Telestop Pte Ltd v Telecom Equipment Pte Ltd and Another Suit
[2004] SGHC 267

Case Number	: Suit 889/2002, 890/2002
Decision Date	: 30 November 2004
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: N Sreenivasan and Valerie Ang (Straits Law Practice LLC) for plaintiffs; Kannan Ramesh, Sean Tan and Christina Choo (Tan Kok Quan Partnership) for defendant
Parties	: Telestop Pte Ltd — Telecom Equipment Pte Ltd

Contract – Contractual terms – Express terms – Whether franchisor failed to provide proper system for efficient management of franchise outlets – Whether franchisor in breach of franchise agreement

Contract – Contractual terms – Implied terms – Whether there was implied term of non-competition in franchise agreements – Scope of implied term – Whether franchisor breached narrower implied term in franchise agreement

Contract – Franchise contract – Whether breach of duty of good faith a separate cause of action to be specifically pleaded

30 November 2004 *Judgment reserved.*

Judith Prakash J:

Introduction

1 Telecom Equipment Pte Ltd, the defendant in these consolidated actions, is a wholly-owned subsidiary of Singapore Telecommunications Ltd and a member of the SingTel group of companies. It was set up in order to retail telecommunication equipment. For this purpose, the defendant established a chain of retail outlets under the brand name "Teleshop". The defendant itself operated some of these outlets while others were operated by franchisees under a franchise arrangement with the defendant.

2 The plaintiffs in these actions were two of the defendant's franchisees. They are two companies owned and controlled by the same persons. The plaintiff in Suit No 890 of 2002, Telestop Pte Ltd (hereinafter sometimes called "TPL"), ran two outlets, one in Clementi and the other one first at Bedok and thereafter at Holland Drive, whilst the plaintiff in Suit No 889 of 2002, U-R First Pte Ltd (hereinafter sometimes called "URF"), ran one outlet at Boon Lay.

3 The first franchise agreement was signed in May 1993 between TPL and the defendant. It was for a term of ten years and provided for the running of a Teleshop at Block 443 Clementi Avenue 3. The second franchise agreement, signed in December 1997 between the defendant and URF, was for a term of nearly six years and was in respect of a Teleshop at Boon Lay Way. The third agreement, made in February 1998 between the defendant and TPL was for a term of ten years and was in respect of a Teleshop at the Bedok MRT station. Subsequently the location of the shop covered by this agreement was changed to Holland Drive.

4 On 5 June 2001, the plaintiffs jointly served a notice on the defendant that they wished to terminate the franchise agreements in respect of all three Teleshops without prejudice to either

party’s rights and obligations under the agreements. They said that the agreements would terminate 30 days from the date of the letter. The two suits were filed on 30 July 2002 and were consolidated a few months later. The reliefs claimed by both plaintiffs are the same, to wit, damages to be assessed for alleged breach of contract. There are two main heads of claim:

(a) Breaches and continuing breaches of express terms of the franchise agreements.

(b) Breach of the implied term of non-competition.

Background to the disputes

5 The individuals behind the plaintiffs are Mr Kamaluddin s/o Noor Mohamad, Mr Chandra Sehkar s/o Nadaraja and Mr Abdul Sukkoor. All three are directors and shareholders of both plaintiffs and the first two were the plaintiffs’ witnesses in the action. In 1992, the three men were operating a bookshop in Clementi when they received a mailer from the defendant inviting them to consider taking a franchise to operate a Teleshop. They responded positively to the mailer and were subsequently interviewed and briefed on the business. Negotiations went well and they were selected to run a franchise business.

6 TPL was incorporated on 8 May 1993 for the purpose of being the Teleshop franchisee. The first franchise agreement, signed on 27 May 1993, was in respect of the Clementi Teleshop. The subsequent agreements were almost identical in wording.

7 Each franchise taken by the plaintiffs required a substantial investment. The plaintiffs had to pay the defendant a non-recurring licence fee for the grant of each franchise. They also had to incur expenses in renovating premises to meet the defendant’s requirements and to purchase stock and set up a bank guarantee for the purchase of stock. In the case of the Clementi outlet, TPL estimated that its initial expenses, including the payment of the licence fee (which in the case of Clementi was $100,000), amounted to $500,000. In addition, under the franchise agreements, for each outlet the plaintiffs had to pay the defendant a continuing royalty and management fee in a sum equal to 5% of the prior month’s gross monthly sales (for Bedok, the fee was higher) and a marketing levy in the sum of 3% of the prior month’s gross sales.

8 Up to about 1998, the franchised businesses operated fairly well. TPL encountered some problems in the initial operation of the franchise and complaints were made to the defendant from time to time. On the whole, parties managed to work out their differences. In January 1997, the Clementi outlet moved to a new location in the Clementi area. In mid-1997, the defendant approached TPL with a proposal that it operate another outlet at Boon Lay. This proposal was accepted and URF was incorporated for the purpose of taking the Boon Lay franchise and running that outlet. In the case of Boon Lay the licence fee amounted to $57,900. The Boon Lay outlet commenced operation in October 1997.

9 The difficulties between the plaintiffs and the defendant really started with the third franchise agreement that was in respect of a Teleshop to be operated by TPL at Bedok. TPL had secured a lease of shop premises at the Bedok MRT station and proposed to the defendant that a Teleshop be established there. The defendant already had a Teleshop in Bedok that it operated itself. The defendant said that it was not keen on a competing outlet being established nearby and tried to dissuade TPL from proceeding. TPL, however, was adamant. Eventually, the defendant agreed but imposed a higher royalty of 9.5% instead of the royalty of 8% applicable to the other two outlets. The licence fee was $100,000. The Bedok outlet commenced operation in February 1998 and was an immediate failure. Within three months of opening it, the plaintiffs wished to close the outlet and

sought approval from the defendant to do so. In August, the defendant consented to relocation but insisted that the Bedok outlet be closed only when the plaintiffs were ready to move to the new location. The plaintiffs were not happy about this but they carried on operations in Bedok. In December 1998, operations at Bedok ceased and TPL took over the operation of a Teleshop at Holland Drive that had previously been operated by the defendant itself. The plaintiffs complained that they could have saved over $90,000 in operating costs alone had the defendant acceded to their initial request to close the Bedok outlet in June 1998.

10 The plaintiffs stated that their relationship with the defendant started to deteriorate thereafter. They complained that they were handicapped in the operations of the retail outlets by the failure of the defendant to implement a proper "System" to take care of all the operational needs of the outlets. They also suffered from the defendant's practice of competing with the outlets run by franchisees by differentiating between those outlets and the defendant's own Teleshops and its "Hello!" and "POD" shops. The defendant allegedly did this by carrying out special promotions that were available only in the defendant's Teleshops. Further, the average margins given by the defendant continued to drop while sales volumes also dropped or remained flat.

11 According to the plaintiffs, by the second half of 2000, the situation was very critical with the plaintiffs' average margins (after royalties) dropping to as low as between 4% and 6%. The plaintiffs were incurring heavy operational losses and they approached the defendant and presented their plight. There were several meetings with the defendant but no satisfactory solution was arrived at.

12 In the meantime, the defendant had established a new method of retailing telecommunication equipment in the form of the "Hello!" shop and had also established a "POD" shop aimed specifically at young consumers. The plaintiffs were under the impression that their Teleshops would eventually be converted to "Hello!" shops. In April 2001, however, they were informed by the defendant that the defendant did not intend to proceed with the conversion of the retail outlets to "Hello!" shops and that the defendant intended to let the plaintiffs complete the franchise terms with no change to the existing arrangements. The defendant also stated that it did not intend to renew the franchise agreements as it had decided not to continue with the franchise scheme beyond the contracted period. In June 2001, the plaintiffs terminated the various franchise agreements.

First head of claim: breaches of the express terms of the franchise agreements

13 The plaintiffs have alleged that the defendant has breached the express terms of the franchise agreements. Their main complaints are that the defendant failed to:

(a) implement a proper method for conducting, marketing and promoting the business of the franchised Teleshops;

(b) implement a proper point-of-sale ("POS") accounting system;

(c) give advice and guidance; and

(d) conduct performance reviews.

The defendant has denied committing any of the breaches alleged by the plaintiffs. Its position is that it had fully complied with its obligations under the agreements and those contracts did not require it to do the matters of which the plaintiffs complained.

Relevant terms

14 Various terms of the three agreements are relevant to the submissions regarding the alleged breaches. Some of these clauses are worded identically in each of the agreements. Others are worded somewhat differently. For convenience, I set out below the various clauses that the parties rely on, identifying which agreements they come from.

Recitals of the Agreements

(A) The Franchisor [the defendant] as a result of extensive research and practical business experience has developed a successful business of shops retailing telecommunication and other related products and services (hereinafter called "the Business") which is carried on under the name of "Teleshop" (hereinafter called "the Trade Name").

(B) The Franchisor has achieved extensive public awareness and acceptance of, and a favourable reputation and extensive good will throughout Singapore in the Trade Name which is associated with the highest standard of quality and service. The Franchisor is the owner of all rights in the Trade Name.

(C) The Franchisor is the owner of confidential information on the management and operation of the Business and in methods of conducting, marketing and promoting the Business and in a distinctive décor, design and colour scheme of its Business (hereinafter called "the System").

…

(E) The Franchisee [the plaintiffs] recognises the benefits of being identified with and licensed by the Franchisor and is desirous of acquiring from the Franchisor the non-exclusive right and franchise to operate the Business in Singapore in accordance with terms of this Agreement.

Clause 1 of the Agreements – Definitions

"Business" as defined in Recital (A);

"Retail Shop" means one shop opened by the Franchisee to operate the Business at the Location pursuant to this Agreement;

Clause 1 of the Clementi Agreement - Definitions

"Manual" means the manual belonging to the Franchisor setting out the way in which the Franchisee shall operate the Business as set out in Schedule C (as may from time to time be amended);

Clause 2 of the Agreements – Grant of franchise

2.1 For the consideration herein provided, the Franchisor hereby grants to the Franchisee a non-exclusive right, subject to the terms and conditions contained in this Agreement:

(a) to operate the Business at the Retail Shop in accordance with the System; …

2.2 The Franchisor's System used in the operation of the Business is included in this licence. All other systems developed by, or to be developed by the Franchisor and/or its affiliates are not included in this license, but may be licensed separately by the Franchisor, in its sole discretion.

2.3 The non-exclusive grant of the use of the Trade Name and Trade Marks to the Franchisee does not preclude the Franchisor from licensing the use of such Trade Name and Trade Marks to third parties. The Franchisor expressly reserves the right to appoint other franchisees and licensees to operate the Business under the Trade Name in accordance with the System in Singapore and elsewhere.

Clause 5 of the Clementi Agreement – Consideration

The Franchisor shall be deemed to have substantially performed its obligations hereunder upon delivery to the Franchisee of the Manual and upon provision of extensive technical and other assistance and initial advice for the setting up of the Retail Shop. The Franchisor will, however, continue to update information and provide further technical and other assistance as set out in this Agreement. …

Clause 5 of the Boon Lay and Bedok/Holland Drive Agreements

The Franchisor shall be deemed to have substantially performed its obligations hereunder upon provision of extensive technical and other assistance and initial advice for the setting up of the Retail Shop. The Franchisor will, however, continue to update information and provide further technical and other assistance as set out in this Agreement. …

Clause 6.3 of the Clementi Agreement

6.3 The Franchisor will deliver to the Franchisee the Manual in the English Language relating to the Franchisor's Business operation in Singapore as set out in Schedule C. The Franchisee acknowledges that the Manual shall at all times remain in property of the Franchisor and will upon termination of this Agreement be returned to the Franchisor in accordance with Clause 13.3 below.

Clause 6.4 of the Clementi Agreement and clause 6.3 of the Boon Lay and Bedok/Holland Drive Agreements

(a) The Franchisor will undertake advertising and public relations campaigns to promote the Business in Singapore and provide to the Franchisee consultation and advice on the development of concepts and themes for store decoration and displays and window displays.

(b) The Franchisor will make available to the Franchisee, promotional and point-of-sale materials and advise the franchisee on promotional programmes for the Retail Shop.

Clause 6.5 of the Clementi Agreement

6.5 The Franchisor shall:

(a) provide the Franchisee with advice and guidance on management and operations of the Business;

(b) conduct periodic performance reviews together with the Franchisee at least twice a calendar year;

(c) assist the Franchisee in the selection of the Location;

(d) update the Manual and continue its research and development so as continually to improve the System;

(e) make available to the Franchisee all the Products and services which the Franchisor makes available to its other franchisees;

Clause 6.4 of the Boon Lay and Bedok/Holland Drive Agreements

6.4 The Franchisor shall:

(a) provide the Franchisee with advice and guidance on management and operations of the Business;

(b) conduct periodic performance reviews together with the Franchisee at least twice per quarter of a calendar year;

(c) assist the Franchisee in the selection of the Location;

(d) continue its research and development so as continually to improve the System;

(e) make available to the Franchisee all the Products and services which the Franchisor makes available to its other franchisees;

Clause 7.4 of the Agreements

7.4 In order to maintain the highest standard of service to be provided by the Franchisee and the Franchisor's other franchisees operating under the System and to sustain and protect the goodwill and prestige the Business and the Trade Marks enjoy with the public, the Franchisee agrees that:

(a) The Retail Shop will be identified, decorated, furnished, fixturized, equipped and maintained in accordance with uniform standards established by the Franchisor and all such equipment shall meet the Franchisor's specifications.

(b) It will maintain sufficient stocks of the Products and employ sufficient staff to meet all likely demand from the customers of the Retail Shop. All the products and services used or provided by the Franchisee under this Agreement will be of substantially equivalent type, quantity, quality and variety as those used or provided by the Franchisor and consistent with the business image of the Business. The Franchisee shall not advertise or charge customers prices in excess of or below the prices specified by the Franchisor from time to time. The Franchisee will promptly replace or refund the cost of any Products or services supplied by the Franchisee which do not confirm with the high standards required by the System.

(c) All the products used, sold or distributed by the Franchisee in the Retail Shop will be supplied directly through the Franchisor or its approved nominated suppliers. …

(e) It will continuously operate the Retail Shop upon such days and between such hours as the Franchisor shall specify.

(i) The Franchisee shall promptly pay all suppliers of the Business in accordance with their usual terms and conditions. Where the Franchisee has purchased goods from the Franchisor, the Franchisee shall pay for the same within thirty (30) days of the date of the relevant invoice and in the event of default of payment, the Franchisor shall be entitled to charge interest on the sum outstanding at the rate specified in the relevant invoice from the date the sum was due to the date of receipt of payment by the Franchisor.

Clause 7.12 of the Clementi Agreement

7.12 The Franchisee shall implement and thereafter continue to operate the point of sale accounting system in the Retail Shop (more fully set out in the Manual) and which has been devised by the Franchisor and forms part of the System.

Clause 7.11 of the Boon Lay and Bedok/Holland Drive Agreements

7.11 The Franchisee shall implement and thereafter continue to operate the point of sale accounting system in the Retail Shop which has been devised by the Franchisor and forms part of the System.

As can be seen, the differences in wording and numbering between the clauses of the Clementi agreement and those of the Boon Lay/Bedok/Holland Drive agreements are slight. For convenience, I will henceforth specifically mention only the clauses of the Clementi agreement and such references are to be taken as encompassing references to the equivalent clauses in the other agreements.

Did the defendant fail to implement a proper method of business?

15 The plaintiffs quoted recital (C) and cll 2.1(a), 2.2, 6.1, 6.5(d), 7.1 and 7.4 and put forward the proposition that the defendant was obliged to provide the retail outlets with a proper "System" for the efficient management of the same. They submitted that these provisions meant that the System had to be capable of performing the essential functions of sales, marketing, purchasing, inventory control and performance monitoring and review so that the retail outlets could operate efficiently and successfully. The plaintiffs said that the defendant had not shown what its System actually comprised nor did it show that it had provided every necessary ingredient of the same for the Business of the Retail Shops. They also pointed out that the System operated in the Teleshops owned by the defendant itself would have been different from that employed in the franchisee-owned Teleshops as the defendant-owned shops did not need a system for calculating rebates.

16 The first specific allegation under this head made by the plaintiffs was that an inventory management system for the purpose of inventory control and re-ordering was lacking. The plaintiffs were left to their own devices to monitor the stock levels for both inventory control and replenishment purposes. They said that their sales and profitability were often affected by the defendant's inability to fulfil the plaintiffs' purchase orders. They also relied on the evidence of Mr Andrew Koh, who was employed by the defendant as general manager, retail, between October 1994 and January 1998. He said in court that the POS accounting system provided by the defendant "cannot do that inventory. It's point of sale – it's a cash register. Neither can it do accounting".

17 The defendant's evidence on the inventory management system was contained in the affidavit of Ms Pauline Ong who in 1993 was the defendant's assistant manager in charge of two Teleshops, one of which was the Clementi outlet. She said that when the Clementi outlet was established, it was provided with the POS system and the Teleshop Management System ("TMS"). The TMS included inventory management, sales management and repair tracking for customers' faulty items. It comprised a computer that was connected to the defendant's central computer. The details

of the inventory management system were set out in section 6.1.3 of the Manual. The sales transactions registered in the POS system were uploaded at the end of each day to the defendant's central computer for processing. After processing, the stock status of each Teleshop would be downloaded into its own TMS by the next morning. The inventory management system could generate the stock status report, the stock ledger and the stock transaction report of all products. These reports would enable the Teleshops to track the inventory and determine whether they had sufficient stocks left in their shops. As regards the plaintiffs' allegation that the inventory management system could not "generate re-orders for products when they fell below a pre-determined critical level", such a function was never available. The Manual stated that stocks had to be ordered by purchase orders.

18 Ms Ong's evidence was corroborated by that given by Ms Neo Geok Kuan who was an area manager and operations manager with the defendant between 1993 and May 2000. Ms Neo also said that whilst initially the inventory management system was part of the TMS, subsequently it was integrated into the POS system. The improved POS system could process the sales transactions and stock status of the Teleshop without having to rely on the central computer to do such processing under the TMS. The improved POS system was installed in the Boon Lay and Bedok/Holland Drive outlets.

19 Ms Ong testified that the reports referred to could have been generated by the System in May 1993 when the Clementi outlet was opened. She referred to certain exhibits but it was then pointed out to her that these exhibits were for dates in 1998 which was four and a half years after she had left the defendant. She was asked whether she or the defendant could produce a single inventory report that the TMS was able to deliver between 1993 and 1998 and her reply was they could but it was a long time ago and she was not sure that such records had been kept.

20 The defendant submitted that it was not surprising that it had not been able to produce an inventory report made between 1993 and January 1998 as the System had been upgraded in 1998 for the Clementi Teleshop and the old inventory management system no longer existed. In any event, Ms Ong had confirmed in cross-examination that the inventory management system as at May 1993 could produce the same inventory reports as those exhibited in her affidavit in 1998 and that samples of such reports had been attached to the Manual which had been given to TPL. The defendant also submitted that the plaintiffs had misinterpreted Mr Koh's evidence. He had simply said that "POS system cannot do that inventory" which was correct because during his term of employment with the defendants, the inventory management system was contained within the TMS and not the POS system. That was not inconsistent with Ms Ong's evidence that TMS contained the inventory management system. The plaintiffs cast aspersions on the quality of Ms Ong's evidence. Having examined her evidence, I find that those criticisms were not merited.

21 From the sections of the agreements which I have set out above, it would be noted that the main difference between the Clementi agreement and the agreements for Boon Lay and Bedok/Holland Drive lay in the references to "the Manual" which were contained in the Clementi agreement and absent from the other two. There is no dispute that upon signing the Clementi agreement, TPL was given a copy of the Manual. The plaintiffs down played the importance of the Manual which they described as being a start-up kit rather than an authoritative document. However, an examination of the Manual shows that it is a substantial document that sets out in detail the business format and the System of the Teleshop, including the pre-opening preparations, the operation of the Teleshop outlet, the systems used by the defendant's Teleshops, namely the POS System and the TMS, and certain technical know-how. The Manual describes the POS System at section 3.2.9 as being a "cash register used to keep monies as well as transmit daily sales data into the Franchise Inventory System". Whilst that section also says that POS data would be used to analyse the inventory status of each Teleshop, it makes it clear that the POS System is separate from the inventory system. The

Manual sets out the inventory control in the various sub-sections of section 4.3 and this makes clear that it is the stock status report generated by the TMS that would show a detailed record of the movement of all trading stocks. It also gives instructions on how to operate the TMS.

22 Having considered all the evidence, I find that the plaintiffs have not made out their allegation in relation to the lack of a proper inventory system. The inventory system was required by all Teleshops, not only those operated by franchisees like the plaintiffs. The defendant provided the same inventory system to everyone and whilst the plaintiffs might have found it inadequate in certain respects, they managed to operate that system and to run their outlets fairly efficiently for a number of years. Certainly, the defendant recognised that the system was not perfect and therefore upgraded it subsequently. Such upgrading did not mean that a totally inadequate system was provided originally. The system given could produce inventory reports which would have enabled the plaintiffs to track their inventory status and the plaintiffs were able to manually re-order stocks using purchase orders if they did not have sufficient stocks left. Whilst an electronic ordering system would have saved time, the system provided to the plaintiffs was the same one as the defendant was using in its own Teleshops and what the defendant had promised the plaintiffs was to give them the system that it had developed and used. This was the system provided in fact.

23 The second allegation under this head related to rebates. The plaintiffs stated that in a normal course of business with the defendant, they had to claim about 20% to 25% of turnover per month in rebate payments. This was a significant amount and the rebate claims were an integral and recurrent feature of the franchise operation. The defendant did not have a system to track the rebates accruing to the plaintiffs and pay them accordingly. The defendant resorted to a lengthy, *ad hoc* and manual rebate process which imposed on the plaintiffs tedious and unnecessary administrative work. As a result the plaintiffs had difficulty in computing and reconciling the rebates due to them. As the defendant invariably paid less than the amount claimed by the plaintiffs, there were numerous disputes between the parties. In a rebate dispute relating to a period between 2000 and 2001, the defendant initially rejected about $220,000 worth of the plaintiffs' claims. After the plaintiffs protested, the defendant paid 90% of the rejected claims. The difficulties and delays in claiming rebates affected the plaintiffs' cash flow and their ability to carry on business.

24 The plaintiffs' complaint about rebates arose because the defendant supplied them with telecommunication products at normal cost (*ie*, the recommended retail price less the profit margin). When promotions were conducted by the defendant for the Teleshops, the outlets would sell the products to customers at the promotion price instead of the recommended retail price. The difference between the normal cost and the promotion cost (the promotion less the profit margin) would be paid back to the plaintiffs as a rebate.

25 The defendant's response to the above allegation was that there never was any agreement or representation made by the defendant that it would provide an automated rebate tracking or computation system or that the POS System provided to the plaintiffs would be capable of such functions. The defendant pointed out that during cross-examination, Mr Kamaluddin admitted that the Manual did not state that the POS System included a rebate feature. The defendant's Teleshops had never had to claim rebates. The defendant's evidence also was that in the initial stages of the Clementi outlet operation, rebate claims were filled and made on an *ad hoc* basis. Therefore, the rebates were not an integral feature of the franchise operations as alleged by the plaintiffs, but were a feature that evolved over time and in response to changing market conditions. The defendant therefore was not in breach for not providing a rebate system that satisfied the plaintiffs.

26 Mr Andrew Koh's testimony showed that prior to 1994, the defendant did not have a rebate claim system because at that time prices were not volatile in that they changed only every three

months. In those days the defendant was able to give Teleshops two or three weeks' notice of an intended change in prices so that the Teleshops could sell off the old stock at the old prices and no rebates were required. The witness said that from 1994 up to 1997, rebates were given on an *ad hoc* basis. When the rebate claims became more frequent in 1997 because of frequent changes in the selling price of the products due to increased competition, the defendant did provide a manual rebate system to process the rebate claims. The plaintiffs were not happy with that because of the amount of manual work involved. Mr Koh agreed that the system was not perfect but said it was the best the defendant could come up with at that time and was a way to give the franchisees the rebates. Mr Koh also testified that the volume of mobile phones sold by the defendant after MobileOne entered the market in 1997 increased by eight to nine times within the first few months of the increase in competition. The defendant had to employ additional staff to handle the increase.

27 Mr Koh considered that the manual rebate system was cumbersome but another view was taken by Ms Neo. She said that there were only two columns that the claimant needed to fill in and after doing so, it simply had to submit the form to the defendant's retail support team. She also stated that the plaintiffs made the first request for an automated rebate tracking system only in early 1999 by their letter of 17 March 1999. It was Mr Kamaluddin who proposed that the rebate system should be integrated into the POS System and subsequently the defendant engaged a contractor to try and do this.

28 It is apparent from the evidence that initially the defendant had not provided any particular system in relation to rebate claims. It was probably not thought of because the defendant-operated Teleshops did not require such a system to function efficiently since they did not purchase equipment from the defendant. At the beginning also, in view of the relatively stable price situation, there was no need for a sophisticated rebate claim system. *Ad hoc* claims were sufficient. Around 1997, a manual rebate system was introduced in response to the changed situation. Subsequently, when the price changes became even more frequent the manual system adopted revealed its inadequacies. The issue that confronts me is whether by not providing a system which could deal efficiently with the great number of rebate claims that had to be made by the plaintiffs after 1997, the defendant was in breach of its contract with the plaintiffs to provide a system allowing for the successful business of retailing telecommunication products.

29 I have concluded that in relation to the Clementi agreement, there was no breach of contract initially as the defendant's obligation under the agreement was to give TPL the system that it had developed for use in its own Teleshops. That system did not include a rebate system, first because the defendant itself required no such system and secondly, because the business climate of the time did not disclose the need for such a system when the business was franchised. As regards subsequent developments, by cl 6.5 of the Clementi agreement, the defendant undertook to update the Manual and continue its research and development so as continually to improve the System. As the situation changed in relation to rebates, the defendant did introduce a manual rebate system and subsequently employed a contractor to try and develop an automated rebate system. It appears to me that the defendant did do its best to respond to the changing situation and thereby met its obligations under the Clementi agreement.

30 As regards the Boon Lay and Bedok/Holland Drive agreements, the plaintiffs were fully aware at the time they signed those agreements of what they would be obtaining in regard to the rebate system and, going by what they said, they had been asking the defendant since 1993 to improve the system. Yet, in the new agreements, there was no express clause describing the type of rebate system that the defendant was obligated to provide to the plaintiffs. Nor was there any evidence that the plaintiffs had insisted on the presence of such a clause. The plaintiffs, when they signed the new agreements, were well aware of the type of rebate system that they would obtain for the Boon

Lay and Bedok/Holland Drive outlets. Still, they went ahead with those agreements. They knew what they would get and what they were provided with could not therefore be a breach of the agreements, no matter how unwieldy and inconvenient the system was.

31 The third complaint related to the way in which the business of the franchised Teleshops was promoted. The plaintiffs stated that they were not privy to information on the defendant's marketing and promotion plans. Often they learned of a promotion only from newspaper advertisements placed by the defendant and had limited or no stock of the items being promoted. Customers who went to the plaintiffs' outlets to buy these items were often irritated to learn that the plaintiffs did not have stock of the same. Secondly, the defendant often carried out promotions and placed advertisements that the items on promotion were only available at the Teleshops it operated or at the "Hello!" and POD shops. The plaintiffs submitted that the defendant was obliged to fulfil their purchase orders because the plaintiffs were not allowed to purchase from any other supplier. They also submitted that the defendant had promised to ensure that the plaintiffs had an adequate supply of goods according to their needs and orders. I should point out here that there was no such express undertaking in the agreements. What the defendant had promised, by cl 6.5(e), was that it would make available to the plaintiffs all the products and services which it made available to its other franchisees.

32 Evidence was given by Mr Koh, Ms Neo and Ms Sarah Chua, senior director, retail and marketing, of the defendant between February 1999 and January 2001, on the marketing efforts made by the defendant. There was a marketing department which carried out extensive advertising of the Teleshop business. It also ran many promotions, with at least four nationwide promotions each year and produced many promotional and point of sale materials to publicise the promotions such as flyers, posters and pamphlets. The defendant provided and paid for the merchandising for promotions. It also introduced services like seven-day exchange periods which allowed customers to exchange their products without questions asked within seven days of purchase. The defendant believed that all Teleshop franchisees, including the plaintiffs, benefited from these advertisements and promotions.

33 On the specific allegations made by the plaintiffs as detailed in [31] above, the defendant responded by relying on evidence adduced by Mr Koh to the effect that due to the competitive nature of the telecommunication business, notices of promotions were faxed to all Teleshops usually with a couple of days' notice and sometimes only the evening or night before the advertisement appeared in the newspapers. The defendant's Teleshops were not given earlier notice than the franchisees. Further, as regards the limited or "out of stock" situation for items on promotion, the plaintiffs were not the only ones facing that problem. All the Teleshops, including the defendant's Teleshops, faced the same problem. The defendant said that in such a situation, it would allocate the promotional items to all Teleshops based on the track records for sales of the Teleshops and the availability of credit. No special preference was given to the defendant's Teleshops. In my view this statement was somewhat disingenuous, bearing in mind that the defendant's own Teleshops would not have had the "availability of credit" problem and thus would always have been front-runners in the allocation of promotional stock.

34 Mr Koh's evidence was that the defendant made sure that stocks were available in all outlets because customers did not distinguish between defendant-owned Teleshops and franchised Teleshops and therefore expected that all stocks available in one would be available in the other. Ms Neo testified that franchisees were given a choice as to whether they wished to participate in any particular promotion and the quantity required by the franchisee would be discussed with the area manager and delivered to the shop before the promotions started. She also said that for some promotions the quantity allocated was pre-determined by the defendant but disagreed that the defendant alone determined the final allocation of the products.

35 The defendant further submitted that the issue of stock insufficiency was also caused by the plaintiffs' own inability to keep within their credit limit. The defendant said that it was not obliged to deliver goods to the plaintiffs beyond the credit limit which was about $1.3m for all three outlets. Even though the plaintiffs were obliged to pay for the products within 30 days of invoice date, they were often late in making payment and as such they exceeded their credit limit and could not obtain products. The plaintiffs met this submission by arguing that the reason for the late payment was that the defendant's failure to fully repay them the rebates due caused them cash-flow difficulties. They also pointed to a letter written by Ms Neo in March 1999 in which she had stated that Mr Chandra Sehkar had never defaulted on his payments and that his monthly payments were prompt. They said that whenever the credit limit was exceeded they had topped up their account and there was thus no question of their being unable to keep within their credit limit.

36 It appears to me that, on the evidence, there is not much substance in the plaintiffs' complaint that the defendant did not sufficiently promote and market the products. There is, however, more substance in the complaint that the defendant did not fulfil all the plaintiffs' purchase orders. Ms Neo stated in court that the plaintiffs had a problem of stock insufficiency due to their having exceeded their credit limit relatively often. When pressed to give the exact number of times this had happened, she said that, based on memory, the ballpark number might have been two to three times a month. She also agreed that stock insufficiency had affected the sales of the Clementi outlet.

37 It is clear therefore that from time to time the defendant refused to fulfil the plaintiffs' purchase orders. The issue is whether such refusal was a breach of contract on the part of the defendant. The franchise granted by the defendant to the plaintiffs was for the plaintiffs to sell the defendant's products. Obviously that implied that the defendant would supply the plaintiffs with these products. There is, however, nothing in the agreements that states that the defendant's obligation to supply these products was unlimited and that, contractually, every purchase order submitted by the plaintiffs had to be fulfilled even if the plaintiffs had not yet paid for all goods previously supplied.

38 Whilst the plaintiffs submitted that the defendant was obliged to fulfil their purchase orders and to ensure that they had an adequate supply of goods according to their orders, this assertion was not part of their pleaded case. In practice too, it appears that the plaintiffs accepted that the extent to which products would be supplied to them on credit was limited notwithstanding the provision in the agreement that they had 30 days in which to pay for products purchased. From the beginning the plaintiffs negotiated credit limits with the defendant and provided the defendant with a banker's guarantee to secure payment. The amount of this banker's guarantee determined the quantum of the credit line that the defendant extended to the plaintiffs. In 1997, the defendant agreed to increase the credit line for the Clementi and Boon Lay outlets to $850,000 if the plaintiffs gave them banker's guarantees totalling $600,000, and in 1998 the defendant extended a credit line of $450,000 to the Bedok outlet upon receipt of a banker's guarantee for $300,000. The plaintiffs, being aware at all times that there was a limit to the amount of credit that the defendant would extend and having accepted the same, are not entitled, in my view, to complain that from time to time their purchase orders were not fulfilled if the reason for the rejection of the purchase orders was that the credit limit had been reached. Whilst the plaintiffs argue that on those occasions the credit limit was only reached because their valid rebate claims had not been accepted and taken into account by the defendant, I do not have sufficient evidence to make such a finding. The plaintiffs have not correlated the rejections of their purchase orders with the rejections of their rebate claims.

Did the defendant fail to implement a proper point-of-sale accounting system?

39 The plaintiffs' position was that the defendant had not provided a proper point-of-sale

accounting system as it was required to do by cll 2, 6 and 7 of the agreement. Whilst these clauses required the plaintiffs to implement and continue to operate the POS System which the defendant had devised, neither they nor any other part of the agreements specified the capabilities of the POS System to be provided. The plaintiffs took the view that in the absence of such specifications they were entitled to receive a POS System which met the operational requirements of the outlets. They pointed out that they had had to pay the defendant $13,000 for the POS System provided to the Clementi outlet and a further $6,000 each for the systems provided to the other two outlets.

40 The system in fact provided was, the plaintiffs submitted, inadequate. It was not able to track important details nor did it provide any of the important reports that were necessary for the proper and efficient management of the retail outlets. The plaintiffs were unable to use it for the purpose of inventory control, nor could the POS System generate re-orders for products when stock fell below a pre-determined critical level. The system did not track cost details and could not generate reports to enable the plaintiffs to monitor the sales performance and profitability. It was also not able to monitor the differences between the recommended retail prices and promotion prices and claim these differences as rebates from the defendant. The plaintiffs also relied on evidence given by Mr Koh during cross-examination that the manual process used for the submission and consideration of rebate claims was complained about by almost all the franchisees and was a cumbersome one for both the franchisees and the defendant. He also confirmed that the POS System did not have the capability of computing rebates or of doing accounting since it was a cash register.

41 The plaintiffs submitted that the POS System was thoroughly incapable of producing any relevant or important reports that were necessary for the proper and efficient management of the retail outlets. The plaintiffs discovered this only when they started to use the POS System. Therefore, in 1997, when the plaintiffs were discussing opening a second outlet in Boon Lay with the defendant, they requested that the defendant arrange for a proper POS System to be implemented before operations at the new outlet commenced. According to Mr Kamaluddin, the defendant agreed to the plaintiffs' request.

42 Turning to the evidence presented by the defendant, the POS System supplied to the Clementi outlet was described in section 3.2.9 of the Manual as being a "Point of Sale (POS) cash register" that was used to "keep monies as well as transmit daily sales data into the Franchise Inventory System". The POS System in the Clementi outlet comprised, in accordance with the description given in section 5 of the Manual, a cash register linked to a computer terminal. The POS System was used to register sales transactions at the point of sale and it was connected to the defendant's central computer. The defendant would, at its end, key in and update all stock data such as the stock quotes and sale prices. The plaintiffs could then simply download the same from the defendant's server to the plaintiffs' POS System. When the plaintiffs keyed in the stock quotes or scanned the bar codes, the POS System would show all critical information regarding the relevant products. Receipts would be printed out for the customer at the point of sale. Every day, the retail outlets uploaded the data in their POS System to the defendant's central computer for processing.

43 According to Ms Neo, who gave the above evidence, the POS System was also capable of generating reports that would show a breakdown of all items sold during a particular period. The system could also categorise these items according to stock quotes. According to section 5.3 of the Manual, the POS System could generate a Store Item Sales Report (containing a breakdown of all items sold in a day), a Store Activity Report, an X-Read Report (giving details of all transactions done), and a Z-Read Report (a daily summary of all transactions at the end of the day). These reports enabled the Teleshops to know how many units of each product were sold during a certain period. They could also be used to monitor an outlet's sales performance and track inventory. The defendant's Teleshops would, on a daily basis, print out the reports and check the inventory to

ensure that there were no discrepancies. This was crucial in preventing fraud and theft. The plaintiffs were also advised to follow this practice.

44 The POS System in place in the Clementi outlet was the same as that used in all the defendant's Teleshops. The POS System installed in the Boon Lay and Bedok/Holland Drive outlets was an improved version of the one installed in Clementi because it integrated the inventory management system from the TMS. In early 1999, the plaintiffs installed the improved POS System at the Clementi outlet as well. Ms Neo maintained that the POS System provided by the defendant was more than a mere cash register and could perform functions that were unavailable in a cash register. The system provided complied with the defendant's contractual obligations. The original system, that initially installed in Clementi, did not include any inventory management system as the latter was part of the TMS. In respect of the improved POS System installed in the Boon Lay and Bedok/Holland Drive outlets, however, the inventory management functions were integrated into the POS System.

45 The two main witnesses giving evidence on behalf of the defendant on the POS System and its features were Ms Neo and Ms Ong who corroborated the evidence of Ms Neo. Counsel for the plaintiffs did not challenge the evidence of these two witnesses during cross-examination. Whilst it was put to Ms Ong that the POS System was a cash register *simpliciter*, she disagreed and maintained that it was a cash register connected to a computer connected to a telephone line to the defendant's headquarters. Whilst Mr Koh had said that it was only a cash register, he was a member of the defendant's senior management and was not familiar with the day to day workings of the Teleshops or with the Manual in which the detailed features of the POS System was set out.

46 Having considered all the evidence, I do not agree that the POS System supplied by the defendant was not a proper system. The system supplied complied with the defendant's contractual obligations and complied with the system described in the Manual. It was the same POS System used in the defendant's own Teleshops. The fact that the plaintiffs found inadequacies in the POS System does not of itself put the defendant in breach of contract.

Did the defendant fail to conduct performance reviews and to give advice and guidance?

47 Clause 6.5 provides that the franchisor shall:

> (a) provide the franchisee with advice and guidance on management and operations of the Business; and
>
> (b) conduct periodic performance reviews together with the franchisee at least twice a calendar year.

The plaintiffs submitted that the defendant was in breach of both these obligations.

48 The defendant adduced evidence of the system that it put in place to monitor and advise on the management and operation of the Business. Each Teleshop, whether operated by the defendant itself or by a franchisee, was placed under the charge of an area manager employed by the defendant. The area manager visited his Teleshops on a weekly basis and had to advise and guide the management of the outlets on the running of the Business. The area manager had also to ensure that the Teleshops under his charge met the sales target that the defendant had set for them.

49 An example of how this system operated can be found in the evidence of Ms Neo, the area manager in charge of the Clementi outlet up till June 1997. She confirmed that, as area manager, she had visited that outlet weekly for four years. On each visit, she would first examine the shop display

and check to ensure that it was eye-catching and in accordance with the guidelines given by the retail department. She would ensure that current promotional products and materials were displayed and would advise the shop manager on the proper method of display. Additionally, she would observe the customer service skills and the presentation of the staff. Any deficiencies in knowledge or training would be pointed out to the manager. After spending about half an hour in the front of the shop observing operations, Ms Neo would adjourn to the back room with the shop manager to inform him of her observations and advise him on ways of improving operations. She would also examine the inventory and sales report of the outlet and then analyse the inventory status and sales performance with the manager. If there were stocks that had been around for some time, she would advise the plaintiffs to return the same to the defendant so that credit would be freed up for them to purchase other stocks that would sell better. She would also examine the sales volume and advise the shop manager on the type of products that appear to be selling well in the Clementi outlet and to ask him to order more of such products. If there were insufficient stocks to meet the demand, she would look into the problem and try to arrange for more stocks to be given to the Clementi outlet.

50 At the close of each month, and upon consolidation of the sales and inventory data for the Teleshops, the area manager would discuss and analyse the sales performance for that month with the shop managers. Ms Neo said that for her part, during such discussions with the manager of the Clementi outlet, she would compare the sales performance for that month with that of the previous months as well as compare it with the sales performances of other Teleshops under her care during that month. She did this to inform the shop manager how his outlet was faring financially on the macro level.

51 The defendant also conducted monthly shop managers' meetings which were attended by its retail director, its operations manager and the area managers. During these meetings, the shop managers were free to raise any concerns or problems they had with the defendant and to seek advice and guidance. In addition, the defendant conducted regular training sessions for the plaintiffs including on-site training by the defendant's training department. Product training was provided prior to each product launch. The defendant paid for the services of a "mystery shopper" who would visit all of the Teleshops randomly and without notice and report on the quality of the customer service of the Teleshops. The defendant also engaged a research company to conduct, on a yearly basis, a "customer satisfaction survey" in respect of the Teleshops. All reports and survey results were distributed to the various franchisees, including the plaintiffs, to assist them in monitoring and improving their customer service.

52 The above evidence of the type of advice and guidance proffered by the defendant was not challenged by the plaintiffs. Their complaint in this area centred on the opening of the Bedok outlet. That outlet was a failure from the start and what the plaintiffs are upset about is that the defendant permitted them to open this outlet. In their closing submissions, the plaintiffs focused on Ms Neo's assertions that the defendant did not want the plaintiffs to open an outlet at the Bedok Mass Rapid Transit (MRT) station and that the higher royalty imposed for the Bedok outlet was meant to discourage the plaintiffs from establishing it. The plaintiffs submitted that Ms Neo was being untruthful in giving the above evidence since if the defendant really did not want the plaintiffs to open the Bedok outlet, it could simply have said "no approval" and that would have been the end of the matter. On the other hand, if it was indeed true that the defendant's conclusion was that the Bedok MRT station was unsuitable for a Teleshop, then the defendant had failed in its obligation to assist the plaintiffs in the selection of a suitable location as it had approved the location whilst believing it to be unsuitable. Further, when the Bedok outlet failed to perform, the defendant turned down the plaintiffs' proposal to cut their losses by closing the Bedok Teleshop immediately. The defendant's insistence that the plaintiffs continue operations at Bedok until a new outlet could be opened showed a lack of concern for the welfare of the plaintiffs and a lack of good faith.

53 According to Ms Neo, when the plaintiffs first proposed opening an outlet at Bedok, she informed them of the defendant's concern that the Bedok area was too small to support two Teleshops and the sales of the defendant's own Teleshop would be diluted if a new outlet was set up. She then turned down the proposal. The plaintiffs were still keen on this proposal so she then inspected the site and did some financial projections which indicated that their proposal was not workable. The initial negotiations were held with Mr Chandra Sehkar. The plaintiffs then asked for a further meeting and this time Mr Kamaluddin met Ms Neo and the then general manager, Mr Lee. At that meeting, Mr Kamaluddin showed Mr Lee the plaintiffs' own projections and said that the plaintiffs were very confident that the area could support two Teleshops. The defendant finally decided to ask for increased royalties of 10% to discourage the plaintiffs from proceeding. The plaintiffs were not happy with this royalty figure but assured the defendant that they had done their homework and were confident that the Bedok outlet would be a success. Since the plaintiffs appeared determined to set up the outlet, the defendant agreed to reduce the royalties slightly to 9.5%.

54 As stated above, Ms Neo's position in court was that the increased rate of royalty was intended to act as a disincentive. A document which she produced in March 1999, however, stated that the higher royalty was asked for in order to compensate for "sales cannibalisation" as Bedok Central was a relatively small area. I, however, have no reason to doubt Ms Neo's evidence that she turned down the plaintiffs' proposal twice. Mr Chandra Sekhar, the person whom she spoke with, did not contradict her evidence on this point. It appears to me that the defendant's initial reluctance to sanction the outlet was worn down by the plaintiffs' enthusiasm and insistence. The defendant's main concern at that time was that the Bedok area was too small to support two shops and that its own Teleshop would lose sales. The plaintiffs were made aware of this position and yet wanted to proceed. They were willing to pay higher royalties for the outlet because of their confidence in its location. Subsequently, when sales were bad, they ascribed the poor result to a combination of the following factors:

(a) The shop was in an enclosed area which was not well air-conditioned or lit and as such the thousands of commuters who used the MRT station tended to rush out of the station.

(b) There was only one shop in the location, making it unattractive as a shopping destination.

(c) There was no convenient car park for customers who were driving.

(d) There was an established Teleshop nearby.

In hindsight, it is clear that the defendant made a mistake in acceding to the plaintiffs' request and approving the location of the Bedok outlet. I am, however, not prepared to hold the defendant in breach of contract for having done so when the evidence has established to my satisfaction that it was the plaintiffs who wanted this location and who kept on working on the defendant to overcome its reluctance and give the necessary permission. It is unfortunate that the defendant's fears were proved correct. All the factors that the plaintiffs complained about later would, however, have been known to them at the time they established the shop and if they, experienced businessmen, underestimated the adverse impact of such factors, they cannot really complain that the defendant gave in to their continued persuasion. Overall, the evidence has established the defendant continually carried out its obligations to give advice and guidance to the plaintiffs on the running and management of their business.

55 The second complaint in relation to the Bedok Teleshop was that the defendant had failed to provide advice and guidance by insisting that the plaintiffs continue with the operation of the Bedok

outlet despite the losses incurred. The defendant's response was that it was not obliged under the Bedok/Holland Drive agreement to accede to this request but that it had, out of goodwill, agreed to allow the plaintiffs to relocate the outlet and had assisted them in looking for a new location.

56 It appears to me that the plaintiffs cannot seriously argue that the defendant's obligation to provide the franchisee with advice and guidance on the management and operations of the business meant that it was obliged to permit the plaintiffs to close the outlet when it lost money. Closing of the outlet would have meant, in effect, a termination of the Bedok/Holland Drive agreement. That agreement was for a term of ten years. There is no provision in the Bedok/Holland Drive agreement that allows for early termination if the outlet turns out to be a loss-making enterprise. The Clementi agreement contains such a provision but this clause was omitted from the Bedok/Holland Drive agreement. Under the latter, TPL could seek an early termination but only by giving notice after the lapse of 36 months from the opening date of the business. Alternatively, if the defendant was in breach of its obligations, TPL could terminate for cause. The scheme of the Bedok/Holland Drive agreement therefore clearly contemplated that for the first 36 months the outlet would continue to function and the defendant would not be bound to advise TPL to close it notwithstanding its poor performance. The plaintiffs themselves, in their letter of 17 September 1998 to the defendant setting out their problems with the Bedok Teleshop and asking for permission to close it while they were looking for an alternative location, did not assert that the defendant had a contractual obligation to permit such closure, much less that the defendant would be in breach of contract if it did not agree to their request. The plaintiffs at that time had a clearer appreciation of the contractual situation than they displayed in their closing submissions.

57 The third complaint is that the defendant failed to carry out the performance reviews required under the contract. It appears to me that the dispute revolves around the meaning of the term "performance reviews". The defendant maintained that performance reviews had been conducted regularly although there were no written records of the same. It was not disputed that there had been regular meetings at the various outlets between the defendant's area managers and the staff of such outlets. The plaintiffs took the view that such meetings were for the purpose of enabling the area managers to provide advice and guidance to the staff on daily operational matters and were not performance reviews. They asserted that to qualify as a "performance review" within the terms of the contract, the review had to be on the sales and profitability of the outlets and contain advice on how to improve profitability.

58 The defendant's position was that the weekly meetings between its area managers and the staff of the outlets and the regular meetings between the franchisees and the area managers (about once every three or four months) fulfilled the obligation to conduct performance reviews. The profitability of the franchised outlets was not the defendant's concern and it was not part of its function to monitor profitability or advise on the same. Its advice was directed at assisting the Teleshops to meet their sales targets and achieve a certain turnover. Whether such turnover would translate into bigger or smaller profits for the franchisees would depend on the latter's own costs.

59 Clause 6 of the Clementi agreement deals with the defendant's obligations as franchisor. There are five sub-clauses and each of them deals with an aspect of the franchised business. Sub-clause 6.1 sets out the obligations of the defendant to provide training and technical assistance to the employees of the franchisee. Under cl 6.2, the defendant agreed to make its own personnel available to the franchisee for additional technical and other assistance. Clause 6.3 deals with the delivery of the Manual and cl 6.4 deals with the marketing and advertising needed to promote the business and advice on store decoration and display of merchandise. Clause 6.5 has six sub-paragraphs. The first deals with advice and guidance on management and operations, the third deals with the selection of the location of the store, the fourth relates to the improvement of the system,

the fifth is on the availability of products and services and the sixth relates to warranties for the products. The second sub-paragraph, which is the one I am concerned with here, deals with the conduct of "performance reviews". This sub-paragraph therefore appears in a context that deals with how the franchisor is supposed to impart knowledge of its franchised business system to the franchisee and provide the necessary support to enable the franchisee to operate the business in the correct way and maximise its sales. The whole clause is concerned with the conduct of the business. It is not concerned with the franchisee's own profit margins. Everything is aimed at turnover. The performance reviews in this context must be reviews aimed at ascertaining how well the franchisee had implemented the system, both from the point of view of display and range of products and from the point of view of staff competence, knowledge and customer service. Discussions covering the areas of sales, customer service, competency of staff and display of merchandise would contribute to improved performance of any outlet. How such improved performance impacted on the individual franchisee's profitability would depend on other factors as well that were not within the defendant's control. In this context, the plaintiffs' interpretation of the words "performance review" to mean review of the profitability of their outlets is strained. It is worth noting that there is no profit guarantee in any of the agreements.

60 It is also significant that the plaintiffs did not complain before May 2001, when their relationship with the defendant deteriorated, that the defendant had failed to carry out the obligatory performance reviews. The plaintiffs complained about various things during their relationship with the defendant and it is therefore not unfair to infer that, on the whole, they did not expect the defendant to go into detail on issues relating to their own profitability. The directors of the plaintiffs were experienced businessmen. They ran bookshops before they went into the telecommunication equipment sales business. One of them, Mr Kamaluddin, held a degree in business administration. He agreed in court that profitability of the outlets was determined to a large extent by two factors, *ie*, income and overheads and that the matter of overheads was largely within the plaintiffs' control. He also agreed that the overheads were substantially made up of directors' salaries and the rental for the various outlets. Mr Kamaluddin and his partners were well aware of how profitability could be controlled. They were also aware of what information needed to be given to the defendant if they wanted advice on profitability. They did not go to the defendant at any time with this information and ask for such advice. The plaintiffs have not established that by failing to deal with the profitability of the outlets, the defendant was in breach of contract.

Did the defendant fail to ensure an adequate product range for the plaintiffs' outlets?

61 In relation to this allegation, the plaintiffs rely on the terms of recital (A) and cll 7.4(b) and (c). They assert that for the last few years during which their outlets operated, the defendant drastically reduced the range of pagers and fixedline telephones supplied to the plaintiffs. These items were of low value but gave the plaintiffs higher margins and helped increase the plaintiffs' average margins. Such items sold well in the plaintiffs' outlets and the plaintiffs could not comprehend why the defendant saw it fit to discontinue such products. At times, the defendant also did not allow the plaintiffs to carry some products (for example, the latest data communication products), insisting that such products were meant for the defendant's Teleshops.

62 The defendant's response was that the above allegations were not pleaded and the plaintiffs in respect of such claims adduced no evidence. None of the defendant's witnesses were cross-examined on these points and the plaintiffs never put their case on the same to any of the defendant's witnesses. On the authority of *Browne v Dunn* (1893) 6 R 67, such failure to put their case would be fatal to the plaintiffs.

63 The defendant's points were well taken. Paragraph 12 of the Re-Re-Amended Statement of

Claim in Suit No 890 of 2002 and para 6 of the Re-Amended Statement of Claim in Suit No 889 of 2002 contain the respective plaintiffs' averments in relation to breach of contract. In each case, there are six sub-paragraphs setting out the specific ways in which the defendant has, allegedly, breached the agreements. None of these sub-paragraphs states that the defendant breached the agreement by drastically reducing the range of pagers and fixed-line telephones supplied to the plaintiffs and by refusing to allow the plaintiffs to carry some of the products. Since these alleged breaches have not been pleaded, they were not before the court and the defendant did not have an opportunity to deal with them either by way of pleadings or by way of evidence. The plaintiffs cannot raise these points now.

Conclusion on the allegation of express breach

64 In considering the various allegations made by the plaintiffs, I have borne in mind that the parties, as franchisor and franchisees, were in a continuing commercial relationship, had dealt with each other over many years, and had a common interest in the promotion of the business. There were difficulties faced by both parties during the relationship due to both internal factors like the way in which the franchised system operated and external factors like the increased competition faced by the defendant from other purveyors of telecommunication services. However, both parties worked reasonably well together to try and sort out any problems that they faced. The evidence adduced by the defendant showed that there was no substance in the plaintiffs' complaint that the defendant failed to maintain and promote a continuing interest in the business of the franchised outlets. Further, if occasionally there were breaches of contract by the defendant in the early years, these cannot have been serious breaches causing loss to the plaintiffs as they went on to sign the Boon Lay agreement in December 1997 and the Bedok/Holland Drive agreement in February 1998 without asking for any express terms to be included in these two agreements to address their complaints. On the evidence, the plaintiffs have not made out their allegations in this area.

Second head of claim: breach of implied term

65 In their respective Statements of Claim, the plaintiffs pleaded that the agreements each contained an implied term that:

> in order to give business efficacy to [the agreement] the defendant would not during the currency of the agreement compete either directly or indirectly with the Retail Shop and the other franchisees.

They further averred that in breach of the agreement the defendant had competed with the plaintiffs. The advantages offered to the defendant's own Teleshops and the setting up of "Hello!" and "POD" shops made the plaintiffs' outlets materially less profitable for the purposes contemplated by the agreement and prevented the plaintiffs from reaping benefits as franchisees of the defendant. The particulars of the foregoing allegation were as follows:

> (a) The defendant had conducted special promotions which were only made available to the defendant's own Teleshops. The said promotions differentiated between the defendant's own Teleshops and those of the franchisees, including the plaintiffs' outlets, thereby preventing the plaintiffs from fully enjoying the benefits of using the trade name "Teleshop". In the premises, the plaintiffs had suffered loss of sales.
>
> (b) In or around early 2000, the defendant introduced the competing trade names "Hello!" and "POD". The defendant announced the progressive replacement of its Teleshops with "Hello!" and "POD" retail shops. The defendant's marketing campaigns and promotions were focused on

the said competing trade names. The defendant failed and/or neglected to implement any or substantial marketing strategy for the plaintiffs' outlets.

66 Before I go on to deal with the issue of whether there was an implied term relating to competition, I must mention that in their closing submissions, the plaintiffs also invoked the notion of good faith. They submitted:

> The crux of the claim for breach of implied term is the submission that a duty of good faith is implied into a franchise agreement. It is the plaintiffs' submission that the defendant, as franchisor, owe the plaintiffs, as franchisees, a general duty of good faith. The pleaded implied term is part of that general duty, which the plaintiffs say arises on the facts of this case, and which was breached.

67 The defendant submitted and I agree that the plaintiffs were not entitled to make any submissions relating to a duty of good faith or a breach of such duty. I have set out in [65] above the way in which the plaintiffs pleaded the existence of the implied term, its nature and the manner in which it was allegedly breached. They did not plead that in a contract between a franchisor and a franchisee there is a duty of good faith. They did not plead what such a duty would consist of and they did not plead how such duty was allegedly breached. It is clear from *Bullen & Leake & Jacob's Precedents of Pleadings* (13th Ed, 1990) and Australian cases like *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393 that a breach of a duty of good faith must be specifically pleaded as a separate cause of action. Pleading the point is all the more important in that the legal position as to whether Singapore law recognises the existence of a duty of good faith in a franchise contract has not yet been established. In the absence of such a pleading, the point cannot be raised. Therefore, in considering whether the plaintiffs have made out their case in relation to the implied term relied on, I am disregarding all arguments founded on the alleged duty of good faith.

68 The courts do not lightly imply a term into a written contract. They only do so if, objectively, it is considered necessary for the "business efficacy" of the contract and so obvious that there would be no doubt of the parties' joint answer to the query of the "officious bystander" as to whether that term was part of the contract. *Chitty on Contracts* (29th Ed, 2004) states (at 13-004):

> An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and, in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both, however, depend on the presumed intention of the parties.

In *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458, the Court of Appeal (*per* Chao J at [18]) held that the relationship between the two tests was "probably" correctly summarised in the above passage. Andrew Phang has, however, to my mind, persuasively argued on the basis of the historical development of the tests that they are not alternatives but complementary in as much as the "officious bystander" test is the practical mode by which the theoretical guideline encompassed within the "business efficacy" test is fulfilled: see Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] JBL 1. One highly distinguished authority that gives rise to that view is the oft-quoted statement of Scrutton LJ in *Reigate v Union Manufacturing Company (Ramsbottom), Limited* [1918] 1 KB 592 at 605 that:

> [a] term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a

> case," they would have both replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear."

It is also worth repeating the strictures of the Court of Appeal in the *Hiap Hong* case to the effect that the "business efficacy" test is a convenient means of repairing an obvious oversight, but that the principle should not be overstretched or used indiscriminately; and that the touchstone for the implication of terms is necessity and not merely reasonableness, but that a necessary term to be implied must always be equitable and reasonable. The court further declared that a term would be implied if, from the language of the contract and the surrounding circumstances, an inference should be made that the parties must have intended the stipulation in question. Finally, the term to be implied must be capable of clear expression and it must not contradict any express term of the contract: see *Phillips Electronique Grand Public SA v British Sky Broadcasting Limited* [1995] EMLR [*Entertainment & Media Law Reports*] 472.

69 The term the plaintiffs seek to imply is that the defendant would not during the currency of the agreements compete either directly or indirectly with the plaintiffs' Teleshops and the other Teleshop franchisees. An application of the principles set out above leads me to the conclusion that it is not possible to read such a broadly-phrased term into the agreements in view of the express terms of the agreements and the knowledge that both parties had when they contracted with each other. I will elaborate.

70 The fundamental nature of the relationship between the defendant as franchisor and the plaintiffs as franchisee is clearly stated in the recitals to the agreements. The defendant had developed a successful business of shops retailing telecommunication and other related products and services carried on under the name of Teleshop and had achieved public awareness of, and extensive goodwill in, this trade name. This was recital (A). It recognised that when the Clementi agreement was entered into, the defendant had already established a number of retail outlets known as Teleshops in which the defendant's products were sold in a consistent and systematic manner. Recital (B) enunciated the plaintiffs' recognition of the benefit of being identified with and licensed by the defendant and therefore their decision to enter into the agreement to obtain a non-exclusive right and franchise to operate Teleshop outlets. Thus, the essential purpose of the agreements was to delineate the terms on which the plaintiffs could operate businesses selling the defendant's products in the way developed by the defendant, so as to ensure that from the point of view of the public the plaintiffs' franchised Teleshops were identical to and not distinguishable from the defendant's own Teleshops. The plaintiffs knew at that time that the intention was to grant other franchises to other parties and that the defendant itself might continue to establish its own Teleshops at various locations. The plaintiffs themselves were happy to benefit from this intention by entering additional agreements to operate new outlets even though theoretically those new outlets might compete with their existing outlet at Clementi.

71 Other clauses are also important. Clause 2.2 of the Clementi agreement stipulated that the defendant's business system used in the operation of its business was included in the licence and then went on to expressly provide that "all other systems developed by, or to be developed by the Franchisor and/or its affiliates are not included in this licence, but may be licensed by the Franchisor, in its own discretion". The agreements also contained non-competition clauses which, significantly, only restricted the plaintiffs from competing with the defendant. No express provision on non-competition by the defendant was included. The duration of the agreements is also relevant. The Clementi and Bedok/Holland Drive agreements each had a duration of ten years and the Boon Lay agreement was to last five years. The plaintiffs had an option to renew each agreement for a further five years upon its expiry. The agreements also provided that the plaintiffs had to buy the products only from the defendant, had to sell at prices set by the defendant and did not control the marketing

of the brand or the products. All advertisement and marketing were to be done by the defendant. It is also important in this exercise that the agreements required the plaintiffs to pay the defendant a franchise fee as well as royalties on the products actually sold.

72 So the circumstances were that the plaintiffs were paying a fee to operate a retail outlet indistinguishable from the defendant's own retail outlets but were also aware that similar retail outlets had been and would be set up throughout Singapore operated by both the defendant and other franchisees. The defendant also had the specific right to develop other marketing systems which would not be part of the franchise. It cannot therefore have been obvious to both parties when they negotiated this contract that there would be no competition at all by the defendant with the plaintiffs' outlets. The implied term as formulated by the plaintiffs is far too wide. Whilst the meaning of "compete either directly or indirectly" is not readily ascertainable, it is obvious that at the least it bans all direct competition by way of other outlets selling the same products in the same way. Such a ban would be completely contrary to the parties' intentions.

73 For the reasons given above, I cannot imply into the agreements an implied term in the language formulated by the plaintiffs. However, it is clear to me that to enable the plaintiffs to derive benefit from the franchise arrangement over the lengthy period of time it was to subsist, some form of limitation on competition by the defendant would be necessary. Bearing in mind, therefore, that the licence given by the defendant was to operate a Teleshop at a particular location, it would be necessary and obvious that the defendant would not be entitled to compete with the plaintiffs by setting up another Teleshop or other retail outlet providing the same products and services within the vicinity of the plaintiffs' Teleshops.

74 The evidence of Mr Lum Hon Fye, who was the chief executive officer of the defendant for two years, was that the defendant would not have agreed to include in the agreements a clause stating that it would not, during the currency of the agreements, compete either directly or indirectly with the plaintiffs' Teleshops and other franchisees. Mr Lum testified that this clause would have been contrary to the defendant's roll-out plan for Teleshops and other strategies for the retail of telecommunication equipment and services. This evidence, which is completely credible, is another reason for not implying the clause in the terms contended for by the plaintiffs.

75 There is, however, a basis for implying a more limited non-competition clause. Whilst the defendant's witnesses in their evidence did not address the issue of a clause that prevented them from competing by setting up another Teleshop in the vicinity of the plaintiffs' outlets, its evidence was that retail shops under the SingTel banner were sited at different locations around Singapore because each retail outlet was designed to target customers in a particular catchment area. The geographical separation of outlets was important in the defendant's overall retail strategy since cannibalisation of another retail outlet would not make commercial sense. I think that if the "officious bystander" had asked the defendant whether it was permitted to open another outlet next door to, or in the catchment area of, the Clementi Teleshop, both it and the plaintiffs would have said "Of course not". Accordingly, a term could be implied which provided that the defendant would not compete with the plaintiffs by establishing a Teleshop within the vicinity of the plaintiffs' outlet. However, even if such a term were implied into the agreements, there is no evidence that the defendant was in breach of the same.

76 The plaintiffs did not complain about the location of any of the defendant's own Teleshops. This part of the plaintiffs' case was focused on the existence of the "Hello!" and "POD" shops. These shops were, however, nowhere near any of the plaintiffs' outlets. The defendant's evidence was that it took care not to locate a "Hello!" shop close to a Teleshop and the "Hello!" shops were competing with the shops of SingTel's competitors located in the Central Business District. Though the plaintiffs

contended that the catchment area for the "Hello!" shops would not simply be the immediate vicinity of those shops given that Singapore is a small island and people travel widely for work, and therefore the "Hello!" shops competed with their outlets, accepting this argument would also mean denying the defendant's right to set up any other Teleshops in Singapore since those could also be accessed by consumers from other places like Boon Lay, Clementi and Bedok. The defendant's right to set up other stores was contractually enshrined and cannot be denied. I find that the establishment of the "Hello!" and "POD" shops was not in breach of any implied clause preventing the defendant from competing with the plaintiffs' outlets within the vicinity of the same.

77 The plaintiffs' other complaint under the rubric "breach of non-competition term" was that their business had been made less profitable because the defendant had conducted special promotions that were made available only to the defendant's own Teleshops and had thereby differentiated between them and the plaintiffs' outlets. That was an inappropriate rubric for such a complaint. The agreements contemplated that the defendant would run its own Teleshops and thus, to some extent, compete with the plaintiffs. What the plaintiffs were really saying in making this complaint was that the agreements contained an implied term to the effect that the defendant would make its special promotions available to all Teleshops including franchised outlets. Whilst the plaintiffs have not pleaded the implied term in this manner, bearing in mind the express reference to such conduct in the Statements of Claim and the further allegation that this conduct caused loss of sales to the plaintiffs, I will consider whether such a term could be implied.

78 Was it essential for the business efficacy of the franchise that all promotions mounted by the defendant were made available equally to the franchisees and the defendant's Teleshops? The franchisees were paying for marketing and advertisement and had no control over what promotions were to be mounted by the defendant. It is arguable that, if they had known that a discriminatory policy might be adopted in relation to promotions, they would have been less enthusiastic about entering into the franchise agreements. However, whilst it might have been reasonable from the franchisees' point of view to include such a term in the franchise agreements, it was not essential for their business efficacy as shown by the fact that for many years the plaintiffs' outlets were able to carry on business and have good turnovers even though they did not participate in many promotions. Further, this was not the type of term that I could conclude would have been obviously acceptable to the defendant as well since its evidence established that there were many good commercial reasons why promotions were not always made available to all outlets.

79 First, the defendant carried out local store promotions to create publicity for a particular Teleshop or a few Teleshops in a region whenever there was a need for the same arising from causes like slow moving sales, the establishment of a new shop and to counter competition from competitors' outlets. An example of this was the special promotion that was conducted for each of the plaintiffs' outlets upon the opening of the same. The plaintiffs did not complain that they benefited from promotions not extended to others. Second, where the margins for the promotional products were very low (for example where the intention was to clear obsolete products) and it was not profitable for the franchisees to participate in the promotions, the promotions were conducted in the defendant's Teleshops. Third, the defendant sometimes conducted promotions in conjunction with or to complement a particular event like a road show and therefore only involved nearby Teleshops in the promotion. Limited promotions were also conducted when there were limited stocks or a new product was being tested in the market, or where the promotion was being conducted in partnership with a third party. Bearing in mind the various reasons for conducting limited promotions, I cannot conclude that the defendant would have agreed to the inclusion of the implied term in the agreements. It would have rejected such a term because it would have wanted to preserve its marketing options.

80 I thus conclude that even in the reformulated version, the term on which this part of the plaintiffs' case depends cannot be implied into the agreements. Whilst the defendant had valid commercial reasons for not extending its promotions to all Teleshops all the time, this does not necessarily mean that, in fact, all cases of limited promotions were made for such valid reasons. I do not have to decide that latter issue, however, in view of my finding in relation to the implied term.

Conclusion

81 For the reasons given above, both limbs of the plaintiffs' claims fail. Both actions are dismissed with costs to the defendant.