Corinna Chin Shu Hwa *v* Hewlett-Packard Singapore (Sales) Pte Ltd [2015] SGHC 204

Case Number	: Suit No 918 of 2012
Decision Date	: 04 August 2015
Tribunal/Court	: High Court
Coram	: Edmund Leow JC
Counsel Name(s)	: PE Ashokan and Geraldine Soon (KhattarWong LLP) for the plaintiff; Gregory Vijayendran, Lester Chua and Pradeep Nair (Rajah & Tann LLP) for the defendant.
Parties	: CORINNA CHIN SHU HWA — HEWLETT-PACKARD SINGAPORE (SALES) PTE LTD

Contract – Contractual terms

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 109 of 2015 was allowed by the Court of Appeal on 28 March 2016. See [2016] SGCA 19.]

4 August 2015

Edmund Leow JC:

Introduction

1 The plaintiff, Corinna Chin ("Corinna"), was a sales product specialist with the defendant from January 2005 until June 2012, when she was retrenched. The defendant is a Singapore subsidiary of Hewlett-Packard ("HP"), a well-known multinational corporation. Corinna claimed a total of $627,369.54 from HP. From this sum, $584,613.19 was for allegedly outstanding incentive compensation from a $5.38m contract that Corinna helped to clinch with Network for Electronic Transfers (Singapore) Pte Ltd ("NETS"), the electronic payments provider. The other $42,756.35 was claimed on the basis that her final incentive pay for sales made should have been calculated based on pro-rated rather than full-year targets as she was retrenched before the end of the financial year. I decided in her favour on both claims on 28 April 2015. As HP has appealed, I set out my grounds.

Background

The incentive compensation scheme

2 Corinna was a product sales specialist in HP's NonStop Enterprise Division ("NED"). NonStop systems are fault-tolerant servers designed for businesses that cannot afford any downtime in the provision of their services. Her salary package comprised base pay and a variable component, the incentive compensation. For sales employees, incentive compensation typically forms the bulk of the total pay package. At HP, annual sales letters set out the performance metrics on which incentive compensation amounts are based. For the financial year 2012 (starting 1 November 2011) ("FY12"), HP introduced a new performance metric – the New Business Metric ("NBM") – to encourage sales specialists to bring in new business. HP also disseminated a guideline to define "new business", which I partially reproduce:

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

...

3 The guideline also set out the procedure for claim processing. Sales specialists were to submit claim forms, which had to be endorsed by the country business critical systems manager and approved by the regional NED manager. Approved claims were to be submitted for sales crediting on a quarterly basis to HP's Sales Compensation Operations ("SCO").

4 The regional NED manager was Sandeep Kapoor ("Sandeep"), who was a key witness for HP at trial. Sandeep was one of the developers of the NBM. According to HP, Sandeep was vested with the authority to implement various aspects of the NBM in the Asia-Pacific and Japan ("APJ") region, including determining the applicable definition of "new business". [note: 1]

The NETS contract

5 NETS operates an electronic payment system that allows ATM cards to be used to make payments island wide. NETS had been using HP's "Tandem" servers to support its e-payment system. These servers ran a software application named Base24 Classic from a company called ACI Worldwide Inc. When the HP platform fell due for replacement, NETS started to consider alternatives. While HP did put forward a proposal for a new system, NETS decided in late 2010 to buy IBM servers that ran a software application from a company called FIS instead. NETS entered into a contract with IBM that was worth $5m to $6m [note: 2]; it took delivery of the IBM servers in April 2011. [note: 3] It also contracted with FIS for the software application.

6 The process of system migration to the new IBM servers took place in 2011. Software development and customisation for these servers had to be completed before NETS' critical business load could be moved to the new IBM servers. Until then, the old HP servers had to remain online to serve NETS' critical business needs. The complete migration process was supposed to take about 18 months. [note: 4] However, the migration met with problems. FIS was unable to provide NETS with a satisfactory system as of December 2011, although it met the first milestone in June that year. [note: 5] Sandeep said that around March to June 2011, the "industry talk" was that the FIS application development for the IBM servers was not proceeding smoothly. Around April 2011, key NETS personnel linked to the project had also resigned. [note: 6] Upon getting wind of the migration problem, Corinna and her colleagues tried to woo NETS back. Sandeep said that he met with ACI Worldwide personnel to "devise an aggressive strategy" to ensure that NETS abandoned their migration plans and continued with the HP/ACI platform. [note: 7] However, HP's attempt started even before that. HP said that Sandeep, Corinna and other colleagues devised a plan in January 2011 to create a "compelling event" for NETS to abandon their plans to migrate to the IBM servers and "opt for a 'technology

refresh'" with HP instead. In a nutshell, this involved refusing to extend maintenance services for the existing servers unless NETS signed a new contract with HP. [note: 8] For example, Corinna told NETS in an email that the maintenance service could not be extended to end March 2012 even if NETS made pre-payment. [note: 9]

7 This was a hardball tactic designed to leave NETS with little choice but to consider returning to HP for new servers. Given the critical nature of the e-payment service to the general public, the existing HP servers had to remain online until after the migration was completed. Mr Lau Soon Liang, NETS' director of technology and infrastructure, said that even after the new system had gone live, NETS would still require hardware maintenance for the old servers for at least three months. [note: 10] This was a "prudent measure" to ensure a fall back in the event of any issue arising on the new machines. However, the maintenance contract for the existing HP servers was expiring at the end of December 2011. As the migration process needed longer than that, especially given the issues that had cropped up, NETS could not afford to risk having no maintenance cover for the existing HP servers. As Soon Liang said: "… the continual maintenance from the hardware vendor is very critical". Therefore, HP's refusal to extend the maintenance service put pressure on NETS' planned migration. [note: 11]

8 For a combination of reasons, HP's efforts to woo NETS back over the course of 2011 were ultimately successful. Faced with problems in meeting the migration schedule, which spelled knock-on effects for its business requirements, NETS decided to discontinue the planned migration from the old HP platform to the new IBM platform around December 2011. According to HP, active negotiations with NETS took place between October 2011 and March 2012 to explore "upgrading" to HP's NonStop Blades servers instead. [note: 12] For example, Corinna and her colleagues met NETS' representatives in November 2011 to discuss the option of migrating NETS' critical business load to the new HP servers. Corinna sent NETS a finalised quotation on 23 February 2012. About a month later, on 21 March 2012, HP concluded the NETS contract when NETS issued a purchase order for the new HP servers, worth about $5.38m. HP also extended its maintenance support for the old servers. [note: 13] Customisation and tests for migration to the new system was completed by 8 May 2013, when the new HP system went live. [note: 14] The conclusion of the NETS contract with HP took place about 15 months after NETS had entered into the contract with IBM.

9 Corinna's effort in clinching the NETS contract was not disputed. Sandeep's evidence was that she had made a "significant contribution in implementing" HP's strategy and was also HP's main point of interface with NETS, although he said that NETS was principally motivated by the failure of applications development for the IBM/FIS platform. [note: 15]

Corinna's repeated queries on the NETS contract

10 On learning of the new incentive compensation scheme, Corinna made repeated queries as to whether the NETS contract would constitute new business for the purposes of the NBM. On 27 September 2011, she sent an email to her former manager, Koh Lian Chong, to ask if the NETS deal was "considered new biz since it has been lost to IBM". [note: 16] Upon learning that Sandeep and another manager were to make the "final call" for the "real case", she emailed them on 26 October 2011. [note: 17] In the email, Corinna asked if the sales to NETS would constitute new business since NETS had already received servers from IBM and was in the process of migration. [note: 18] They did not respond to her query. [note: 19] The annual Sales Kick-Off event ("SKO event") for regional NED sales took place on 2 December 2011. According to HP, Sandeep presented on the NBM and fielded

many questions on the definition of "new business". However, Corinna repeated her query in an email on 17 February 2012 which she sent to Julie Shaw, the manager for NED sales operations in the APJ region, and Sandeep. Corinna wrote: [note: 20]

> Hi, Julie,
>
> As spoken, please seek clarification that winning back NETS as a NonStop account (lost to IBM when NETS decided to migrate out of Base24 …) is considered 'New Business' and that the NonStop product revenue for this deal will go towards fulfilling the quota for the New Business Metric.
>
> Sandeep,
>
> I will count on your support in this matter based on your words of 'I would like to help maximise salespeoples' compensation' to me this morning.

This eventually drew a reply from Sandeep five days later: [note: 21]

> As I had mentioned during the SKO 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 ESSN management people.
>
> …

11 As can be seen, Sandeep did not address Corinna's query squarely. Corinna's doubts continued even as the timeline to close the NETS contract drew closer. In a 27 February 2012 email reply to a manager who had urged her to close the deal, Corinna wrote that she would then need his help to "resolve the New Business Metric issue asap" so that she had "clarity" on her compensation plan. [note: 22] In his reply on 1 March 2012, the manager stated that it was Corinna's job to close the "must win deal". He added that he was not aware of the sales compensation issue but said that "we will address it separately with your Manager".

12 On 13 March 2012, Jacob Lieu ("Jacob") told Corinna that he was taking the NETS contract as new business. As Corinna's country business critical systems manager, Jacob was the endorser of her new business claims under the NBM implementation guideline (see [3] above).

Events after the NETS contract

13 On 20 April 2012, Corinna filed her claim under the NBM on the basis that NETS was a "win back" client, that is, a client that left HP but later returned. She completed the manual claim form, which had two ovals, one for a new customer and another for an existing customer. She highlighted the words "existing customer" and added "Win Back Account" in parentheses. She also stated that the NonStop system was replacing the IBM servers, and the applications used were Base24 and Base24-EPS (the newer version of the software). The claim was endorsed by Jacob five minutes after he received the relevant email, but Sandeep refused to approve Corinna's claim.

14 In an email on 8 May 2012 to Jacob and other managers, Sandeep stated, *inter alia*, that the NETS deal was not a "clear cut fit to be qualified for new business definition, yet it is very important win at the same time". [note: 23] On 11 May 2012, he asked Jacob to check with NETS if HP's new

system was replacing IBM's servers (*ie*, whether the IBM system had already gone live) or replacing the old HP ones, and whether any new application ran on the new system. On 7 June 2012, Jacob replied to Sandeep's email to say that NETS had confirmed that it had moved from using HP's old system to its new one; there was no new application running.

15 In an email to Sandeep on 5 June 2012, Corinna wrote that she had been informed by Jacob that Sandeep had rejected her claim. She asked for reasons, but received no reply from Sandeep. On 8 June 2012, Corinna lodged a complaint with HP's corporate compliance department for alleged unethical and discriminatory management practice in the pay-out for the NBM claim. This led to an internal probe titled Project Merlion. Christina Teong ("Christina"), the investigation lead, also gave evidence for HP at the trial.

16 On 12 June 2012, Sandeep, in an email sent to Jacob and other members of HP's management, rejected Corinna's claim. This email was not sent to Corinna. He said that, based on the information from NETS, the contract did not fall within the guideline for new business. Corinna had set her quota for new business at 10% of her total NED quota – the minimum required. Sandeep added that this "further corroborates" that the NETS deal was not included in the quota setting for new business. However, he said that since NETS was a rather competitive deal, appropriate compensation relief could be provided "as goodwill to acknowledge the sales effort". [note: 24] Essentially, HP's view was that the NETS contract had failed to meet any criteria for new business. Corinna disputed this, and claimed an outstanding incentive compensation amount of $584,613.19, thus giving rise to the first issue.

17 Corinna was retrenched on 18 June 2012, before the end of the financial year. On 3 October 2012, Corinna finally received an official response. She was told, *inter alia*, that after a comprehensive review, [note: 25] her claim did not amount to new business under the NBM. In addition, the amount of sales compensation that she was entitled to was calculated on an aggregate basis, *ie*, her final incentive pay of $229,370.60 was derived by measuring her sales performance against full-year goals. However, Corinna contended that the calculation should have been done on a pro-rated basis as she was involuntarily terminated.

18 The initial calculation for Corinna's sales compensation had in fact been done on a pro-rated basis. At least two other employees received the same treatment. In those cases, the final payments had remained based on the pro-rated calculations. [note: 26] However, HP put these two cases down to the error of junior analysts in the SCO. The policy and practice was clear – sales compensation for all terminations, whether voluntary or otherwise, was on an aggregate basis. Besides the two cases, there were no calculation and payment errors for the other 10 retrenched employees. At trial, HP confirmed that it had not sought recovery of the purported over-payment from the two former employees. Nor had it written to them. This was ostensibly because the sums involved were relatively small at $2,000 and $6,000. However, HP explicitly reserved its rights to legal recourse against one of them for sharing the details of her compensation calculations with Corinna in alleged breach of confidentiality provisions, which had potentially exposed HP to greater damage. [note: 27]

19 Both sides relied mainly on HP's Global Sales Compensation documents, including a handbook and a policy that governed Corinna's sales plan, to support their respective interpretations of how the final incentive pay should have been calculated. Corinna claimed another $42,756.35 for this issue.

20 In total therefore, Corinna was claiming a further $627,369.54 on top of the $229,370.60 that HP had paid her on retrenchment.

Issues

Issues

21 Based on the facts above, two main issues arose:

(a) Whether the NETS contract qualified as new business under the NBM ("the NBM issue"); and

(b) Whether Corinna's final incentive pay on retrenchment should have been calculated by measuring her sales performance against full year or pro-rated goals ("the Pro-rating Issue").

Whether the NETS contract was new business

22 For ease of reference, I again reproduce the implementation guideline for the NBM, which laid out the definition of new business:

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

23 As Corinna rightly pointed out, this issue turned on the contractual interpretation of what was meant by the term "new business". [note: 28] Specifically, the crux of the matter lay in whether NETS qualified as a "new end user customer" – the first bullet point of the definition – such that the new NonStop system sale constituted new business. Corinna also submitted that the NETS contract was new business as it fulfilled the other criteria in the definition, but I did not rely on those grounds to resolve this issue. The question was whether a "win back" customer was considered a "new end-user customer" or whether only a customer with no prior relationship with HP could ever be considered new.

Interpretation of the NBM

24 The NBM issue, as well as the Pro-rating Issue, both required contractual interpretation. The interpretation process involves ascribing to the words that meaning which the parties, using those words against the relevant background, would have reasonably understood them to mean: see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 06.042, citing the House of Lords decision of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913. As was stated in the treatise, this may not always accord with a "party's *subjective intentions*, for the purpose of the process of construction is to identify and give effect to the parties' intention, *objectively* ascertained" [emphasis in original].

25 The Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") approved the contextual approach to contractual interpretation (at [114]). Extrinsic evidence is admissible to aid in the interpretation of

written words; ambiguity is not a pre-requisite for the admissibility of extrinsic evidence: see *Zurich Insurance* at [132(c)]. But to be admissible, extrinsic material must meet three criteria: relevance (it would affect how the language would have been understood by a reasonable man), reasonable availability to the contracting parties and relation to a clear or obvious context ("the Zurich criteria"): see *Zurich Insurance* at [132(d)].

26 On the need for the extrinsic evidence to make reference to a clear or obvious context, the Court of Appeal in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 stated at [43] that "the context must allow the court to objectively ascertain a clearly defined or definable intention held by both parties with respect to how the contractual term in question should be interpreted." The Court of Appeal in that case commented that in "cases where the courts had read down the scope of contractual terms, the relevant factual contexts were sufficiently clear and obvious such that the court could ascertain the clearly defined intention of the parties". Where extrinsic evidence is unclear, it will "also be generally unhelpful to the reasonable man's understanding of the contractual terms": see Goh Yihan, "The New Contractual Interpretation in Singapore" [2013] 2 SJLS 301 at 323.

27 As a preliminary matter, I note that the NBM and its implementation guideline were created by HP's management for its sales specialists to act on in FY12, starting November 2011. The scheme was introduced by the management with no opportunity for mutual negotiations beforehand. The arrangement resembled a unilateral contract, in the sense that Corinna was eligible for incentive payments if she met the sales criteria that were promulgated by HP, subject to HP's discretion The course of dealing between Corinna and HP was marked by her repeated requests for clarification of the criteria in the light of the NETS contract (see [10]–[11] above). However, clarification was not forthcoming even when the NETS contract was concluded on 21 March 2012.

28 Extrinsic evidence may be of surrounding circumstances, previous negotiations, subsequent conduct and subjective intent. Surrounding circumstances can include "the legal, regulatory, and factual matrix which constitutes the background in which the document was drafted" (*Zurich Insurance* at [131]). Evidence of the circumstances surrounding the contract enables the court to consider the "facts and circumstances which were (or ought to have been) in the mind of the [drafter] when he used those words": *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [64]. It was also held in *Zurich Insurance* (at [132(d)]) that "there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in a normal case, such evidence is likely to be inadmissible for non-compliance" with the Zurich criteria. Further, evidence of subjective intent may assist where there is latent, as opposed to patent, ambiguity. In such cases, where ambiguity does not appear from the language but only becomes apparent when the language is applied to the factual situation, the court may take into account subjective declarations of intent, such as direct evidence of the intention of the parties (see *Zurich Insurance* at [132(e)] and [50]).

29 In Corinna's sales letter, the section on performance metrics, which was called "… Shipment New Business", did not define the NBM. The sales letter would have been read together with the implementation guideline that Corinna received on 7 December 2011 (see [22] above). The guideline contained the new business definition, but the meaning of "new" was unexplained although it was used repeatedly. For a word so often used in daily life, "new", which was deployed as an adjective in the definition, has multifarious meanings depending on the context. In the *New Shorter Oxford English Dictionary* vol 2 (Clarendon Press, 1993) at p 1912, "new" could mean "[n]ot existing before; now made or existing for the first time". On this meaning, NETS would not be a "new end user customer" as long as it had existed on HP's books in the past. However, other meanings of "new" included "[s]tarting afresh; restored or renewed after decay, disappearance, etc" and "… in addition to others

already existing or present". On this view, a customer who had left but later returned to HP's existing client book, *ie*, a "win back", could well be considered a "new end user customer". The rest of the sales letter and the implementation guideline were of no assistance in providing further context.

30 According to Sandeep, the concept of a "win back" customer was so hypothetical and remote in the business that it was not factored in when the rules were set for generating new business. [note: 29] Given the huge outlay involved in buying business critical servers, it would be a rare case where a lost customer returned to the fold. Sandeep also said that the new business definition was clear to its intended audience – the sales representatives. He said that "the definition to the targeted audience have a good visibility of what this really applies to…" [note: 30] Moreover, at the SKO event on 2 December 2011, a lot of effort had been made to explain the definition of new business. HP "took pains" to explain to the sales personnel, including Corinna, "what really constitutes new business, what is new business within a new customer or within the [installed] base customer". [note: 31]

31 I accepted that a reasonable person would know that, in the normal course of NED sales, it was exceedingly rare for a customer to return to HP once it had entered into a contract with another company to buy servers, which involves outlays of millions of dollars. However, at the material time, a reasonable person with the relevant background information would have the knowledge that NETS had already been lost to HP, in the sense that NETS had rejected HP's proposal in late 2010 and had subsequently taken delivery of IBM servers. Despite this, there was a real chance of a "blue moon" event happening, given that there were ongoing migration issues and continuing efforts to create a "compelling event" by leveraging HP's maintenance agreements with NETS to win it back.

32 With all this background information, a reasonable person would have wondered if NETS would be considered a new end user customer if he persuaded NETS to contract with HP for new servers. Given that "new" might usually refer to someone who was a complete stranger to HP's customer base however, a reasonable person would have thought to enquire with HP's management on whether NETS would be considered a "new end user customer". To ask was in fact what Corinna did. Had answers been forthcoming, the resulting exchange, which would have been available to both parties, might have provided a clear or obvious context. But Sandeep did not respond satisfactorily to her particular queries, even if it was true that he fielded many queries during the SKO event. Her continued queries (see [10]–[11] above) were a clear sign that the briefing at the event might not have come across clearly. The definition could not have been as clear to the target audience – the sales representatives – as Sandeep claimed. It was Corinna's evidence that Sandeep had not clarified the issues relating to the NETS contract during the event. [note: 32] So the true meaning of "new end user customer" was left ambiguous.

33 Extrinsic evidence that is sought to be admitted "must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon" (see *Zurich Insurance* at [132(d)]). In my view the ambiguity was a patent one (see [29] above) and therefore no evidence of subjective intentions could be admitted to resolve the ambiguity (see *Zurich Insurance* at [50] and [76]). But even if I was wrong, and the ambiguity was a latent one, the evidence concerning the subjective intentions of the parties did not in any event supply a clear or obvious context, and served only to underscore the ambiguity.

34 HP said that the NBM was created to encourage HP's sales representatives to sell to new customers and seed new customer accounts. Such activity was more challenging and required more effort than procuring a "technology refresh" (the migration of old HP to new HP servers) and/or an "upsell" (the purchase of greater capacity loads or other upgrades on existing servers) to an existing customer account. [note: 33] The "spirit" of the NBM was corroborated by email exchanges between

Sandeep and his colleagues in July 2011 (which Corinna was not privy to), to work out the compensation plans for FY12. On 26 July 2011, 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 the NED specs to hunt for new business to drive growth for FY12 and beyond. …

35 However, the evidence did not assist as to whether a former customer, who had left the "installed base", would be considered a new customer and hence, "new business" under the NBM. A "win back" customer might have been consistent with the spirit of the NBM as well. Sandeep's evidence at trial was that a customer in FY12 qualified as a new customer only if it had never bought NonStop products. Had this intended meaning of "new end user customer" been available to Corinna, she would not have had sought repeated clarification (see [10]–[11] above).

36 As mentioned above, Corinna had set her quota for new business at 10% of her total NED quota – the minimum required for her performance metrics in December 2011. It was HP's case that by setting such a low percentage, Corinna had not taken into account the prospect of the NETS contract qualifying as "new business" under the NBM. [note: 34] Such evidence might be taken to mean that Corinna herself did not believe that the NETS contract, even if it was a "win back" deal, was new business. However, the evidence was neither here nor there. Corinna might have reduced her quota to the minimum required because she was unsure if the NETS contract would constitute new business. In fact, there was ample evidence to show that Corinna was, at all material times, unsure of that: see [10]–[11] above.

37 HP pointed out that in response to an internal request to verify if existing Singapore customers were still active, Corinna had sent back the relevant document on 21 February 2012 that reflected NETS' status as "active". [note: 35] Corinna had not struck out NETS as a customer. Again, this evidence did not necessarily show that she had considered NETS to be an existing customer, such that it could not be a new end user customer *for the purpose of the NBM*. The request, which was for Sandeep's presentation, did not specify if the status of a customer was to be considered from an incentive compensation standpoint. It was open to Corinna to take a technical perspective and view NETS as an active customer since the old HP servers were still running at the time. But even from a sales perspective, NETS could also be considered "active" at the time as it was close to being won back. By December 2011, NETS had decided to discontinue the planned migration from the old HP platform to the new IBM platform. By HP's own submission, by 17 February 2012, most of the technical and price issues in relation to the NETS contract had been resolved. An official quotation for the new servers had been sent to NETS on 15 November 2011; a finalised quotation was sent on 23 February 2012. Given that the NETS deal was so close to being formally completed, it was quite possible that she saw no reason to strike NETS out as a customer at that point.

38 The evidence that Corinna described HP's proposal to NETS as a technology refresh proposal was also neither here nor there. A reasonable salesperson, intent on gaining the custom of a former customer, would obviously choose wording that would make the customer think that he had remained a valued client.

39 The NETS contract was formally concluded on 21 March 2012 with the issue of the purchase order. The evidence was unclear as to whether the parties had intended for "new end user customer" to exclude a "win back" customer. As already noted, Corinna filed her claim form on 20 April 2012. [note: 36] The form provided two ovals, one for a new customer and another for an existing customer.

Corinna typed in the words "Win Back account" beside the latter category. HP submitted that in doing so, Corinna had regarded NETS to be an existing customer rather than a new end-user customer. [note: 37] Hence, there was no ambiguity at all – it was clear to all parties concerned that a new end user customer was one that had no prior relationship with HP. However, if this had been the case, she could have simply shaded the oval for existing customer without inserting "Win Back account". In fact, Corinna's actions viewed as a whole (see above at [10]–[11]) indicated that she was unsure. At trial, she said that she filled in the form as she did as IBM was still using the old HP servers, "[s]o to actually use new customer is not quite correct, to use existing customer is also yes and no. So actually I put in … 'Win Back account'…" [note: 38] In other words, NETS was a new customer in some respects (it had been lost to IBM but won back), but not others (it was still using the old HP servers). The uncertainty resulted precisely because the NBM and the implementation guideline were unclear as to the meaning of a new customer. Given that the form only provided two mutually exclusive options, Corinna was simply trying to fill up the form as best as she could.

40 HP also adduced evidence of the treatment of other claims in the APJ region, but I did not consider the fact that there were no disputes to other NBM claims elsewhere relevant to the question before me. HP also submitted that NETS had considered itself to be an existing end user customer of HP, but this was also irrelevant – the question of the meaning of "new end user customer" should be considered from the viewpoint of a reasonable person in the position of the parties. In any event, NETS would have wanted to consider itself a long-standing customer as it might yield benefits in its dealings with HP.

41 At the end of the interpretive exercise, I therefore concluded that the meaning of "new end user customer" remained objectively ambiguous – HP had caused it and left it to be so.

Further evidence of ambiguity

42 The evidence at trial supported my finding of ambiguity. The investigation team that was commissioned to look into Corinna's complaints recognised ambiguity in the definition of new business for FY12. An internal case summary on the investigations in July 2012 listed one of the investigation objectives as whether the NETS deal met the definition of new business so as to render eligibility for sales compensation entitlement. [note: 39] The slide on recommendations, which was part of a series of slides, stated:

> 1) New business performance metrics as stated in the Sales Letter needs to be clearly defined as to how the phrase should be interpreted and clear explanation/guidance to be given by the superior before the next financial year kick off
>
> 2) New business definition in the new business metric (implementation guidelines) needs to be clearly defined and/or with additional guidance or examples

43 In the investigation report, which had different versions which were only produced after a court order, it was also recommended that the ambiguity be clarified: [note: 40]

> **<u>Other recommendations</u>**
>
> **To have better clarity in defining "new business" and a clear communication on sales plan to employee**
>
> The investigation team noted that the definition of new business could be better defined in the

implementation guideline. The team therefore recommends that a clear definition and/or additional guidance or examples should be included in the implementation guideline and reference to be made in individual Sales Letter to clarify the ambiguity …

44 Amendments were in fact made to the definition for the following financial year, FY13. HP disclosed this only at trial. [note: 41] In the revised guidelines, [note: 42] a "win back" customer did in fact count as a new customer, provided that two years had passed since the end of its maintenance contract with HP:

New Business definition

- New End-user customer

  a) Customer who has no HP NonStop /Tandem system installed, or

  b) *In case any customer in the past had a NonStop/ Tandem system, but had migrated off their NonStop/Tandem production environment to other platforms, and hence seized (sic) to be NonStop customer, and now wish to come back to NonStop, can be considered new business provided there is at least 2 year gap since the previous TS maintenance contract was discontinued.*

- Installed Base Customer

  a) New application and/or new area for the existing end-user customer, and

  b) New NonStop system sale as pre-requisite to new business entitlement to differentiate new biz from up sell, and

  c) There should be a considerable selling effort and/or displacement of a competitive platform in the new area of application. The new business eligibility in installed base is effort based and NED SR / Pre sales should be able to substantiate a considerable selling effort including submitting proofs / documentations of migration SOW from other platforms /databases as necessary to clearly establish new business vs. installed base capacity / migration/refresh.

  …

[emphasis in italics added]

45 In the new guidelines, the maximum sales credit that could be earned under the NBM was also capped at 2.5 times of the quota for new business.

46 Against all this, Sandeep claimed that the new business definition was clear to the sales staff – for FY12, a new customer referred to one who had never bought a system from HP. [note: 43] At trial, he reiterated that there had been no ambiguity in regard to the definition of new business. [note: 44] He also explained that the subsequent recommendations by the investigation team were precautionary in nature.

47 However, if the meaning was so clear, I saw no reason for his failure to address Corinna's query on 26 October 2011 in a timely fashion (see [10] above). Despite his intimate involvement in the NETS

deal, [note: 45] Sandeep said that he did not respond to Corinna's query at the time as the NETS contract was "not scoped out, so it was too premature at that stage to call it new business or not new business". [note: 46] When asked why he did not at least acknowledge her email even if he was unable to furnish a substantive response at the time, he said that "all our energies [were] going into securing the revenue for the end of the financial year". [note: 47] I did not think that Sandeep's explanations were convincing. Neither were they acceptable if his position was that there was no ambiguity in the definition. At the very least, he would have been able to clarify that the NETS contract could never satisfy the particular category of "new end user customer" since NETS was not a customer who had never bought a NonStop product from HP. He did not do so, and the ambiguity persisted.

48 In fact, there were signs that Sandeep himself had an unclear and inconsistent view on the scope or application of his definition. In his reply to Corinna's email query in February 2012 (see [10] above), he said that "Julie will look into the definition of new business. We may have to take opinion from sales comp and few other ESSN management people …" In his email to Jacob and other managers in May 2012 (see [14] above), he said that the NETS deal was not a "clear cut fit to be qualified for new business definition …" While he stated in his email exchange with the investigation team in July 2012 that new customers were those who had not previously bought HP products, [note: 48] he also said that if NETS had approached HP after its maintenance contract had been terminated for a period of time, "that will be a clear distinction to classify it as a new business". [note: 49] Asked about this contradiction at trial, Sandeep could only say that there might have been a "mix-up" as he was working on improving the FY13 definition at that point in time. [note: 50]

49 When Sandeep emailed Jacob on 6 June 2012 for his response from making checks with NETS on whether Corinna's claim fell within the new business rules, Sandeep had required confirmation on whether: [note: 51]

> a) The NonStop system is replacing IBM system that is already in production or whether the existing HP S series system is still under TS contract and the supplied NonStop Blade system is replacing the HP S Series system.
>
> b) any new application that the NonStop Blade system will run …

Clearly, Sandeep had asked Jacob to check not just whether the NETS contract involved a new application for an existing end user customer, but if the NETS contract involved a new end user customer in the "win back" sense. As Corinna submitted, if Sandeep truly believed that "new end user customer" in FY12 only meant a new customer who had never bought a NonStop product from HP, he would not even have considered whether NETS could qualify as a new customer, as on his definition, that would never have been the case. [note: 52] In my view, Sandeep's own contradictions underscored the uncertainty over the meaning of "new end user customer". They also reflected poorly on Sandeep's credibility as a witness.

50 My finding of ambiguity was also buttressed by the fact that Jacob, who was designated as the endorser of the claim, was of the view that the NETS contract qualified as new business as NETS should be considered a "win back". He had reasoned that NETS had opted to buy IBM's servers in December 2010 to replace IBM's old Tandem servers, and had expended a large sum in the process. Therefore, if Corinna had clinched the NETS contract, HP would have won NETS back as an NED customer and that would constitute new business under the NBM. [note: 53] Through the trial, I found Jacob to be a credible witness who spoke in good faith. By October 2012, he had left HP's employ,

and I was of the opinion that he had no personal interest in the outcome of the case. Jacob's evidence, which supported Corinna's interpretation, indicated that her interpretation was a plausible one.

51 At trial, Christina of the investigation team had also said that while the conclusion of the investigation was that Sandeep had rejected Corinna's claim on objective criteria, the definition of new business was ambiguous and needed to be clarified. Her evidence contradicted Sandeep's insistence that there was no ambiguity. She said: [note: 54]

> When I look at the definitions, I think it's – when I make the recommendations and say the definition is not clear, it's ambiguous because there is no further elaboration what is a new business. It is just "new business", full stop. That's all. So it sounds like it is up to individual how you want to interpret it.

52 HP raised a number of other arguments in support of its position that there was no real difficulty or ambiguity in the definition of new business, including the meaning of "new end user customer". For example, on the findings of the investigation team, HP submitted that it was unclear from the presentation slides and the investigation report precisely which aspects of the NBM lacked clarity. In regard to the slides, the team was referring to a need for clarity in definition as opposed to ambiguity. Moreover, the recommendations were in regard to the need for "clarity in writing", so it did not follow that there was no clear explanation of the NBM guidelines to staff, including Corinna, for FY12. HP also urged me to give little weight to the recommendations as the report was examining the process and not whether the definition was clear. HP said that Christina's views on the new business definition were based on how it appeared on paper, and did not take into account the fact that the definition was discussed at length at the SKO event.

53 In view of my interpretation of the meaning of "new end user customer" and the further evidence that supported my finding of ambiguity, I did not find these arguments particularly convincing. None of these arguments adequately explained why Corinna had to make repeated enquiries on whether NETS qualified as new business (see [10]–[11] above) without receiving a meaningful response from Sandeep, if the definition was as clear as HP claimed.

Applying the contra proferentem rule

54 It is a canon of construction that where there is doubt about the meaning of a contract, the words will be construed against the person who put them forward: see Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) at p 360. According to the learned author, who reviewed common law authority on the application of the canon, the phrase "the one who puts forward" includes the person who prepared the document as a whole and the person who prepared the particular clause (p 362). Where one party had the responsibility of putting forward the whole contract, the contract would be construed against him, even if the other party had a hand in the drafting process. In support of this proposition, the author cited the Supreme Court of Canada case of *Co-operators Life Insurance Co v Gibbens* (2009) SCC 59, which held at [25] that "[w]hoever holds the pen creates the ambiguity and must live with the consequences".

55 On when the maxim applies, the author found that "[p]erhaps the most that can be said is that the court will resort to the maxim where the justice of the case demands it" (at p 367). He also commented at p 362:

> … In *Association of British Travel Agents Ltd v British Airways Plc* Sedley LJ described it as "a principle not only of law but of justice." The origin and first purpose of the principle is to limit the

power of a dominant contractor who is able to deal on his own take-it-or-leave-it terms with others.

56 However, there is one important condition before the principle can apply – there must be a doubt or ambiguity, and the principle "should not be used for the purpose of creating a doubt or magnifying an ambiguity, where the circumstances of the case raise no difficulty" (at p367). In *McGeown v Direct Travel Insurance* [2004] 1 All ER (Comm) 609, Auld LJ held 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. …

57 Similarly, our courts have also held that the principle "cannot apply to create an ambiguity where one does not exist": see *LTT Global Consultants v BMC Academy Pte Ltd* [2011] 3 SLR 903 at [56]. Hence, it is only when the court is unable to arrive at a conclusion of the meaning of the term in question after undergoing the interpretative process that the principle may be applied as a tool of last resort. Having done so, I was still unable to determine which meaning of "new end user customer" should be preferred, *ie*, whether he was a customer who had never bought a NonStop product from HP or whether he could also be former customer who had returned to HP to buy a NonStop product. I thus construed the term *contra proferentem* against HP, which drafted the definition.

58 I was satisfied that this was a paradigm case in which this canon of interpretation should apply. The sales letter containing the NBM and its defining guidelines were put forward by HP with no room for negotiation. This was not unlike a "take it or leave it" situation, where the sales staff had no opportunity to vary the terms prior to their announcement. Given that the meaning of "new end user customer" was ambiguous, especially in the light of the NETS contract, it was only natural for Corinna to seek clarification from HP's management, including Sandeep, who had the power to state the guidelines more clearly. Had he addressed Corinna's queries, the ambiguity would have been resolved, and that would have nipped the issue in the bud. At trial, Sandeep himself agreed that any definition of new business had to be clear and properly explained to sales employees, because the payment of incentive compensation depended on it. [note: 55] In the circumstances, the justice of the case demanded that HP bore the risk of the ambiguity in the meaning of "new end user customer".

59 Given that I had held against HP on the meaning of "new end user customer", I considered whether, on the facts, NETS was a "win back" customer so that it fell within the definition. HP suggested that NETS had always remained an existing customer. At all material times, NETS' critical business load continued to be supported by HP's old servers. There was also an ongoing maintenance agreement, with payment of software licence fees. Therefore, the contract was a mere technology refresh contract in the sense that it involved a migration of NETS' critical business load from old to new HP servers. However, the key difference between the present case and a case of technology refresh was that NETS had rejected HP by signing a contract with IBM for servers in late 2010, when it made the decision to buy the IBM platform. In terms of sales, NETS had been lost as a customer at the time. HP took issue with Corinna's drawing of a distinction between a technical viewpoint and a sales compensation viewpoint, but since this was an incentive compensation scheme for sales specialists, I was of the opinion that it was the latter viewpoint that mattered. After all, when the contract with IBM was signed, the only reason for the critical business load to remain on the old HP servers for a time was because of a migration process that could not be completed overnight. The maintenance agreements had to continue because NETS could ill afford any downtime. But for all

intents and purposes of the NBM, NETS had been lost as a customer. Corinna submitted that HP's employees had themselves acknowledged on many occasions that HP had lost NETS. [note: 56] For example, in an email that Sandeep sent to Corinna in November 2010, he stated that there was "high risk that if we lose NETS", there would be impact on other customers. [note: 57] This suggested that the defining aspect of the relationship with NETS was the NETS contract. Therefore, NETS was a "win back" – *ie*, a new end user customer – when it signed a contract for HP's NonStop Blades servers in March 2012. The NETS contract therefore fell within the new business definition on the application of the *contra proferentem* rule.

60 Corinna's employment contract documents with HP, such as her employment agreement and sales letter, gave HP the sole discretion to grant payments under her variable pay plan and decide on payment disputes. However, it was not HP's case that it was entitled to exercise its sole discretion in an unreasonable or arbitrary manner, or even if the NETS contract qualified as new business on the objective criteria, to cap or reject Corinna's claim. [note: 58] As such, the only way for HP to exercise its discretion was in favour of Corinna, who was thus entitled to her claim for the outstanding incentive compensation.

61 HP had also contended that since the NETS contract was a technology refresh, the requirement for a new NonStop system sale, which was stated in the implementation guideline as a pre-requisite to new business entitlement, was not met. HP submitted that the need for a new system sale and new end user customer were cumulative requirements. [note: 59] Similarly, the need for a new system sale and that of a new application/area for an existing customer were also cumulative requirements. However, the NETS contract was not a technology refresh contract, in the sense that an existing customer was simply upgrading its existing HP systems to new ones. The NETS contract came after NETS had bought IBM servers to run its critical business in place of the existing HP servers. While migration did take place from the existing HP servers to the new HP ones, this was because NETS was won back as a customer before – and not after – the migration process was completed. Since I had already found that a "win back" customer was a "new end user customer", the sale of the new HP servers must surely constitute a new system sale. In any event, I doubted that cumulative requirements could be read into the implementation guideline. As Corinna pointed out, it was not in the definition that there had to be a new system sale additional to the existing systems to qualify as new business. [note: 60] I also noted that for the FY13 guideline, the need for a new NonStop system sale was parked under the category of existing customers that bought into new applications/areas.

62 Corinna had also made arguments on the basis of estoppel. [note: 61] She contended that HP was estopped from claiming that the NETS contract was not new business. The "overall effect" of HP's words and conduct was an affirmation that the contract was new business, constituting an implied promise to that effect. There was also an implied promise that if she could bring in the NETS contract within the second quarter, HP would consider the contract as new business. As I found for Corinna on interpretation, I did not decide on this point, which would have required me to determine whether promissory estoppel could be used as a cause of action in itself, *ie*, a sword, instead of a shield: see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

The Pro-rating Issue

63 Corinna contended that her incentive compensation should have been calculated on a pro-rated quota basis as opposed to an aggregate quota basis. On the other hand, HP submitted that it was its practice to calculate a sales employee's final incentive compensation on an aggregate basis for both voluntary as well as involuntary terminations. [note: 62]

64 I resolved the issue of how the incentive pay was to be calculated by interpreting HP's Global Sales Compensation documents, which included a policy and a handbook that governed Corinna's sales plan. These documents bore the hallmark of standard form documents insofar as they prescribed a standard treatment of incentive pay administration for HP employees on sales plans worldwide. Just like the guidelines for the NBM, HP, as the employer, drafted and put the terms forward without any negotiation with the employees.

65 HP submitted that it was an express term of Corinna's employment contract with HP that her final incentive pay should be calculated on an aggregate basis. [note: 63] It relied heavily on the Terminations section of the FY12 HP Global Sales Compensation Policy (Section 8.4) to support its interpretation that, no matter how an employee was terminated, incentive pay was calculated with reference to the goals that she had to meet over a full year. Specifically, HP relied on the first bullet point:

> **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. …

66 HP considered this term clear and unequivocal. At first blush, HP's interpretation seemed the only possible one. It seemed to apply to all terminations. But terms must be interpreted in context. Once this was done, it became unclear whether it actually referred and applied to all terminations or only to voluntary terminations.

67 The Terminations section referred the reader to additional information in the HP Global Sales Compensation Handbook. The handbook contained a scenario to illustrate the effect of the Terminations section:

> **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.
>
> **Calculation:**

Quota - $6,000,000

Q1 Sales Performance Attainment = $3,000,000

Quota Attainment = 50% (3,000,000 Actual / 6,000,000 Quota)

TIA for the measurement plan period = $6,000

Total incentive payment = $3,000 (Please see below calculation)

…

Jack's plan also included a 60% performance level pay advance threshold that was not satisfied. The incentive payments are a liability and are recoverable by HP.

[emphasis added]

68 This scenario considered the situation of an employee who had resigned but who had also received a performance level pay advance. This advance was a sum that an employee received from HP to supplement his cash flow before he attained actual sales performance credits. However, such an employee would incur incentive liability to HP if he was eventually unable to cross the performance level threshold that had been set for him.

69 The "question" in the single scenario actually comprised two distinct queries: first, whether an employee who left voluntarily would have his final incentive payment calculated on a pro-rated or aggregate quota basis. Secondly, whether the incentive liability of the employee in question would be calculated on a pro-rated or aggregate quota basis. The "answer" could also be seen in two parts. The first two sentences of the answer – "Since Jack has left HP voluntarily … No proration will be used" – were obviously directed to the first question, which was relevant to the issue before me. This answer indicated that if Jack left HP involuntarily, the proration method would be used.

70 The last two sentences of the "answer" responded to the second question: whether the employee, who had failed to meet his 60% performance level pay advance threshold and had thus incurred incentive liability, was entitled to have the amount of incentive liability calculated on a pro-rated or aggregate basis. Since the employee had voluntarily left HP, the calculation would be on the aggregate basis. The second question was an elucidation of the seventh and eighth bullet points of the Terminations section, which stated:

…

- 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. …

71 I went along with HP's submission that the seventh and eighth bullet points were not applicable to Corinna. Anthony James Alizzi ("Tony"), HP's director of SCO for APJ, said that the practice of including 60% performance level pay thresholds in sales plans had already been abolished elsewhere in the world except for the Americas for FY12. Therefore, there was no distinction of any sort to be

drawn between employees who had voluntarily resigned and those who had been retrenched – the first bullet point (see above at [65]) would apply. Tony told the court that if the policy had been written for the rest of the world excluding the Americas, the words in the scenario's answer "[s]ince Jack has left HP voluntarily" would not be there. [note: 64]

72 I noted that it is stated on the second page of the policy that its purpose was to describe the standard treatment of incentive pay administration. The scope was stated to apply to all HP employees assigned to a sales plan.

73 Having reviewed the policy and the accompanying handbook, I was of the view that a reasonable person in the position of a relevant HP employee would have read the first bullet point of the Terminations section above and considered that no matter whether the termination was voluntary or not, his incentive pay would be calculated with reference to full-year goals. He would have the background knowledge that the seventh and eighth bullet points were inapplicable in Singapore as there was no performance level pay advances to speak of. However, the reasonable person would also entertain the conclusion that the seventh and eighth bullet points, while not directly relevant, did show that employees were to be treated differently depending on whether they were terminated voluntarily or involuntarily. In particular, the seventh bullet prescribed that where an employee was involuntarily terminated, the calculation of the incentive liability that he owed HP was derived from pro-rated goals. This was based on the rationale that an employee who had been terminated through no fault of his own should not be made to pay back a large sum that he might not possess. As directed by the policy, the reasonable person would then seek clarification from the handbook, which provided for a scenario on termination. The reasonable person would discern that the lone scenario could be read in two distinct parts. On the first question, that of whether a voluntarily terminated employee would have his incentive payment calculated on a pro-rated or aggregate basis, he would read that the answer to that was: "[s]ince 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". It would then follow that the situation was different where the employee had left HP involuntarily. Yet there was the apparently unequivocal first bullet point. Thus, at the end of the exercise, the reasonable person would remain unclear as to whether the first bullet point applied even to involuntary terminations.

74 Neither did I find the extrinsic evidence to be of assistance. It did not supply a clear or obvious context.

75 In fact, HP's practice in regard to the termination of involuntarily terminated employees was itself inconsistent. Corinna herself had initially received a pro-rated calculation. Soh Chai Ching, the sales support management analyst of HP's SCO department, wrote an email to Corinna on 23 August 2012 in which Chai Ching calculated Corinna's incentive compensation on a pro-rated quota basis: [note: 65]

> … As spoken, your actual performance is calculated till May and guarantee pay out for Jun & Jul.
>
> Total amount paid to you this month is SGD 10,551.75.
>
> Using prorated quota and TIA till May (M7), your TIA% have exceeded more than 350% which we require Region approval before paying the balance to you. …

76 There were also two other cases of HP employees – Adeline Soh ("Adeline") and K. Sudershan – whose incentive compensation on termination had been calculated on a pro-rated basis. [note: 66]

Another SCO employee and junior analyst, Nan Jiang, [note: 67] wrote an email to Adeline on 7 September 2012 stating: "…As per HR guidance … we prorate quota and TIA to 7 months, then calculate performance". Like Corinna, Adeline had also been involuntarily terminated mid-way through the financial year. [note: 68] The two cases resulted in erroneous over-payments of some $2,000 for Adeline and $6,000 for K. Sudershan. However, HP has not sought to recover these amounts from these two persons, or even written to them regarding the matter, as of the time of the trial. [note: 69]

77 HP submitted that Adeline and K. Sudershan were "exceptional cases". These were "erroneous calculations" made by junior sales analysts within the SCO organisation. [note: 70] The error in Adeline's case was discovered in August 2012 when Corinna alleged that there had been another employee who was paid on a pro-rata basis. [note: 71] The error in K. Sudershan's case was uncovered two months later when HP double-checked its calculations. [note: 72] HP also pointed out that the other 10 sales employees who were retrenched did not have their final incentive pay calculated and paid on a pro-rated basis. Tony said that "aside from these two … cases, [HP] has consistently applied our Sales Compensation Policy", and the practice was to calculate a sales employee's final incentive compensation on an aggregate basis for both voluntary and involuntary terminations. [note: 73]

78 At trial, Tony said that HP has not sought recovery of the $2,000 and $6,000, given the relatively small size of these amounts. [note: 74] However, he said that HP was reserving its rights in relation to Adeline. HP was "not done" as she had divulged her compensation details to Corinna in breach of confidentiality terms. The revelation allowed Corinna to make a case for inconsistency of treatment, thus exposing HP to potentially greater damage. [note: 75]

79 I agree that the alleged inconsistency of treatment was insufficient to make a finding that HP's policy and practice were to calculate retrenched employees' final incentive pay on a pro-rated basis. However, the fact that two of HP's own sales analysts, however junior and inexperienced, could read the relevant documents in a way that was contrary to HP's declared intention – apparently enshrined in the first bullet point – reinforced my finding of ambiguity. Surely then, a reasonable person could hardly be faulted for construing the policy in a different way than was submitted by HP.

80 The investigation team also recommended in its report: [note: 76]

> **To review the policy and or interpretation**
>
> The investigation team noted there are some clauses on the SCO policies which are obsolete. The team also noted there is some confusion on the use of full year or pro-rated quota for sales compensation/ incentive payment calculation when it comes to employee's final incentive payment upon termination. …

81 HP's interpretation of the Terminations section could lead to very unreasonable results. Consider a scenario where an employee clinched a big contract early on in the measurement period, perhaps in the first one or two months. It would then be open to the employer to terminate his employment and by relying on the first bullet point, massively reduce his incentive pay by measuring his performance in the first one or two months against his target for the full year. At trial, even Tony said: [note: 77]

Q: You were asked questions about a hypothetical, if Corinna was given 2 million target for 12 months and if she's retrenched halfway, how does HP determine whether she achieved her target in order to compensate her; your answer was the full measurement period as the period over which she earns a commission. And then counsel then suggested to you that this seems unfair, what's the rationale. You remember the question?

…

A: Your Honour, so we have policy, we apply the policy, we don't interpret it or try to make judgments of fairness or otherwise regarding the policy. That's the only way I can –

Court: Who makes judgments of fairness?

A: The policy is determined by – so we have a legal team based in the US, and my manager who is the head of sales compensation worldwide, between the two of them they essentially set the global tone of what goes on in collaboration with the heads of our business as to what should be the conditions.

Court: So you have no view as to whether it's fair, or, I mean, whatever?

A: If asked my view it's probably a bit tough, yes.

Court: Okay.

A: But I'm not here to make opinion, I'm here to pay staff what they are due.

82 In my view, a standard form contract containing provisions that are obviously unfair needs to be particularly clear and unambiguous. That is especially so in the context of an employment relationship, where an implied duty of trust and confidence exists and even more so where the provisions concern financial compensation, which for many employees is the reason why they work. For sales employees, incentive payment provisions are extremely important as such payments form the bulk of their compensation. Based on HP's interpretation, such provisions can be used, on an employee's retrenchment, to dilute his sales commission by benchmarking his achievements against full-year targets, although he would have no opportunity to make any further sales for the rest of the work year.

83 I would go further to say that even a term that purports to calculate an employee's final incentive pay by reference to full-year targets when he resigns *voluntarily* before the end of the work year is *prima facie* unfair. When an employee decides to resign, his annual leave entitlement is typically pro-rated based on the number of months he had worked in that year. In a termination situation, even if voluntary, an employee is also entitled to presume that pro-rated measurements will be used. That said, where the employee chooses to resign, it may be more permissible for the employer to stipulate that his sales commission will be calculated with reference to full-year targets. This is so as the employee has brought the problem on himself by voluntarily choosing to resign before the end of the year. But even then, the onus is on the employer to make such a term crystal clear to the employee, so he can make an informed choice.

84 On the subject of onerous or unusual terms, *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) at para 12-015 states:

Although the party receiving the document knows it contains conditions, if the particular

condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention.

85 As Lord Denning held in *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 at 466:

> … I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient. …

86 To my mind, in the employer-employee context, it was not only necessary that notice be given of a term that could be used unfairly on an employee. It was also necessary that such a term be put across in a way that was clear and unambiguous. If the employer had not done so, it did not lie in its mouth to later claim that its subjective interpretation prevailed. Employees in a large company with sophisticated human resource policies and practices are surely entitled to expect more from their employer.

87 Corinna contended that the seventh bullet point should be construed *contra proferentem* against HP, on the ground that it was not clear if "liability" due referred to the employee's liability to HP or HP's liability to the employee. I rejected this contention as it was clear in the context that the true meaning was the former. There was no ambiguity to speak of. However, as I had found, the same could not be said of the Terminations sections, specifically the first bullet point. Despite HP's argument that that bullet point was clear and unequivocal, following the interpretation exercise, there was ambiguity as to whether that bullet point applied only to voluntary terminations or all terminations.

88 Applying the *contra proferentem* rule, I thus held that the first bullet point applied only to voluntary terminations. As Corinna had been involuntarily terminated, the calculation of her incentive pay should be on a pro-rated basis.

HP's conduct of the trial

89 Before I conclude, I note that I found HP to have been less than forthcoming in putting relevant evidence before the court. While key pieces of evidence were eventually disclosed or produced, its conduct of the case had some impact on its credibility as it left me questioning if I had been presented with the full picture.

90 For example, the FY13 guideline for the NBM was not voluntarily disclosed before the trial. [note: 78] The guideline was disclosed after Sandeep offered to tender it during cross-examination. [note: 79] I did not agree with HP that documents relating to the FY13 implementation guideline were irrelevant, despite its argument that the new guideline was implemented "after the event" and had no "direct relevance to the issues of interpretation to merit disclosure at first instance". [note: 80]

91 The table of employees who had been retrenched was also only tendered when Tony was cross-examined at trial on 22 July 2014, despite the notice to produce having been filed on 24 March 2014. At trial, counsel for HP pointed out that the "notice to produce says produce at trial, and our intent … was to produce what we can reasonably to the court through [Tony] and this is the proper time because this is the stage when this witness gives evidence in the court of law". [note: 81] But while HP had kept to the text of the notice, it certainly did not comply with the spirit of fair play. The documents had already been prepared several weeks before. [note: 82] As a result, as Corinna put it,

the cross-examination of Tony on the documents was done "under constrained time and circumstances". [note: 83]

92 Then there was the report of HP's investigations into Corinna's complaint (Project Merlion). HP has fiercely resisted Corinna's allegations that it had deliberately amended, revised or modified the investigation report to support its case at trial. While the investigation report did undergo revisions, I reserved comment as to whether the changes were deliberately skewed to support its case. However, what was clear was that HP had resisted disclosure of the report, which was produced only after an order of court on 21 June 2013. [note: 84] Yet the report was clearly relevant to the case. Other versions of the report were eventually disclosed.

93 I end off by noting that at trial, HP expressly reserved its rights to pursue claims against Adeline for divulging her compensation details to Corinna in breach of confidentiality terms (see [78] above), as the revelation allowed Corinna to make her case. As he said:

> Had it not been divulged there would be no case to claim consistency of treatment because this employee has divulged that. One is saying "I want what the other got" but that person should not have even known in the first place what the other person was getting, had there not been a breach of the terms of employment … For $2,000 we were not prepared to really chase and make much of this, but for the consequential damage as a result of the divulgement, substantial damage was done … so in fact, we're not done here, is my answer.

Given the other instances that signalled HP's inclination to be less than forthcoming with relevant evidence, the fact that HP was thinking of pursuing Adeline raised a suspicion that it would not have disclosed information on the calculation discrepancies had it found that out on its own.

Conclusion

94 In conclusion, I found for Corinna on both issues. She was thus entitled to the total sum of $627,369.54 and interest pursuant to s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed) from the start of the action to the date of my oral judgment. I will hear parties further on costs, including the costs for a summons and a registrar's appeal.

[note: 1] Defendant's closing submissions ("DCS") at paras 26–27.

[note: 2] NE 1 April 2014 at p14.

[note: 3] NE 1 April 2014 at p18.

[note: 4] NE 1 April 2014 at p46.

[note: 5] NE 1 April 2014 at p99.

[note: 6] Defendant's Bundle of AEICs at Tab 2 at paras 21-23.

[note: 7] Defendant's Bundle of AEICs at Tab 2 at para 24.

[note: 8] Defendant's closing submissions at p19.

[note: 9] AB Vol 2 at p411.

[note: 10] NE 1 April 2014 at p36.

[note: 11] NE 1 April 2014 at p28.

[note: 12] DCS at para 22.

[note: 13] NE 1 April 2014 at p35.

[note: 14] NE 1 April 2014 at p56.

[note: 15] Defendant's Bundle of AEICs at Tab 2 p14.

[note: 16] AB Vol 3 at p609.

[note: 17] AB Vol 3 at pp610-611.

[note: 18] AB Vol 3 at p610.

[note: 19] NE 15 July at p71.

[note: 20] AB Vol 3 at p815.

[note: 21] AB Vol 3 at p815.

[note: 22] AB Vol 3 at p847.

[note: 23] AB Vol 4 p912.

[note: 24] AB Vol 4 at p956.

[note: 25] AB Vol 5 p1298.

[note: 26] NE 22 July 2014 pp41-44.

[note: 27] NE 22 July 2014 at p18.

[note: 28] PCS at para 1.

[note: 29] NE 16 July 2014 at p97.

[note: 30] NE 18 July 2014 at p113.

[note: 31] NE 15 July 2014 p62.

[note: 32] See PCS at para 151(c).

[note: 33] DCS at para 26.

[note: 34] DCS at para 38.

[note: 35] AB Vol 3 pp806-7.

[note: 36] AB Vol 4 p905.

[note: 37] DCS at para 94.

[note: 38] NE 21 April 2014 at p44.

[note: 39] AB Vol 1 p291.

[note: 40] DBD p29.

[note: 41] PCS at [270]

[note: 42] AB Vol 5 p1457.

[note: 43] Defendant's Bundle of AEICs Tab 2 at para 8.

[note: 44] See *eg*, NE 15 July 2014 at p6.

[note: 45] NE 15 July 2014 at p4.

[note: 46] NE 15 July 2014 at p72.

[note: 47] NE 15 July 2014 at p76.

[note: 48] AB Vol 4 at p1159.

[note: 49] AB Vol 4 at 1160.

[note: 50] NE 16 July at p105.

[note: 51] AB Vol 4 at p957.

[note: 52] PCS at [99].

[note: 53] Plaintiff's Bundle of AEICs Vol 1 Tab 2 at para 13.

[note: 54] NE 18 December 2014 at p48.

[note: 55] NE 15 July 2014 at p47.

[note: 56] PCS at para 68

[note: 57] AB Vol 2 at p344.

[note: 58] Defendant's reply closing submissions at para 46. See also NE 17 July at p60.

[note: 59] DCS at para 131.

[note: 60] PCS at para 115.

[note: 61] PCS at para 147.

[note: 62] AEIC of Anthony James Alizzi at para22.

[note: 63] DCS at para 162.

[note: 64] NE 22 July 2014 at p147.

[note: 65] AB Vol 5 at p1233.

[note: 66] AEIC of Anthony James Alizzi at para 22.

[note: 67] NE 22 July at pp10-11.

[note: 68] AB Vol 5 at p1225.

[note: 69] NE 22 July 2014 at p21 and p45.

[note: 70] DCS at para 187.

[note: 71] NE 22 July 2014 at p15.

[note: 72] NE 22 July 2014 at p45.

[note: 73] AEIC of Anthony James Alizzi at para 22.

[note: 74] NE 22 July 2014 at p44.

[note: 75] NE 22 July 2014 at pp16-21.

[note: 76] DBOD at p29.

[note: 77] NE 22 July p142-3

[note: 78] PCS at para 271.

[note: 79] NE 15 July pp52-53.

[note: 80] DRSat para 164.

[note: 81] NE 22 July 2014 at p94.

[note: 82] NE 22 July 2014 at p101.

[note: 83] PCS at para 272.

[note: 84] PCS at para 214.

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