interpretive process.

57 Indeed, the present case underscores some of the problems with relying on subsequent conduct to interpret contracts. First, there is the issue of what inferences the court should draw from Sandeep's conduct. Did Sandeep take such a long time to reply because he was of the view that the term "new end-user customer" was difficult to apply, or was it for some other reason? Whilst the courts are well-equipped at drawing the appropriate inferences from conduct, this adds a layer of uncertainty to the exercise of contractual interpretation. Secondly, assuming that we take the view that it was because the term was difficult to apply, there is a strong temptation to come to the conclusion that the term "new end-user customer" was objectively ambiguous simply because the drafter (Sandeep) found it difficult to apply. However, as already mentioned, there might have been very sound reasons for Sandeep not responding immediately to the Respondent's questions and this conclusion does not necessarily follow. What would otherwise have been a clear interpretation for the court to adopt having considered the text and context of the contract would now become muddled if the court places undue emphasis on such subsequent conduct.

58 For the reasons set out above, we are of the view that the term "new end-user customer" is objectively unambiguous and excludes NETS in the context of the NETS Contract. We now turn to the second argument raised by the Appellant, *viz*, that the NETS Contract did not fall within the situation relating to a "new application and/or new area for the existing end-user customer".

Did the NETS Contract fall within the situation relating to a "new application and/or new area for the existing end-user customer"?

59 To answer this issue, we must turn to *the purpose* of the NBM in general and that relating to this definition of "new business" in particular. It will be recalled that we had observed that this particular definition (*ie*, the situation relating to a "new application and/or new area for the existing end-user customer") would be satisfied *only if it served to result in an expansion of the NED "footprint"*. In particular, as we had also observed (above at [43]), this particular situation envisaged one in which the existing end-user customer (who, *ex hypothesi*, would hitherto have been using HP servers for some *existing* applications/areas of its operations) would purchase HP NonStop servers for the purpose of *other applications/areas that were hitherto utilising non-HP servers.* This was clearly not the situation in the present case.

60 In so far as the term "new application" is concerned, it is undisputed that the application that eventually ran on the new NonStop servers was Base24 Classic, which was the same application that ran on the old Tandem servers (see above at [8]). This is corroborated by Jacob's confirmation to Sandeep that there was "[n]o new application running in the new system" (see above at [20]). The Respondent argued that there were four new applications that ran on the new NonStop servers, *ie*, Secure MR-Win 6530; TOP; new XYGATE modules; and GoldenGate software. However, as pointed out by the Appellant (and which we

accept), these applications were merely "accessory software", *ie*, software which improves the functionality of the existing system. Indeed, according to Soon Liang, Secure MR-Win 6530 and TOP were applications that allowed NETS staff to access the new NonStop servers to retrieve information for NETS' day-to-day operations and to answer consumers' queries. Further, the GoldenGate software was meant to merely replicate data from one server to another server. Such software did *not* "drive" the need for a new NonStop server which would then *expand the NED "footprint"*. To accept the Respondent's argument would mean that a "technology refresh" (*ie*, an existing customer upgrading its existing servers to better servers) would transform into "new business" simply because a new data sanitisation software ran on the new servers. This does not sit well with the purpose of the NBM in general and that relating to this definition of "new business" in particular.

61 In so far as the term "new area" is concerned, it is also undisputed that the new NonStop servers were employed to support NETS' e-payment system, *ie*, the same "area" which the old Tandem servers were utilised for. The Respondent contended that there were other business areas that NETS intended to use the new NonStop servers for (as set out in the Indicative Roadmap provided in NETS' Summary of Requirements dated 21 October 2011). We are of the view, however, that the predominant purpose of the NETS Contract was for NETS to purchase new servers to support the e-payment system that was running on the old Tandem servers, which NETS had to do because the old Tandem servers were being phased out. This places the NETS Contract outside the definition of "new area … for the existing end-user customer".

62 In our view, the NETS Contract was, at best, a mere "technology refresh". The new NonStop servers were being employed in the same area as

the old Tandem servers. Further, the fact that NETS had also purchased new software did not add anything as there was *no expansion* of the NED "footprint". This argument of the Respondent with regard to the criterion relating to a "new application and/or new area for the existing end-user customer" therefore fails.

Was the Appellant estopped from denying that the NETS Contract constituted "new business"?

63 It remains for us to deal with the final argument of the Respondent with regard to Issue 1. The Respondent submitted that the Appellant's management's words and conduct, taken together, constituted an implied promise to her that the NETS Contract would be considered "new business", and that she had relied on this promise to her detriment as she had to "prioritize and put in extra effort to bring in the revenue of the NETS Contract from Q3 to Q2 of FY2012".

64 We note that, in this regard, the Respondent is attempting to utilise promissory estoppel as a "sword". The Judge did not decide on this issue as he had found for the Respondent on the issue of interpretation (see the GD at [62]). In our view, it is unnecessary to decide whether promissory estoppel may be used as a "sword" given that no implied promise or detrimental reliance can be readily found on the facts to begin with. The words and conduct of the Appellant that the Respondent relied on are as follows (most of which have already been mentioned above):

(a) The email dated 26 October 2011 from Corinna to Sandeep and another manager asking if the NETS deal would be considered "new business" to which neither of them replied (see above at [14]);

(b) The email dated 22 February 2012 from Sandeep in response to the Respondent's further query on whether the NETS deal would be considered "new business" (see above at [15]);

(c) The email dated 1 March 2012 from Thomas Lee in response to the Respondent asking for help in resolving the "[NBM] issue asap" (see above at [16]); and

(d) The email dated 13 March 2012 from Jacob stating that he would take the NETS Contract as "new business" (see above at [17]).

65 It is trite that to found an estoppel a representation must be clear and unequivocal (see, for example, Spencer Bower, *The Law Relating to Estoppel by Representation* (LexisNexis, 4th Ed, 2004) at para XIV.2.2). It is clear from the above-mentioned correspondence that there was no express promise by the Appellant that the NETS Contract would be taken as "new business" (apart from Jacob's email which we will deal with shortly). The above words and conduct, whether taken individually or together, also do not imply an unequivocal promise that the NETS Contract would be considered "new business". At best, they indicate that Sandeep and Thomas Lee were of the view that the Respondent's main focus should be on closing the NETS deal. Whether the NETS deal amounted to "new business" could be discussed later, since the NETS deal was a "must win" in any event. Indeed, there was no evidence to suggest that the Respondent understood Sandeep and Thomas Lee to be promising to take the NETS Contract as "new business".

66 In so far as Jacob's email that he would take the NETS Contract as "new business" is concerned, that came only a mere week before the NETS Contract was signed. It cannot be said that the Respondent had relied on it to her

detriment. In fact, it was in the Respondent's own interest to secure the NETS deal even if the NETS Contract did not amount to "new business". This is because the NETS Contract would still count towards the first and third metric of her sales plan, thereby affecting her incentive compensation significantly (as it turned out, to the tune of $229,370.60).

67 We are therefore of the view that no estoppel arises in the present case. In the light of the foregoing, we find in favour of the Appellant with respect to Issue 1.

Issue 2

68 We turn now to consider Issue 2, *viz*, whether the Respondent's final incentive pay should be calculated with reference to full-year targets or to pro-rated targets. To recapitulate, the Respondent contended that Section 8.4 bullet point 1 of the SC Policy 2012 was ambiguous and should therefore be construed against the Appellant as applying only to voluntary terminations. In the alternative, the Respondent argued that there was a HR policy and practice to calculate incentive compensation on a pro-rated quota basis for involuntary terminations which would prevail over Section 8.4 bullet point 1 of the SC Policy 2012.

69 We turn to consider each argument in turn.

Does Section 8.4 bullet point 1 of the SC Policy 2012 apply only to voluntary terminations or to all terminations?

70 For ease of reference, we set out the relevant provisions under the SC Policy 2012 and the relevant scenario in the SC Handbook 2012:

> **8.4 Terminations**
>
> • The Sales employee's final incentive pay will be calculated with full measurement plan period TIA, goals, and performance credit for the time spent in the sales role.
>
> …
>
> • For involuntary terminations and where applicable, liability due for performance level pay advances will be based on prorated goals (seasonality and weighted performance average factored where applicable) and performance credit for the time of active status in sales role.
>
> • For voluntary terminations and where applicable liability due for performance level pay advances will be based on full period quota and will not be prorated.

The relevant scenario in the SC Handbook 2012 was as follows:

> **Scenario: Voluntary termination- Final incentive pay calculation example including a 60% performance level pay advance threshold liability**
>
> **Question:**
>
> Jack Black was on an annual Sales plan and decided to leave HP voluntarily at the end Q1 of his measurement plan period, would his final incentive payment be based on prorated measurement plan period quota and sales performance attainment?
>
> Jack's Sales plan also included a 60% performance level pay advance. Would his liability calculation be based on prorated quota and sales performance attainment?
>
> **Answer:**
>
> *Since Jack has left HP voluntarily policy states (Section 8.4) that the final incentive payment will be based on full measurement plan period quota and sales performance attainment. No proration will be used.* Moreover, Jack's Sales plan included a 60% performance level pay advance threshold and the liability calculation would not be based on prorated quota or sales performance attainment either. In this case, Jack would be liable to pay back the incentive payments made because the 60% performance level threshold limit was not satisfied.
>
> [emphasis added]

71 The Judge was of the view that Section 8.4 bullet point 1 was ambiguous and therefore construed it to apply only to voluntary terminations. With respect, we disagree for the following reasons.

72 First, the text clearly states that an employee's final incentive payment will be calculated with reference to full-year goals and no mention is made that a distinction ought to be drawn between voluntary and involuntary terminations.

73 Secondly, the fact that such a distinction was drawn in respect of liability due for performance level pay advances (Section 8.4 bullet points 7 and 8) but not in respect of incentive compensation suggests that *no such distinction was intended* for the latter. Whilst Section 8.4 bullet points 7 and 8 did demonstrate that employees were to be treated differently depending on how they were terminated (as noted by the Judge at [73] of the Judgment), the provisions of the policy clearly *limited* that distinction to liability due for performance level pay advances. Those provisions do not introduce any ambiguity into Section 8.4 bullet point 1.

74 Thirdly, looking at the scenario in the SC Handbook 2012 holistically, the phrase "[s]ince Jack has left HP voluntarily" was included because the SC Policy 2012 drew a distinction between voluntary and involuntary terminations for performance level pay advances liabilities. It was thus necessary to use those words in the "Answer" since the "Scenario" dealt with performance level pay advances liabilities as well. Indeed, according to Anthony James Alizzi ("Anthony"), the Appellant's Sales Compensation Operations Director for Asia Pacific & Japan, Section 8.4 bullet points 7 and 8 of the SC Policy 2012 actually only applied to the Americas and not to the other regions of the world that the Appellant operated in (including the Asia Pacific

& Japan, where the Respondent was situated), and if the Policy had been written for the rest of the world excluding the Americas, the words "[s]ince Jack has left HP voluntarily" would not have been there. Therefore, the SC Handbook 2012 should not be taken to suggest, contrary to Section 8.4 bullet point 1, that final incentive payment would be calculated on a pro-rated basis if the employee was terminated involuntarily.

75 Finally, it *cannot* be the case that Section 8.4 bullet point 1 applied *only to voluntary terminations*. If that were so, there would be *no term* in the SC Policy 2012 that would have provided for how final incentive payment should be calculated *in respect of involuntary terminations*. Further, this would mean that the situation of involuntary terminations would be governed by the *alleged implication* of the SC Handbook 2012 that final incentive payment would be calculated on a pro-rated basis if the employee was terminated involuntarily (see the GD at [73]). In essence, the SC Handbook 2012 would be *introducing* an *entire provision* on *involuntary terminations* to the SC Policy 2012. Notwithstanding that this "provision" was only an *implication*, the SC Handbook 2012 provided that it was meant merely to provide "execution information regarding [SC Policy 2012] topics". It would be inappropriate to rely on the SC Handbook 2012 to find an ambiguity in an otherwise clear provision, and to introduce a provision to the SC Policy 2012 that governed involuntary terminations. In this regard, we emphasise, once again, that the *contra proferentem* rule does not enable the court to adopt a strained meaning of the contract. In the Supreme Court of New South Wales decision of *North v Marina* [2003] NSWSC 64, for example, Campbell J observed thus (at [75]):

> The role of the [*contra proferentem*] maxim is to enable the court to choose between alternative meanings of the document or clause in question, being meanings which are fairly open. It is not a legitimate use of the maxim to say that two meanings of a

> particular contractual provision are possible, and that the meaning unfavourable to the proferens should be chosen, if one of those alternative meanings is an unrealistic or unlikely construction of the contract. …

76 In our view, when contrasted with how the SC Policy 2012 provided for both situations (voluntary and involuntary terminations) with respect to performance level pay advances liability (*via* Section 8.4 bullet points 7 and 8), it is clear that HP must have intended for Section 8.4 bullet point 1 to apply to *all* terminations.

Was there a HR policy that prevails over the SC Policy 2012?

77 The Respondent argued that the alleged HR policy was reflected in two specific emails to herself and Adeline Soh, another of the Appellant's sales employees whose employment was terminated. In these emails, the relevant HR employees had informed both of them that their respective incentive compensations would be calculated with reference to pro-rated targets. In addition, the Judge found that there was another employee, K Sudershan, whose incentive compensation on termination had been calculated on a pro-rated basis. Whilst the Respondent's final incentive compensation was eventually calculated by reference to full-year targets, Adeline Soh and K Sudershan's calculations were left unchanged, resulting in the two being allegedly over-paid $2,000 and $6,000, respectively. The Appellant had not sought to recover these sums from Adeline Soh and K Sudershan.

78 Despite what was described in the preceding paragraph, the Judge concluded that there was insufficient evidence to make a finding that the Appellant's policy and practice was to calculate retrenched employees' final incentive pay on a pro-rated basis (see the GD at [79]). We agree with the Judge. Apart from the emails referred to in the previous paragraph, the Respondent

adduced no other evidence to prove this policy existed. In contrast, Anthony stated in his AEIC that it had always been the Appellant's practice to adopt an aggregate basis for *both* voluntary and involuntary terminations. He testified that, in fact, of the 12 employees who were retrenched along with the Respondent, the incentive compensations for ten of them were calculated by reference to full-year targets. The exceptions were Adeline Soh and K Sudershan, which Anthony testified were "erroneous". In so far as the Respondent was concerned, her incentive compensation calculation was initially based on pro-rated targets, but that was subsequently rectified by the Appellant. In our view, this particular contention of the Respondent therefore fails.

79 We therefore find in favour of the Appellant with respect to Issue 2.

Conclusion

80 For the reasons set out above, we allow the appeal. We will hear the parties on costs both here and below (having regard, in particular, to the observation made above at [49]).

Sundaresh Menon	Chao Hick Tin	Andrew Phang Boon Leong
Chief Justice	Judge of Appeal	Judge of Appeal

Gregory Vijayendran, Lester Chua and Pradeep Nair (Rajah & Tann Singapore LLP) for the appellant;

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