IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 04789

BEECHAM MOTORS PTY LTD (ACN 010 580 551) — Plaintiff

v

GENERAL MOTORS HOLDEN AUSTRALIA NSC PTY LTD (ACN 603 486 933) — Defendant

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JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	26-28 September 2023; 8-10 November 2023
DATE OF JUDGMENT:	20 March 2025
CASE MAY BE CITED AS:	Beecham Motors Pty Ltd v General Motors Holden Australia NSC Pty Ltd
MEDIUM NEUTRAL CITATION:	[2025] VSC 125

CONTRACT – Contractual interpretation - Express terms - Where plaintiff alleged obligation to ensure supply – Text of contractual clause passive and non-imperative - Alleged obligation expressed without any qualification – No express supply obligation found.

CONTRACT – Contractual interpretation - Express terms - Where plaintiff alleged 'endeavour' to supply obligation – Language of contractual clause promissory – Meaning of reasonable endeavours and best endeavours – Express 'endeavour' obligation found - *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 - *Electricity Generation Corporation v Woodside Energy Ltd* [2014] 251 CLR 640 – *Re Iceland Cold Storage Australia Pty Ltd* [2023] VSC 206 - *Altis PropCo2 Pty Ltd v Majors Bay Development Pty Ltd* [2022] NSWSC 403 - *Joseph Street Pty Ltd and Others v Tan and Others* (2012) 38 VR 241.

CONTRACT – Contractual interpretation - Textual implications from express words and nature of contract – *Realestate.com.au Pty Ltd v Hardingham (2022) 406 ALR 678 – H Lundbeck A/S v Sandoz Pty Ltd* (2022) 276 CLR 170.

CONTRACT – Contractual interpretation – *Contra proferentum* – Rule of last resort to resolve

ambiguity – Applicable only where there is real doubt as to correct construction – No real doubt in contractual clauses in issue - *Insurance Commission of Western Australia v Container Handles Pty Ltd* (2003) 218 CLR 89 - *LCA Marrickville Pty Ltd v Swiss Re International SE* (2022) 290 FCR 435.

CONTRACT – Contractual interpretation - Implied terms – Business efficacy - *BP Refinery* criteria – No term implied by business efficacy found - *BP Refinery* (1977) 180 CLR 266 - *Grocon Constructors (Vic) Pty Ltd v Apn Df2 Project 2 Pty Ltd - AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd*.

CONTRACT – Contractual interpretation - Implied terms – Custom or usage - Australian new motor vehicle retailing industry – No term implied by custom or usage found – *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 - *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 - *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48.

BREACH OF CONTRACT – Whether breach of 'endeavour to supply' obligation – Onus of proof – No breach of 'endeavour' obligation - *Jones v Dunkel* (1959) 101 CLR 298 - *Blatch v Archer* (1774) 98 E.R. 969 - *HQ Café Pty Ltd v Melbourne Café Pty Ltd* [2023] VSCA 200.

DUTY OF GOOD FAITH – Franchisor and franchisee – Statutory duty of good faith - Duty of good faith implied at common law – Application of Franchising Code s 6(1) – Franchising Code does not enable a general claim of failure to act in good faith – Plaintiff did not establish defendant failed to act in good faith - *Competition and Consumer Act 2010* (Cth) ss 51AE and 51ACB - Franchising Code s 6(1) - *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* [2023] FCA 1022 - *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199.

CONTRACT – Damages – Breach of contract – Onus of proof – Assessment of damage - Counterfactual scenario – Whether evidentiary onus on plaintiff met – Where the plaintiff's pleaded counterfactual case confined to an obligation that the Court found did not exist – Not a case of mere difficulty in estimating damages - Pleading fell short of what is required for a counterfactual damages contention –Plaintiff's evidence did not extend to what would have been necessary to establish damages - Unnecessary to posit alternative contractual construction for determining damages – Unnecessary to answer common question as to damages - *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 - *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 - *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257 - *RW & ME Smith Pty Ltd v Boral Resources (Vic) Pty Ltd* [2022] VSCA 216 - *Jones v Dunkel* (1959) 101 CLR 298 - *Blatch v Archer* (1774) 98 E.R. 969.

GROUP PROCEEDINGS – Determination of common questions.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Dr C Parkinson KC with Mr H Hill-Smith	HWL Ebsworth Lawyers

For the Defendant	Mr J Giles SC with Mr Andrew McRobert	Norton Rose Fulbright Australia

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HER HONOUR:

PART A: INTRODUCTION AND FACTUAL BACKGROUND

1 Holden cars were part of the fabric of Australian society for decades. First appearing in 1908, they were manufactured in Australia until 2017. Holden branded cars were sold nationally through Holden's network of dealers. In February 2020, General Motors Company (**GMC**), the ultimate parent entity of the Australian-based Holden company, announced that it was shutting down the Holden brand and exiting the Australian market, and would do so by 2021. The decision was implemented swiftly, and by August 2020, after a wind-down, no further new Holden cars were available to be sold in Australia. The agreements under which Holden dealers were appointed were not due to expire until the end of 2022. The dealers, who had invested heavily in their Holden dealerships, had expected business as usual until the end of the dealership term.

2 The plaintiff, Beecham Motors, operated a Holden dealership in Caboolture, Queensland, since 1987. The defendant (**Holden**)[1] entered into **Dealer Agreements** dated 1 January 2018 with the plaintiff and each group member, appointing them to its network of authorised dealers to sell and service new Holden branded motor vehicles and to sell authorised parts. The Agreements, which were in a standard form, were in each case for a term of five years, ending on 31 December 2022. They were franchising agreements to which the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (**Franchising Code**) applied.

3 Beecham Motors commenced this action as a group proceeding under Part 4A of the *Supreme Court Act 1986* (Vic), on behalf of a group of Holden dealers who entered into dealer agreements with Holden commencing on 1 January 2018 for terms ending on 31 December 2022 (the **Term**).[2]

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1 The relevant Australian entity is General Motors Holden Australia NSC Ltd, which is the **defendant**. I shall refer to it as '**Holden'**.

2 The group is confined and comprises named entities. The represented class has been closed from the commencement of the proceeding.

4 The plaintiff settled its own personal claim with Holden in July 2023 but continued as plaintiff as is permitted under s 33D(2) of the *Supreme Court Act 1986* (Vic). Once the plaintiff had settled its claim the remaining issues for determination were common questions of fact and law.

5 The plaintiff alleges that Holden promised to supply group members with new Holden branded vehicles throughout the duration of the term of Dealer Agreements, but, in breach of agreement, ceased that supply in 2020, mid-term.

6 Holden is a wholly owned subsidiary of GMC. Through a number of subsidiaries GMC operates a global business which is headquartered in the United States of America and which includes manufacturing facilities.[3]

7 On 26 February 2020, Holden notified its network of dealers that, based on the announcement by GMC to retire the Holden brand, it would cancel and remove any existing 'un-preferenced' orders for new Holden motor vehicles in its electronic ordering system, not accept any orders for additional vehicles after close of business on 3 March 2020 and commence an equitable 'share of build activity' for the remaining stock and pipeline to the Holden dealer network. It implemented its actions, as announced.

8 By 6 March 2020, any vehicles offered to dealers in Holden's notification to them of their 'share of build' but not accepted, were offered to the dealer network in a second and final round of the share of build.

9 In or about March 2020, the last motor vehicle under the Holden brand was manufactured.

10 Since 3 March 2020, group members have been unable to place purchase orders for new Holden vehicles.

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3 I will refer to the group of companies headed by GMC, and the business conducted by that group, as '**General Motors**'.

11 On 23 April 2020, Holden told its network of dealers that it was not able to order for production any further new Holden motor vehicles and would transition to an after-sales organisation, without the capacity to import and distribute vehicles.

12 Between March and August 2020, Holden ran a 'liquidation allowance' program, allocating all remaining stock of new Holden cars to its network of authorised dealers and ran an aggressive clearance campaign to liquidate the stock.

13 In around May 2020, Holden made offers of compensation to all dealers.

14 By August 2020, the defendant had ceased to supply any new vehicles to the plaintiff and each group member.

15 The closure of the Holden brand in Australia was exceedingly difficult for Holden dealers, including because of its financial impacts.

16 Despite the impact on dealers, on the proper construction of the Dealer Agreements, the answers to the questions for determination do not support their contractual claims.

17 The **common questions** for determination, and the answers to them, are as follows:

1. Do the Dealer Agreements contain:
    a. the Business Efficacy Implied Term;

       Answer: No.

    b. the Custom Implied Term;

       Answer: No.

    c. the Implied Good Faith Term?

       Answer: unnecessary to decide.

2. In relation to the supply of new Holden brand motor vehicles or a substitute thereto, has the Defendant breached any or all of:
    a. cl 9.1(g) of the Dealer Agreements, by failing to comply with cl 7.17.14.1 of the Manual?

    b. cl 9.1(g) of the Dealer Agreements, by failing to comply with cl 7.17.14.2 of the Manual?

c. cl 9.1(g) of the Dealer Agreements, by failing to comply with cl 7.17.14.3 of the Manual?

d. cl 9.1(g) of the Dealer Agreements, by failing to comply with cl 7.17.14.4 of the Manual?

e. cl 10.4(a) and (c) of the Dealer Agreements?

f. the implied terms in question 1?

g. the Statutory Good Faith Obligation?

Answer:

Clause 9.1(g) the Dealer Agreements and clause 7.17.14.3 of the Manual were promissory, and imposed an obligation on Holden to endeavour to supply a sufficient quantity of new Holden vehicles (as defined in that clause). It has not been established that Holden breached that obligation.

The other provisions relied upon did not impose the obligation alleged, and I have not found the implied terms. The question of breach of those terms does not arise.

The statutory good faith obligation, in the circumstances, goes no further than the contractual obligations. It has not been established that Holden breached its statutory obligation.

3. Does the *force majeure* clause at cl 26.9 of the Dealer Agreements relieve the Defendant from liability?

Answer: unnecessary to decide.

4. In relation to the damages counterfactual:

a. would the Defendant have supplied Trailblazer and Colorado vehicles to the dealership network for the balance of the Term?

b. would the Defendant's supply of Holden vehicles to the dealership network have been affected by manufacturing and supply chain disruptions caused by the COVID-19 pandemic, and if so, to what extent?

c. what volume of Holden vehicles would have been supplied to the dealership network for the balance of the Term?

d. would GMC's decision to retire the Holden brand at the end of the Term, and the announcement thereof, have occurred in or about February 2020 or in or about June 2022?

e. would General Motors have ceased producing vehicles for

sale in Australia around June 2022 in accordance with an intent by Holden that all remaining new Holden vehicles would be sold to end-customers by the end of the Term?

f. would the Defendant, pursuant to clause 19.5(b), have excluded from cancellation any order(s) for special vehicle(s) that Holden had commenced to process so as to continue to supply vehicles after the Term of the Dealer Agreements?

Answer to each question: unnecessary to decide.

PART B: CONTRACTUAL TERMS

Overview

18 The plaintiff said that in order to give business efficacy to the Dealer Agreement it was necessary to imply a term that *the defendant would ensure the availability for supply of new Holden branded motor vehicles or a substitute thereto*[4] *for the Term*. Substantively the same term, that *the defendant was and remains obliged to ensure the availability for supply of new passenger vehicles to the plaintiff for the Term of the Agreement*, was said to have been implied by reason of the custom and usage in the Australian new motor vehicle retailing industry. Recognising the fine line that may exist between contractual expression and implication, the plaintiff construed certain express terms of the Agreement to impose a substantively similar 'supply obligation'. Separately, one express term was said to require the defendant to 'endeavour to supply' dealers with a sufficient quantity of new Holden branded vehicles. I will use the expression 'supply obligation' for convenience, without meaning to detract from the importance of the contractual language. The plaintiff also relied on the statutory good faith obligation imposed by s 6(1) of the **Franchising Code**. Each of the terms was alleged to have been breached by Holden ceasing to supply any new vehicles to the plaintiff and group members from August 2020 and in providing an 'inadequate' supply of new vehicles from early March 2020.

19 The **plaintiff's** overarching case was that whether for interpretation or implication purposes, the Dealer Agreement was commercially nonsensical if Holden had no

[4] The plaintiff did not press a case addressing the obligation to provide a substitute for Holden-branded vehicles.

obligation to supply any Holden branded vehicles during the term. It was said that the whole point of the appointment of a dealer was the sale and service of Holden branded vehicles (to which the sale of parts and servicing of vehicles was an adjunct). Without a supply of new vehicles, the commercial purpose of the relationship expressed by the Agreement was wholly undermined. A Holden dealership was, under the Dealer Agreement, obliged to assume and did in fact assume a very significant financial burden for the sole purpose of selling and servicing new Holden branded vehicles, and without an ongoing supply of new Holden vehicles that burden was both unsustainable and commercially irrational. A dealership was required to establish and maintain a dealership premises of an approved size that was built or renovated to Holden's specifications. These bespoke premises could not be used for another purpose without Holden's permission and could not be cheaply or quickly converted to another economic use. The dealership could not operate another motor vehicle franchise without Holden's permission. There were minimum staffing and staff training requirements. The benefit that dealers bargained for and in return for which they assumed those onerous obligations, was security of supply of the product that they were appointed to sell, namely Holden branded vehicles. The plaintiff emphasised the principle that a commercial contract is construed so as to avoid making commercial nonsense or working a commercial inconvenience.[5]

20 The **defendant** said that the Dealer Agreement was not (as the plaintiff contends) commercially nonsensical if Holden had no obligation to 'ensure' supply. They were premised on an expectation and not a promise of a mutually beneficial business relationship for the term. Each matter on which the plaintiff relies in support of its construction and implied terms is explained by an expectation (not a promise) of supply. In entering their Dealer Agreements, group members made the commercial judgment that Holden would continue to supply them with Holden vehicles during the term of their agreement, assuming and expecting that it was in Holden's commercial interests and their own interests for that to occur. But that was not the contractual bargain that was struck. The contractual bargain did not require Holden

5 *LCA Marrickville Pty Limited v Swiss Re International SE* (2022) 290 FCR 435, [57]-[60].

to *ensure* that vehicles were available for supply throughout the term of the Agreements, when one applies the orthodox principles of contractual interpretation. Whilst an obligation on Holden to *ensure* a supply of vehicles would be commercially attractive to a dealer, one can immediately see that such an obligation would be a commercial anathema to Holden. It did not build cars in Australia. It was a distributor of products that had a complex supply chain. It was in no position to *ensure* the supply of vehicles, especially in circumstances where there was only one source of supply of Holden branded vehicles. The plaintiff's view of business common sense just happens to coincide with its own commercial interests.[6] The defendant said that in various ways, the submissions do not engage with the actual language of the agreement.

Contractual Interpretation – Governing Principles

21 The meaning of particular words in a contract must be determined in light of the context provided by the contract as a whole and the circumstances in which it was made.[7] The whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must, if possible, be construed so as to render them all harmonious with one another.[8] A court will strain against an interpretation that renders parts of a contract ineffective unless it is impossible to reconcile conflicting parts.[9]

22 Words and expressions in a commercial contract should be given a 'business sense', that is, the sense which a reasonable businessperson in the context of the contract would give them.[10] What a reasonable businessperson would have understood those terms to mean requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. An appreciation of the commercial purpose and objects is facilitated by an understanding of the genesis of the transaction, the background,

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6 See *Cirrus Real Time Processing Systems Pty Ltd v Jet Aviation Australia Pty Ltd* [2023] NSWCA 280, [64]–[67], [84]–[95].

7 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 64 (Gibbs CJ) (***Hospital Products***).

8 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109 (***Australian Broadcasting Commission***).

9 See for example, *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402, 411.

10 *Bergl (Australia) Ltd v Moxon Lighterage Co Ltd* (1920) 28 CLR 194, 199.

context and market in which the parties are operating.[11] Unless contrary intention is indicated, a court is entitled to approach the task of interpreting a commercial contract on the assumption that the parties intended to produce a commercial result. A commercial contract should therefore be construed so as to avoid making commercial nonsense or working commercial inconvenience.[12] If contractual language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable inconvenient or unjust.[13] Whilst a court should construe a commercial contract to avoid absurdity, it is not part of its role to construe an agreement that otherwise has an explicable commercial result in a manner that increases the commercial benefits to one party to the agreement.[14] It does not constitute a licence to alter the meaning of a term to achieve a result the court may think to be reasonable.[15]

23 A contractual term may be implied on the basis of implications contained in the express words of the contract, implications from the nature of the contract itself as expressed in the words of the contract, implications from considerations of business efficacy and implications from usage (for example, in mercantile contracts). The different forms of implication are generally understood to exist on a spectrum.[16]

24 Textual implications from the express words and nature of the contract are the result of construing the text of the contract as a whole in accordance with ordinary principles of construction.[17] This type of implication is not subject to the five *BP Refinery*[18] criteria which apply where a term is implied to give business efficacy to the contract. The line between textual implication from an express term and the implication of a term under

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11 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, [35] (***Woodside Energy***).
12 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46]–[51].
13 *Australian Broadcasting Commission*, 109-110.
14 *Apple and Pear Australia Ltd v Pink Lady America LLC* [2016] VSCA 280, 343; adopted in *PCCEF Pty Ltd v Geelong Football Club Ltd* [2019] VSCA 144, [55].
15 *Great Union Pty Ltd v Sportsgirl Pty Ltd* [2012] VSCA 299, [32], citing *Amcor Ltd v Barnes* [2021] VSCA 6, [648].
16 *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, [31] (***Brambles***), citing *Carlton & United Breweries Ltd v Tooth & Co Ltd* (1986) 7 IPR 581 at 605-60.
17 *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, [28].
18 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (***BP Refinery***).

the *BP Refinery* principles may be a matter of impression.[19] As Edelman and Steward JJ said in *Realestate.com.au Pty Ltd v Hardingham*:

> As to express terms, since language is imperfect, the meaning of many express terms will include implications, such as explicatures arising from the words expressed and implicatures supplementing the words expressed: "language itself could not function if it did not sit atop a vast infrastructure of tacit knowledge about the world". Nevertheless, the term, as a whole, remains an express term: the implication, from the words in their context, is "included in and part of that which is expressed", is "contained in the express words of the contract", or is a necessary supplement to the words of the term.[20]

25 In *H Lundbeck A/S v Sandoz Pty Ltd*,[21] Edelman J said (in separate reasons concurring with the majority) that the different modes of drawing implication from express words are best understood as existing on a continuum. Where the content of an implication is properly regarded as a new and separate term, the five factors in *BP Refinery* must be satisfied before that term is implied.[22] His Honour relevantly said,

> At one end of the continuum, an implication beyond the literal meaning of express words might be slight and in contractual interpretation the inference of that implied meaning can be readily drawn if that was the meaning that would have been intended by a reasonable person in the position of the parties. It does not matter if the inference is described as inserting new words. As Lord Eldon LC said in Wight v Dickson, "[i]t had been said that it was too strong to insert a word; but the answer was, that the other words in the [contract] could not have their proper effect without it".
>
> At the other end of the continuum, a contractual implication beyond the literal meaning of the express words might be large, requiring a high level of satisfaction by the court that the implication would have been intended by a reasonable person in the position of the parties. Hence, if the implication is properly characterised as a new, and separate, term of the contract, the present state of the law is that a court will require satisfaction of all five of the factors endorsed in Codelfa before the implication is recognised.'[23] (citations omitted)

26 It is only once the express terms of a contract have been identified and interpreted, including with all the implications they contain, that the second task of identifying any implied terms is to be undertaken.[24]

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19 *Realestate.com.au Pty Ltd v Hardingham* (2022) 406 ALR 678, [105] (***Hardingham***).
20 *Hardingham*, [103]-[105] (citations omitted).
21 *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 276 CLR 170 (***Sandoz***).
22 *Sandoz*, [94]-[99] (Edelman J).
23 *Sandoz*, [97]-[99] (Edelman J).
24 *Hardingham*, [110] (Edelman and Steward JJ), see also [74] (Gordon J).

27 A term may be implied to give business efficacy to a contract where the parties have failed to provide for a matter that they have not stated but are taken to have agreed would form part of the contract. A term implied in this way is implied in fact, to give effect to 'the presumed intention of the parties to the contract in respect of a matter that they have not mentioned but on which presumably they would have agreed should be part of the contract'.[25] Five criteria must be satisfied in order to imply a term so as to give business efficacy to a contract. The term must:

(a) be reasonable and equitable;

(b) be capable of clear expression;

(c) not contradict the express terms of the contract;

(d) be necessary to give business efficacy to the contract; and

(e) be so obvious that it goes without saying.[26]

28 These criteria serve to answer the ultimate question: what would have been intended by a reasonable person in the position of the contracting parties?[27] 'Business efficacy' in this context has been described as commercial or practical coherence.[28]

29 In *Grocon Constructors (Vic) Pty Ltd v Apn Df2 Project 2 Pty Ltd*,[29] the Victorian Court of Appeal said that the five criteria are 'cumulative and import different considerations' and explained the application of the criteria as follows,[30]

> In relation to the condition that an implied term **"must be reasonable and equitable**", we note that the High Court has refused to imply a term that would operate in a partisan fashion. The application of the condition will often require consideration of the matrix of facts in which a contract was agreed.
>
> The condition that an implied term '**must be necessary to give business efficacy to the contract**' requires consideration of whether the term is necessary for the purposes of "giving to the transaction such efficacy as both

25 *Breen v Williams* (1996) 186 CLR 71, 102.
26 *BP Refinery*, 283; *Hardingham*, [18] and [113].
27 *Hardingham*, [115], [116] and [119].
28 *ASC AWD Shipbuilder Pty ltd v Ottoway Engineering Pty Ltd* (2017) 129 SASR 122, [5].
29 *Grocon Constructors (Vic) Pty Ltd v Apn Df2 Project 2 Pty Ltd* [2015] VSCA 190 (***Grocon***).
30 *Grocon*, [140].

parties must have intended that at all events it should have", making the agreement work or avoiding an unworkable situation. Where the express terms of an agreement are sufficient to give it the business efficacy the parties intended it to have, it will not become necessary to imply the additional terms. However, a term may be commercially necessary, in order for the contract to be workable in a business sense, notwithstanding that it can operate without the term. In *Commonwealth Bank of Australia v Barker*, French CJ, Bell and Keane JJ stated that the requirement that a term implied in fact be necessary "to give business efficacy" to a contract can be regarded as a "specific application" of the criterion of necessity which also supports the implication of a term in law. They also said that "[i]mplications which might be thought reasonable are not, on that account only, necessary"'.

The condition that an implied term '**must be so obvious that "it goes without saying**"' requires consideration of whether, at the time that the parties were making their bargain, the suggestion of insertion of the implied term into the agreement by an "officious bystander" would have been met "with a common, "Oh, of course"" from the parties.

In relation to the condition that an implied term "**must be capable of clear expression**", it is worth noting the observation of Gibbs J in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* that the "width and lack of precision" of a term supplied an argument against implying it. Mason J in *Codelfa* refused to imply a term into a contract on the basis that, had the parties explored the term at the time that they entered into the contract, negotiation about the term "might have yielded any one of a number of alternative provisions, each being regarded as a reasonable solution". It has been observed by this court that it is elementary that a contractual party who is to be subjected to an additional obligation by reason of the implication of a term into a contract should be "left in no doubt of the extent of the obligation" and, accordingly, a term that would leave a party in a "state of speculation" as to the extent of its obligations would not be implied.

Conflation of the "reasonable and equitable" and the "necessity" conditions of the *BP* Test may lead a court into error. This follows from the statement at [142] above in *Barker* and also from Mason J's earlier statement in *Codelfa* that it is not enough that it is reasonable to imply a term, it must also be necessary to do so to give business efficacy to the contract.

However, the authorities acknowledge that the conditions in the *BP* Test may overlap….Einstein J in *New South Wales v Banabelle Electrical Pty Ltd* observed that the condition that an implied term 'must be so obvious that "it goes without saying"' involves a consideration degree of overlap with the condition that a term "must be necessary to give "business efficacy" to a contract".[31] (citations omitted and emphasis added)

30 Courts are slow to imply a term, for reasons which include not rewriting the contract

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31 *Grocon*, [141]-[146], cited to with approval in *Masters Home improvement Pty Ltd v North East Solution Pty Ltd* (2017) 372 ALR 190, [58] and *ASC AWD Shipbuilder Pty Ltd v Ottoway Engineering Pty Ltd* (2017) 129 SASR 122, [73].

for the parties.[32] The party alleging that a term should be implied bears the onus of proof.[33] The more detailed and comprehensive the contract, the less ground there is for supposing that the parties have failed to turn their minds to address the question in issue.[34]

Express Terms – Clause 9.1(g) and the Holden Wholesale Standards

31 Within the context of the entire agreement, the plaintiff relied on clause 9 of the Dealer Agreement which is entitled, 'Holden's Obligations'. Read with the chapeau to clause 9.1, sub-clause 9.1(g) reads,

> Holden agrees to comply with Holden's Wholesale Standards as contained in the Manual.

32 The '**Manual'** was defined to mean,

> the manual(s) provided by Holden[35] to the Dealer (including by online access) containing the policies, procedures and guidelines relevant to the performance of this agreement as varied by Holden from time to time.

33 Clause 7.17 of the Manual sets out the '**Holden Wholesale Standards'**. The plaintiff relies on four sub-clauses within the Standards, as follows:

> **Clause 7.17.14 — Holden product and supply**
>
> 7.17.14.1 Holden provides a broad range of world class products.
>
> 7.17.14.2 Holden will endeavour to distribute new vehicles among Holden dealers in a fair and equitable manner.
>
> 7.17.14.3 Holden will endeavour to supply dealers with a sufficient quantity of vehicles that will allow achievement of sales evaluation guide (SEG) or meet reasonably anticipated demand.
>
> 7.17.14.4 Holden delivers new vehicles to dealerships in a time scale which satisfies both dealers and customers subject to capacity and logistic constraints.

34 The plaintiff's pleaded case in relation to the Wholesale Standards was that the defendant has *failed to comply* with its obligations under the Standards by failing to

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32 *Pilbara Iron Ore Ltd v Ammon* [2020] WASCA 92, [88] (***Pilbara***), citing *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 346 (***Codelfa***).

33 *Pilbara*, [88], citing *Heimann v Commonwealth* (1938) 38 SR (NSW) 691, 695.

34 *Pilbara*, [88], citing *Codelfa*, 346.

35 The Dealer Agreement refers throughout, to 'Holden', which is a reference to General Motors Holden Australia NSC Ltd, i.e. the Defendant.

ensure the availability of vehicles for supply. The express terms relied upon were identified in the pleading by setting out the words of the Wholesale Standards, although the implication to be drawn from them was not. The plaintiff described this part of its case as concerned with express terms. The case was, however, more accurately described as concerned with terms implied from the language of the express terms and the nature of the Agreement.

35 The central dispute between the parties concerned whether those provisions of the Manual, read with clause 9.1(g) of the Agreement, were indeed contractual promises and if so, what was their proper construction. Although the **common questions** (formulated before trial) addressed only whether in relation to the supply of new Holden branded motor vehicles the defendant *breached* clause 9.1(g) by failing to comply with the relevant parts of the Manual,[36] there was no dispute that the question whether those clauses were contractual promises to ensure a supply of vehicles, was to be determined.

Plaintiff's submissions

36 The plaintiff made the following submissions.

37 **First**, the Wholesale Standards on which the plaintiff relies are promissory.

38 The language of clause 9.1(g) ('Holden agrees to comply …') is promissory. There is no warrant for reading it down. It is true that the Manual was a 650 page document, subject to amendment from time to time, that described a variety of policies and procedures for dealers on an array of subjects. However, by clause 9.1(g) of the Dealer Agreements Holden promised to comply with the Holden Wholesale Standards which comprised only 6 pages of the 650 paged Manual. That the Standards were confined and readily identifiable is contextually and linguistically a strong indicator that when read with clause 9.1(g), they were promissory. Holden, who drafted the Dealer Agreement, elected to promise that it would comply with that one confined part of the Manual. It must be accepted that the Wholesale Standards contain some

[36] Common questions 2(a), (b), (c), (d).

statements that are descriptive and 'non-promissory'. The plaintiff focuses only upon the four standards concerned with 'Holden product and supply', which are promissory (as discussed below). The sub-clauses within clause 7.17.14 each contain obligations capable of breach.

39 The defendant's submission that its ability to amend the Manual (under clause 26.15 of the Dealer Agreement) points against the wholesale standards being promissory, is erroneous. Properly construed, the amendment power does not apply to the Holden Wholesale Standards. Holden agreed to comply with the Wholesale Standard as contained in the Manual, as they were at the time of contracting. Having promised to comply it was not entitled to change those standards during the Term. Even if it had the power to amend the Wholesale Standards, its powers were expressly limited and was confined to the purposes identified in the clause and would be subject to the good faith obligation under the Franchising Code and the implied good faith term. The power could not be exercised to eliminate Holden's obligations under clause 7.17.14.

40 **Second**, a supply obligation emerges from the clause 7.17.14 standards because ongoing supply by Holden is a 'necessary supplement' to those provisions and is implied in their express words.[37] The obligation of Holden to have new Holden vehicles available for the Term arises from the nature of the contract itself and from its words. The obligations of both parties[38] cannot operate without a supply of new Holden vehicles for the Term. Furthermore, the nature of the agreement itself being a fixed term agreement for the supply and sale of vehicles implies that there will be a supply of vehicles for the Term. The implication arises most forcefully from the objectives stated in clause 1 of the Dealer Agreement and from the appointment under clause 2.1(1) pursuant to which Holden appointed the dealership to 'actively promote, sell and service the Products'. Textual implications arising from the express terms of a contract are the result of construing its language in accordance with the ordinary principles of construction,[39] as distinct from the implication of a term for business

37 *Hardingham*, [103]-[105] (Edelman and Steward JJ).
38 As more particularly set out below (see under Implied Term).
39 *Brambles Holdings Ltd v Bathurst City Council* [2001] 53 NSWLR 153, [28].

efficacy.[40] Doctrinally this is a form of construction, but it is recognised that in a given case the line between this type of implication and *BP Refinery* implication may be a matter of impression.[41]

41 The sub-clauses within clause 7.17.14 can and should be read together, coherently. The first sub-clause within clause 7.17.14 imposed an obligation on Holden to provide a broad range of new vehicles for the Term. An available supply of new Holden branded vehicles throughout the Term of the Dealer Agreement was a necessary incident and predicate of the performance by Holden of the obligations in the remaining clauses. The second sub-clause imposed obligations regarding how that supply of vehicles would be distributed amongst dealers. The third concerned the number of vehicles that would be supplied by Holden and the fourth concerned the timing of vehicle delivery.

42 It will be noticed that clause 7.17.14.3 required Holden to *endeavour* to supply dealers with a sufficient quantity of vehicles by two stated measures – to allow achievement of the sales evaluation guide (**SEG**[42]) or reasonably anticipated demand. The other clauses of the Wholesale Standards (and clause 10.4(a) of the Dealer Agreement[43]) impose on Holden an obligation to ensure the availability for supply of new Holden brand motor vehicles for the Term. As the plaintiff put it, those terms 'say nothing about the volume that had to be supplied and how that volume related to the SEG target or reasonably anticipated demand'. Read that way, clause 7.17.14.3, which imposes an 'endeavours' obligation, is not inconsistent with provisions (express and implied) imposing an unqualified supply obligation.

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40 *Boreland v Docker* [2007] NSWCA 94, [100]-[111]; *Rankin Investments (Qld) Pty Ltd v CMC Property Pty Ltd* [2021] QCA 156, [78]-[80].

41 *Hardingham*, [105] (Edelman and Steward JJ).

42 Discussed below.

43 The implied term is relied upon in the event that an obligation to ensure the availability of supply of new vehicles throughout the Term is not found to have been expressly agreed.

43 Clauses 7.17.14.2 and 7.17.14.4 (addressing equitable distribution of new vehicles between dealers and 'time scale' for the delivery of new vehicles to dealerships) would not be capable of performance where there was a 'permanent non-supply of vehicles'.

44 Turning to the language of each sub-clause of the relevant Wholesale Standards, clause **7.17.14.1** states that, '*Holden provides a broad range of world class products*'.

45 A term can contain a contractual promise or warranty even if promissory words are not used. The standard is expressed as a statement of fact but if promissory words are needed they are provided by clause 9.1(g). Complying with the standard that Holden provides a broad range of world class products means *that Holden must have available for supply, a broad range of new Holden vehicles during the Term.* As the plaintiff put it, this clause combined with clause 9.1(g) creates an obligation on Holden *'for there to be Holden vehicles provided for the Term'.*

46 Clause 7.17.14.1 is not puffery or non-promissory but is a fundamental obligation in the section which is then expanded upon in the remaining parts of clause 7.17.14. Construing it as promissory is consistent with a commercially sensible approach to interpretation that avoids working commercial nonsense or inconvenience. If the clause is open to two constructions, one promissory and the other non-promissory, the court should avoid a construction that permits Holden to cease supply mid-Term which is a construction that is capricious, unreasonable, inconvenient and unjust. The expression 'world class products' is given content by clause 7.17.23 of the Holden Wholesale Standards. That clause (entitled 'Product quality') describes (albeit briefly) the standards Holden says it maintains in designing and manufacturing vehicles.

47 Clause 10.4(d) of the Dealer Agreement provides that, *all purchase orders are subject to acceptance by Holden; Holden is not bound to accept any purchase order*. On Holden's case that that clause is inconsistent with a construction of any part of the agreement as imposing an obligation on it to ensure the availability for supply of new vehicles for the Term, is misconceived. Clause 10.4(d) is not in fact inconsistent with Holden agreeing to ensure a supply of new vehicles. Whilst Holden was not bound to accept

any purchase order for a particular vehicle, it was nevertheless obliged to provide a broad range of vehicles for the Term. Under clause 10.4(d) it could refuse individual orders that it was unable to fulfil (such as an order for '200 pink Colorado utes') but it was not entitled to provide *no vehicles*. That clause did not entitled it to retire the Holden brand mid-Term. The same is true of clause 10.1(a), which permits Holden to 'change the new Vehicles and Demonstrator Vehicles that the Dearer is authorised to sell at any time by reasonable prior written notice to the Dealer.' By failing to provide a broad range of new vehicles from early 2020 or any new vehicle products from in or about August 2020 until 31 December 2022, Holden breached clause 9.1(g) of the Agreement.

48 Holden's contention that construing the clause as a promise to provide a 'broad range of world class products' would render it a warranty which would in turn be inconsistent which clause 16.1(b) of the Agreement, should be rejected. Clause 16.1(b) provides Holden makes no express warranties to the dealer or its customers with respect to the Products or parts other than those give in clause 16. Clause 16.1(a) makes clear that the warranties the subject of clause 16 are those provided to customers and dealers. The Agreement is referring to repair warranties for individual vehicles.

49 **Clause 7.17.14.2** provides that '*Holden will endeavour to distribute New Vehicles among Holden dealers in a fair and equitable manner*'. 'New Vehicles' picks up the expression as defined in the particular terms of the Dealer Agreement, which refers to those vehicles that Holden provides or says that the dealer will be buying from it. The clause necessarily contemplates that *there will be a distribution* of new vehicles for the duration of the Term; that Holden has new vehicles to distribute. This is a term implied by the express words of the contract.

50 **Clause 7.17.14.3** provides that, '*Holden will endeavour to supply dealers with a sufficient quantity of vehicles that will allow achievement of Sales Evaluation Guide (**SEG**) or meet reasonably anticipated demand*'. The context for this standard is given by clause 13.1 of the Dealer Agreement by which the dealer was required to comply with the 'performance criteria' set out in the Manual. Clause 13.1 provides that,

> Holden will establish SEG Objectives for the Dealer collectively or by model in relation to the dealer's expected sales performance. Holden may change the SEG Objectives at any time following consultation with the Dealer where in the Dealers' view the Dealer's market circumstances support a bona fide cause of change to the SEG Objectives.

51 The SEG Objectives were elaborated upon in the Manual which described in detail how the objectives and other metrics were set. The SEG was expressed as single numerical value for each dealership, broken down into 'carlines' (e.g., Astra, Trailblazer) or model types (e.g., SUV, passenger). It was set by vehicle model in relation to each dealer's expected sales performance and calculated using a weighted index of market data and sales data.[44] The SEG formed part of the performance criteria against which the dealer's performance was evaluated. The dealer was obliged, by clause 13 of the Agreement, to operate the dealership business to meet or exceed the performance criteria for specified items including 'promoting and selling the Products and Parts'. It was agreed that Holden would periodically evaluate the dealer's performance, providing yearly performance reports, and that performance criteria failure[45] identified by Holden constitutes a breach of the Agreement. Under the Agreement the dealer acknowledged[46] that its compliance was fundamental to the agreement. For context, the plaintiff tendered examples of the notices given to it specifying its own yearly SEG Objectives. The 2017 notice explained that,

> Holden establishes SEG's by model to set a base line for performance expectations, with the total and carline SEG's based on Holden 2017 forecast sales volumes. Individual Dealer SEG's represent a fair share of the total National SEG and are calculated for your area of primary responsibility ("APR") based on industry registrations and Dealer sales data over the prior 2 years and nine months to smooth out fluctuations and ensure a more accurate and relevant calculation.

52 As to the 'endeavours' obligation, although the parties did not use the words of 'reasonable endeavours' or 'best endeavours', the Court should conclude that the word 'endeavour' imposed a best endeavours or alternatively a reasonable endeavours obligation. The obligation is more extensive than Holden submits. It required Holden to 'resolve conflicts between the obligation to use reasonable

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44 Manual, clause 2.7.2.

45 To which notice, discussion and rectification provisions applied.

46 Dealer Agreement clause 13.3.

endeavours and its own business interests, by the standard of reasonableness'.[47] The nature and extent of the obligation depends upon the contract in question. The nature, capacity, qualifications and responsibilities of the person upon whom the obligation is imposed, viewed in light of the contract are factors to be taken into account in measuring the standard of endeavour required.[48] In circumstances where GMC was Holden's ultimate parent the endeavours obligation would have required Holden to endeavour to supply sufficient vehicles to meet reasonably anticipated demand.

53 If sub-clauses 7.17.14.1, 7.17.14..4 (or, as discussed below, clause 10.4(a) of the Dealer Agreement) promised an available supply of vehicles throughout the Term, practically speaking there would be no need to consider whether Holden failed to endeavour to meet the clause 7.17.14.3 obligation.

54 Holden contends that any obligation in clause 7.17.14.3 could be rendered nugatory by Holden reducing or setting the targets to nil, which is said to indicate that the clause was non-promissory. That contention disregards the second limb of clause 7.17.14.3 which refers to 'reasonably anticipated demand'. The obligation could not be satisfied by Holden setting a nil SEG target or endeavouring to supply fewer vehicles than reasonably anticipated demand irrespective of the SEG targets.

55 **Clause 7.17.14.4** provides that 'Holden delivers New Vehicles to dealership in a time scale which satisfies both dealers and customers subject to capacity and logistic constraints'. The clause necessarily requires *that there be new vehicles available for supply*. It would not be commercially sensible to construe 'capacity and logistics constraints' as including a commercial decision by GMC to cease vehicle supply to Holden.

Defendant's submissions

56 The defendant made the following submissions.

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47 *Tyro Payments Ltd v Kounta Pty Ltd* [2023] NSWSC 1384; plaintiff's reply submissions [6].

48 *Re Iceland Cold Storage Australia Pty Ltd* [2023] VSC 206, [156]; *Ha Tinh Pty Ltd v Chin Yin Pty Ltd* [2022] QSC 282, [85].

57 Whether a requirement for performance is promissory must be ascertained from the intention of the parties assessed objectively and gained from an examination of the language used.[49] It is an available construction that the words in clause 9.1(g) ('Holden agrees to comply with ..') are promissory. As a matter of grammar and from the words used, the expression 'agrees to comply' can be and usually is, construed as a promise. However, the words can also be read, grammatically, as a statement of intent or expectation. The latter is the better view in this case.

58 In this case, that with which Holden agrees to comply - the Wholesale Standards – comprise Part 7.17 of the Manual extending over 70 paragraphs which contain a mixture of statements, some of which are highly aspirational. Some sentences refer to present fact and some to past fact. Some are descriptive and express a statement of believed fact. In some cases the language is capable of being understood as promissory but when one construes it in context it is more sensibly a statement of fact or intention than an enforceable promise (for example, 'Holden's team will return calls within 24 hours'). Where there is a constructional choice as to whether a statement is promissory or not the inchoate nature of what is being said tends against it being promissory.

59 The contractual statement that Holden agrees to 'comply with' the Wholesale Standards means that *Holden will strive to or aspire to meet those standards*. Clause 9.1(g) is a statement of intention or expectation rather than a promise to do something. That interpretation is derived from a combination of the language of the clause and the particular content of the standards. That characterisation can and should be applied to whole of the Wholesale Standards. The plaintiff has selected only four paragraphs of the standards but cl 9.1(g) applies to the whole of the Standards. One thus looks to the whole of the Standards in ascertaining their status and whether a reasonable business person would have understood them to constitute a binding promise by Holden or as standards or aspirations that Holden would strive to achieve.

60 In the alternative, the agreement by clause 9.1(g) is in its effect, an agreement to

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[49] *Re Association for Visual Impairment The Homeless and The Destitute Inc. (in liquidation)* [2013] VSC 673, [22].

comply with those parts of the Standards that are promissory and not merely aspirational or in the nature of a recitals of fact. The defendant accepts that each construction is available, but says the first should be preferred, noting that the second construction provides it with more support when it comes to the implied term on the question of inconsistency.

61 That the expression 'agrees to comply with' should be read as a statement of intent or expectation is supported by the use of like expressions in other parts of the Dealer Agreement. For example the words 'agrees that' are often used in the Dealer Agreement as words of acknowledgement — clauses 7.3(a), 17.5(a), 22(d) and 22(f).[50]

62 Concentrating on clauses 9.1 and 9.2, the same words 'agrees to comply with' are used in sub-clause 9.1(h) by which Holden agrees to comply with all applicable laws, regulations and codes. If the expression were construed as promissory in clause 9.1(h), its breach would entitle a dealer to damages. Holden's compliance with many applicable laws would have little if any impact on the dealer for example council by-laws, traffic laws and employment laws. Clause 9.1(h) is unlikely to be promissory. Further, where clauses 9.1 and 9.2 contain a contractual promise by Holden that obligation is usually qualified, for example clause 9.1(a) provides that Holden agrees to provide the dealer with such technical product, marketing and like information *that it considers necessary to assist the dealer*. Other commitments are limited by best endeavours or Holden's business judgment. There are no such words of limitation in clause 9.1(g). If it were intended to make compliance with the Wholesale Standards obligatory one would expect to see some words of limitation. That is particularly so when the Wholesale Standards contain over 70 numbered paragraphs much of which are expressed in imprecise and non-imperative language.

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50 The dealer agrees that Holden has the right to give directions to the dealer in respect of certain matters; the dealer acknowledges that clause 17.5(a) is a fundamental term of the agreement and will constitute grounds for termination; the dealer acknowledges that Holden is entitled to a period of time to consider any request for assignment and that the conditions and other requirements specified by Holden in the Manual are without limitation to certain rights of Holden.

63 As to the word, 'standards', for constructional purposes it is, by itself, neutral. The construction exercise is informed by the content of the Standards.

64 The Wholesale Standards begin with clauses 7.17.1 and 7.17.2. which state,

> 7.17.1 Holden embraces the Holden Wholesale Standards and develops a culture where all personnel strive to work with and fully support our dealers to deliver vehicles and experiences that inspire passion and loyalty to create customers for life. We are committed to work with our Holden dealers to build Australia's best network.
>
> 7.17.2 Standards Measurement and Reporting.
>
> 7.17.2.1 Holden and dealers develop and maintain a process that measures performance relative to Dealer and Wholesaler Standards and communicates results to Holden and dealers.
>
> 7.17.2.2 Holden and dealers develop and maintain a process to provide assistance where necessary to enable dealers and Holden to maximise performance and Standards.

65 The Wholesale Standards are thus standards that Holden is to strive or aspire to in seeking to maximise performance. It is clear from those paragraphs that the Standards do not have the status of a contractual promise, breach of which would entitle a dealer to at least bring a claim for damages. What is required is Holden's performance 'relative to' those standards and that the results of its performance will be considered in developing processes to 'maximise performance'.

66 Much of the Wholesale Standards are expressed in language which is non-imperative. By way of example:

> 7.17.4.1a: "Holden provides dealers with a trained, competent and enthusiastic field support team …";
>
> 7.15.5.1a: "All dealer enquiries are attended to, with all telephone calls and correspondence being answered in a prompt and courteous manner";
>
> 7.17.7.1: "Holden enables the effectiveness and efficiency of the dealer network, leveraging global processes, standards and best practices underpinned by global communications systems that are made to dealers via Global Connect";
>
> 7.17.8: "Holden Corporate Affairs Department is active in promoting our business interests and works in synergy with Sales and Marketing Department to enhance The Holden Brand Image and relevant Brand Values".

67 The fact that the Wholesale Standards contain aspirational statements that are expressed in different language to the promissory obligations contained in the Dealer Agreement itself, supports a non-promissory construction. One example is clause 7.17.13.1 which states that 'Holden provides industry competitive warranties on new Holden vehicle and parts', which may be contrasted with clause 16.1 of the Agreement which provides that Holden makes no express warranties including to the dealer's customers with respect to the products or parts, other than those described in clause 16.

68 All four paragraphs of the standards on which the plaintiff relies are aspirational statements, expressed in 'non-imperative' language.

69 **Clause 7.17.14.1** is a statement that describes Holden's business. It is not a promissory statement. It is expressed in non-imperative language. It does not say, 'shall', 'will' or 'must' either with the active or passive voice.[51] It cannot be read as a warranty in light of clause 16.1(b) of the Dealer Agreement. The plaintiff does not explain how that clause can impose a freestanding contractual promise of supply when it is clause 7.17.14.3 that actually refers to 'supply'. Furthermore, an attempt to construe that clause by implication as conferring an obligation to supply new vehicles throughout the Term, encounters some of the same difficulties as discussed in connection with the proposed implied term: its content is vague and it is inconsistent with express terms in the Dealer Agreement including clause 10.4(d).[52]

70 **Clause 7.17.14.2** is expressed in 'more promissory' language than clauses 14.1 and 14.4 (it uses the expression, 'Holden will'). However, the Dealer Agreement includes a promise concerning equitable distribution of new vehicles between dealers that is subject to express carve-outs.[53] That tends against those being promissory in that

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51 See *New Standard Energy PEL 570 Pty Ltd v Outback Energy Hunter Pty Ltd* (2019) 135 SASR 469, [94]–[95]; *McTier v Haupt* [1992] 1 VR 653, 658.

52 Those arguments are discussed under Implied Term below.

53 Dealer Agreement clause 10.2 provides 'subject to clause 19.3, Holden may determine and may change in what Holden considers a fair and equitable manner: (a) the allocation between dealers of New Vehicles ordered and the relative priority of their allocation between dealers and will provide to the Dealer an explanation of the method used; (b) the source plant for New Vehicles ordered; and (c) the

there is an existing promise in the Dealer Agreement with carve outs. A contract may contain redundancy but as a matter of construction it is improbable. The clause concerns the equitable distribution of new vehicles between dealers *inter-se* and is addressed to the distribution of such vehicles that Holden supplies to dealers. It is not itself a promise of supply. The implication of a requirement of supply does not arise from the language of the provision. The issue of supply is addressed in clause 7.17.14.3. Like the previous clause, attempting to construe the clause in that way encounters the difficulty that the obligation to supply is vague in content and inconsistent with express terms in the Dealer Agreement. Holden fulfilled the obligation in circumstances where it became unable to source new Holden vehicles, where the clause was concerned with the equitable distribution of new vehicles between dealers and did not impose a broader obligation to endeavour to distribute new vehicles.

71 **Clause 7.17.14.3** is grammatically capable of being a promise and also grammatically capable of being a statement of intent. The language of endeavours supports the construction that the standards are something that Holden would strive towards.

72 Further, it was Holden who set the SEG targets. The starting point for the calculation of the SEG was Holden's own budgeted sales for the relevant year. In effect, a dealer's SEG was its share of the nationwide number of vehicles that Holden had budgeted to sell in the year. Any obligation imposed by that clause to endeavour to supply dealers with the relevant quantity of vehicles could be rendered nugatory by Holden reducing or setting SEG targets to zero which it would reasonably be entitled to do in circumstances where GMC had decided to retire the Holden brand in Australia and New Zealand. That it could do so indicates that the statement that Holden would make endeavours was not truly promissory. It was an illusory promise because

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method of delivery of New Vehicles to the Dealership Premises or any alternate delivery destination. (Clause 19.3 applies only where Holden has a right to give notice of termination of the Agreement).

performance was at the promisor's choice. Promissory language reserving an option as to the performance does not create a contract.[54]

73 The expression 'Holden will endeavour to' stands in contrast to the terms 'best endeavours' and 'best efforts' used in the Dealer Agreement itself. The 'endeavour to supply' obligation (if it is promissory) carries a constructional difficulty. There may be a difference between a best endeavours obligation and reasonable endeavours obligation; the extent and basis for the difference is in some respects hard to identify on the reasoning in the authorities. The Dealer Agreement includes reasonable endeavours obligations. Textually, 'endeavours' should suggest something less than reasonable endeavours. The defendant's Senior Counsel accepted that it was difficult to contend that if a promise was to make endeavours, such a promise would not encompass some degree of reasonableness, saying that perhaps there was a graduation of degree. Otherwise, Holden submitted that if a contractual promise is made by this paragraph the standard of performance is meagre.

74 **Clause 14.4** is not grammatically expressed as a promise. Like clause 7.17.14.1, it is in the form of a statement, and it should be read as a statement of fact. It is aspirational because it is subject to capacity and logistics constraints. More fundamentally, it is concerned with the timeframe for the delivery of vehicles that Holden will supply to dealers. It is not a promise of supply. The implication of a requirement of supply does not arise from the language of the provision. Attempting to construe the clause in that way encounters the difficulty that the obligation to supply is vague in content and inconsistent with express terms in the Dealer Agreement.

75 Separately, a promise which is not truly promissory such as one which is made to perform wholly at the promisor's choice is not binding and is illusory.[55] Holden was entitled to unilaterally modify or vary the Wholesale Standards from time to time

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54 *Anglican Development Fund Diocese of Bathurst v Palmer* (2015) 336 ALR 372, [348] citing *Placer Development Ltd v Commonwealth of Australia* (1969) 121 CLR 353, 356.

55 *Great Union Pty Ltd v Sportsgirl Pty Ltd* [2021] VSCA 299, [32], citing *Amcor Ltd v Barnes* [2021] VSCA 6, [648]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, [98]; *SAS (Vic) Pty Ltd v Urban Ecological Systems Ltd* [2021] VSCA 335, [66].

(Dealer Agreement clause 26.15). Its power to do so also speaks against them being promissory.

Analysis

76 The constructional question is whether by the clauses in issue the parties intended that Holden was obliged to the thing alleged (ensure a supply of new vehicles for the Term), which if not done, would expose it to damages.

77 A document said to embody a contract or agreement might contain some parts that are promissory, meaning that they impose an obligation of performance capable of breach, while other parts cannot be so construed. To be binding 'a promise must commit the promisor to a future course of action sufficiently certain to be enforceable.'[56] The expression, 'Holden agrees to comply' within clause 9.1(g) is on its face, a promise by Holden that it will comply with the Wholesale Standards. Such language is commonly read as promissory, as the defendant accepted. It does not bespeak mere intent or aspiration. It may be distinguished from the words, 'agrees that' which appear elsewhere in the Agreement, as words of acknowledgement.[57]

78 What it means to comply with a *standard* will depend upon the nature of the standard in question. Some 'standards' might be capable of clear and certain satisfaction such that compliance with the standard can be objectively ascertained. The content of other standards might be inchoate or vague, such that an agreement to comply with the standard is not a commitment to a sufficiently certain course of action. Asking in the abstract whether an agreement to comply with a standard is likely to have been intended as promissory, does not greatly assist. As the defendant accepted, the word 'standard' by itself is neutral. Plainly enough, an agreement to comply with a standard that itself provides that a party will do something, may be read as a promise by the party to do the thing in question. In this case, any impediment to the conclusion that a particular part of the Wholesale Standards is promissory, arises from the content of

56 *Anglican Development Fund Diocese of Bathurst v Palmer & Ors* (2015) 336 ALR 372, [348].
57 See clauses 7.3(a), 22(f).

the standard rather than from the contractual statement that 'Holden agrees to comply with the Wholesale Standards'.

79 The Wholesale Standards are a sub-chapter within the Holden Dealer Policies and Procedures Manual,[58] comprising six pages. They commence with an introductory paragraph followed by 28 paragraphs each addressing its own topic or subject matter, with most containing sub-paragraphs. The paragraph in issue in is entitled, 'Holden Product and Supply'. The Wholesale Standards contain statements of differing kinds. Many statements are expressed very generally and in the passive and are best characterised as descriptive of Holden's business: for example, '*Holden implements standards for dealer communication and feedback systems*'; '*Holden supports dealers with a field support and business planning team including dedicated resources to answer queries, prepare annual business plans and budgets, and to give technical and non-technical training to staff*'. Some are best described as stating Holden's values in respect of its Dealer network and retail business: for example, '*Holden maintains its brand image and promotes its business interests through its public relations department and adheres to its trademark policy*'; '*Holden and its dealers work together and execute new vehicles sales and marketing strategies which achieve market share objectives'*). Statements of that kind are, to adopt the defendant's language, descriptive statements of believed or asserted fact.

80 The defendant's contention that clause 9.1(g) is a statement of intention or expectation rather than a promise to do something, was (as the defendant accepted) derived from a combination of the language of the clause and the particular content of the Standards. Accordingly, to the extent that that interpretation was applied to the whole of the Standards, it rested on an assumption as a whole, the Standards were expressed in aspirational, descriptive, or otherwise non-promissory language. To make that assumption good it would be necessary to have regard to every part of the Standards, or to conclude that a construction that some parts of the Standards could be read as promissory while others were not read that way, was for some reason unsound. The latter proposition was not made, and if it was intended to be made it was not

[58] They form a sub-part of the Retail Standards.

established. That being so, the correct position is that the contractual statement in clause 9.1(g), when read with a particular part of the Wholesale Standards, might be properly construed as promissory, and when read with other parts, might be properly construed as non-promissory. The content of the relevant of the part of the Standards will determine whether the promisor is committed to a future course of action that is sufficiently certain to be enforceable. Subject to the further considerations below, I accept the defendant's alternative construction, namely that clause 9.1(g) is in its effect, an agreement to comply with those parts of the Standards that are promissory in content and not merely aspirational or in the nature of a recitals of fact.

81 The defendant said that the first two paragraphs of the Wholesale Standards supported its global characterisation of the Standards as merely aspirational. Clause 7.17.1 provides,

> 7.17.1 Holden embraces the Holden Wholesale Standards and develops a culture where all personnel strive to work with and fully support our dealers to deliver vehicles and experiences that inspire passion and loyalty to create customers for life. We are committed to work with our Holden dealers to build Australia's best network. This is out service commitment to our Holden dealer network.

82 I accept that the language of 'embracing' the Standards and developing a culture is aspirational. However, the interpretation must account for the language of clause 9.1(g), which states an agreement to comply with the Standards, whose contents are contained in clauses 7.17.2 to 7.17.28. The descriptive language of clause 7.17.1 does not by itself require the agreement to comply in clause 9.1(g) to read as a mere statement of intent. It is necessary to have regard to the content of the Standards themselves, to take the analysis further.

83 Clause 7.17.2 provides,

> 7.17.2 **Standards Measurement and Reporting**
>
> 7.17.2.1 Holden and dealers develop and maintain a process that measures performance relative to Dealer and Wholesale Standards and communicates results to Holden and dealers.
>
> 7.17.2.2 Holden and dealers develop and maintain a process to provide assistance where necessary to enable dealers and Holden to maximise

performance and Standards.

84 The substance of these clauses is that the performance of dealers on the one hand and Holden on the other, is measured against the Dealer Standards and the Wholesale Standards respectively. The expression 'relative to' does not of itself convey that compliance with the standards is satisfied by mere aspiration, or that in this context, clause 9.1(g) was intended as a statement of 'expectation'. Nor does the fact that sub-clause 7.17.2, refers to 'maximising' performance and Standards. How the measurement or 'maximisation' of performance may occur depends on the content of the standard in question. It is relevant to the construction exercise that although clause 7.17.2 is contained within part 7.17 of the Manual (the Wholesale Standards) it applies to both dealers and to Holden. The Manual contains prescriptive standards for dealers, including its dealer operating standards in chapter 2, and its retail standards in chapter 7. The provision in clause 7.17.2 for measurement of performance was not said to indicate that the standards applicable to dealers were not obligatory. Clause 7.17.2 should be read as applying the same way to the Standards applicable to dealers and to Holden. The evident purpose of the clause is to provide that Holden and dealers maintain processes for measuring their respective performances.

85 Turning to the Agreement itself, clause 9 commences with the words, 'Holden agrees to …'. The sub-clauses that follow commence with or include a variety of verbs: provide, consult, inform, use its best endeavours to ensure, and 'comply with'. The expression 'comply with' appears in sub-clauses 9.1(g) and (h). I do not accept the submission that because it might be hard to conclude that clause 9.1(h) is promissory, that the same conclusion must apply to sub-clause 9.1(g). An agreement to comply with relevant laws, code and guidelines might be unenforceable for a number of reasons but that is not because the language 'comply with' requires that conclusion. Whether by clause 9.1(g) Holden made a binding promise is to be determined by the language of that clause read in combination with the content of the Standards.

86 I reject the remaining submission addressed to clause 9, which was that where it contains a contractual promise by Holden the obligation is usually qualified, there are

no such words of limitation in clause 9.1(g) and so if it were intended to make compliance with the Wholesale Standards obligatory one would expect to see some words of limitation. First, not all other promises contained within clause 9 are conditioned.[59] Second, the sub-clauses within clause 9 address diverse subject matter and should be construed on their terms. Third, the logic that Holden cannot have made an unqualified promise to do something because its promises were usually qualified, rests on an impermissible, a-priori assumption about what Holden would have been prepared to agree and requires a reading down of the words of the provision, on that assumption. The absence of a qualification in one clause where it is present in others, rather suggests that the absence is a deliberate choice.

87 The defendant submitted that Holden was entitled to unilaterally modify the Wholesale Standards under clause 26.25 and its ability to do so speaks against an intention that they be promissory. The plaintiff said that having promised to comply with the Wholesale Standards as they were at the time of contracting, Holden was not entitled to amend them during the Term, and even if it were so entitled, its power to amend was confined. Speaking generally, the ability of a party to modify a standard (or rule or other undertaking) with which it has agreed to comply might be capable of rendering the agreement to comply discretionary (in the sense that the power to modify could be used to nullify the obligation or otherwise) and thus render the promise illusory. However, the question is what the parties to the particular contract intended, determined objectively. In this case it is necessary to determine the proper relationship between the 'agreement to comply' with the Standards and the presence of a power to amend the Standards under a broad power to amend the Manual, in the context of the Agreement as a whole.

88 Clause 26.15 confers a broad power on Holden to 'unilaterally' modify the Manual from time to time during the Term. The power to amend was to be exercised for the purposes set out in the clause ('in order to' do those things), which are themselves broadly defined. Although sub-clause 26.15(a)(ii) refers to the amendment of the

[59] See sub-clauses 9.2(c) and (e), 9.1(b)(ii).

Manual in accordance with the 'requirements of Holden in respect of its authorised network of dealers', given the breadth of the clause as a whole, the provision should be read as encompassing modification to any part of the Manual including the Wholesale Standards, unless the Agreement otherwise provides. [60]

89 The plaintiff's construction reads down the power to modify in favour of the agreement to comply, concluding the parties as having agreed in effect to fix the Standards at a point in time, for the Term. The defendant's construction renders the agreement to comply, illusory.

90 Courts should strive to construe contracts to as to render their provisions harmonious with one another, straining against an interpretation that renders parts of a contract that ineffective unless it is possible to reconcile conflicting parts.[61]

91 It is relevant to the constructional exercise that under the Agreement each of Holden and the dealer agreed to comply with relevant parts of the Manual. By clause 9.1(g) Holden *agreed to comply* with the Wholesale Standards contained in the Manual. By clauses 8.1 and 8.4(a) the dealer *agreed to comply* with 'the standards, procedures and guidelines contained in the Manual' including those relating to the Holden Retail Standards, the Dealer Operating Standards, the sale and service of the Products, accounting and reporting, the preparation of business plans, marketing, customer experience and customer complaints. Several other significant obligations imposed on the Dealer were defined by reference to the Manual, including the obligation to operate the Holden Dealership premises to meet or exceed the performance criteria specified in the Manual (clause 13.1), to establish and maintain dealership premises in accordance with the Manual (clause 7.1(a)) and to place purchase orders with Holden for new vehicles in accordance with the Manual (clause 10.4(a)). The power reposed in Holden to modify the Manual applied to the whole of the Manual, meaning those

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60 In respect of dealers, Holden was expressly permitted by clause 13.1 to modify the performance criteria specified in the Manual, save that the SEG Objectives would only be modified in accordance with the criteria in clause 13.1(c).

61 See the principles set out earlier.

parts of the Manual that, when read with the Agreement imposed or defined obligations on each party.

92 A reasonable business person would understand that although the Manual was susceptible to change from time to time at Holden's instance, both parties had bound themselves to comply with the relevant parts of the Manual *as in force from time to time*. The dealer intended to bind itself to comply with those parts of the Manual that applied to it as in force from time to time, and Holden intended to bind itself to comply with those parts of the Manual that applied to it, as called out in the Agreement.[62]

93 That construction does not require the unqualified language of clause 9.1(g) to be read as requiring only a wholly discretionary performance on the basis of the indirect effect of clause 26.15, as the defendant proposes. It does not require clause 26.15 to be read down as the plaintiff proposes. It reads the agreement to comply with the relevant parts of the Manual the same way for both parties. Doing so is consistent with the parties' stated joint commercial objectives to establish a mutually beneficial business relationship for the Term that the parties said would include the provision to the dealer with a high quality range of motor vehicles and access to best practice commercial and market plans, and the expectation by Holden that the dealer would do the things stated in relation to the dealership business and the marketing of Holden's vehicles.[63] Those benefits said to accrue to the dealer (the provision of vehicles, and commercial and marketing plans) were the subject of the Wholesale Standards,[64] and those things that Holden expected of the dealer were the subject of the Standards within the Manual applicable to the dealer. Had the parties intended Holden's agreement to comply with the Standards to be discretionary, they could have said so explicitly. In the circumstances it is improbable that they did so indirectly. That a standard (or other undertaking) with which a party has agreed to comply may

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62 As discussed earlier, the performance obligations were subject to the content of the relevant Standards. In the sense discussed, the promise was to comply with the parts that were promissory and not mere statements of fact or aspiration.

63 Agreement clause 1.

64 Wholesale Standards clauses 7.17.14 (vehicles), 7.17-4; 7.17.8-12; 7.17.16-17 (commercial and marketing plans).

change from time to time during the term of the relevant agreement, does not mean it is inherently uncertain. It is evident from the prominence of the Manual in the definition of several substantive parts of the Agreement that the parties, objectively, did not regard the obligations imposed by reference to the Manual as uncertain because they could change from time to time. For these reasons, a reasonable businessperson would not conclude that by the conferral on Holden of a power to modify the Manual and thus the Wholesale Standards, the parties agreed that Holden's obligation to comply with the Standards was discretionary or otherwise non-binding.

94 The result of this excursus is that there is no reason to construe clause 9.1(g) and the whole (meaning every part of) the Wholesale Standards as non-promissory, and to describe clause 9.1(g) as limited generally, to a statement of intention or expectation rather than a promise to do something. The result is to return to the defendant's alternative proposition that some of the Wholesale Standards, read with clause 9.1(g), may be promissory, depending upon their content. In substance the plaintiff accepted that proposition.

Wholesale Standards Clause 7.17.14.1

95 The plaintiff read clause 9.1(g) and sub-clause 7.17.14.1 of the Wholesale Standards as imposing an obligation on Holden to supply new vehicles and submitted that compliance with that clause required that 'Holden must *have available for supply*, a broad range of new Holden vehicles during the Term.' That interpretation was expressed in substantially the same terms as the alleged implied term, that 'Holden would *ensure the availability for supply* of new Holden branded motor vehicles for the Term.'

96 The clause is expressed in non-imperative language. It does not say, 'shall, 'will' or 'must', either with the active or passive voice. While expressly promissory language will not always be required, when contracting parties adopt passive language it may

contra-indicate an intention to making a binding promise.[65] In this case, taken together with the otherwise non-specific language of the clause, it tends against the conclusion that the parties intended the statement to be promissory. The plaintiff said that the expression, 'world class products' is given content by clause 7.17.23 of the Holden Wholesale Standards, which meant that the sub-clause should not be taken as puffery. Clause 7.17.23 (comprising four short paragraphs) refers to Holden's Quality Management System, its 'GM 4-Phase Vehicle Development Process' and 'GM Holden Continuous Improvement Process'. It states that Holden vehicles and components are engineered and manufactured in compliance with GM Holden Quality Standards and that Holden will acknowledge, investigate and resolve all product problems promptly and effectively. There is nothing about that part of the Standards that suggests that sub-clause 7.17.14.3 is addressed to a supply obligation. If anything, it draws attention to the quality or attributes of that which Holden provides.

97 According to its ordinary language the clause does not commit Holden to a future course of action sufficiently certain to be enforceable. It is, rather, descriptive of the Holden business. It describes that which Holden provides but does not, by any necessary implication from its language, impose any obligation to supply that thing.

98 It remains necessary to consider the content of the alleged obligation and the immediate and broader context for this sub-clause. For the reasons that follow, the broader context does not support a different conclusion.

99 The plaintiff's case concentrated upon the breach of obligation, alleging that when Holden did not supply any vehicles, it did not comply with the clause. It might be readily demonstrated that in circumstances where Holden provides no cars, the statement, 'Holden provides a broad range of world class products' (products meaning cars) would be untrue of Holden. The case was not, however, founded in misrepresentation. One must go further, and ascertain whether the Agreement imposed the obligation alleged. The asserted obligation was expressed without any

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65 See for example, *New Standard Energy PEL 570 Pty Ltd v Outback Energy Hunter Pty Ltd* (2019) 135 SASR 469, [94]-[95].

qualification and the plaintiff's focus on the breach case tended to distract from the task of defining its content. The contention that Holden did not fulfil the essential purpose of the relationship with its dealers by providing no vehicles, might appear persuasive until one focuses on the positive performance said to be required by the Agreement. What if anything was required of Holden must be understood prospectively. The plaintiff's case was not that certain vehicles were ordered and not supplied to the plaintiff (or to particular group members) but that the defendant was required to and did not, 'have available' new vehicles for supply. One must then ask what was required of the defendant by the asserted obligation to *have available a supply of vehicles* during the Term? A requirement to have a thing 'available for supply' (like its cognate, to 'ensure the availability' of thing for supply) is concerned with the circumstance that must exist before supply can occur. It is necessary to consider how the requirement to 'have available' a supply of vehicles translates into a positive obligation that is expressed in terms making sufficiently clear what Holden is to do, rather than merely describes a circumstance that should exist.

100 A supply may be adequate or inadequate depending upon the requirement it is intended to meet. One must then ask, what requirement was to be satisfied by the 'available' supply? An attempt to define the content of the obligation provokes questions as to what supply would be required - supply to what extent or in what volume? Availability of which vehicles? If a 'broad range' of vehicles was required, by what measure was a 'broad range' to be determined? The questions arise because the thing to be supplied is a product that must be sourced and manufactured. Would the requirement be satisfied by having ten cars available per year? Five? Three? Fifty? If the answer to that question was, 'of course not', that would be because of an assumption that supply to that extent would not meet the requirements of the Agreement. It must be recalled that although the Dealer Agreement was in a standard form, the Agreements existed between Holden and each dealer. In each case, the supply of new Holden vehicles occurred by the submission of orders by dealers and fulfilment of them by Holden, so that the vehicles could be sold by the particular

dealer from a particular premises. The notion of 'supply' or 'availability for supply' in the abstract is nebulous.

101 The questions raised by an interrogation of the content of the asserted obligation draw attention to the relationship between sub-clauses 7.17.14.1 and 7.17.14.3.

102 The language of the sub-clauses within clause 7.17.14 can be distinguished by their chosen verbs and voice. Under sub-clause [.14.1] Holden '*provides*' a range of products. By sub-clause [.14.2] Holden '*will endeavour to distribute*' new vehicles among dealers equitably. By sub-clause [.14.3] Holden '*will endeavour to supply dealers* with a sufficient quantity of vehicles' to allow the achievement of SEG or meet reasonably anticipated demand'. Under clause [.14.4] Holden '*delivers*' new vehicles in dealerships in the described time scale. It will be seen immediately that sub-clause [.14.3] is the only clause that employs the verb, 'supply'. Unlike sub-clause [.14.1] it expresses a commitment in active voice with definite content (will endeavour to supply a sufficient quantity of vehicles to satisfy the stated objectives). Unlike sub-clause [.14.1], it is concerned with supply *to dealers* and not provision of products in the abstract.

103 Sub-clause [.14.3] defined the volume of vehicles that Holden was obliged[66] to endeavour to supply, namely that quantity sufficient to allow the achievement of SEG or to meet reasonably anticipated demand. As noted earlier, the SEG defined the number of vehicles a dealership was expected to sell in a given year. It formed part of the performance criteria that each dealer was required to meet, compliance with which was acknowledged by the dealer to have been fundamental to the Agreement. As a matter of practicality, obtaining a supply of vehicles that would allow the dealer to achieve its SEG or to meet reasonably anticipated demand would allow the dealership to function consistently with the objectives defined in the Agreement. It is contextually sensible that any obligation to supply new vehicles to Holden dealers would be tied to the dealer's SEG or its reasonably anticipated demand.

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66 The contractual nature of sub-clause 7.17.14.3 is addressed further below.

104 The plaintiff sought to distinguish sub-clauses [.14.1] and [.14.3] so as to give contractual force to clause [.14.1], by contending that sub-clause [.14.3] addresses the number of vehicles Holden was required to endeavour to supply, whereas sub-clause [.14.1] (and in the alternative, the implied term), address what was said to be a different issue; the obligation on Holden to ensure the availability for supply of new Holden brand motor vehicles for the Term. The plaintiff said that sub-clause [.14.1] (and the implied term) 'say nothing about the volume that had to be supplied and how that related to the SEG target or reasonably anticipated demand.' Accordingly, both sub-clauses had work to do, both had contractual force and they were not inconsistent. That submission draws an illusory distinction between volume and supply. An obligation to have cars 'available for supply' is devoid of meaningful content unless it clearly defines what Holden is to do in order to discharge it. That definition is not provided by sub-clause [.14.3]. Clause [.14.3] has its own distinct contractual function, which is to impose an obligation on Holden to 'endeavour' to supply. The fact that under that clause Holden was only required to *endeavour* to supply a sufficient quantity of vehicles to allow achievement of the SEG or reasonably anticipated demand, provokes the question, what then was the content of the more absolute obligation to 'provide a broad range of world class Products' or more relevantly, as the plaintiff would have it, 'to have an available a supply of vehicles' during the Term? The unconfined supply obligation advanced by the plaintiff is inconsistent with sub-clause [.14.3] and not otherwise given content by the Agreement.

105 Returning to the foundations of the plaintiff's construction of clause [.14.1], the obligation was said to be a textual implication which arose from the construction of the language of the clause and the contract as a whole. For the reasons discussed in the context of the Implied Term under the *BP Refinery* principles, the obligation alleged is not a necessary implication from the language of the contract as whole. Those reasons include the difficulties with the content of the obligation, discussed earlier.

Wholesale Standards Clause 7.17.14.2

106 The clause provides that Holden will endeavour to distribute New Vehicles amount Holden dealers in a fair and equitable manner. I accept the defendant's submission that the clause is concerned with the distribution of vehicles between dealers inter-se, and is not itself a promise of supply. The plaintiff's submission was that the clause necessarily contemplates *that there will be distribution* of new vehicles for the duration of the term; that Holden *has new vehicles* to distribute. The argument was the same in substance as that advanced in relation to sub-clause [.14.2]. I reject it for the reasons stated above. The defendant added that the clause was unlikely to be promissory despite its active language, because clause 10.2 of the Agreement contained a similarly worded clause, but with carve-outs. I doubt that there is an inconsistency between clause 10.2 of the Agreement and sub-clause [.14.2] of the Wholesale Standards, but that point is not determinative.

Wholesale Standards Clause 7.17.14.3

107 Returning to clause 7.17.14.3, the defendant accepted that it could be construed as a promise, grammatically, but said that it could also be construed as a statement of intent, and that language of 'endeavours' supported the construction that the Standards were something that Holden would strive towards. In my view the language and the content of clause 7.17.14.3 in conjunction with clause 9.1 makes it promissory. By those clauses read together, Holden agreed that it would endeavour to supply dealers in the way described. The description of the manner in which supply was to occur gives the obligation specific content, as discussed above. An agreement to 'endeavour' to do something is not inherently non-promissory.

108 The defendant separately submitted that the obligation to supply dealers with relevant quantities of vehicles could be rendered nugatory by Holden reducing the SEG Objectives to zero, which meant performance was at the discretion of Holden. Accordingly, the statement that Holden would endeavour to supply vehicles was not promissory. The defendant added that it would have been reasonably entitled to write back the SEG Objectives in circumstances where GMC had retired the Holden brand

in Australia.[67] I do not accept that the fact that Holden itself set the SEG targets meant the standard was not promissory.

109 First, it did not follow from the fact that the SEG Objectives might be set at a low number or even to zero at a given time, that Holden was not obliged to endeavour to supply a quantity of vehicles to allow achievement of the SEG. The SEG determined what would be required to discharge the obligation. If the SEG was set at a low number, the delivery of that low number of vehicles would satisfy the obligation. The obligation was to supply the relevant quantity to satisfy the SEG as it was any given time.

110 Second, the significance of Holden's ability to set the SEG Objectives (including to zero) needs to be understood in the context of the Agreement as a whole. The obligation in sub-clause [.14.3] is to endeavour to supply the quantity of vehicles sufficient to achieve SEG *or meet reasonably anticipated demand*. The defendant's submission disregarded the second limb. The two limbs provide alternative measures for the quantity of vehicles to be supplied. The inclusion of both limbs without an indication of any hierarchy between them means that an equivalence between them was intended. The SEG is a technical calculation determined by Holden. The 'demand' element of the second limb, however, refers to a circumstance external to Holden. In the context of the SEG Objectives, it concerns or at least incudes demand as anticipated for the dealership for which the particular SEG is set. 'Reasonably anticipated' introduces a subjective element but one that is qualified by the requirement that it be reasonable. Predicating the supply obligations on the achievement of the SEG where Holden could theoretically set the SEG Objectives at zero, did not disclose a contractual intention that the power could be exercised at Holden's whim regardless of demand for its vehicles as reasonably anticipated by it.

111 Further, Holden's ability to change the SEG Objectives was expressly confined by clause 13.1(c) which permitted a change only after consultation with the dealer where in Holden's view the dealer's market circumstances supported a bona fide cause for a

[67] It was not suggested that it did in fact do that.

change. That power was more restricted than Holden's power to change the performance criteria generally. The latter required consultation but not the formation of a specific state of mind by Holden. The fact that the ability to change the SEG was constrained was consistent with the fact that the SEG Objectives assumed some significance in the parties' relationship as defined by the Agreement as a whole. If understood as a contractual promise, the obligation imposed on Holden by clause 9.1(g) and sub-clause [.14.3] was the counter-part of the obligation on the dealer to comply with the performance criteria which included the SEG, where compliance was said to be fundamental to the Agreement, the viable existence of an authorised dealer network and the continuance of the mutually beneficially relationship created by the Agreement.[68] Practically speaking, the commercial object of the Agreement was served by the dealer agreeing to sell Holden cars in accordance with the SEG, while Holden agreed to endeavour to supply its cars in sufficiently numbers to *allow the achievement* of the SEG (or to meet reasonably anticipated demand).

112 For the reasons discussed below I do not consider that this construction is inconsistent with clause 10.4 of the Agreement, under which Holden is not bound to accept any purchase order.

113 A reasonable businessperson would understand that although it was Holden who set the SEG Objectives, Holden had bound itself to endeavour to supply to dealers a sufficient quantity of vehicles that would allow the achievement of the dealer's SEG or to meet reasonably anticipated demand.

114 As to the meaning of 'endeavour', the plaintiff's submission was that the clause imposed a best endeavours or alternatively a reasonable endeavours obligation, although the submission did not say why that was so. The defendant submitted that textually, 'endeavours' should suggest something less than reasonable endeavours, but accepted that it was difficult to contend that the promise is make endeavours would not encompass some degree of reasonableness.

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[68] Agreement clause 13.3.

115 The word, 'endeavour' should be taken as bearing its ordinary meaning, which is 'to exert oneself to do or effect something'; to attempt, to try.[69] The question whether the obligation means anything different from a reasonable or best endeavours obligation arises because the Agreement also uses those expressions.[70] It is recognised when construing similar but differently worded contractual terms that, '*the habit of a legal draftsman is to eschew synonyms. He uses the same words throughout the document to express the same thing or concept, and consequently if he uses different words the presumption is that he means a different thing or concept*.'[71] That presumption takes the matter only so far in this case. The context in which the expressions, 'reasonable endeavours' and 'best endeavours' appear in the Agreement does not assist in discerning what the drafter intended, objectively. The position is more nuanced than the defendant's view that a bare endeavours obligation required something less than a reasonable endeavours obligation, as its Senior Counsel's submission acknowledged.

116 Commonly, where contractual terms impose endeavours-based obligations the transitive verb 'endeavour' is qualified by adjective 'reasonable' or 'best'. Reasonable and best endeavours obligations have legally accepted meanings although the relationship between them is unclear. Reasonable endeavours (and best efforts) provisions operate to qualify what would otherwise be a more absolute obligation.[72] In *Hospital Products*, the distributorship agreement in question required the distributor to 'use best efforts' to promote the sale of the company's products. Mason J said that a qualification of reasonableness is usually associated with a best efforts clause. His Honour explained that, '*the qualification itself is aimed at situations in which there would be a conflict between the obligation to use best efforts and the independent business interests of the distributor and has the object of resolving those conflicts by the standard of reasonableness*.'[73] As the High Court said in *Electricity Generation Corporation v Woodside Energy*, *'[a]n obligor's freedom to act in its own business interests, in matters to which the*

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69 Macquire Dictionary Online.

70 Dealer's obligations at clauses 8.1(a) and 8.2(a); Holden's obligation at clause 9.1(f).

71 *Prestcold (Central) Ltd v Minister of Labour* [1969] 2 WLR 89 adopted by the Victorian Court of Appeal in *Eureka Funds Management Ltd v Freehills Services Pty Ltd* (2008) 19 VR 676, [52].

72 *Hospital Products*, 92 (Mason J).

73 *Hospital Products*, 92 (Mason J); subsequently adopted in *Woodside Energy*, [40]-[41].

agreement relates, is not necessarily foreclosed, or to be sacrificed, by an obligation to use reasonable endeavours to achieve a contractual objective.[74] The obligation is conditioned by the terms of the contract in issue and what is reasonable in the circumstances, which may include circumstances that affect an obligor's business.[75] The characteristics of the person upon whom the obligation is imposed, viewed in light of the contract, are to be taken into account in measuring the standard of endeavour required.[76]

117 The authorities do not speak with one voice on the relationship between 'reasonable endeavours' and 'best' efforts or endeavours. Some decisions hold that the obligations are substantially similar.[77] Others, while recognising that the difference is elusive, accept that a 'best endeavours' obligation is somewhat more onerous. To the extent that a difference is recognised, it is, to adopt the language of Ball J of the New South Wales Supreme Court in *Altis PropCo 2 v Majors Bay Development*,[78] that '['best endeavours'] imposes an obligation to do everything that is reasonably possible to bring about the stated end, whereas ['reasonable endeavours'] simply requires a person on whom the obligation is placed to take steps that a reasonable person in the circumstances would take to achieve that end.' In *Joseph Street v Tan*,[79] the Victoria Court of Appeal held that an obligation to use best endeavours to achieve a contractual object requires the obligor to do all he or she reasonably can do in the circumstances to achieve that contractual object, and that, 'within reasonable limits, they require the obligor, broadly speaking, to leave no stone unturned to achieve the object in view.'[80]

118 Returning to the present Agreement, the absence of the word 'reasonable' in sub-clause [.14.3] of the Standards does not imply that Holden would satisfy the obligation by something less than reasonable endeavours. The requirement, which follows from the ordinary meaning of 'endeavour', is that Holden exert itself to attempt to supply

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74 *Woodside Energy*, [42].
75 *Woodside Energy*, [40]-[41].
76 *Re Iceland Cold Storage Australia Pty Ltd* [2023] VSC 206, [156], citing *Woodside Energy*, [41]-[43].
77 See for example, *Tyro Payments Ltd v Kounta Pty Ltd* [2023] NSWSC 1384, [138]-[139]; *ASIC v Dover* (2019) 140 ACSR 561, [54].
78 *Altis PropCo2 Pty Ltd v Majors Bay Development Pty Ltd* [2022] NSWSC 403, [73].
79 *Joseph Street Pty Ltd and Others v Tan and Others* (2012) 38 VR 241 (***Joseph Street***).
80 *Joseph Street*, [41]; cited in *Hoho Property Pty Ltd v Bass Finance No 37 Pty Ltd* [2023] NSWSC 411, [310]-[311], 'the obligation to use 'best endeavours' is more onerous than 'reasonable endeavours'.'

a sufficient quantity of vehicles to allow the dealer to achieve SEG or meet anticipated demand. It requires effort on Holden's part to bring to try to bring about that outcome. Were Holden to conduct itself in a way that did not genuinely make that endeavour, it would not discharge the obligation. Efforts or actions not in fact directed to attempting to achieve the contractual outcome would not satisfy the obligation. The standard of reasonableness expressed by the authorities introduces an element of objectivity, but it allows for the circumstances of the obligor to be taken into account. It is hard to see that Holden could satisfy the 'endeavours' obligation by doing less than what a reasonable person would do in the circumstances, when that standard is to be judged by the contract and circumstances in question, including Holden's own circumstances. To the extent that 'reasonable' is distinguished from 'best', it is to confine the endeavours obligation rather than to enlarge it. The adjective 'reasonable' supplies a standard by which endeavours may be measured, but when examined in this context, its absence does not mean that the standard for performance is 'something less than reasonable'; or the taking of whatever action or stance that Holden wishes, regardless of whether its endeavours in fact amount to an effort to bring about the contractual objective. Linguistically speaking, the adjective 'best', more readily implies the highest standard of endeavours available, in the sense discussed in *Joseph Street v Tan*.[81]

Wholesale Standards Clause 7.17.14.4

119 I accept the defendant's submission that clause 7.17.14.1 is concerned with the timeframe for delivery of the vehicles that Holden will supply to its dealers; it is not itself a promise of supply and the implication of supply does not arise from the language of the clause. The plaintiff's submission was that the clause necessarily requires that there will be new vehicles available for supply, and was the same in substance as that advanced in relation to sub-clause [.14.2]. I reject it for the reasons stated above.

[81] (2012) 38 VR 241.

Express Terms – Dealer Agreement Clause 10.4

120 The **plaintiff** alleged that in breach of clauses 10.4(a) and (c) Holden refused to accept or consider purchase orders from the plaintiff and group members. Clause 10.4 of the Agreement concerns purchase orders. Clause 10.4 relevantly provides that:

> (a) The Dealer must place purchase orders with Holden for New Vehicles in accordance with the Manual. A purchase order for a New Vehicle is deemed to include any equipment or accessories required by law to be installed even if they are not included in the Dealer's purchase order.
>
> …
>
> (c) Purchase orders received by Holden will be considered to be bona fide and are non-cancellable, other than in the manner specified in the Manual.
>
> (d) All purchase orders are subject to acceptance by Holden. Holden is not bound to accept any purchase order.

121 The plaintiff said that is implicit in sub-clause 10.4(a) that Holden *would not be permanently disabled from fulfilling purchase orders*. The clause created a mutual obligation, to be drawn from the text of the clause, rather than as an implication for business efficacy purposes. Clause 10.4(a) required that dealers place orders in accordance with the Manual, and clause 5.1 of the Manual required that dealers maintain a base level of stock to achieve their forecasted sales (45 days, 50 days in the case of Colorado). Clause 10.4(a) could only operate then with Holden having new vehicles available for supply; dealers cannot meet the obligation to place orders in accordance with the Manual unless Holden has available vehicles for supply. As the plaintiff put it, the *dealership would place purchase orders and there would be new Holden vehicles available for supply in response to those purchase orders*. Further, clause 5.2 of the Manual specified 'share of build' procedures which were said to apply 'when Holden's vehicle production is constrained or where special edition vehicles are offered in the market.' From that clause it may be inferred that the parties 'never contemplated that a share of build procedure would ever result in a total and permanent cessation of vehicle supply'. The plaintiff submitted that the purpose of **clause 10.4(d)** is to enable Holden to refuse orders that don't comply with its requirements; it did not entitle Holden to cease vehicle supply altogether. That follows

from clause 5.3.2 of the Manual which applies where an order is not a valid vehicle specification. Note 2 to cl 5.3.2 states, in respect of accepted orders, that '*in some instances material may not be able to be sourced to meet total dealer requirements. In this instance, dealer order may be pushed to the next production month*.' Clause 10.4(d) also enables Holden to engage in the alternate colour match process set out at clause 5.3.3.2 of the Manual, or under clause 5.1.5, to cancel an order where a dealership has ordered too few of a given model to meet the minimum requirements or has over-ordered a particular vehicle. The purpose of clause 10.4(d), read in the context of the Manual, is to ensure that Holden's dealerships orders a sufficient quantity of vehicles that matched the number of vehicles that Holden had sourced from the GMC group.

122 The **defendant** submitted that any refusal by Holden to accept or consider purchase orders for new vehicles could not amount to a breach of the clause 10.4(a), which on its plain language, imposes no obligation on Holden. Nor does clause 10.4(c) impose any obligation on Holden. That clause is for the benefit of Holden, and the reference to an order being 'non-cancellable' means that it is non-cancellable by the dealer. So much is plain from the words of clause but also when read with clause 5.4.7 of the Manual, which states that 'once a vehicle order has been 'preferenced', this order cannot be cancelled, nor will Holden accept the handback of preferenced vehicles.' Furthermore, the plain words of clause 10.4(d) cannot be read down as the plaintiff contends. It does not mean that, 'Holden does not have to accept *every* order' and nor is it limited to enabling Holden to reject orders which it is unable to supply because it does not offer the type of vehicle ordered by the dealer (say, 200 pink Colorados). The words are plain and unambiguous and should be accorded their plain meaning. Holden does not have to accept an order and if it does not have to accept an order then it does not have to supply. The Disclosure Document accurately characterises clause 10.4(d) namely there is an obligation to supply *once an order has been accepted*. The difficulty with the plaintiff's construction is defining the reach of the clause, when it is not founded in the text. To illustrate that point, once clause 10.4(d) allows Holden to say that it cannot supply a particular vehicle (a pink Cadillac or a two seated Colorado) there is no conceptual distinction between that and saying it cannot supply

Colorados. If it is correct that an order can be rejected because the particular vehicle is not available, because vehicles with particular characteristics are not available or because Holden does not wish to supply such vehicles, Holden doing so is not qualitatively different from it say, refusing to supply Colorados and therefore rejecting all orders for Colorados. That is not qualitatively different from saying, for example, that no more right hand drive vehicles are available and no orders for them will be accepted.

Analysis

123 Clauses 10.(a) and (c), read with the relevant parts of the Manual, do not impose on Holden the requirement that it must 'have new vehicles available for supply'.

124 The implication of a contractual term by this method of construction is an implication from the contractual words and their context, where the term implied is a 'necessary supplement' to the words.[82] A contextual reading requires that the implied term not be inconsistent with any other term.

125 Commencing with clause 10.4, it is clear from the process described in Chapter 5 of the Manual that clause 10.4(c) of the Agreement is for Holden's benefit and refers to orders being non-cancellable by the dealer. As to clause 10.4(a), its words make plain that it is a procedural requirement instructing dealers as to how they are to place purchase orders. It does not require dealers to place orders. It means that any purchase orders placed with Holden must be placed in accordance with the Manual. It does not itself impose any obligations on Holden.

126 If an obligation to supply is to be found, it must be implied from the Manual, on the predicate that dealers are required to comply with any obligations contained in it.[83] The relevant parts of the Manual provide in substance as follows:

(a) Chapter 5.1 of the Manual provides a distribution policy and procedure for vehicle ordering. It sets out Holden's requirements for vehicle ordering by

82 *Hardingham,* [103]-[105] (Edelman and Steward JJ).

83 The dealer agrees to comply with the Manual, by clause 8.4 of the Agreement.

dealers. The first step in the process is that vehicles are to be ordered in accordance with the 'Holden forward availability workout' or **FAW**, which is an Excel based worksheet produced by Holden and available online (or at an earlier time, sent by email to dealers). The stated aim of FAW is to assist dealers to optimise their model mix and to maintain the nominated days' supply, by model. The FAW will calculate, among other things, how many cars by model the dealer needs to have in stock at the start of each month to be able to achieve the 'required days' supply' and to achieve their sales forecast.[84] It is intended to assist dealers plan their projected sales by placing orders approximately two months ahead of when they are required. The calculation made by the FAW is based on the dealer's average sales history, a seasonality factor determined by Holden, based on the 'monthly Holden Volume Forecast Summary which is approved by Holden's board of directors'. [85] As clause 5.1.1. states,

> The FAW calculates order requirements for the current ordering cycle taking into consideration the Dealers sales history, stock & pipeline and forecasted sales. A dealer's individual FAW factors in the Holden national forecast, day's supply requirements, marketing strategies and supply constraints. [86]

(b) The 'national day's supply requirement' is that,

> Dealers are required to 'maintain an agreed level of stock and pipeline orders to achieve their forecasted sales. Consideration is given to the lead times and model complexity. The minimum day's supply requirements for each carline are [45 days for imported passenger vehicles] and [50 days for Colorado due to the level of product complexity].[87]

(c) Prior to order close-off dates each dealer is contacted by their district manager to discuss the dealer's ordering of vehicles and once the dealer and manager agree on order volumes by model, the 'commitment' is formally documented in the FAW. Dealers are required to order their committed volumes or 'pick up vehicles in the pipeline.[88]

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84 Clause 5.1.3.5.
85 Clause 5.1.3.3.
86 Emphasis added.
87 Clause 5.1.2.
88 Clause 5.1.5.

(d) Holden has share of build (**SOB**) procedures that 'are used when Holden's vehicle production is constrained or when special edition vehicles are offered in the market.' A dealer's sales history as a percentage of national sales, guides the SOB.[89]

(e) Once orders are submitted by dealers by the order close-off date Holden analyses its dealer orders (for a particular month) and the forecast order for the month is renegotiated with 'Holden Materials Management' to make revisions, including where material is not available to meet the total dealer requirements, in which case orders may be pushed to the next production month.[90]

(f) The ordering system will not accept an order for a vehicle with an invalid vehicle specification, and will in that case generate an error report. The ordered vehicles 'will not appear on the status report until the errors have been corrected.'[91]

(g) Holden engages in an order matching process whereby it collects dealer orders and matches them to vehicles already in stock or in the production pipeline. Where an 'exact match' is identified the vehicle will be allocated to the dealer's code in fulfillment of the order and Holden will not accept a handback (returning the car to Holden). Where an 'exact match' is not successful Holden will identify a match to the dealer's order with an alternative colour.[92]

(h) On successfully entering an error free order, an event code 20 will be applied to the order indicating an un-preferenced order, meaning the status is 'order accepted' and can be selected for production.[93] Once an order is selected for production for a specific build, week it progresses through the production life

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89 Clause 5.2
90 Clause 5.3.1.
91 Clause 5.3.2.
92 Clause 5.3.3.
93 Clause 5.4.2.

cycle.

127 Some conclusions can be drawn from the relevant parts of the Manual. According to the process described in the Manual, no vehicle may be ordered until an order is submitted through the FAW process. The calculations made in that process are governed by Holden, including by reference to its forecasts that address factors beyond individual dealers' circumstances and wishes. One of the factors is, explicitly, supply constraints. The share of build procedures explicitly recognise that supply may be constrained, and provide for equity between dealers in circumstances where production is constrained. The statement of process for managing supply constraints is not by itself an implied promise that when supply is not constrained it will be guaranteed. The 'national day's supply requirement' (the requirement that dealers maintain 45 days' stock) has an evident commercial purpose, which is to enable Holden to manage what can be taken to be a complex manufacturing and supply process, matching production requirements and constraints with the dealers' expected sales and Holden's overall forecast demand, noting that it is Holden who ultimately sets the dealer's forecast sales under the SEG process (discussed earlier). It is not a standalone requirement imposed on dealers outside of the process described in the Manual. Taken on its face, it represents Holden's judgment about what is required to meet sales forecasts (i.e. to have the requisite number of vehicles in dealerships available for sale), taking into account production requirements and timelines. It is one input into the FAW process. The FAW process, which occurs before an order is placed, is not itself complete until it is approved by a Holden manager. Taking those elements into account, there is nothing about the process described and imposed by the Manual itself, that implies a guaranteed supply of vehicles.

128 Returning to clause 10, the sub-clauses upon which the plaintiff relies must be read contextually.

129 Supply in the context of this Agreement is a supply of new Holden vehicles to a dealer by Holden under the terms set out. A supply of vehicles occurs by the submission (by the dealer) and acceptance (by Holden) of purchase orders, and the delivery to the

dealer of new vehicles the subject of those accepted orders (by Holden). For the reasons discussed, what may be ordered is controlled by Holden, albeit in a process that involves the dealer. Clause 10.4(d) provides that, '[*a*]*ll purchase orders are subject to acceptance by Holden. Holden is not bound to accept any purchase order*.' The words of this clause are plain. When Holden's system rejects a purchase order because it does not conform with process requirements or because Holden does not or cannot produce what is requested, Holden might be understood, contractually, to be acting under clause 10.4(d). However, there is no warrant in the language of clause 10.4(d), clause 10.4 as a whole, or the relevant provisions of the Manual, to restrict its operation to those circumstances, or like circumstances. The fact that Holden can refuse purchase orders is in fact consistent with the process described in the Manual which places ultimate control of what a dealer may order, in Holden's remit, through the FAW, share of build, vehicle forward ordering system and the SEG Objectives.

130 Furthermore, for the reasons the defendant submitted, a difficulty with the plaintiff's construction is defining the reach of the clause, when it is not founded in the text. Relatedly, the asserted supply obligation is as the plaintiff put it, that *there would be new Holden vehicles available for supply* in response to purchase orders. An attempt to define the content of the obligation that the plaintiff sought to imply from the text of clause 10.4(a) is beset with the difficulties discussed in the context of the attempt to imply the same obligation from the Wholesale Standards.

131 It will be recalled that one consideration relevant to the implication of a term from the express words of the contract is whether the absence of the implied term would produce a plainly unreasonable and unjust result.[94] For the reasons discussed, the obligation upon dealers to maintain a minimum number of days' supply of cars is not a stand-alone requirement imposed on dealers outside of the ordering process which anticipates, among other things, that supply constraints will be taken into account. By itself, that obligation does not produce unfairness that requires the implication of the alleged obligation. The dealer's source of vehicles that it must maintain is Holden. The

[94] *Rankin Investments (Qld) Pty Ltd v CMC Property Pty Ltd* [2021] QCA 156, [80].

purpose of requiring the dealer to maintain the specified number of days' supply is to manage the manufacturing and supply process, with a view to obtaining forecast sales. Where supply is constrained, the dealer is not contractually required to somehow, separately, source a supply of vehicles itself, to meet the minimum days' supply requirement.

132 Further, as the defendant submitted, clause 10.4(d) does not render the relationship commercially absurd, when regard is had to the fact that Holden was a distributor which did not have the ability to control supply. The plaintiff's case appeared to assume that it must have had an ability to control or influence supply, because of its relationship with GMC. As discussed below in the context of the endeavours obligation, that proposition was not established.

133 The broader question of commercial unfairness – the commercial purpose and objectives of the relationship (including any mutuality of obligation), is addressed under the rubric of business efficacy and the implication of a term for that purpose, subject to the requirements in *BP Refinery*, discussed below.

134 Subject to what is said below, I agree with the defendant that under clause 10.4, an obligation to supply is imposed on Holden only once it has accepted a purchase order.

135 Before turning to that question, is should be observed that the while clause 10.4(d) means what it says, the Agreement must of course be read as a whole. Whilst Holden is entitled to refuse to accept purchase orders, Holden separately has an obligation to endeavour to supply dealers with sufficient vehicles to allow the achievement of their SEG Objectives or to meet reasonably anticipated demand. So while the defendant's reading of clause 10.4(d) is correct, it only accounts for part of the contractual framework. Clause 10.4(d) on the one hand and clause 9.1(g) read with Wholesale Standards clause 7.17.4.3 on the other, operate consistently. Under clause 10.4(d) Holden is not bound to accept any purchase order. However, the decisions it makes about what it does accept, must be informed by its obligation to endeavour to supply a sufficient quantity of vehicles to allow the dealer to meet its SEG Objectives or to

satisfy reasonably anticipated demand. What is required to satisfy the 'endeavour' will be informed by the circumstances. A requirement to endeavour to supply a thing does not require that the endeavour succeeds. On the one hand, making endeavours to supply a sufficient number of vehicles, does not have the necessary consequence that any particular purchase orders must be accepted. On the other hand, a continued refusal to accept orders might have put Holden in breach of the clause 7.17.14.3 obligation, depending on the circumstances.

The *Contra Proferentum* Rule

136 The plaintiff referred in various parts of its submissions, to the fact that Holden's lawyers had prepared the Dealer Agreement, which was in a standard form applicable to all Holden dealers, and relied on the *contra proferentum* rule. The rule derives from the maxim, *verba chartarum fortius accipiuntur contra proferentem*, translated, 'the words of the deed should be construed strongly against the grantor'.[95] Where the rule applies, a relevant ambiguity in a contract is resolved by construing the relevant words against the interests of the party who proffered the agreement or the clause.[96] The justification for the rule ultimately rests on one party having control of the language of a contractual document or clause, rather than on the particular kind of clause to which it is said to apply.[97] It is accepted that the rule is one of 'last resort'.[98] As the Full Court of the Federal Court said in *LCA Marrackville* v *Swiss Re International*,

> The rule applies where, after ascertaining the literal or grammatical meanings and evaluating them against the text, context and purpose of the contract, there remains "real doubt" as to the correct construction: *Zhang v ROC Services* at 591 [140]. See also *XL Insurance Co SE v BNY Trust Company of Australia Ltd* (2019) 20 ANZ Ins Cas 62-211 (*XL Insurance v BNY Trust Company*) at 77,413 [107]. Thus, the description of the rule as a last resort is apt because it applies only where that process fails to resolve any ambiguity and there is insufficient basis for choosing between the then available constructions.[99]

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95 *Insurance Commission of Western Australia v Container Handles Pty Ltd* (2003) 218 CLR 89, [97].

96 *LCA Marrickville Pty Ltd v Swiss Re International SE* (2022) 290 FCR 435, [83] (***LCA Marrackville***).

97 *LCA Marrackville*, [83]; *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* (2020) 104 NSWLR 634; *Transit Pty Ltd v Arch Underwriting at Lloyd's (Australia) Pty Ltd* [2024] VSC 485, [85]; *Princess Theatre Pty Ltd v Ansvar Insurance Ltd* [2024] VSC 363, [31]; *Zhang & Liu Investment Pty Ltd v Nando's Australia Pty Ltd* [2023] VSC 199, [55].

98 *LCA Marrickville*, [102].

99 *LCA Marrickville*, [102].

137 There must be real doubt as to the correct construction, upon the application of the orthodox rules of construction. The court does not elect between whatever construction is favoured by 'the narrowest of margins'.[100]

138 In this case, for the reasons already given, the construction of the contractual clauses in issue, does not give rise to real doubt. The rule has no application.

Implied Term – Business Efficacy

Plaintiff's submissions

139 In the alternative to its case concerning the implication from the language and nature of the Agreement, the plaintiff relied upon a term implied to give business efficacy to the Agreement which it described in submissions as a requirement to ensure that *there were new Holden vehicles available for the duration of the Term of each Agreement*.

140 The **plaintiff** made the following submissions in support of the implied term.

141 The entire contractual framework is designed for and predicated upon Holden selling wholesale vehicles to dealers, to sell to customers. The essence of the relationship was that the dealers purchased the cars from Holden at a wholesale price and sold them at a retail price. They did so exclusively for Holden. All of the significant obligations imposed upon dealers under the Agreement are predicated upon a supply of vehicles. Every other service provided by the dealer in the operation of the dealership was derivative of the sale of new vehicles. Without a supply obligation on Holden the Agreement has no operative coherence, and several parts of it are rendered nugatory or ineffective,[101] including the many terms that impose significant obligations on dealerships. In order satisfy the commercial purpose of the relationship constituted by the Agreement, Holden was *not permitted to have no models or no lines of vehicles to supply to its dealers to sell*. After the announcement of the retirement of the Holden brand, had a dealer asked, what lines of new Holden vehicles Holden had available to supply to it for sale to its customers, the answer would have, 'none'. The response by

100 *LCA Marrickville*, [102].
101 See *LCA Marrickville*, [57]–[59].

Holden when the supply of vehicles ceased was to make compensation payments and wind up the dealership arrangements because nothing about the relationship established by the Dealer Agreements functioned without a supply of vehicles. For the same reasons, the implied term was obvious in the sense that the officious bystander's question would have been met with a common, 'oh of course', from the plaintiff and Holden.

142 The implied term was not an inflexible obligation to supply a specific number of cars. Rather, it was the requirement that there were new Holden vehicles available for the duration of the Term of each Agreement. The criticism made by Holden that the implied term is uncertain and unclear because it is silent about volume of supply, price of supply and timeframe for supply misses the point entirely. The implied term does did not need to address those issues. Its focus was solely upon a requirement that Holden vehicles would be available for supply. The essence of the obligation was that *there cannot be a complete cessation of vehicle supply during the Term*. The implied term is accordingly both reasonable and equitable, and capable of clear expression.

143 The implied term does not contradict the express terms of the agreement. Clause 10.4(d) on its proper construction is directed towards Holden's ability to refuse individual orders (as discussed earlier). The ability to refuse purchase orders under clause 10.4(d) is not inconsistent with Holden 'having lines and models available for a dealer supply and having vehicles to sell to customers'. Clause 7.17.14.3 of the Wholesale Standards directed towards the number of vehicles Holden was obliged to supply (as discussed earlier) whereas the implied term requires Holden to have vehicles available for supply. The effect of the implied term is that the manufacturing of Holden branded vehicles and the supply thereof to Holden *cannot have ceased altogether during the term*.

144 The plaintiff elaborated on those contentions by reference to the particular terms of the Dealer Agreement, as follows:

(a) **Recitals:** the purpose of the network of authorised dealers included the selling

of new vehicles. The expression 'New Vehicles' is defined to mean the lines of Holden vehicles specified in the particular terms displayed for sale and sold. The product addendum identifies the products a dealer may order. This assumes that there are products which Holden is in fact marketing which a dealer may order.

(b) **Clause 1 (Objectives)**: the objectives in clause 1 are consistent with an obligation to have vehicles available for supply. The purpose of the agreement is a mutually beneficially business relationship for the Term that will provide the Dealer with a high quality range of motor vehicles. This identifies the fundamental nature of the bargain embodied in the agreement. In return for the supply the dealer is required to perform the obligations identified in that paragraph. Those things that Holden 'expects' can only be achieved where there is a continuous supply of new Holden branded vehicles for the five year term.

(c) **Clause 2 (Appointment and term)**: Holden appoints the dealer to actively promote and sell the Products, for the Term which was for five years. The nature of the appointment is inconsistent with Holden's ability to permanently cease supplying mid-term. The appointment is to actively promote and sell the Products. A five year fixed term provides the parties with clarity about how long the central business activity of selling Holden vehicles would continue. The dealer is required to make major investments in securing the agreement. The Term provides the dealer with the period over which they will be supplied with vehicles and knowledge that at the end of the Term there is the risk that they will not be renewed for a further term. For Holden the Term identifies the period within which *they will need to have Holden vehicles available for supply*.

(d) **Clause 3.1 (Management and Ownership)**: the dealer promises that the principal will personally conduct and actively manage the Holden Dealership Business and without approval the principal is prohibited from performing other functions in connection with another motor vehicle franchise business.

Those obligations are only commercially sensible if there was a continuing supply of vehicles. This reflects the common intention of the parties that there would be sufficient work for the dealer principal during the Term to justify a full time management level employee being solely dedicated to the Holden franchise.

(e) **Clause 3.3**: the dealer is not permitted to make any alternative use of the dealership facilities without Holden's permission for the Term, which is only consistent with there being a supply of new vehicles to enable the dealership premises to be used productively for the Term.

(f) **Clause 5 (Area of Primary Responsibility (APR)):** the dealer is allocated the APR as the geographical area in which the dealer is to focus on efforts in promoting, selling and servicing the Products. The dealer cannot do so without the availability of new Holden vehicles for the five year term. Changes to the APR are within Holden's discretion but the APR may not be reduced without agreement between Holden and the dealer, but Holden may change the APR without consent upon expiry or termination of the agreement. The fact that the parties did not give Holden an unfettered right to make changes to its distribution model during the Term reflects a mutual intention that the dealership would enjoy certainty and no risk during the Term of its APR, in which it was required to sell and service the vehicles, being reduced.

(g) **Clause 7 (Dealership Premises and Display Requirements)**: the clause envisages that there will be a continuing supply of vehicles to justify the construction and maintenance of the premises and the obligation to only use the premises for the purpose of selling and servicing the Products. Clause 7.1(e) is material because it imposes an obligation on the dealership to upgrade the premises during the Term if Holden requires it. The dealership needs to have an expensive and specialised premises at the start of the Term and is required to make further upgrades if required. It is required to acknowledge, agree and accept that compliance will require capital expenditure on its part. The related

obligations in the Manual are burdensome and result in a facility whose sole productive use is the selling and servicing of Holden vehicles. The premises must enable the dealer to meet its forecast sales and service volumes based on Holden's forecasts of population growth and changes in market conditions within the APR over the Term.

(h) **Clause 8 (Dealer's Obligations)**: the Agreement imposes obligations on the dealer including using best endeavours to promote and maximise sales of the Products and to ensure that a representative range of New Vehicles is displayed at the Dealership Premises,[102] and to manage and order stock on a consistent basis in accordance with the Manual. Those obligations are nonsensical without a supply of vehicles throughout the Term. The requirements in the Manual for dealership standards (location, size, display requirements, minimum staffing and so on) reveal that the commercial purpose of the Agreements, their commercial workability and their internal consistency all depended upon and contemplated an ongoing supply of vehicles.

(i) **Clause 8.4** requires the dealer to comply with the standards contained in the Manual including the Holden Retail Standards. Clause 7.10.1 of the Retail Standards requires that the 'the dealership carries sufficient number and range of Holden vehicles including demonstrators'. Clause 7.10.1.2 requires that the 'dealership stocks adequate volume of Product as agreed with Holden to sufficiently represent the Holden range within its APR stock'. Those obligations can only operate with an ongoing supply of new Holden vehicles for the Term.

(j) **Clause 10.1 (Product Lines)**: this clause provides that Holden may change the New Vehicles and Demonstrator Vehicles that the Dealer is authorised to sell at any time by reasonable prior notice to the Dealer. If Holden introduces a new line of New Vehicles (that is not a substitution for a corresponding continued line) or derivatives of the New Vehicles, Holden has full discretion in determining which Dealers will sell that line, or those derivatives. The

[102] Clause 8.2(c).

limitation in respect of the new lines of vehicles reflect the 'overarching theme of the agreement which was that there was significant limits on what changes Holden could make to its supply of vehicles during the Term'. The same point can be drawn from clause 10.2 which provides that Holden may determine and may change in what it considers a fair and equitable manner the allocation between Dealers of New Vehicles ordered, the relative priority of their allocation, the source plant for New Vehicles ordered and the method of their delivery. It is significant that this clause does not include any reference to Holden's rights to cease the supply of vehicles altogether. A reasonable business person would have expected any right to be addressed or acknowledged in clause 10.2, which would have been the natural location in the agreement given its subject matter.

(k) **Clause 10.4 (Purchase Orders)**: the plaintiff's submissions about the meaning of clause 10.4 are discussed above, in the context of the alleged express terms.

(l) **Clause 13 (Dealer Performance and Evaluation)**: the dealer is required to comply with the Performance Criteria set out in the Manual which include that Holden will establish SEG Objectives for the dealer collectively or by model in relation to the dealer's expected performance. An unrectified failure to meet the performance criteria can constitute a breach of the agreement. In circumstances where Holden failed to supply vehicles, that would not enliven a breach by the dealership and a termination right because it would involve Holden taking advantage of its own wrong by relying on a termination ground caused by its own breach. However, the Performance Criteria emphasise the importance of vehicle supply to the essential relationship created by the Agreement. By clause 13.3 the dealer acknowledged that its compliance with the Performance Criteria was fundamental to the Agreement and 'the viable existence of a first class network of authorised Dealers and the continuance of the mutually beneficial relationship created by this agreement'.

(m) **Clause 19 (termination)**: Holden was entitled to terminate the agreement on

12 months written notice if it intended to change its system of distribution of New Vehicles, subject to a requirement that a replacement agreement would continue for the during of the Term. That provision indicates that the parties placed significant weight on the security and certainty provided by the Term, that there was a mutual intention that there were limits to what changes Holden could make to its distribution of New Vehicles during the Term and that more significant changes such as reducing the number of Australian dealerships or exiting Australia altogether could not occur during the Term. Holden could have inserted a clause in this section that expressly dealt with the circumstances of GMC ceasing vehicle supply to it, but did not do so.

(n) **Clause 19.3** addresses 'other measures' that Holden may take where it has a right to terminate the agreement, instead of immediately exercising that right, in its absolute discretion. One measure is to 'suspend the supply of Products, parts and/or supported services to the Dealer'. That clause is significant because it implies that '*there would always be a supply of New Vehicles in relation to which Holden could exercise those rights*'. The same point may be made in relation to clause 19.5 which deals with supply of vehicles when an agreement is terminated and provides that 'Holden will not be obliged or expected to supply New Vehicles in numbers that exceed the number invoiced to the Dealer in the three months prior to the date of termination'. It is said to be implicit that the parties understood that absent express words such as these, there was an obligation of supply that otherwise applied to Holden.

145 Holden was obliged to provide its dealers (including the plaintiff and group members) with disclosure documents under clause 9 of the Franchising Code. Both parties agreed that the Agreements were to be construed in the context of the Disclosure Documents which were given in a standard form with the same relevant content, and formed part of the commercial context and surrounding circumstances of the Agreements. The Code required that the Disclosure Documents must give the respective franchisee certain information, relevantly concerning any requirement for

the franchisee to maintain a level of inventory or acquire an amount of goods or services; the franchisor's obligation to supply goods or services to the franchisee; whether the franchisee will be offered the right to be supplied with the whole range of the goods or services of the franchise and whether the franchisor may change the range of goods or services and if so to what extent. The Disclosure Documents stated relevantly:

> [10.1(a)] … the Franchisee is required to hold sufficient stock of new motor vehicles by line (excluding demonstrators) to meet the number of motor vehicles that the Franchisee is expected to sell under its applicable Notice Of Sales Evaluation Guide, or to meet reasonably anticipated demand in the Area of Primary Responsibility. The Franchisee is also required to hold sufficient stock by line of well-maintained demonstrators to meet reasonably anticipated demand for demonstration by prospective purchasers.
>
> …
>
> [10.1(e)]: The Franchisor has the obligation to arrange the supply of motor vehicles and parts and accessories for which orders have been accepted by the Franchisor. The Franchisor has the right to determine the allocation of motor vehicles between Franchisees …
>
> [10.1(f)] … The Franchisee may be offered the right to be supplied with the whole range of the Franchisor's vehicles, and parts and accessories appropriate to the Franchisee's business requirements. However, the franchisor may change the New Vehicles (including in relation to new lines of New Vehicles) and Demonstrator Vehicles that the Franchisee is authorised to sell in accordance with clause 10.1 of the Franchise Agreement.
>
> …
>
> [10.1(i)]: … The Franchisor may change the lines of motor vehicles set out in the Product Addendum to the Franchise Agreement.

146 The plaintiff submitted that the Disclosure Documents did not disclose that Holden had *no obligation to have new vehicles available for supp*ly, or that Holden had *no obligation to supply any new vehicles to the plaintiff and each group member during the Term*. If the Agreements operated in that way, Holden ought to have disclosed that fact. It did not, with the consequence that the disclosure that was made, was inaccurate or misleading. Contravention of the Franchising Code disclosure obligations at the time was subject to civil penalties set out in s 8(1). The Court should prefer a construction that would avoid a conclusion that Holden contravened its disclosure obligations under the

Franchising Code, and should thus avoid a construction under which Holden could permanently cease vehicle supply at any time during the Term.

Defendant's submissions

147 The **defendant** made the following submissions.

148 The business efficacy implied term offends each criterion in *BP Refinery*.

149 First, the term is so uncertain as to deny any business efficacy. It raises more questions than it answers. A term that leaves a party in a state of speculation as to the extent of its obligations would not be implied. The term is alleged in absolute (unqualified) language: it is an obligation to ensure the availability for supply of new Holden brand motor vehicles or a substitute thereto for the Term. It is not, for example, qualified by reference to meeting SEG targets or reasonably anticipated demand. It is silent as to several critical matters, the most crucial of which is expressed by asking 'ensure supply in what volume(s)?' Supply of which models of vehicles? Would the unconditioned obligation require GM to ensure supply of all new models? Further questions arise: ensure supply at what price? Must supply be guaranteed irrespective of whether it is unprofitable? In *Codelfa* Mason J refused to imply a term into a contract on the basis that had the parties explored the term at the time they entered the contract negotiation, it might have yielded any one of a number of alternative provisions, each being regarded as a reasonable solution. It is elementary that a contractual party who is subjected to the implication of a term should be left in no doubt of the extent of the obligation.

150 Second, on the plaintiff's own case the term contradicts the express terms of the Dealer Agreement. On the plaintiff's own case clause 7.17.14.3 of the Manual deals with the same subject matter but is confined to the requirement to 'endeavour' to supply new vehicles to dealers in sufficient quantities. The pleaded term is inconsistent with clause 7.17.14.3 of the wholesale standards and with clause 10.4(d) of the Dealer Agreement which provides that Holden is not bound to accept any purchase order (see further below).

151 Third, the term is neither reasonable nor equitable because it fails to account for Holden's position as a distributor of vehicles and admits of no exceptions. It is an obligation to ensure availability in all circumstances, regardless of external factors. The Court would not imply a term that would operate in a partisan fashion. The term overlooks Holden's position as a *distributor* of vehicles, a fact that was known to the contracting parties at the time of agreeing, as set out in the Disclosure Documents. A distributor is simply not in a position to guarantee supply. A supplier might become insolvent and unable to continue to supply to the distributor. It might simply refuse to supply the distributor and specific performance may be unavailable. The plaintiff's contention that the term is reasonable because it ensures a degree of mutuality of obligation on the part of Holden in return for the investments made by a dealer in their dealership is a re-run of a similar, unsuccessful argument made in *AHG WA (2015) Pty Ltd v* M*ercedes-Benz Australia/Pacific Pty Ltd*.[103] There, the contention of the motor vehicle dealers that the relationship established under dealer agreements was to be considered permanent (barring Mercedes Benz from exercising its power of non-renewal) because of the investments by the dealers, was rejected. Further, the unconditioned obligation to supply does not provide for circumstances in which the supply would be loss-making for one or both parties. The Court would not imply a term that would require Holden to ensure supply vehicles at a price that is unprofitable for it. The supply by Holden at a profitable price might be unprofitable for a dealer.

152 Fourth, the term is not necessary to give business efficacy to the contract. The plaintiff's case is that the term is required because it is ensures mutuality of obligation – fairness to the dealer for the investments made by it. Even if that were so, it is not enough that it is reasonable to imply a term, it must also be *necessary* to give business efficacy to the contract.[104] The plaintiff conflates the reasonable and equitable requirements with the necessity condition in *BP Refinery*, which is an error. Here, the

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103 *AHG WA (2015) Pty Ltd v* M*ercedes-Benz Australia/Pacific Pty Ltd* [2023] FCA 1022, [65], [75], [740], [755]–[790], [2317], [2950] (***Mercedes-Benz***).

104 *Grocon*, [145]; *Hardingham*, [18], [75], [114].

implied term is not required to give 'the transaction such efficacy as both parties must have intended that at all events it should have, making the agreement work or avoiding an unworkable situation'.[105]

153 The absence of an obligation on Holden to ensure the supply of new Holden vehicles for the term was a counterpoint to the dealer being able to end the relationship on three months' notice. The Dealer Agreement presupposes a profit making enterprise for both parties. Each group member knew from the Wholesale Standards that Holden had expressed an intention only to endeavour to supply them with vehicles. Each of them knew that Holden was an importer and distributor of vehicles and not a manufacturer. Dealers may well have had some commercial expectation that Holden would supply them with vehicles it being in the parties' mutual interests that it do so. Yet any such expectation was one the dealers made only by way of business gamble and took no steps to make it expressly part of the bargain.

154 Fifth, the term is very far from so obvious that it goes without saying. One can see why an absolute obligation on Holden to ensure supply would be commercially attractive to a dealer but also why it would be entirely commercially unacceptable to Holden, for the reasons discussed above. Had the officious bystander asked the parties when they were contracting whether the implied term should be included in the agreement Holden would have answered 'of course not'.

155 The submissions as to the Disclosure Documents are misconceived because the Disclosure Documents refers to Holden only being obligated to supply orders which have been accepted.

156 The plaintiff does not refer to provisions in the Dealer Agreement that do not assist it. The defendant elaborated upon its submissions by reference to the particular terms of the Dealer Agreement, as follows:

(a) **Clause 1**: the clause does not in terms impose any obligation on Holden to ensure the supply of new vehicles throughout the Term. The objectives in

105 *Grocon*, [142].

clause 1 reveal that as between each dealer and Holden they assumed the buying and selling at different levels of the supply chain of Holden branded vehicles would be commercially or economically beneficial. The object of the Dealer Agreement was to enable the dealer to participate during the Term of the agreement in Holden's franchise system using the Holden brand, thereby providing an opportunity for both the dealer and Holden to generate profits. Contextually, when the parties entered into the Dealer Agreements the Holden brand had a long history in Australia. The business relationship contemplated by clause 1 is necessarily predicated on a commercial expectation of a business relationship that will be a profit making exercise for dealers and Holden, including an assumption that consumers will continue to buy the Holden brand. The objectives, as they were expressed contractually, must be understood by reference to the whole agreement.

(b) **Clause 2.1(a)** provides that Holden 'appoints the dealer to actively promote, sell and service the Products' under the terms of the Agreement. The Products were defined as the vehicles displayed for sale and sold by the dealer from the dealership premises. It was a matter for Holden to determine what products the dealer may order from it. This is reinforced by **clause 10.1(a)** which allows Holden to change the new vehicles at any time on reasonable prior notice and discontinue lines of product.

(c) **Clause 2.3(c)** provides that Holden has full discretion as to whether or not the agreement would be renewed at the end of the Term. The inability to recoup any investments made during the Term at the end of the Term upon non-renewal of the appointment, was a consequence of the commercial allocation of risk.

(d) **Clauses 4.1 and 4.3(a)**: Holden assumed no liability in connection with the dealership business. The risk was borne by the dealer as an independent contractor.

(e) **Clause 6**: Holden may appoint additional dealers in the dealer's area of primary responsibility (**APR**), which was the geographical area designated for the particular dealership. Holden was entitled to do so without the dealer's consent. If Holden decided that an additional dealer may be required in the APR, it would tell the dealer and give it an opportunity to make a business case for its representation of the APR. The final decision rested with Holden, based on its business judgment, including as to the impact upon the dealership. The ability to appoint additional dealers was reflective of Holden's ability to affect the financial outcome of the dealership businesses by its own decisions.

(f) **Clause 9** (**Holden's Obligations)**: the obligations are expressed in qualified terms including that Holden will provide the dealer with such assistance that it considers necessary to assist the dealer in carrying out its obligations under the agreement.

(g) **Clause 10.4:** Holden's submissions concerning clause **10.4(d)** are discussed above in the context of the express terms. Holden said that it is difficult if not impossible to reconcile with the plaintiff's case that Holden had a contractual obligation to supply Products to its dealers. By reason of clause 10.4(d), Holden did not have to accept purchase orders. That provision is both a constructional aid in deciding whether a term should be implied and, as Holden's counsel put it, a 'silver bullet' which defeats the plaintiff's case. The plaintiff gives clause 10.4(d) an artificially confined meaning, contrary to its plain words.

(h) **Clause 10.5** provides in substance that the price payable by a dealer for a new vehicle is set by Holden, who may change the prices for new vehicles at any time on 10 days' notice to the dealer. Holden will consult with the Australian Holden Dealer Council at least 60 days in advance of implementing any change that may adversely affect the nominal dealer's margin on new vehicles. The dealer remains free to set what prices it sees fit for the sale of new vehicles to customers subject only to any maximum price that Holden may determine from time to time. Holden's ability to set prices identifies the frailty of the dealer's

entitlements. One can postulate a circumstance where Holden was entitled to lift prices of new vehicles to the point where it was profitable for Holden but not profitable for certain dealers. That is the risk assumed. The ultimate point is the underlying commerce that leads to the limitation on rights.

(i) **Clause 19** affords the dealer a right to terminate on 3 months' notice. Holden has much more constrained termination rights. It may terminate on 12 months' notice but only where it intends to change its system to distribution and then, it must on termination, offer the dealer an appointment under the new conditions. It may also terminate immediately in defined circumstances on the usual kind (e.g., conduct by the dealer involving offences under the Franchising Code, bankruptcy, abandonment of the dealership).

157 More generally, the relationship between Holden and dealers established by the Agreement is not bilateral in every respect or indeed in many respects. The dealers have more favourable rights to terminate the Agreement. Holden has other rights and significant control over the principal inputs to the dealership business.

Analysis – Implied Term – Business Efficacy

158 The plaintiff was right to say that the purpose of the appointment of dealers by Holden under its Dealer Agreement was to enable dealers to purchase cars from Holden at a wholesale price, and sell them to consumers at a retail price. Cars (new vehicles in particular) were the lifeblood of the relationship. The dealership businesses did not continue, apart from wind-down activity, servicing and parts, when Holden stopped supplying new vehicles. Without more, the proposition that Holden must have been required to 'have vehicles available for supply' might appear persuasive. However, the broad purpose of selling cars was expressed in a particular contractual framework. As Beach J said in *Mercedes-Benz*, the commercial bargain is not something that is separate from the contract itself; it is the very bargain struck by and embodied in the

contract. Identification of the bargain is not an anterior step to analysing the text of the contract.[106]

159 The objective of the Agreement was 'to establish a mutually beneficial relationship for the Term that will provide the dealer with a high quality range of motor vehicles and associated products and access to best practice commercial and marketing plans,' in return for the expectations of the dealer as set out, which go to its sale of Holden vehicles and promotion of the Holden brand (clause 1). It remains necessary to consider how the objectives of the relationship were expressed in the Agreement as a whole.

160 Without repeating the detail of what appears from the parties' submissions, the significant features of the bargain expressly agreed by the parties were as follows.

161 The relationship between Holden and the dealer established by the Agreement was not merely ad hoc, subsisting purchase order by purchase order; it was an appointment of the dealer as Holden for the stated Term (5 years). The object of the Term was to afford a measure of certainty. The dealer was afforded certainty in relation to the duration of the relationship in view of Holden's limited rights of termination. Certainty in that respect was not mutual because the dealer was entitled to terminate on three months' notice. In order to accord meaning to the Term in construing the Agreement it must be recalled that the certainty that the appointment of the dealer for a Term could afford, was certainty *that the contractual obligations otherwise agreed upon would be performed over the duration of the Term*. It did not follow merely from the fact that the parties agreed upon a five year term, that they had any particular agreement about supply of vehicles during that term.

162 Some parts of the Agreement assume the existence and supply of the 'Product' (new vehicles): the appointment of dealers to sell and service the Products (recitals), the dealer's obligations to use best endeavours to promote and maximise sales of the Product (clause 8), the requirement to carry adequate stock (clause 8.4 and the relevant

106 *Mercedez Benz*, [2949].

parts of the Manual), dealer performance requirements including SEG objectives (clause 13), among others. The dealer could not perform the dealer's obligations without cars to sell. The dealer's performance criteria, which were said to be fundamental to the Agreement (clause 13.3), could not be met without a supply of vehicles.

163 It may be accepted that the Agreement imposed substantial financial obligations upon dealers, especially in relation to capital expenditure on premises fitted out to display and sell Holden vehicles, combined with exclusivity requirements for the use of premises and the engagement of the dealer's principal.

164 The essence of the bargain, however, cannot be understood without taking into account the control that the parties gave to Holden, over what the dealer was permitted to sell. Holden was permitted to change the new vehicles and demonstrator vehicles that a dealer was authorised to sell at any time by reasonable prior notice to the dealer. The supply of vehicles under the Dealer Agreement occurred between Holden and the relevant dealership, by the placing of purchase orders and their fulfilment. No order for a vehicle could be placed without submitting it through the FAW process, in which Holden governed the calculations determining what may be ordered, by reference to factors both personal and external to the dealer, explicitly including supply constraints. Holden's evidence was that the SEG did not cap the number of vehicles that it could supply to a dealership in a given year and that dealers had some flexibility to orders additional stock. Nevertheless, it was Holden who set the SEG objectives. Those processes were described in the Manual, the relevant parts of which were given contractual effect. By clause 10.4(d) all purchase orders were subject to acceptance by Holden, who was not bound to accept any purchase order.[107] The fact that Holden could refuse purchase orders was consistent with its control of the ordering process. By the express terms upon which the parties agreed, the dealers were prepared to commit to making substantial capital investments, while at the same time ceding to Holden's contractual ability to control which vehicles and how many

[107] See under Express Terms – Dealer Agreement clause 10.4.

vehicles the dealer could sell. Holden's control also extended to the wholesale price, and to its ability to make changes to the dealer's geographic domain (its APR) by introducing new dealers, subject to some limits.

165 Given the practical importance of the availability of cars for sale by dealers, those parts of the Agreement that deal explicitly with supply, assume particular importance. The parties explicitly addressed supply, by clause 7.17.14.3 of the Wholesale Standards and clause 9.1(g) of the Agreement. The parties agreed that the Holden must endeavour to supply to the dealer a sufficient quantity of vehicles to meet it SEG Objectives or to meet reasonably anticipated demand.[108]

166 With those observations, it is convenient to address the legal criteria for the implication of a term for business efficacy. I have reached the view that the requirements are not satisfied.

167 First, for the reasons the defendant submitted, and for the reasons discussed earlier in the context of the express terms, **the asserted implied term lacks clarity and certainty**. That is so, despite its beguiling simplicity. The asserted obligation was to 'ensure the availability for supply' of new vehicles. It is necessary to consider how the requirement to 'ensure the availability for supply' of vehicles translates into a positive obligation that is expressed in terms making sufficiently clear what Holden is to do, rather than merely describing a circumstance that should exist before supply can occur. The alleged obligation is expressed without any qualification. A supply may be adequate or inadequate depending upon the requirement it is intended to meet. An attempt to define the content of the obligation would provoke in the mind of a reasonable person, questions as to what that requirement was. Availability for supply to what extent or in what volume? Availability of which vehicles? If the obligation

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108 The plaintiff submitted that the Agreement also indirectly addressed supply in clauses 19.3 and 19.5. Clause 19.3 concerns what is to occur when Holden has a right to terminate the Agreement but does not immediately exercise it, and provides that instead of terminating the Agreement Holden may (among other things) suspend supply. Clause 19.5 applies where the Agreement is terminated under clause 19.1(f). Read as a whole, it concerns orders accepted but undelivered, placing a ceiling on the number of vehicles that Holden will supply in those circumstances. Both provisions have a specific purpose. Neither can be relied upon as implying the general supply obligation alleged.

would not be satisfied by having available say 5 or 10 or 100 vehicles, that would only be because of the particular requirements for supply, to the dealer, under the Agreement. The notion of 'supply' or 'availability for supply' in the abstract is nebulous. The plaintiff said in the course of submissions that the essence of the obligation was that *there cannot be a complete cessation of vehicle supply during the Term*. That alternative articulation addressing what Holden was *not* permitted to do, underscored the difficulty in giving content to the term, positively and prospectively. That formulation too, would generate questions including whether, if Holden was not permitted to cease supply altogether, it could discharge the obligation by having available for supply, a demonstrably inadequate number of vehicles or a very limited range of vehicles. Were the term implied it would leave Holden in real doubt as to how to comply with the contract.

168 Second, the parties otherwise and differently addressed the question of Holden's obligation to supply vehicles. They did so by expressly agreeing that Holden was required to endeavour to supply a sufficient quantity of vehicles to allow the dealer to achieve its SEG Objectives or to meet reasonably anticipated demand, under clause 9.1(g) of the Agreement and clause 7.17.14.3 of the Wholesale Standards. The contractual function of clause 7.17.14.3 of the Wholesale Standards was not to define the content of a wider, free standing obligation to 'ensure' supply, but to impose an obligation on Holden to 'endeavour' to supply. For the reasons discussed earlier, the clause [.14.3] obligation and Holden's entitlement to refuse purchase orders under clause 10.4(d) of the Agreement functioned coherently together. The unconfined supply obligation advanced by the plaintiff is **inconsistent** with those express terms.

169 Third, the implication of such a term is **not necessary to give business efficacy** to the contract. Broadly stated, the bargain agreed between the parties provided an opportunity to the dealers to sell Holden branded cars under the Holden franchise model which was intended to benefit both parties. To succeed, the expected mutually beneficial business relationship required from dealers a substantive commitment to establish premises and staff dedicated to promoting and selling new Holden vehicles,

and compliance with Holden's prescriptive standards for the conduct of the dealership business. It required that Holden give the dealer access to the Holden brand and business systems and that Holden provide cars to the dealer to sell.

170 However, whilst the availability of cars for retail sale is at the centre of the parties' relationship, the Agreement itself did not confer a general right on the dealer to sell Holden branded cars from dealership premises. The parties agreed that Holden would control, through particular mechanisms, which vehicles and how many vehicles the dealer could sell. They agreed upon what Holden would do to supply cars to the dealers for sale. That they did so in confined terms (by an 'endeavours' obligation) is one aspect of the control that the dealers ceded to Holden over the factors liable to affect the dealers' economic fortunes. The bargain that was expressly struck accepted that control and the capital and other investments required, in return for the opportunity afforded to the dealers to sell new Holden-branded cars within the Holden business system.

171 The 'endeavours' obligation in respect of supply meant that if an endeavour was made as agreed but failed, supply could be interrupted. What effect the 'supply' terms might have on a dealership in a practical sense over a given five-year period would depend upon the circumstances affecting supply. The opportunity for the dealers to profit under the Agreement would also be affected, among other things, by demand.

172 The Dealer Agreement entailed both opportunity and risk for dealers, including the risk of not recouping the considerable expenses outlaid. The plaintiff contended that the obligations dealers assumed would be 'justified' by a promise of ongoing supply. But the Agreement as a whole does not evidence a mutual intention that recoupment of the dealer's investments would be guaranteed. As the defendant submitted, the objectives stated in the Agreement reflect the parties' expectations upon entering the Agreement that Holden branded cars would continue to be manufactured, obtainable by Holden and supplied. The expectation though, was expressed in conjunction with terms assigning meaningful risks to the dealers, along with the opportunity to profit. Both parties assumed risk under the Agreement. The contractual obligations Holden

assumed to allow and support its dealers to conduct Holden franchise businesses during the Term, came with the costs of conducting the Holden business and of operating the necessary business systems as agreed, where Holden had limited termination rights under the Dealer Agreement.

173 The implication of a business efficacy term is not a broad warrant for re-writing the commercial bargain that the parties have made in order to re-balance the risks to make it fairer in the court's mind, where the contract is otherwise coherent in a practical and commercial sense. The agreement reflected a commercial bargain and was not lacking in commercial or practical coherence, despite an arguable commercial imbalance from the dealer's perspective. Further, Holden is an importer and distributor of Holden branded motor vehicles, not a manufacturer. It contracted with the dealers on that basis. The Disclosure Document given under the Franchising Code relevantly stated:

> 2.3 A description of the kind of business operated under the franchise.
>
> The Franchisor is an importer and distributor of motor vehicles and motor vehicle parts and accessories. The franchisor has established and administers a network of authorised Dealers operating at approved locations to sell and service the motor vehicle products marketed by the Franchisor in the most effective manner and to build and maintain consumer confidence in the Franchisor and such authorised Dealers.
>
> 2.4 The number of years that the franchise or franchise system has operated in Australia
>
> The Holden brand has been operating in the automobile industry in Australia since 1908. In 1931, Holden became a subsidiary of the United-States based General Motors and traded under the name General-Motors-Holden Ltd before changing name to Holden Ltd in 1998. In 2005, the name was changed to 'GM Holden Ltd'. In 2015, General Motors Holden Australia NSC Ltd became part of the Holden corporate group and is responsible for the importing and sale of motor vehicles to Dealers in the dealer network.

174 It is a particular feature of the surrounding circumstances of this Agreement that Holden obtained the vehicles it sold to dealers from its parent entity, who owned and controlled the brand. That fact however, did not permit an assumption that somehow Holden could control supply against GMC's wishes or obtain supply other than by taking such steps that were within its control. Those arrangements might well have

suited the commercial purposes of GMC. But given Holden's role in the supply chain, the fact that the parties agreed only upon an 'endeavour to supply' obligation was not obviously lacking in commercial common sense.

175 Fourth, it may be doubted that the implied term would **be reasonable and equitable**, because it is unqualified by any criterion and without qualification, and would require Holden, who did not manufacture what it distributed, to guarantee supply.

176 Finally, for the reasons already discussed, the implied term is **not so obvious it goes without saying**. The absolute supply obligation is not one that *both* parties would be taken to have said must have been agreed. That conclusion also follows from the fact that the parties expressly agreed a different supply obligation.

177 For completeness, I do not accept the plaintiff's submission that the contractual construction exercise is to be guided by assuming that Holden cannot have intended to agree upon any supply arrangements that were not fully described in the Disclosure Documents. The Documents referred to Holden's status as a distributor, and to the operation of clause 10.4(d), in terms not inconsistent with the conclusions I have reached about that clause. Whether or not the disclosure considered in its totality was incomplete was not an issue for decision in this proceeding. In construing the Agreement the disclosure made under the Franchising Code was a contextual circumstance that could be properly taken into account, although not to the extent the plaintiff submits. The proper construction of the Agreement is not to be determined by what Holden said the Agreement meant, at the time of contracting.

178 The answer to **common question 1(a) is No**.

Custom Implied Term

179 The plaintiff alleged that the Dealer Agreement contained a term implied by custom and usage in the Australian new motor vehicle retailing industry, that

> the defendant was and remains obliged to ensure the availability for supply of new passenger vehicles to the Plaintiff for the Term of the Agreement.

180 The term was said to have been implied by reason of the custom that,

> At all material times in Australia, persons dealing with and engaged in the:
>
> > (a) wholesale supply of new passenger vehicles (including sports utility vehicles (**SUVs**) and utes); and
> >
> > (b) retailing of new passenger vehicles (including SUVs and utes),
>
> pursuant to fixed term passenger vehicle dealership agreements (the **Australian new motor vehicle retailing industry**), recognised and observed the custom and usage that there was an obligation of the wholesale supplier to ensure the availability for supply of new passenger vehicles to the retailer for the term of their motor vehicle dealership agreements.

181 For proof of the custom the plaintiff relied on the evidence of Mr Douglas Dickson who was the former managing director of Mazda Australia. The plaintiff's case was that:

(a) Mr Dickson gave evidence that franchised dealership agreements were not commercially viable without an ongoing supply of vehicles and that the investments involved in operating dealerships were non-economic without an obligation of ongoing supply on the wholesaler. Mr Dickson's evidence was effectively uncontradicted because Holden did not call any of its own expert evidence on the subject.[109] That evidence was sufficient to establish that the custom was so well known and acquiesced in that 'everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract.' The plaintiff's submissions did not provide the basis for that conclusion.

(b) The cross-examination of Mr Dickson, which largely focused on the express terms of the Mazda Dealers Agreement, was irrelevant to the question whether a custom existed. A custom implied term reflects the practice of market participants. It is always possible for some industry participants to limit or exclude what would otherwise be implied through custom or usage. Analysing the written terms of the Mazda or other dealer agreements does not bear on the

[109] Holden's evidence was in the documentary tender of dealership agreements.

question of the notoriety of the custom.

(c) The implied term was not inconsistent with the express terms of the Dealer Agreement, for the same reasons that business efficacy implied term was not inconsistent with the express terms.

182 The defendant denied the existence of the term and said that it was inconsistent with express terms of the Dealer Agreement (cl 10.4(d) and cl 7.17.14.3 of the Wholesale Standards, assuming it to be promissory). The defendant submitted that:

(a) The plaintiff's evidence does not come close to meeting the required standard, by which one must show by clear evidence of usage that the particular term is notorious in the sense that it is so well known and acquiesced in that relevant market that everyone who conducts business in that market is presumed to contract on that basis.

(b) Mr Dickson's evidence is at odds with the dealer agreements of participants in the Australian new motor vehicle retailing industry, upon which Holden relies (Hyundai, Isuzu, Mazda, Mercedes Benz, MG, Great Wall Motors Haval, Mitsubishi, Nissan, Peugeot, Skoda, Subaru, Suzuki, Volkswagen, and Volvo). Those terms show a diversity of approach to supply obligations among industry participants. Many of the agreements in evidence contain supply and termination clauses which are entirely at odds with the assertion that persons in the industry 'recognised and observed the custom and usage that there was an obligation of the wholesaler supplier to ensure the availability for supply of new passenger vehicles to the retailer for the term of their motor vehicle dealer agreements'. The evidence demonstrates no consistent custom. Many suppliers reserved a right not to supply or make limited or conditioned promises in relation to supply. Some of those suppliers, and others, expressly reserved the right to terminate the dealer agreement – often without compensation – if they ceased to be able to supply vehicles.

Governing Principles

183 A term may be implied into an agreement by reason of custom or usage in a particular market.[110] Implication by custom or usage is in effect a short hand way of describing both a proposition of fact, and a legal conclusion. The governing principles are summarised in *Con-stan Industries of Australia Pty Ltd v Norwich Winterhur Insurance (Aust) Ltd*, as follows:[111]

(a) The existence of a custom or usage that will justify the implication of a term into a contract is a question of fact.[112]

(b) The alleged custom 'must be so notorious that everybody in the trade enters into a contract with that usage as an implied term.'[113] There must be evidence of actual market practice that establishes 'that the custom or usage is so well known and acquiesced in that everyone making a contract in those circumstances can reasonably be expected to be presumed to have imported those terms into the contract.'[114]

(c) The term 'must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself.'[115] However, 'it is not necessary that the custom be universally accepted', for that would mean the mere existence of a dispute about an implied term's existence would undermine the party relying on the alleged implied term.[116]

(d) In circumstances where the Court implies a term, 'the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain'.[117]

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110 *Uszok v Henley Properties (NSW) Pty Ltd* [2007] NSWCA 31, [22].
111 *Con-stan Industries of Australia Pty Ltd v Norwich Winterhur Insurance (Aust) Ltd* (1986) 160 CLR, 236-9, citations omitted (***Con-stan***).
112 *Con-stan*, 236.
113 *Con-stan*, 236.
114 *Con-stan*, 236.
115 *Con-stan*, 236.
116 *Con-stan*, 236.
117 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 440; *Con-stan*, 236-238.

(e) A term will not be implied by custom or usage 'where it is contrary to the express terms of the agreement'.[118] An alleged implied term must yield to the actual intention of the parties 'as embodied in the express terms of the contract, regardless of whether the contract is written or oral.'[119]

(f) Even where a party to a contract has no knowledge of an implied term, a party may be bound by a custom or usage.[120]

184 A custom may only be inferred by the multiplication or aggregation of a great number of particular instances, which each are connected by a 'principle of unity running through their variety, and that unity must shew a certain course of business and an established understanding of respecting it.'[121]

Evidence of Douglas Dickson

185 Since 1986, Mazda has been the sole wholesaler of Mazda motor vehicles for Australia. Mr Dickson has held several senior positions with Mazda Australia over a period of 31 years including National Sales Manager and Managing Director. From around 1987, he represented Mazda in negotiations with the National Mazda Dealers Association (which represented dealers) concerning amendments to Mazda dealer agreements, which were for a fixed term of five years. Mr Dickson served on the board of the Federal Chamber of Automotive Industries, whose primary function was to represent the view of the wholesale motor industry to all levels of government. After retiring from Mazda, he was appointed as the independent chair of the Australian Automative Dealers Association, on which the heads of all national dealer associations within the Australian industry were represented, and whose purpose was to address issues relating to dealers' relationships with their wholesalers.

186 Mr Dickson was asked the following questions:

(1) In or about January 2018 in Australia, did persons dealing with and engaged

118 *Con-stan*, 236-237.
119 *Con-stan*, 237.
120 *Con-stan*, 237-238.
121 *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48, 61, citations omitted.

> in the (a) wholesale supply of new passenger vehicles (including sports utility vehicles and utes); and (b) retailing of new passenger vehicles (including sports utility vehicles and utes), pursuant to fixed term passenger vehicle dealership agreements (the Australian new motor vehicle retailing industry), recognise and observe the custom and usage that there was an obligation of the wholesale supplier to ensure the availability for supply of new passenger vehicles to the retailer for the term of their motor vehicle dealership agreements?
>
> (2) Is the term that the supplier will ensure the availability for supply of new passenger vehicles to dealers for the duration of a fixed term passenger vehicle dealership agreement so well-known, notorious, and acquiesced in that everyone entering into a passenger vehicle dealership agreement in Australia can reasonably be presumed to have incorporated such a term into the vehicle dealership agreement? Is that term supported by a course of business and an established understanding respecting it in the market or industry?
>
> (3) If not, is there a similar term that in your view satisfies the requirements set out in the above paragraphs.

187 He answered 'yes' to questions 1 and 2.

188 His evidence was that his observations and opinion about the practice of Mazda dealers 'applies equally to dealers for other motor vehicle brands'. Through the course of representing Mazda in negotiating Mazda dealer agreements, he learnt about the terms of other brands' dealer agreements from Mazda dealers who also represented various other brands and who shared with him the conditions of comparable dealer agreements on a 'confidential basis'. Mr Dickson summarised his observations and opinions in the following way:

> …[My] 35 years' experience at senior levels in the Australian motor vehicle industry leads me to believe that wholesalers did have an obligation to ensure the availability for supply of motor vehicles to their dealers because dealers would never have signed a dealer agreement which imposed financial and performance obligations if that dealer was not convinced that their wholesaler had an obligation to supply sufficient motor vehicles for the dealer to recover their investment and earn a decent return.
>
> It was my experience that most dealers were concerned, not by the possibility that their wholesaler might withhold supply, but by the much more likely possibility their wholesaler might unduly pressure them to take more motor vehicles than they believed they could sell profitably.
>
> Specifically… there was a course of business in the Australian motor industry where:
>
> 1. wholesalers required their dealers to invest significant amounts in dealership facilities, signage, staff, staff training and customer service, and to meet strict performance targets;

2. dealers resisted these requirements because of the considerable financial investment required;

3. wholesalers forced their dealers to meet the above requirements mentioned in 1 above by incorporating their requirements as terms in their dealer agreements; and

4. dealers reluctantly accepted those agreements because there was an established understanding in the industry that wholesalers were obliged to ensure the availability for supply of motor vehicles to their dealers.

189 Mr Dickson elaborated upon his opinion as follows (omitting some detail):

> The primary role of wholesalers is to appoint dealers to sell at retail the motor vehicles produced and made available to the wholesaler by its manufacturer. The principal reason that wholesalers require the many obligations that dealer agreements impose on their dealers is to prescribe and control the retail experience. The reason that agreements are needed at all is that wholesalers and their dealers have divergent business priorities.
>
> The considerable amount most dealers invest in their dealerships is not always of their own choice and is enforced through dealer agreements.
>
> In my experience, wholesalers expected their dealers to arrange their affairs to be indistinguishable from the manufacturer so far as retail customers were concerned. On the other hand, dealers generally considered that the wholesaler's requirements were largely unnecessary, unrealistic, discriminatory, and too costly. In fact, several dealers held the view that their brand was far stronger in their local area than the wholesaler's brand. They considered that they knew best how to sell at retail in their local area and that the wholesaler should refrain from interfering.
>
> Certain competing business priorities became the subject of robust debate particularly at the time of renegotiation of dealer agreements. For example, wholesalers expected exclusive showrooms exceeding corporate standards with the highest quality finish and fixtures. Dealers preferred minimal showroom area with corporate identity paid by the wholesaler … Wholesalers expected that dealers maintain at least 30 days' worth of stock of all new models whereas retailers maintained that stock holding requirements did not improve sales but shifted holding cost to dealers. The debates about conflicting views and competing priorities concerned showroom facilities and corporate identification, brand exclusivity, staff exclusivity and training, customer service, prescribed levels of stock and business performance.
>
> Wholesalers resorted to incorporating their requirements as terms of their dealer agreements. These terms were reluctantly agreed to on the basis that dealers accepted the wholesaler's promises that improvement in dealer facilities, customer service, sales training, and stockholding would create increased interest in the brand and thus better opportunities to sell more motor vehicles at a higher gross profit. Wholesalers convinced dealers that, over time, the promised increase in sales and profitability would more than repay dealers' significant upfront investment to comply with the terms of their agreement.

In accepting these terms, dealers placed great trust in their wholesaler to continue to make available over the term of their agreement, motor vehicles at least the equal of, if not better than, competitive offerings in terms of quality, design, and price. Above all they trusted their wholesaler to make available a consistent and reliable supply of these motor vehicles which they could sell to retail customers and thereby earn sufficient to cover their significant investments costs. Additionally, if demand temporarily exceeded supply, then to allocate available product on a fair and equitable basis.

In my view the course of business described above clearly implies that a bargain exists between wholesaler and dealer. The wholesaler needs compliance with its policies. Dealers question the need and relevance of the wholesaler's policies and resent the cost. However, dealers have no alternative because all the brands worth representing offer the same sort of bargain. After robust and lengthy negotiation, dealers reluctantly sign their agreements and commit to the required investment.

But the quid pro quo for dealers is that the wholesaler acknowledges an obligation to ensure the availability for supply of new passenger vehicles for the duration of their agreement so that their dealers can earn sufficient from the retail sale of these vehicles to recover the cost of their investment.

In my view the bargain referred to above is identified, from a dealers' perspective, in the express terms of the agreement relating to dealer obligations and, from the wholesaler's perspective, the implied term that the wholesaler will ensure the availability for supply of new passenger vehicles to its dealers, so they have a real opportunity to recover their investment.

All of the Mazda dealer agreements I can recall incorporated terms that required significant dealer investment. In my experience, if there had been any suggestion, implicit or explicit, that supply to Mazda dealers might be paused or discontinued at Mazda Australia's option, none of the agreements containing the terms outlined in this paper would have been acceptable to Mazda dealers and none of those agreements would have been signed. To sign up to such terms would have left a Mazda dealer exposed to the whim of Mazda Australia and remove any certainty or ability that the dealer might otherwise have to earn profits from sales of Mazda motor vehicle and recover their significant investments. From my experience I have no doubt that dealers for other brands would have the same reservations.

Dealers could not and would not take the risk of investing significant sums in facilities, signage, staff, training, and customer service if there was even the slightest possibility that the wholesaler, at its option, could turn off supply unforced - thus denying dealers the opportunity to profit from the sale of motor vehicles and recover their investments.

It was inconceivable that motor vehicle business could have been conducted as we know if it were acknowledged generally that there was no obligation to supply. It follows that everyone in the industry accepted that such an obligation existed and was so fundamental and well known to the industry that explicit acknowledgement in dealer agreements was not required.

The implied term that the wholesaler will ensure the availability for supply of new passenger vehicles to dealers was not without caveat and there were

> occasions in which a wholesaler simply could not supply vehicles to its dealers. The process from the manufacturer acquiring supplies of bulk raw materials and components through to the delivery of a finished motor vehicle to a retail customer presents many opportunities for disruption resulting in delays, if not complete failure to deliver. Dealers were exposed to the risks of disrupted delivery and to claims by irate customers for inconvenience and loss of income. Every year in my 35 years with Mazda, there was some disruption to the delivery of one or more product lines with causes ranging from fires in minor supplier factories to overwhelming infrastructure destruction consequent to the Japan tsunamis of 2004 and 2011. Disruptions to supply, although rarely over all products or for more than three months, were still of serious concern to dealers. For this reason, dealers (including Mazda) incorporated terms in their retail sale agreements limiting their liability for customer claims resulting from delayed or non-delivery and wholesalers incorporated similar terms in their agreements to back up their dealers.
>
> Drawing on my 35 years' experience in the Australian motor industry, I formed the view that Mazda dealers accepted that this term was in no way inconsistent with Mazda Australia's implied obligation to supply. They accepted that the words 'many factors influence the supply of Mazda Products' signified that the term related to supply disruptions in the ordinary course of business as outlined above together with liabilities to Mazda dealers and their retail customers resulting from such disruptions. I formed the view that Mazda dealers accepted that the use of the word '*any*' and not '*all*' in the statement 'has the right to suspend or discontinue supply of any Mazda Products' [in clause 3.7 of the Mazda Agreement] signified that this term only protected Mazda Australia *from isolated and temporary supply disruptions* as outlined above and that it wasn't a carve out to absolve Mazda Australia from liability as a wholesaler if we simply refused to supply our dealers at all. As Mazda dealers were not dissimilar to dealers in other franchises, similar terms in other dealer agreements would not absolve a wholesaler's liability if that wholesaler refused to supply their dealers at all.

190 Mr Dickson also offered an opinion that a manufacturer is under a similar obligation to supply its wholesalers. He said that, 'the manufacturer makes a bargain with the wholesalers that it appoints that in return for the wholesaler buying and holding stock of new motor vehicles and parts, setting up training facilities, appointing dealers, and providing staff to assist them, and finally advertising and promoting its products, the manufacturer will ensure availability of supply so that the wholesaler can recover its significant investment through sales to the dealers appointed by that wholesaler.'

191 In cross-examination, Mr Dickson was asked about a vehicle wholesaler's supply obligations and discretion to terminate supply by reference to the Mazda Dealer Agreement which was for a 5 year term commencing in 2009. Clause 3.7 of that agreement provided,

Non-Delivery, Late Delivery, Suspension, Discontinuance of Supply

> The Dealer acknowledges that many factors influence the supply of Mazda Products and agrees that the Distributor will not be held liable for non-delivery or late delivery of Mazda Products to the Dealer. The Dealer also acknowledges and agrees that the Distributor has the right to suspend or discontinue supply of any Mazda Products at any time without incurring any liability to the Dealer.

192 Mr Dickson said that right was inserted in Mazda dealer agreement in order to protect the Mazda network from third party claims, and that he did not recall any negotiations between Mazda Australia and dealers concerning its inclusion. The clause was relied upon by Mazda Australia following the 2011 tsunami in Japan in support of Mazda's position that its supplier was not liable to dealers for non-supply. He said that similar clauses featured in retail contracts so that customers could not claim against dealers for failure to supply. His recollection was that dealers did not take issue with clause 3.7; it was not the subject of negotiations.

193 Clause 16.2 of the Agreement provides that should Mazda Australia no longer be the Mazda distributor in the region in which the dealer is operating, Mazda Australia may terminate the Agreement and will endeavour to procure any substitute distributor to enter an agreement with the dealer or to take an assignment of its rights and obligations under the Agreement. Mr Dickson's evidence was that he understood clause 16.2 to be a 'hangover' from a previous agreement that persisted from a time when the distributor had not been Mazda Australia. He said that since 1989, the clause had been 'rather superfluous' because Mazda Australia is wholly owned by Mazda Corporation. He did not recall any negotiations with dealers concerning clause 16.2.

194 Mr Dickson said that he became familiar with several other brands' dealer agreements, and that the agreements across various brands are 'remarkably similar' insofar as they deal with similar subject matter and that they do not generally include an express obligation that suppliers supply new vehicles. His opinion was that it was always understood by the parties to a dealer agreement negotiation that the suppliers would supply new vehicles, because that supply is the 'life blood of the industry'.

195 Mr Dickson's evidence did not establish the existence of the asserted custom. The basis

for that conclusion can be briefly stated:

(a) Mr Dickson's factual observations concerned the kinds of terms that were commonly reached between dealers and wholesalers and the expression of conflicts of view and opposing interests in the course of negotiation over those terms at Mazda. From those observations he drew an inference that commonly, dealers agreed to terms that they did not want and that they regarded as commercially onerous because in return they obtained security of supply of motor vehicles. The evidence was in substance, an opinion about the commerciality of the bargain, as dealers must have assessed it. That opinion was not itself based on any observation about practice, other than as to terms that were commonly agreed. It was an unsupported inference about the commercial assessments that dealers made.

(b) Even discounting the difficulties with the basis for the opinion about the bargain, the opinion itself was undermined by and inconsistent with Mr Dickson's evidence that dealers agreed to the wholesalers' terms because they accepted the wholesalers' promises that improvement in dealer facilities and the like would create increased interest in the brand and thus better opportunities to sell cars at a higher gross profit; that dealers were convinced over time that promised increases in sales and profitability would more than repay dealers' significant upfront investment required to comply with the terms of their agreements. In other words, dealers were prepared to make the required investments because they considered they would deliver sufficient profit.

(c) The proposition that dealers agreed to wholesalers' terms in return for obtaining security of supply, and that they would not otherwise have agreed to those terms even if there was the slightest possibility of supply being cut off, was undermined by the evidence that dealers trusted their wholesalers and lacked bargaining power. As Mr Dickson put it, 'dealers have no alternative because all the brands worth representing offer the same sort of bargain.'

(d) The opinion was inconsistent with express terms of the Mazda agreement. The inconsistency was not explained, other than by saying that the implied term was subject to caveat. Mr Dickson's evidence that dealers considered that clause 3.7 only protected Mazda Australia from isolated and temporary supply disruptions was an argument, not an opinion supported by any evident factual basis. He did not explain why the clause was not the subject of any negotiations and why dealers took no issue with it. He did not explain why, if guaranteed supply was so central to dealers' concerns and to the bargain that was struck, the detailed written agreement did not expressly provide for it.

(e) The opinion as to the wider industry was contradicted by the documentary evidence adduced by Holden, discussed below.

Dealer Agreements – Industry Participants

196 The defendant tendered a suite of dealership agreements produced on subpoena from participants in the Australian new motor vehicle retailing industry: Honda, Hyundai, Isuzu, Mazda, Mercedes Benz, MG, Great Wall Motors Haval, Mitsubishi, Nissan, Peugeot, Skoda, Subaru, Suzuki, Volkswagen, and Volvo. Between them the agreements covered the period 2009 to 2022, with most dated in the period 2019 to 2022. The defendant submitted that the agreements exhibited no consistent practice with respect to supply obligations amongst industry participants. Instead, they exhibit a diversity of approach to supply obligations and related rights in respect of the consequences of non-supply.

197 To summarise the evidence, the agreements refer to the supplier:

(a) having an obligation to use 'best endeavours' to supply unless 'supply is impossible or not reasonable practical due to circumstances' beyond the supplier's 'direct control';

(b) having an obligation to use 'reasonable endeavours' to supply a product, for which the order has been accepted by the supplier;

(c) having 'absolute discretion' to supply and distribute product in a manner it 'considers reasonable';

(d) having 'discretion to allocate supplies' of products 'on a fair and reasonable basis', but no express obligation to supply;

(e) having 'the right at any time and from time to time to determine allocation' of products to the dealer;

(f) having an obligation to supply products 'in a manner and on such terms' and 'at such prices as the Distributor determines';

(g) committing to supply products in accordance with policies and procedures ordered in accordance with the Dealership Agreement;

(h) using 'its best endeavours to supply' ordered products to the dealer 'as accepted by' the supplier but 'expressly reserving the right to depart from such orders in the event there is an insufficient number of' vehicles or products;

(i) committing, 'as it considers appropriate', to supply the products ordered in accordance with Policies and Manuals, using 'best endeavours to supply' ordered vehicles, having discretion to allocate vehicles among its dealers as it 'reasonably believes is in the best interest of the Dealer Network' and customers;

(j) having an obligation to 'use reasonable efforts to fulfil an order which has been accepted' by the supplier.

198 Several of the agreements state that the supplier has no liability for, and the dealer has no right to compensation for, non-supply.

199 Some examples are as follows.

(a) The Supplier has discretion to accept or reject an order placed by the Dealer. For an accepted order, the Supplier will 'use reasonable endeavours' to supply

the ordered products. The Supplier is under no obligation to supply the full range of products, and may withdraw or modify vehicles in the list of products available for order;

(b) The Supplier agrees to supply the products ordered in accordance with policies and procedures (which are not before the Court), provided that the Supplier accepts the order and the Supplier has adequate stock available. The Supplier reserves the right not to supply to the Dealer any product or amend the list of available products. 'Where reasonably possible', the Supplier 'will use reasonable endeavours to provide at least 3 months' notice of its intention to stop supply' of any products;

(c) The Supplier 'will use best endeavours to supply' all products ordered by the Dealer but in the event of insufficient supply, the Supplier will allocate products 'among its dealers in its sole discretion'. The Supplier will 'as it considers reasonably appropriate' supply the Dealer with products ordered in accordance with policies and manuals . The Supplier will not be liable for non-delivery, late delivery or suspension or discontinuation of any product 'at any time'. The Supplier may refuse to supply goods to the Dealer or supply 'subject to special terms and conditions';

(d) All orders placed by the Dealer with the Supplier are subject to acceptance by the Supplier. The Supplier shall 'use its best endeavours' to supply all ordered products. The Supplier is entitled to allocate available supply between dealers in its 'absolute discretion'. The Supplier 'shall not be liable…for any inability to supply';

(e) The Supplier has discretion to allocate supply between dealers 'on a fair and reasonable basis'. The Supplier 'has the right to suspend or discontinue supply' of any product without incurring any liability to the Dealer.

200 The parties did not seek to construe any of those agreements in their entirety. That notwithstanding, the tendered documents evidence the agreements that were struck

between the major wholesalers in the Australian market and their retailers with respect to supply obligations and related rights where non-supply occurs. The evidence of those terms is sufficient to establish that it is usual practice for wholesalers and dealers to expressly agree upon terms concerning the supply of vehicles by the wholesaler and commonly, what is agreed does not appear to reflect the implied term asserted in this case.

201 The plaintiff made the general submission that it is possible for some industry participants to limit or exclude what would otherwise be an implied term through custom or usage. As such, the exercise of analysing the dealer agreements from brands other than Holden does not bear upon the essential question of notoriety of the custom.

202 The requirement for establishing a term implied by industry practice and custom is that the asserted term must be uniform as well as reasonable. It may only be inferred by the aggregation of instances that are connected by a principle of unity. It is of course not necessary to demonstrate universal acceptance. The mere fact of an exception to the custom will not prevent proof of its existence.

203 The plaintiff's contention was no answer to the evidence that the bargains expressly reached between wholesalers and their retail suppliers, as expressed in fixed term dealer agreements, exhibit a diversity of approaches to supply and related terms, which, on their face, commonly appear to be inconsistent with an assumption that the wholesaler will generally guarantee supply.

204 The documentary evidence did not merely to go an exception to a practice that was otherwise proved. The contention in this case is that a term was implied by custom into wholesaler-dealer agreements. The custom was concerned with the contractual terms governing relations between wholesalers and dealers in the Australian new motor vehicle retailing industry. A custom is something that is recognised and observed. The evidence of industry practice to the effect that industry participants commonly incorporated terms in their agreements that, on their face, were not

consistent with the asserted term or which otherwise addressed the supply of vehicles, did not evidence recognition and observance of the asserted term. The evidence was to the contrary.

Conclusion

205 The asserted implied term has not been established. The evidence did not come close to establishing widespread and notorious industry practice. In any event, the term lacked clarity for the reasons given earlier in the context of the other alleged terms, and was inconsistent with express terms of Holden Dealer Agreement for the reasons given in relation to the term alleged to have been implied for business efficacy.

206 The answer to **common question 1(b) is No**.

PART C: BREACH OF CONTRACT

207 Common question 2 is addressed to breach of contract. It follows from the conclusions reached in respect of the contractual terms that it is unnecessary to decide whether the defendant breached any contractual term other than that imposed by clause 9.1(g) when read with clause 7.17.14.3 of the Wholesale Standards (the 'endeavour to supply' obligation). The statutory good faith obligation is addressed later in these Reasons.

208 Common question 3 asks whether the *force majeure* clause at clause 26.9 of the Dealer Agreement relieved the defendant from liability. That clause was not engaged in connection with the 'endeavours' obligation in clause 7.17.14.3. The primary case on the supply obligation raised a novel and interesting question about the relationship between a parent and a subsidiary in the context of a force majeure clause. However, it would not be productive to answer the question in the alternative. Answering it would require as a predicate, the positing of a contractual provision of uncertain content, miring the analysis in layers of hypotheses.

Endeavour to Supply - Plaintiff's Case

209 The plaintiff's pleaded case was that in breach of clause 9.1(g) of the Dealer Agreement, Holden failed to comply with its obligation in clause 7.17.14.3 of the Wholesale Standards by:

(a) failing to supply any vehicles after the relevant time in 2020;

(b) failing to have in place sufficient contractual arrangements for the security of supply of new vehicles of the Term;

(c) failing to enforce its contractual arrangements for supply and failing to negotiate arrangements for the continued supply of new vehicles for the Term.

210 Although a sufficient quantity of vehicles to achieve SEG or meet reasonably anticipated demand would have to be assessed on a dealer by dealer basis, the case was put on the basis that sufficient vehicles were not made available generally, in the circumstances in which no new orders could be placed after March 2020 and none were supplied after August 2020. The plaintiff's pleaded case focused on the adequacy of Holden's arrangements for the supply of vehicles to it. In submissions the plaintiff developed the point that in the face of GMC's review of the Holden brand and its decision to retire the brand in late 2019 and early 2020, Holden made no endeavours to continue the supply of vehicles to dealers.

211 The plaintiff made the following submissions.

212 Holden was aware from late 2019 that the future of the Holden brand was under review by GMC. Kristian Aquilina, Holden's then managing director and chairman, was likely involved in the decision to retire the brand. There was no evidence adduced by Holden of what it did in those circumstances to discharge its obligation to endeavour to supply a sufficient quantity of vehicles to dealers. The proper inference is that Holden made no attempts to discharge its obligation once the decision was announced. It made no entreaties to persuade GMC to continue the brand to permit Holden to supply Holden cars to dealers. It took no steps to press GMC for

supply in accordance with its existing supply contracts which remained on foot throughout the Term. Given the absence of evidence from Holden that it could have called from executives who knew about what occurred at the time, it cannot contend that there was no scope for it to do anything that mattered, to endeavour to supply a sufficient quantity of vehicles to dealers.

213 Focusing on the period of time before GMC commenced its Review, the supply agreements that Holden did have in place in 2020 with a subsidiary of GMC, were one year automatically renewing agreements that were neither terminated nor enforced after the announcement of the retirement of the Holden brand. Holden did not call evidence from any Holden or GMC executive about why it had failed to negotiate arrangements for the continued supply of new vehicles for the duration of the Term of the Dealer Agreements, why it did not seek to obtain supply under those agreements during 2020, or whether it could have had in place alternative supply agreements that gave it security of supply for the duration of the Dealer Agreement. It should be inferred that any such evidence would not have assisted Holden. It should be inferred that Holden made no endeavour to ensure that its ability to supply vehicles to dealers under the Dealer Agreement was supported by an adequate contractual right to obtain new Holden branded vehicles.

214 David Buttner, the former managing director and chairman of Holden, said in evidence about the supply arrangements between Holden and GMC, that he had never seen the supply agreements between Holden and other entities in the GMC group. He was not familiar with the contractual arrangements for the supply of Holden vehicles between Holden and other entities in the GMC group. His evidence was that he considered it was not something to which he ever needed to turn his mind because Holden relied on its parent to provide vehicles to it. He had not turned his mind to whether the term of the supply agreements aligned with the term of the Dealer Agreements. Mark Bernhard, the managing director immediately before Mr Buttner, gave evidence when cross-examined that he had never seen the supply

agreements and never turned his mind to whether it would have been prudent if the term of the supply agreements aligned with the term of the Dealer Agreements.

215 It appears that Holden was likely an active participant in the ending of Holden's vehicle supply. In November 2019 Buttner (then Holden's managing director) was told by Julian Blissett (Vice President of General Motors International division) that a working group was to be formed to study the ongoing viability of the Holden brand in Australia. Buttner resigned two days after that conversation. Kirstian Acquilina, who took over from Buttner and was Holden's managing director and chairman from December 2019 to November 2020, visited Detroit, where GMC is headquartered, in early 2020. In February 2020 (about a week before the announcement by GMC of the retirement of the Holden brand) Acquilina told Michael Jackson, Holden's then director of sales, that GMC was conducting a study in relation to whether it would retire the Holden brand and cease new car sales in Australian and New Zealand. Jackson was required to sign a non-disclosure agreement but didn't participate in the review. He learned of the GMC decision on the day it was publicly announced. Once the decision was announced he became aware that Acquilina had been working on a wind down plan for Holden before the decision was announced.

216 Acquilina was not called to give evidence. He would have had all relevant knowledge and still works for GMC in its Canadian division. It should be inferred that GMC (probably through Blissett) told Aquilina upon him taking over as CEO about the circumstance of a review into the future of Holden being conducted by General Motors in late November 2019. It should be inferred that when the decision to retire the Holden brand was announced, Aquilina had already taken steps to be in a position to wind down the brand. Given Holden's discovery[122] the Court can comfortably

122 The plaintiff sought and was granted discovery including as to documents sent, received or created by Holden's directors between 1 September 2019 and 16 February 2020 referring to or evidencing consideration of the vehicle models that might be supplied by it to Holden dealers in any scenario in which the supply of Holden vehicles continued beyond 2020 (including any scenario where the Rayong plant was sold or closed by GMC in 2020), the timing of any potential announcement to the public that the Holden brand would be retired upon the expiry of the Holden dealer agreements on 31 December 2022 but the supply of Holden vehicles would continue until then, and of any alternative supply arrangements for Holden Trailblazer or Colorado vehicles beyond March 2020 in the event of the sale or closure of General Motors' Rayong plant. No documents were produced.

conclude that Aquilina was not presenting plans to continue supply of vehicles to its dealers after 2020. It can be inferred that Aquilina on behalf of Holden was preparing to 'kill the brand'.

217 Holden has not called any executive from Holden or GMC to give evidence about what Holden did or did not endeavour to do in response to GMC reviewing Holden's future from November 2019 and then proposing to cease the supply of new vehicles in February 2020. Holden has demonstrated that it has access to General Motors executives for the purposes of this proceeding, by calling witnesses employed by GMC. The plaintiff has discharged its onus establishing circumstances requiring a factual answer from Holden on the question of 'no endeavours' (and lack of good faith) and there was no relevant evidentiary response from Holden. The plaintiff can properly rely on *Blatch v Archer* and *Jones v Dunkel* in circumstances where no evidence at all has been led, where it can be concluded that there is material evidence within a party's knowledge. It may in those circumstances be sufficient that the opposing party adduces slight evidence of a matter in issue.

218 There was no evidence of what the directors considered or discussed regarding the GMC decision to retire the brand. The defendant initially pressed the tender of a minute of a board meeting purportedly held on 6 February 2020 addressing the decision to retire the brand. The attempted tender was withdrawn in response to the plaintiff's opposition on the grounds that the minute was drafted in a self-serving way by Holden's lawyers, in contemplation of litigation.

219 Holden contends by its submissions that it couldn't do anything that would have mattered in response to the GMC decision, before or after it was made. It is correct that GMC made the exit decision but what is not known is that Holden could have done nothing. Holden might have called evidence from any one of the three directors of Holden at the relevant time or from Jackson, addressing the period of the review by Holden and explaining that Holden considered that it could have done nothing to change the decision of General Motors. The evidence might have been that Holden honestly held the belief that it could do nothing, whether it was correct or not. Were

that evidence accepted it probably would have been sufficient to discharge Holden's onus that it could have done nothing to change the situation. It would have been a simple matter for one witness (Aquilina for example) to give the evidence that it would not have been worth trying to obtain further supply until the end of the Term. Holden made the forensic decision not to call such evidence and the proper inference is that it couldn't lead the evidence. It could have put forward documents about the study into the future of the brand but it did not. The burden of adducing evidence about the considerations and decision making does not fall on the plaintiff in the circumstances. Holden must bear the consequences of the forensic decision it made to lead no relevant evidence, and to curate the witnesses to ensure that no witness who knew anything could give evidence.

220 In summary, the proper inference is that Holden did nothing (made no endeavours) and there is insufficient evidence for Holden to be able to contend that there was no contractual breach because there was no scope for it to do anything that mattered. It did not call any evidence sufficient to found the conclusion that whatever it did, did not matter. On that basis breaches of the endeavours obligation (and the good faith obligation) are established.

Endeavor to Supply – Defendant's Case

221 The defendant denied the allegations in respect the 'endeavour to supply' term and otherwise said that if it was required to endeavour to supply vehicles to dealers under clause 7.17.14.3, it complied with that obligation by:

(a) Having sourced, at all relevant times, new Holden vehicles for supply to dealers from other GMC subsidiaries pursuant to distribution agreements (as described below); and

(b) Allocating remaining stock to its network of dealers until at least August 2020 and inviting dealers to participate in a 'liquidation allowance program' between March and October 2020 whereby dealers were offered reduced liquidation pricing and therefore reduced profit margins on remaining new

vehicles.

222 In respect of the period before the GMC decision, Holden also relied on the efforts it made to arrest the decline in the Holden brand (as to which, see further below).

223 Holden made the following submissions.

224 On the proper approach to the evidence, it must be recalled that the onus remains on the plaintiff to prove the minimum necessary set of facts. The assessment of evidence does not occur in a vacuum but by the application of judicial logic, applying common sense. Neither *Blatch v Archer* nor *Jones v Dunkel* establish that where one party has an onus of proof and there is no evidence, the other party has to lead some evidence to avoid the inference being drawn.

225 Relatedly, there are a number of ways of seeking to prove facts. In the endeavours context the subjective thoughts of Holden directors or GMC executives would not tell one very much about what might have occurred had Holden entreated with GMC not to wind down the Holden brand until the end of the Term of the Dealer Agreements, or put more directly, had someone picked up the telephone and said to a senior person at GMC, 'we have these obligations and we suggest you continue to run the Australian business, losing money for another two and a half years'. One determines a counterfactual state of affairs by reference to the objective facts. Evidence to the effect that had entreaties been made certain things would have happened, would be treated with a great deal of scepticism. What tells one more about the counterfactual world is the objective fact that GMC was losing money in Australia. It is also necessary when evaluating the discharge of evidentiary and persuasive burdens, to have regard to the case that Holden was called to answer. The plaintiff did not allege that Holden should have done anything at this stage of the review of the Holden brand, including by making requests of GMC. Holden was not called on to answer that proposition.

226 As to the standard of performance, it does not rise to best endeavours or best efforts. The hypothesis of acting reasonably, on the facts, adds nothing meaningful to the endeavours obligation. The standard is conditioned by the terms of the contract in

question and what is reasonable in the circumstances. The nature, capacity, qualifications and responsibilities of the person upon whom the obligation is imposed viewed in light of the contract are factors to be taken into account in measuring the standard of endeavour required. Further, as discussed in *Woodside Energy*[123] an endeavours obligation does not require a party to act inconsistently with its commercial interests. The point is that one can still act in one's commercial interest when one is endeavouring to do something.

227 The endeavours obligation must take its content from that which could be done. In circumstances where there were no new Holden vehicles available the dealer's best endeavours to promote and maximise sale of the products would be an attenuated obligation.

228 The promise to endeavour to supply was discharged by Holden establishing arrangements for the supply of new Holden vehicles via its distribution agreements. It cannot be sensibly contended that the establishment of such arrangements did not constitute an endeavour.[124] The one-year rolling agreements were, on the evidence, agreements 'in the normal course of business'. It was not established or even contended that Holden envisaged that GMC would retire the brand, when putting those arrangements in place.

229 Further, the plaintiff's case is that Holden literally did nothing when GMC announced that it was no longer going to sell vehicles, and that the Court must only look to whether Holden did or did not do something after that point, ignoring anything that it did beforehand. That approach is erroneous. The plaintiff cannot circumvent the result by choosing to start its analysis at that point in time and overlooking any prior endeavour. By the time GMC decided to retire the brand those endeavours had occurred and failed, and in the circumstances there was nothing further to do. One does not have to try to do that which has no apparent source of success, in order to discharge the obligation.

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123 *Woodside Energy*, [41].

124 T276.

230 It is relevant that Holden's trademark is owned by another GMC related company and that there was no apparent alternative source of Holden vehicles, once GMC decided to retire the brand. Plainly, Holden as a wholly owned subsidiary could not control the decision made by its ultimate parent company. It had no ability to assert power over GMC.

231 On the evidence, there is no foundation for a conclusion on the balance of probabilities that any attempt to change GMC's mind would have succeeded. GMC did not tell Holden to cease production (it had not been a local manufacturer since 2017); GMC itself ceased production. The source of supply of Colorados had been sold when GMC announced the retirement of the Holden brand. There was, in the circumstances discussed in the communications from GMC about the retirement of the brand, neither a requirement to nor a utility in saying to GMC that it would continue to supply Holden branded cars to Holden through until 31 December 2022.

232 Holden's endeavours to supply included the steps that it took from 2015 with the support of GMC, trying to re-build the brand. A considerable amount of effort was made and money spent to make the brand viable. Holden relies on everything that was done before GMC's decision, in order to make the brand viable. Those efforts included Mark Bernhard (Holden's then chairman and managing director) requesting GMC to study the feasibility and economics of moving production of five vehicle models to China in the early 2020. He did that after GMC sold its 'Opel' vehicle manufacturing business in Europe to Peugeot Citroen in about March 2017. Holden's proficiency review of late 2017 proposed that the production of successor vehicles to Arcadia, Equinox, Trax, Commodore and Astra be moved to China in the period 2020 to 2025, which Holden considered would deliver a 'steady state' annual financial advantage to Holden, of USD $50-75 million. In October and November 2017 GMC gave interim approval for Holden to source the Encore from China and approved a proposal for producing a mid-cycle upgrade of the Equinox in China from 2023. Holden submitted a proposal for the production of a mid-cycle upgrade of the Arcadia from China from 2025, rather than from Springhill USA. The plaintiff said in closing

submissions that Holden had not pleaded reliance on things done in the four years prior to February 2020 in discharge of its obligations (including its 'endeavours' obligation) and it was accordingly not open to Holden to rely on those matters. That contention should be rejected. The plaintiff itself did not allege that Holden breached its 'endeavours' obligation by 'doing nothing' after the 2019 review or the 2020 announcement, including failing to make representations to GMC. As such, the plaintiff cannot complain (as it did in its closing submissions) that Holden seeks to run an un-pleaded cased that actions prior to GMC's decision may comprise 'endeavours', and to establish those endeavours by evidence already filed in the proceeding.

233 As to the GMC review and decision in late 2019 and early 2020, Holden accepts on the evidence that no entreaties were made by Holden to GMC to assert that there was an entitlement to receive supply under the supply agreement. However, the 'endeavours' promise did not require Holden to do that against a backdrop of having tried for four to five years to make the brand viable, according to the evidence. Further, GMC undertook to provide through a different, subsidiary financial support for the wind down. Against that offer and against the history of trying to build the brand, Holden did not have to undertake any more extensive endeavours.

234 It is not in dispute that it was GMC, not Holden, who made the decision to retire the Holden brand in Australia. The Court would not find on the balance of probabilities that had entreaties been made, GMC would have done anything different. It was, according to its market announcement, committed by $300 million in cash costs and $1.1 billion in non-cash costs, on that decision. The decision occurred against that background of years of trying to make the Australian market work. There was a natural focus in the case on the importance of Australia. But the decision to 'retire the brand' was a decision taken by a global corporation addressing its international business. Further, concluding that there would have been utility in Holden making attempts to stay the closure of the brand proceeds on a predicate that Holden and GMC would assume that they were contractually obliged to continue the supply of

vehicles, despite their being no express promise to that effect. The notion that it is more likely than not that entreaties from Australia would have changed anything, is singularly unlikely. Holden did not have to call a decision maker to draw that inference because it is objectively unlikely, given the decision that was made and the circumstances in which it was made. It should not be assumed that putting that 'counterfactual' to someone would be useful evidence. Furthermore, in evaluating the content of the obligation to endeavour to supply, it must be recalled that it is not in issue in this proceeding that that GMC would shut down the Holden brand in Australia; the plaintiff cavils only with the time at which that decision would take effect.

235 As to the enforcement of supply contracts after the decision by GMC to retire the brand, Holden had agreements with General Motors Overseas Distribution LLC (**GMOD**) and General Motors International Operations Pte Ltd (**GMIO**) for the supply of Holden branded vehicles. Both were with GMC subsidiaries and both were on foot at the time. GMC having made the decision to retire the Holden brand it would not have been commercially realistic for Holden to seek to compel enforcement of the supply agreements from another GMC subsidiary. The cessation of supply occurred because the ultimate parent company decided to shut down the Holden brand. Holden was in no position practically, to compel GMOD to continue to supply vehicles under the distribution agreement against the wishes of GMC. In any case, it is highly unlikely that specific performance would be available. It was for the plaintiff to prove, but it may be observed that the proposition that the distribution agreements could be legally enforced is doubtful. The agreements were governed by Michigan law. If it were to be assumed that the content of that law is the same as the law of the forum (applying the general presumption), it is noted that under Australian law there is a settled practice of courts refusing a mandatory injunction requiring the carrying on of a business.

236 After the decision to retire the brand, Holden oversaw share of build activity for the remaining stock, all of which was 'endeavour'. The steps that occurred in 2020

onwards were endeavours to meet reasonably anticipated demand (which is what the clause required) noting that demand would reduce to zero because there would be no vehicles, and nor would there be any SEG targets beyond 2021. Those endeavours after February 2020 were directed to reasonably anticipated demand in circumstances where the brand was to be retired by 2021. It was Holden who set the SEG targets under the Dealer Agreements. In circumstances where GMC had decided to retire the brand by 2021, there would be no reasonably anticipated demand for new vehicles nor any SEG targets beyond that date, or even before then, if not for the liquidation pricing offered on remaining Holden vehicles.

237 Separately, the defendant accepted that the 'endeavours' case would not attract the *force majeure* defence. It could not be said that taking the steps alleged were 'beyond the reasonable control' of Holden. That did not mean that they were reasonable or necessary steps to take in discharge of the endeavours obligation.

Analysis – Breach of Contract – Endeavour to Supply

Factual findings

238 The facts relevant to this issue, established by the evidence, are as follows.

239 Holden was at all times a wholly owned subsidiary of GMC, with the consequence that it was controlled by GMC. It had no legal ability to assert power over GMC.

240 As a matter of practicality, consequential decisions for Holden, including product offerings, were made by or required approval from GMC or its related entity, General Motors International (**GMI**), after input from Holden. Holden's managing director reported to the president of GMI, who was responsible for General Motors' operating entities in the Asia-Pacific. GMI approved Holden's annual budget which functioned as its operating plan. Holden's managing director had considerable autonomy in implementing the budget but any initiatives or expenditure not included in the budget had to be approved by the GMI president or at times, a more senior GMC executive. Holden had substantial influence in relation to the introduction of new vehicle models for the Australian market.

241 Holden had manufactured Holden branded cars in Australia until 2017 but was not a manufacturer during the Term of the Dealer Agreements. It was an importer and distributor of new vehicles, parts and accessories. As a franchisor, it maintained a network of authorised dealers selling and servicing the cars that it marketed. In that role it was responsible for importing and selling cars to dealers in the network. It described itself as such in the mandated disclosure it made to dealers under the Franchising Code.

242 The Holden trademark was owned by GMC and a related entity. New Holden-branded vehicles could not be obtained other than through GMC (including through its subsidiaries). The principal 'product' the subject of the Dealer Agreements was not fungible.

243 Holden had agreements with GMOD and GMIO for the supply of Holden branded vehicles to it, under which GMOD/GMIO agreed to sell nominated vehicles to Holden in accordance with defined specifications and the policies and procedures in place in the General Motors corporate group (**Distribution Agreements**). The agreements were dated September 2015. They were for one-year terms that automatically renewed on each renewal date for a further one year term unless terminated. The agreements were terminable at any time by mutual agreement or by either party giving written notice at least 90 days before the expiry of then current term. The rights to obtain vehicles provided by the Distribution Agreements were, then, secure for 12-month periods. The Distribution Agreements were on foot at the time the exit decision was made. It may be inferred that they had been automatically renewed in 2016, 2017, 2018 and 2019. GMIO and GMOD were GMC subsidiaries. They sourced the vehicles supplied to Holden from other entities within the General Motors group or entities manufacturing on behalf of GMC.

244 Mark Bernhard was chairman and managing director of Holden between July 2015 and August 2018. He gave evidence for the defendant. He had not seen the Distribution Agreements and said that others within Holden would have reviewed such documents. Other than in 2017, he had not considered the agreements or any

issues around the supply arrangements with other GMC entities (including the length of the term of the Distribution Agreements), because the arrangements were 'the normal course of business'. In 2017 GMC sold its manufacturing business in Europe, in light of which Holden considered its supply arrangements. David Butter was chairman and managing director between August 2018 and December 2019. He gave evidence for the plaintiff (cold-called). He was not familiar with the Distribution Agreements. He did not consider that he needed to turn his mind to the those arrangements because Holden relied on its parent to provide vehicles to it. He did not consider whether the Agreements should have been obtained on different terms, of longer duration.

245 In March 2017, GMC announced that it had agreed to sell its Opel vehicle manufacturing and sales business in Europe to Peugeot-Citroen. Holden's Astra Hatch was then manufactured by Opel and it was planned that the Opel Insignia would be imported by Holden and sold in Australia as the next generation Commodore. When the sale was announced, the chief operating officer of GMC publicly stated that General Motors was '100 percent committed to the Holden business in Australia and New Zealand' and that as a result of the Opel sale there was more opportunity for new vehicles, not less, for the Australian business. That assurance was repeated to a delegation of Australian and New Zealand dealers who attended GMC in Detroit in May 2017, led by Mark Bernhard. Bernhard's assessment, that he reported to Holden leadership at the time, was that General Motors was committed to Holden.

246 In July 2017, Holden executed an addendum to the Master Vehicle Supplier Agreement with Opel Automobile Gmbh and with General Motors UK Ltd (which was at the time and Opel company) for the ongoing supply of the Astra and Next Generation Commodore until their respective production end dates in 2022/2023 and 2024. Holden assigned its rights under the contracts to another General Motors entity in or about November 2017.

247 In 2017, after the Opel sale, Bernhard requested GMC to study the feasibility and economics of moving production of five vehicle models to China in the early 2020, supported by a project scope and business case, and proposed that the production of successor vehicles to Arcadia, Equinox, Trax, Commodore and Astra be moved to China in the period 2020 to 2025. Holden had assessed that moving production to China would deliver a 'steady state' annual financial advantage to Holden, of USD $50-75 million. In October and November 2017 GMC gave interim approval for Holden to source the Encore from China and approved a proposal for producing a mid-cycle upgrade of the Equinox in China from 2023. Holden submitted a proposal for the production of a mid-cycle upgrade of the Arcadia from China from 2025, rather than from Springhill USA. The February 2020 decision by GMC to discontinue the Holden brand occurred before those changes could be enacted.

248 On the subject of the deterioration of the Holden brand, by 2015 Holden's research showed consumers had become increasingly indifferent to its 'blokey, masculine' brand. Then chairman Mark Bernhard's responsibility was to build a 'new Holden' with the launch of new products. In February 2015, it was announced that Holden would introduce 24 new models and 36 powertrain combinations over the next five years. Then president of GMI, Stefan Jacoby, told the February 2015 Holden Dealers Conference that General Motors was investing millions to broaden the Holden portfolio and was investing in Holden's future success. General Motors' CEO, Mary Barra, told the same conference that General Motors wanted to build on the Holden brand and ensure that it regained its leadership position in sales, quality, reputation and profitability for the corporation and dealer network alike. Barra said that '*GM is changing in Australia but one thing that is not changing is our commitment to the Australian market. As the Holden team transitions from a manufacturing-based operation to a national sales company, I can assure you that our Holden operations will remain a key components of GM's global enterpris*e'.

249 Detailed initiatives were established to improve and reinvigorate the Holden brand, including new advertising and rolling out the 24 new models that had been promised

in 2015, which was the most significant 'launch activity' by Holden in 15 years. Berhard told the GMI executive in late 2016 that strong progress had been made in the Holden brand transformation program. That program continued throughout 2017 and 2018. The Holden 2017 budget provided for new model launches, further new model launches planned for 2018, 2019 and 2020 and increased advertising expenditure and capital expenditure, and other initiatives. In 2017, Holden executed the plans contained in the budget, including new model launches, taking up sponsorship opportunities intended for a broader base of potential Holden customers (with Collingwood Football Club, Surf Lifesaving Australia, the National Rugby League, the Sydney Gay and Lesbian Mardi Gras and others). Several other substantive initiatives to improve Holden's offering and market position, of diverse kinds, were the subject of evidence. It is unnecessary to describe them here.

250 Holden was required to tell its dealers by 30 June 2017 whether or not their dealer agreements would be renewed for the period 2018 to 2022. Holden was concerned that lower than expected sales were reducing dealer profitability and the dealers' ability to make the investment required to improve their dealerships as part of the brand transformation program. It closed 30 dealership locations in order to increase volume throughputs whilst maintaining customer service and renewed the dealer agreements for all of Holden's other dealers for a five year term ending December 2022.

251 In 2017 Holden's portfolio was reaching its peak age before replacement models could be introduced and was older than those of Holden's key competitors. Its 2017 financial goal was to break even before its allocation of General Motors' global costs, by 2020. Holden's budget review in August 2017 recorded that the Holden brand had stabilised, but was not improving as quickly as anticipated. The 2018 business plan adopted downgraded forecasts against the 2017 plan but with significant developments foreshadowed, including the launch of the Next Generation Commodore, the launch of the Equinox (a medium SUV) in late 2017, the launch of the Arcadia large SUV in late 2018. Bernhard expected, as at the second half of 2017,

that Holden would meet its objectives. He left Holden in August 2018 and was very surprised by the announcement retirement of the brand in 2020. He had expected and believed that Holden would remain in business in Australia given the consistent support for the transformation of the brand which he had received from General Motors senior executives whilst he was Holden's managing director. When David Buttner took over from Bernhard in August 2018, he told Holden's stakeholders that he hadn't taken the job to close down Holden, and that he would work with them to regrow the franchise.

252 Holden's brand and market analysis in 2019 shows that the Holden brand had lost relevance including because of the public perception of the termination of Australian manufacturing in 2017. Michael Jackson, Holden's then director of sales (who was part of its senior leadership team and who gave evidence for the defendant) considered that Holden leaving Australia discouraged potential customers from buying Holden cars. Measures of brand health had been stagnant between 2014 and 2019, with negative net momentum for the brand's health. Holden's market share versus its competitors had declined from 13% in 2010 (when it was second to Toyota) to 8% in 2017, 5% in 2018 and 4% in 2019. Holden held the lowest market share between 2016 and 2019.

253 In the third quarter of 2019, the measures of brand health were showing improvement, which Jackson attributed to a then recent change in Holden's marketing. The brand declined again in the final quarter of 2019. Holden's 'volume review' showed what Jackson described as a broad and deep deterioration in Holden's forecast sales between the review produced in mid-2018 and that produced in 2019. The 2018 review forecast a total Holden market share at about 8% across 2020 to 2022, whereas the 2019 review revised those forecasts down to about 3.5%. Jackson said that that deterioration reflected Holden not having anticipated the extent of the decline and weakness of its brand and was only in small measure attributable to an anticipated slow-down in the overall car market linked to the broader economy. Jackson's evidence was that Holden's sales volumes for 2018 and 2019 had been inflated by the provision of large

incentives to clear excess stock it had ordered pursuant to earlier forecasts that had proved overly optimistic. That discounting was not sustainable for Holden.

254 Jackson's evidence was that from 2019, the increasing age of Holden's portfolio, combined with Holden's poor brand health created profound challenges for it. Holden was scheduled to make limited launches of new models in 2020 to 2022.

255 It may be accepted that by late 2019, Holden's market share had been in a years-long downward trend. GMC's decision of February 2020 (disused below) was made in the circumstance that there had been (as the defendant put it) a broad and deep deterioration in Holden's forecast sales between the iteration of its business plan produced in mid-2018 and its 10 year volume and market share forecasts, produced in June 2019. The deterioration occurred despite very substantial efforts and investment in the Holden brand which were aimed at transforming the brand. The extensive program to reinvigorate Holden's sales, brand and market position was implemented but it did not succeed.

256 In late 2019 GMC appointed a working group to study the ongoing viability of the Holden brand in Australia (the **Review**). Julian Blissett of GMI told then managing director David Buttner about the Review, and Buttner resigned two days later. Buttner understood that he had been appointed to his position in 2018 to invigorate Holden, not to close it. His predecessor, Mark Bernhard, had expected Holden's renewal efforts to succeed so as to allow Holden to continue. There is no evidence to suggest that prior to being told about the Review in late 2019, that Holden's most senior leadership expected that the Holden brand would be retired and that GMC would no longer supply new Holden-branded cars to the Australian market.

257 Kristian Aquilina, who become interim chairman and managing director in December 2019, knew about the Review. There is no evidence about whether he participated in the Review, whether as a member of the working group undertaking the study, or otherwise. He was not called to give evidence. It may be accepted that he was in Holden's camp. The fact that he was not called does not by of itself, or having regard

to the other available evidence, support the drawing of an inference that he was, as the plaintiff put it, an 'active participant' in the Review or 'involved in the decision', insofar as that description implies that Aquilina was a decision maker. The fact that he travelled to Detroit in January 2020 does not establish anything about what he did there. The decision announced in February 2020 was a decision made by GMC and not by Holden. So much follows from the corporate structure, and is consistent with the evidence about what GMC and Holden said about the decision (as to which, see below). It was not alleged that Holden or someone acting on its behalf, actually made the decision to shut down the brand.

258 The plaintiff's case concentrated on Holden not taking an opportunity to persuade GMC to defer the termination of the Holden brand. Holden (through Aquilina) knew that Holden's future was being considered, and it may be inferred that he knew that Holden would either be shut down or continued, in a decision to be made in late 2019 or early 2020. It may be inferred that because the Review was occurring against a long history of the brand and market position of Holden deteriorating, the prospect that it would be shut down must have been understood by Holden to have been at least a real possibility. By the time of the February 2020 announcement preparations were underway within Holden to wind down the business in its then incarnation, once the decision was announced. Holden did not make entreaties to GMC to seek to change or defer the decision that was announced in February 2020. The defendant accepted that fact in its closing submissions. It also accepted that after it learned of the Review, and after the February 2020 announcement, it did not seek to assert that it was entitled to continue to receive a supply of vehicles under the Distribution Agreement (meaning 'business as usual' supply). Once the closure of the brand was announced, Holden did not take steps to try to enforce performance of the Distribution Agreement against GMOD.

259 On 14 February 2020, General Motors Holdings LLC (**GM Holdings**) wrote to the directors of Holden stating,

> General Motors Company has decided to exit its Holden retail, design and engineering operations in Australia and New Zealand by 2021.

260 The letter stated that information about actions that would be required to be taken by the Holden Group[125] in order to give effect to the exit decision, including a wind-down plan would be given to the directors the next day. GM Holdings requested that 'the directors of each Holden Group entity consider and, if considered appropriate, resolve to carry out the actions provided in these materials.' GM Holdings said that,

> GM Holdings undertakes to financially support each Holden Group company to undertake an orderly, solvent wind-down of its activities and to commit the financial resources necessary to meet each Holden Group company's liabilities in accordance with the wind-down plan. GM Holdings undertakes that it has the financial resources to meet those liabilities.

261 The briefing material provided to the directors on 15 February 2020 said that on 14 February 2020 GM had decided to withdraw Holden from the domestic sales markets in Australia and New Zealand, and to wind down other General Motors operations in Australia, but to maintain a presence to support Holden vehicles and an aftersales service and parts network for at least 10 years. Holden's operations were to wind-down by 2021 and retail and wholesale of Holden sales were to cease by the end of the year. It would be necessary to work with dealers to secure agreed early termination of dealer agreements with appropriate compensation arrangements, with dealerships transitioning to authorised service outlets where dealers agreed to do so.

262 The background given to Holden's directors said relevantly that,

(a) General Motors has conducted a study concerning the future direction of the Holden brand in Australia and New Zealand having regard to General Motors' global investment priorities and criteria for return on investment. General Motors undertook an extensive assessment of the level of investment required for the Holden brand to be competitive and sustainable for the long term. The outcome of this assessment has led to the very difficult decision to wind down Holden vehicle sales, engineering and design operations in Australia and New Zealand. This decision was taken after carefully considering all realistic options

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125 The Holden Group was said to comprise GM Holden Pty Ltd, General Motors Holden Australia NSC Pty Ltd, GMF Australia Pty Ltd, Holden New Zealand Limited.

for continuing Holden vehicle sales, engineering and design operations.

(b) Current sales performance at Holden has been a focus for many years, but the decision is based on assessing the level of investment required for Holden to be competitive and sustainable for the long term. The business case and forecast return on that investment for Holden was compared to General Motors' global strategy, its capital deployment thresholds and other investment options General Motors has globally. Regrettably, the investment case for Holden could not generate sufficient returns. Factors weighing against further investment by General Motors in Holden included the highly fragmented right-hand drive domestic markets, the economics to support growing the brand, and delivering an appropriate return on investment.

(c) This decision will have a significant impact on many people, including in particular Holden dealers, employees, customer and suppliers. Global and local management are developing a transition plan for dealers and an orderly wind-down of Holden sales over coming months. Stock incentives will be provided to assist dealers to sell current vehicle stock, and a dealer compensation package has been developed. Holden dealers will be given the opportunity to continue as Holden authorised vehicle service operators.

263 The decision was publicly announced by General Motors on 16 February 2020. In the same announcement General Motors said that it had signed a binding term sheet with Great Wall Motors to purchase General Motors' Rayong vehicle manufacturing facility in Thailand, and that it would withdraw Chevrolet from the Thai domestic market by the end of 2020. General Motors said that it had undertaken a detailed analysis of the business case for future production at the Rayong manufacturing facility in Thailand and that General Motors production at the site was unsustainable because of low plant utilisation and forecast volumes. The public statement quoted CEO Mary Barra as saying that General Motors was restructuring its international operations, focussing on markets where it had the right strategies to drive robust returns, prioritising global investments. The announcement otherwise said as a result

of the actions to be taken in Australia, New Zealand and Thailand, General Motors expected to incur net cash charges of approximately $300 million and to record 'total cash and non-cash charges' of $1.1 billion.

264 Holden issued its own announcement of the decision on 17 February 2020. Among other things it said that General Motors had undertaken the decision after an exhaustive analysis of the investment required for Holden to be competitive for the long term in Australia and New Zealand's new car markets and that the assessment had determined that such an investment could not meet General Motors' investment thresholds, including for delivering an appropriate return on investment. It added that the issue was one of scale; that the global consolidation of the automotive industry has made it increasingly challenging to support a brand and a business that operates in only two markets which represent less than one percent of the global industry.

265 Manish Gulati, General Motors' chief financial officer – strategic markets, of GMI gave evidence about General Motors' exit from Thailand which was largely addressed to issues arising on the counterfactual analysis addressed by the common questions concerning damages. Relevantly his evidence was that the Thailand sales business had been making substantial losses over some years, despite substantial investment. The vehicles built in Thailand could not be priced for sale in the domestic market at a rate that would cover the variable costs of the manufacture and Rayong plant costs. That problem was caused by substantial under-utilisation of the plant. Holden's Colorado and Trailblazer models were manufactured at the Rayong plant. They were Holden's leading brands and were projected to comprise 60% of Holden's forecast sales for the period 2020-2022.

266 The communication and rollout to the dealer network occurred over several weeks after the date of the announcement. Dealers received individual communications about Holden's transition support package. Holden's stated priority was to assist dealers selling current existing dealer inventory and Holden pipeline stock, including with 'vehicles allowances' that would increase the return per vehicle, to dealers. It was said that there were a limited number of remaining unallocated vehicles and that

Holden would offer dealers a share of build proportionate to their new car sales for the last 6 months of 2019, with the intention that most of the inventory be allocated between March and July 2020.

267 The steps that occurred in the wind-down are set out above, in Part A of these Reasons. 'Un-preferenced' orders in Holden's system (i.e. for vehicles not yet selected for production) as at 17 February 2020 were cancelled. In or about March 2020, the last motor vehicle under the Holden brand was manufactured. New orders for new vehicles could not be placed after 3 March 2020. By August 2020, the defendant had ceased to supply any new vehicles to the plaintiff and group members.

Consideration

268 I have concluded that the plaintiff has ***not*** established that in breach of clause 9.1(g) of the Dealer Agreement the defendant failed to comply with clause 7.17.14.3 of the Wholesale Standards, by failing to endeavour to supply dealers with a sufficient quantity of vehicles that would allow the achievement of SEG or meet reasonably anticipated demand. My reasons for doing so are as follows.

269 It will be recalled that an endeavour is an attempt to do something. The contractual requirement was that Holden exert itself to attempt to supply a sufficient quantity of vehicles to allow its dealers to meet SEG or reasonably anticipated demand. It was required to take steps that a reasonable person in the circumstances would take to achieve the contractual objective. What is reasonable is to be conditioned by the terms of the contract in issue, the circumstances and the person upon whom the obligation is imposed.

270 **First**, Holden's actions in putting in place the arrangements it had for the supply of vehicles to it so that it could in turn supply dealers, are properly characterised as an endeavour for the purposes of clause 7.17.14.3.

271 The promise to 'endeavour to supply' was given by Holden for the whole of the Term of the Dealer Agreement, so that throughout the term Holden was required to do that

which amounted to an endeavour to supply. However, that did not mean that something Holden had done at one point during the life of the Agreement (or from its commencement) could not be capable of sufficing for the duration, as a relevant endeavour. It is true that Holden's arrangements for a supply of vehicles to it were put in place well before GMC's decision in February 2020 which permanently interrupted the supply of vehicles. But, as the defendant submitted, whether or not Holden had endeavoured to supply in the sense required by the Agreement could not be assessed by only considering what occurred from late 2019, once Holden learned that GMC might terminate its retail business in Australia. This is particularly because although the Distribution Agreements that Holden had in place were limited term, automatically renewing agreements, they were nevertheless ongoing and forward looking.

272 The arrangements that Holden made to obtain vehicles to supply to dealers were not said to be inadequate in any respect other than by reference to their term (i.e. the duration of the contract).

273 The term of the Distribution Agreements was shorter than the term of the Dealer Agreements. The Distribution Agreements were terminable on notice at the end of each 12-month term, and otherwise automatically renewing. That meant that at each 12-month mark the supply of vehicles to Holden was contractually vulnerable to termination by the other party (GMOD, a GMC subsidiary). However, that did not mean that they were inherently incapable of amounting an endeavour (meaning a reasonable endeavour) to obtain a supply of cars for re-supply to dealers.

274 The product that Holden required was new Holden branded vehicles. Not new cars generally, but Holden cars whose brand was owned by General Motors, and held by a GMC subsidiary. The product could only be obtained through GMC, whether by a contract directly with a GMC subsidiary or another contractual arrangement under which Holden cars were manufactured for GMC. While the Distribution Agreements

were terminable by GMOD in September 2020,[126] as the events of 2020 revealed, the vulnerability in Holden's supply arrangements was not in fact the term of the supply contracts it had in place, but an inherent consequence of the nature of the product, namely that GMC as the brand owner could decide to cease manufacture of cars for supply to Holden Australia. In the event, it was not a purported termination by GMOD that brought an end to the supply of vehicles to Holden but a decision by GMC in circumstances where the Distribution Agreements were on foot.

275 Whilst the supply of vehicles was vulnerable to GMC's control, the corollary was that an agreement for supply of vehicles from a GMC subsidiary could, objectively, be taken to be a suitable or reasonable arrangement insofar as it was supported by GMC, regardless of whether that agreement was for a 12-month renewable term or a longer term. Differently put, having in place such an agreement at all times during the Term of the Dealer Agreements, in circumstances in which GMC was understood to be committed to the Australian business, is a step that a reasonable person would take to achieve its contractual objective of supplying Holden cars to dealers. An importer who supplied a generic product that might be sourced from any number of suppliers might be required to take different steps to make reasonable endeavours to supply its customers. But the measure of reasonable endeavours is conditioned by the circumstances, including the characteristics of the obligor and its business. In 2020, the Distribution Agreements had been automatically renewed four times, and in 2019, three times. Mark Bernhard, Holden's chairman and managing director until August 2018, expected and believed that GMC remained committed to Holden. He had received assurances to that effect from GMC in March and May 2017. His successor, David Buttner, understood that he was appointed to invigorate Holden, not to close it. There was no basis on the evidence to find that Holden's senior leadership expected that GMC would close down the Holden brand and no longer supply new cars to the Australian market. Bernhard accordingly described the Distribution Agreements as in the 'usual course' of Holden's business. Butter's evidence that Holden relied upon its

126 The date is taken from the date of commencement of the Distribution Agreements, with the result that they ran from September to September.

parent for its supply of vehicles was, when properly understood, an accurate statement. It did not suggest, in the circumstances, a failure to consider the supply of vehicles to Holden.

276 Holden's approach to supply was not 'set and forget', as the evidence about the steps that Bernhard took in 2017 to press upon GMC a transfer of manufacture to China in the period 2020-2025, showed. The proposed move to China was expected to bring significant financial benefits to Holden. Holden's power in relation to the source of manufacture was limited to putting proposals and business cases to GMC. But it did that, and obtained GMC's approvals for the sourcing of some vehicles from China.

277 I do not accept the plaintiff's contention that Holden should not be permitted to rely upon the evidence that Holden took those actions. The plaintiff opened up the issue of the adequacy of Holden's supply arrangements by alleging in its Reply that the 'endeavour to supply' obligation was breached by the defendant failing to have in place sufficient contractual arrangements for the security of supply of new Holden branded vehicles for the Term and by failing to negotiate arrangements for the continued supply of new vehicles for the Term. The pleading was directed to the adequacy of the contractual arrangements and the failure to negotiate. However, it was fairly open to the defendant to defend the allegation by giving evidence about what it did in relation to supply of vehicles to it, including as to the context in which its then current supply arrangements existed. Whilst the steps taken by Holden in 2017 in relation to China concerned supply in the 2020 – 2025 period, that relevance of that evidence is to answer (in conjunction with other evidence) the contention that Holden did not in any real sense think about the need for it to have in place means of achieving a sufficient quantity of Holden vehicles that it could in turn supply to dealers.

278 The plaintiff is correct to say that Holden did not call a witness to explain why the term of 12 months was agreed upon for its Distribution Agreements with GMOD, as opposed to a term that would run for the duration of the Dealer Agreement. It is also true that Holden executed agreements as an addendum to a master supplier agreement with General Motors UK Ltd and Opel Automobile GmbH in 2017 for the

supply of vehicles over terms of five to seven years, and assigned its rights under the those agreements to another GMC subsidiary some months later. The circumstances in which that occurred were not addressed in the evidence, apart from the evidence that GMC sold its Opel vehicle manufacturing business in 2017. However, the plaintiff has not established that without evidence explaining the 12-month term, the length of the term made the Distribution Agreements inadequate and Holden's endeavours in sourcing its supply in that way, something less than reasonable. The fact that agreements for longer terms were put in place on another occasion does not demonstrate that Agreements for a shorter term, automatically renewing, were inherently unsuitable or inadequate, for the reasons discussed.

279 The plaintiff did not say explicitly that had Holden been a party to a contract for a supply of vehicles to it whose term ran until the end of 2022, it would have been more likely that GMC would have deferred its February 2020 decision to stop supplying new vehicles to Australia, or that it would likely have made a different decision. But that is the predicate of its contention that reasonable endeavours required a contract with a longer duration. The plaintiff did not make out that case.

280 Holden was not called upon to answer an inference that might otherwise be drawn, that putting in place agreements for the supply of vehicles to Holden for a term of twelve months (or for less than five years) was not a step reasonably taken to achieve the contractual objective under the Dealer Agreements.[127]

281 In the circumstances, having regard to the nature of the product to be supplied (uniquely controlled by GMC) and Holden's relationship to GMC, Holden having put in place the Distribution Agreements prima facie sufficed as an 'endeavour'. Without more, the plaintiff has not established that the defendant failed to discharge its 'endeavour to supply' obligation.

282 The question remains whether, in view of the events of late 2019 and early 2020, Holden had to do something more to satisfy its obligation. The defendant submitted

[127] See below where the principles concerning the non-calling of witness, are discussed.

that by February 2020 Holden's endeavours had failed, meaning they could not in the circumstances bring about the contractual objective, although the obligation had been discharged. That is the correct conclusion and path of reasoning. The following analysis about what occurred in 2019 and 2020 supports rather than detracts from that conclusion.

283 **Second**, it has not been established that a failure by Holden to make entreaties to GMC once it learned of the 2019 Review, amounted to a failure to endeavour to supply.

284 It was established that Holden knew its future was being considered from the end of November 2019 in a Review that GMC was conducting and that the prospect that GMC would shut down the brand was a real possibility. It did not make entreaties to, or attempt to negotiate with GMC, to seek to have it change or defer the decision that was announced in February 2020. It did not seek to assert that it was entitled to continue to receive a supply of vehicles under the Distribution Agreement (meaning 'business as usual' supply). Having established those propositions (which the defendant accepted), the plaintiff's case was that what occurred in late 2019 and early 2020 in relation to GMC's decision to retire the brand is a matter peculiarly within the knowledge of Holden and GMC, not the plaintiff. The defendant could have called a witness[128] to explain what happened at the time, including to say (if true) that Holden did not have any scope to 'do anything that mattered', but it did not do so. The plaintiff said that as a result, it was *not open to Holden to contend that there was no scope for it to do anything that mattered, to enable it to continue the supply of cars to dealers*. If it was not open to so contend, the fact that Holden did 'nothing' (having learned of the Review and then the GMC decision) is sufficient to establish that it failed to make endeavours to supply.

285 The plaintiff's case implicitly accepted (as it must) that the taking of such steps that a reasonable person would take to achieve the contractual objective, does not require engaging in what would amount to a futile exercise. Doing what is reasonable does

128 Aquilina, Blissett or others identified in the plaintiff's submissions.

not require doing that which is not objectively likely to achieve the intended object.[129] The endeavours obligation must take its content from that which can be done, reasonably. The question whether the steps that it is said the obligor ought to have taken would have 'made a difference', is not (as the plaintiff suggested in parts of its submissions) an impermissible causation analysis. It is addressed to whether acting as a reasonable person would act, required acting in the way alleged.

286 In *HQ Café Pty Ltd v Melbourne Café Pty Ltd*, the Court of Appeal summarised the relevant principles governing proof and inferential reasoning in this way:[130]

> … [T]he burden of proof will be discharged 'by adducing evidence of some fact the existence of which, in the absence of further evidence, is sufficient to justify the drawing of an inference that it is more likely than not that the event occurred or that the state affairs exists'. This process of inferential reasoning is informed by the fundamental principle established in *Blatch v Archer* that 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted'.
>
> In *Ho v Powell*, the New South Wales Court of Appeal explained the operation of the principle in *Blatch v Archer* where there is only limited evidence available:
>
> [I]n deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision …
>
> In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so.
>
> Indeed, there may be cases where the facts required to be proven by the plaintiff are peculiarly within the knowledge of the defendant. In such a case, 'if the plaintiff provides sufficient evidence from which the matter may be inferred, the defendant then comes under an evidential burden'. In other words, 'slight evidence of that fact may suffice to prove the fact unless that evidence is explained away by the party with the knowledge of the fact'.

287 Slight evidence of a fact in issue may suffice, particularly where that evidence is not contradicted by the party who is in a position to contradict it but chooses not to do so. But a party on whom the legal burden of proof rests, must nevertheless adduce sufficient evidence of the facts alleged. The fact that a witness has not been called

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129 *Re Iceland Cold Storage Australia Pty Ltd* [2023] VSC 206, [180]; *Altis PropCo2 Pty Ltd v Major Bay Development Pty Ltd* [2022] NSWSC 403, [104]; *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135, 150-2.

130 *HQ Café Pty Ltd v Melbourne Café Pty Ltd* [2023] VSCA 200, [168]-[171], citations omitted.

cannot 'gap fill', converting suspicion to inference.[131] 'Where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence, is properly to be taken into account as a circumstance in favour of drawing an inference.'[132]

288 The plaintiff bore the onus of establishing by sufficient evidence that what it alleged the defendant ought to have done, was required of a reasonable person in the circumstances. It did not discharge that burden by merely asserting that attempts by Holden to persuade GMC to defer or change its decision might have made a difference, and that the only evidence about that issue could come from decision makers within GMC or from Holden's Kristian Acquilina. The plaintiff did not discharge its burden of proof by adducing evidence of some fact the existence of which, in the absence of further evidence, was sufficient to justify the inference that it was more likely than not that entreaties by Holden would have 'made a difference' (being objectively likely to achieve the continuation of a supply of vehicles to meet the business as usual requirements under the Dealer Agreements). It did not shift the evidential burden of proof to the defendant. There is also considerable force in the defendant's submission that it was not called on to answer the case that it breached its endeavour to supply obligation, by failing to make entreaties to GMC. That case was not pleaded. That is a matter to be taken into account when assessing the inferences that may properly be drawn from the available evidence.

289 To summarise without repeating the factual findings set out earlier,

(a) GMC decided to exit its retail operations in Australia. It was the owner of the Holden brand, the parent entity of entities contracted to supply vehicles to Holden. Unsurprisingly, Holden did not seek to challenge in this proceeding, GMC's entitlement to make the decision it made.

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131 *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)* [2022] VSC 13, [1993]; *Jones v Dunkel* (1959) 101 CLR 298, 313 (Menzies J).

132 *Jones v Dunkel* (1959) 101 CLR 298, 312 (Menzies J).

(b) According to its briefing materials GMC made that decision after an extensive assessment of the levels of investment required for the Holden brand to be competitive and sustainable for the long term and after reviewing all realistic options. Its assessment was that the investment case for Holden could not generate sufficient returns. What GMC said about its decision was consistent with the evidence about the years-long decline of Holden's market share and the broad and deep decline in its forecast sales, despite an extensive program, supported by GMC, to reinvigorate the brand and Holden's market position.

(c) GMC said in its briefing materials to the Holden directors, that it had made the exit decision having regard to its global investment priorities and criteria for return on investment. It is not in any way inherently improbable that it did so.

(d) At the same time as deciding to exit the Australian market, GMC sold its Rayong manufacturing plant in Thailand, where Holden's two most important vehicles were manufactured. In the announcement of the Australia-New Zealand exit decision, GMC said that it had signed a binding terms sheet with Great Wall Motors to purchase the facility. GMC's statement that the Thai facility was unsustainable because of low plant utilisation and forecast volumes was consistent with the evidence given about the Thai plant. It is unnecessary to address the counterfactual question (arising on the plaintiff's damages case) as to whether, if the Holden business continued until the end of 2022, GMC would have decided not to close Rayong because Colorado and Trailblazer models were made there for sale to Australia. The fact was, that in reorganising part of its manufacturing and retail footprint in pursuing its global investment priorities, it suited GMC to retire the Holden brand and close the Rayong facility, at the same time, and that is what it did.

(e) Against those considerations, it was not said that Holden could or should have presented an alternative business case for GMC to consider, to satisfy its requirements for return on investment. There was no evidence that it could do so. Holden's entreaties, had they occurred, would only have concerned the

necessity or desirability of maintaining a supply of vehicles for the remainder of the Term of the Australian Dealer Agreements. The representation that the plaintiff implicitly contended that Holden ought to have made to GMC, was that GMC's investment in Holden should continue despite its assessment that Holden could not generate sufficient returns, because if it did not continue, Holden would breach the contractual promises it had made to its dealers. For the reasons given earlier, Holden had not in fact promised to continue to supply its dealers absolutely, for the five year term. It promised only to endeavour to do so. The plaintiff's analysis assumes (again without being explicit) that Holden would have had a real chance at persuading GMC to continue the Australian business despite its conclusion that the business could not deliver sufficient returns, because of the need to perform a supply obligation that it had not made explicitly. In submissions the plaintiff described Holden's failure to make endeavours as a failure to *negotiate* with GMC. It may be accepted that the significant consequences visited upon those affected by the decision, especially dealers, made the exit decision a difficult one (as GMC said in its public statements and briefing material). However, it was not shown that Holden would have any real power in a negotiation or any compelling commercial case to make, had it attempted to persuade GMC to decide differently or to defer the implementation of its decision. GMC was prepared to make the decision in fact, despite it being, on its own assessment, difficult, and according to its public statements, financially costly to implement.

290 As the defendant submitted, the notion that it is more likely than not that entreaties from Australia would have changed anything, is singularly unlikely. Holden did not have to call a decision maker to answer an inference to the opposite effect (by counter-factual evidence about whether a different decision might have been) when regard is had to the objective facts. The plaintiff did not establish that it was necessary, acting as a reasonable person in Holden's position would act, to seek to persuade or negotiate with Holden in late 2019 and early 2020, to change or defer its decision to exit the Australian market.

291 **Third**, the plaintiff has not established that a reasonable person in Holden's position would have sought to enforce supply to it under the Distribution Agreements. It has not shown (or even attempted to show) that GMC having made the decision to retire the Holden brand, it would have been commercially realistic for Holden to seek to compel enforcement of the supply agreements from another GMC subsidiary. As discussed earlier, the cessation of supply occurred because GMC decided to shut down the Holden brand, not because GMOD decided for its own reasons not to comply with the Distribution Agreement. On the objective facts, GMOD continuing to supply Holden (on a business as usual basis) would have entailed subverting the GMC decision to exit the brand and accept no new orders for new vehicles after March 2020. The plaintiff did not establish that a reasonable person ought to have regarded the prospect of compelling supply in those circumstances as something that was objectively likely to achieve supply, commercially or legally[133], or was even a remote possibility. No such proof was attempted.

292 Generally speaking, a subsidiary is entitled to take direction from and act in the interests of its immediate or ultimate holding company.[134] Holden acting in accordance with GMC's wishes was not unreasonable, in circumstances where the steps it might have taken to seek to persuade GMC against its investment analysis or to subvert GMC's decision by trying to enforce supply from another GMC subsidiary, were unlikely to achieve supply. Holden's inaction as it were, did not amount to a failure to endeavour to supply in breach of clause 9.1(g) of the Dealer Agreement.

293 The defendant contended that after the decision to retire the brand, Holden oversaw the 'share of build activity' for the remaining stock, all of which was an 'endeavour' to meet reasonably anticipated demand, noting that demand would reduce to zero because there would be no vehicles available and nor would there be any SEG targets beyond 2021.

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133 The plaintiff said that it was not required to show that the Distribution Agreements could be or would likely be specifically enforceable.

134 *Mercedes-Benz*, [219].

294 For the reasons discussed, Holden had made endeavours before 2020 to achieve the supply of new cars to dealers as required by clause [.14.3] (to allow them to achieve SEG or meet reasonably anticipated demand) which had satisfied the contractual obligation, although the endeavours failed in the face of GMC's decision. On the evidence, what Holden did in 2020 was to distribute what it accepted was very limited remaining stock in accordance with its policies for equitable distribution. After March 2020 the 'endeavours' obligation was attenuated, as the defendant submitted.

295 The plaintiff's claim was concerned with what I have called 'business as usual' supply. Steps taken in 2020 could not amount to an attempt to achieve business as usual supply, because consequent upon GMC's exit decision, ongoing supply was to end. Consistent with Holden's primary case, what occurred in 2020 was beside the point.

296 Mr Beecham's evidence was (to summarise it very generally) that consumer demand for both new and used vehicles was very high from the beginning of 2020 and in effect, he could sell significantly more vehicles than he was able to supply. It is also true that once new Holden vehicles were simply not available, consumer demand would cease. It is unnecessary to determine the point at which demand actually ceased, having regard to the conclusions I have already reached. Holden's point about the cessation of demand to zero, and the fact that SEG targets would be inutile once no supply was available, is technically correct, although it is not addressed to the substance of the plaintiff's case and is unnecessary having regard to the conclusions otherwise reached.

297 The answer to **common question 2(c) is No**.

PART D: GOOD FAITH

298 The Franchising Code is prescribed as a mandatory industry code for the purposes of s 51AE of the *Competition and Consumer Act 2010* (Cth) (**CCA**), contravention of which is a contravention of s 51ACB of the CCA. Holden was obliged by s 6(1) of the Franchising Code to act towards the plaintiff and group members with good faith within the meaning of the unwritten law, in respect of any matter arising under or in

relation to the Dealer Agreement.[135] It was alleged that Holden was also subject to a duty of good faith implied as a term of the Dealer Agreement at common law.

299 The conduct alleged to have been contrary to the obligation was the same conduct as that relied upon for the other contractual breaches, framed in the same way. The plaintiff's case was that in breach of the statutory obligation (and the good faith term) Holden *failed to ensure the availability for supply of new Holden branded motor vehicles for the Term, and refused to accept or consider purchase orders for new vehicles*. By way of particulars, the plaintiff said that the core purpose of the fixed term agreement was to ensure the security of supply and commercial certainty for the parties; that any interruption or cessation of the supply of new vehicles during the term would have significant adverse consequences for the plaintiff and group members; that Holden did not have in place sufficient contractual arrangements for the security of supply of new vehicles for the Term, or failed to enforce its contractual arrangements. Accordingly, it did not act with fidelity to the bargain represented by the Dealer Agreements, but undermined it, not acting reasonably nor with fair dealing. The plaintiff relied upon the absence of evidence from the defendant about whether or why Holden failed to have in place sufficient contractual arrangements for the security of supply or failed to enforce such arrangements that it had (the same evidence as relied upon for the breach of endeavours obligation).

300 Clause 6(1) of the Franchising Code provides that each party to a franchise agreement must act towards another party with good faith, *in respect of any matter arising under or in relation to* the agreement and the Franchising Code. In its written submissions the plaintiff relied upon the analysis of the statutory obligation in *Mercedes-Benz*, to the effect that because of the language in the opening words of clause 6(1) of the Franchising Code ('*in respect of any matter arising under* ***or in relation to***') the statutory duty is not limited strictly to the matters arising under the franchise agreement but

135 Section 6 of the Franchising Code applies obligations of good faith to every franchise contract, and prevents the exclusion of such an obligation as a matter of interpretation of a particular contract: *Mercedes-Benz*, [3063].

applies more broadly to the whole of the dealings between a franchisor and a franchisee.[136]

301 However, in closing, the plaintiff's Senior Counsel conceded that the good faith claim 'does not provide a separate or alternative route home' if the Court were otherwise unpersuaded to find for the plaintiff on its primary contractual claims.

302 The concession was well-founded. As the defendant submitted, the application of clause 6(1) of the Code requires the identification of the matter arising under or in relation to the franchise agreement or the Code in respect of which there has been a failure to act in good faith by one party towards the other. It does not enable a general claim that there has been a failure to act in good faith. Fundamentally 'it is good faith or fair dealing between the parties *by reference to the bargain and its terms* that is called for'.[137] As the Full Court of the Federal Court said in *Paciocco*, the notion of good faith 'is rooted in the bargain and requires behaviour to support it, not undermine it'.[138] This case does not raise for consideration, on its facts, conduct that might be characterised as arising 'in relation to' the Dealer Agreement or the Franchising Code, but not 'under' the Agreement or the Code. It is unnecessary to explore the legal significance of the opening words of s 6(1), in this case.

303 The usual content of an obligation to act in good faith at common law is a requirement to act honestly and with fidelity to the bargain, not to act dishonestly, and not to act to undermine the bargain or the substance of the contractual benefit bargained for, and to act reasonably and with fair dealing. It includes considerations of whether a party has acted honestly and not arbitrarily and whether the party has co-operated to achieve the purpose of the bargain. Conduct which is dishonest, arbitrary, or motivated by a purpose which is antithetical to the evident object of a contractual provisions, or which is otherwise motivated by bad faith will not meet the standard.[139]

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136 *Mercedes-Benz*, [3074].

137 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [289] (***Paciocco***).

138 *Paciocco*, [289].

139 *Mercedes-Benz*, [3077] and the authorities cited there: *Australian Competition and Consumer Commission v Geowash Pty Ltd (No 3)* (2019) 368 ALR 441, [746]; *Ali v Australian Competition and Consumer Commission* (2021) 394 ALR 227, [194].

Where the subject conduct is objectively unreasonable, the absence of reasonableness may inform the evaluation of whether there has been a lack of good faith but objective unreasonableness is not sufficient by itself to amount to lack of good faith.[140] There are no closed categories of conduct that might constitute acting without good faith. The evaluation of any conduct said to amount to a breach of a duty to act in good faith is undertaken with regard to the substance of the bargain. In *Overlook v Foxtel*, Barret J observed that,

> The implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary. … The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.[141]

304 The normative standard adopted by the Franchising Code by reference to the written and unwritten law is concerned to protect against the exploitation by franchisors of positions of economic or contractual strength as against franchisees who may be in positions of particular economic or contractual vulnerability.[142]

305 The plaintiff in this case did not rely, for example, on the cynical exercise of a contractual power, dishonesty, acts motivated by bad faith or on particular conduct undermining the bargain, as distinct from a *failure to perform the bargain itself*. As the defendant submitted and the plaintiff ultimately accepted, the crux of the claim was that Holden failed to support and not undermine the parties' contractual bargain by failing to ensure continuity of supply of new vehicles for the Term. The claim could, then, rise no higher than the primary contractual claims in establishing *that to which fidelity was required*. If the bargain did not require continuity of supply in an absolute sense then good faith could not require it.

306 As the plaintiff accepted, whether or not an implied term of good faith were recognised in addition to the statutory obligation, would make no difference to the

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140 *Mercedes-Benz*, [3077] and the authorities cited there.

141 *Overlook v Foxtel* [2002] NSWSC 17, [67]; see also *Mercedez-Benz*, [3087].

142 *Mercedez-Benz*, [3069].

outcome, save possibly in respect of the assessment of damages (according to the plaintiff) which was not an issue requiring determination.

307 Because of the way the case was put, it follows from the conclusions reached earlier in these Reasons, that it has not been established that the defendant failed to act with fidelity to the bargain, or otherwise failed to act in good faith, contrary to its statutory obligation to do so.

PART E: DAMAGES

308 Even if, contrary to the foregoing conclusions, the defendant in fact breached the 'endeavour to supply' obligation, the plaintiff did not establish any causal consequence of the breach, and only nominal damages would follow.

309 Damages for breach of contract are awarded with the object of placing the plaintiff in the position in which it would have been had the contract been performed, so far as money can do it.[143] In ascertaining damages for loss of bargain, the Court is required to compare the actual position of the claimant with the position in which it would likely have been, in a counterfactual scenario in which the defaulting party performed its obligation. The plaintiff must plead all material facts upon which it relies to constitute the counterfactual scenario.[144] The defendant is also expected to plead any different counterfactual on which it seeks to resist the plaintiff's case.[145] The plaintiff bears the onus of proving and quantifying the loss claimed and must prove these matters on the balance of probabilities with as much precision as the subject matter reasonably permits.[146] A mere difficulty in estimating damages does not relieve a court from the responsibility of estimating damages as best it can.[147] Where the evidence is uncertain the Court is entitled to take a 'broad brush approach' and

143 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80 (Mason CJ and Dawson J) (***Amann Aviation***).
144 *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151, [72] (Gageler and Edelman JJ) (***Berry***).
145 *Berry*, [72].
146 *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257, [37] (Hayne J, with whom Gleeson CJ, McHugh and Kirby JJ agreed) (***Placer***).
147 *Amann Aviation*, 83 (Mason CJ and Dawson J); *Placer*, [38].

'something short of certainty may suffice'.[148] When evaluating the evidence available in support of any counterfactual scenario, the Court ought to have regard to the considerations derived from *Jones v Dunkel* and *Blatch v Archer*.[149]

310 This is not a case of a mere difficulty in estimating damages. The plaintiff's pleaded counterfactual case was concerned with and confined to, those parts of its case by which it alleged that the defendant had an obligation to ensure a supply of new Holden vehicles for the Term (its implied terms case). The plaintiff did not plead any counterfactual concerning a breach of clause 7.17.14.3 of the Wholesale Standards. In addressing its alleged breach of endeavours obligation the plaintiff made the submissions discussed earlier. But its pleading fell well short of what is required for a counterfactual damages contention. It did not allege what Holden would have done to endeavour to obtain supply of new vehicles where GMC had decided to exit the Holden brand. Nor did the pleading engage with the likelihood or otherwise that any such endeavours by Holden would have resulted in it obtaining supply of new Holden vehicles. It did not articulate what SEG targets, if any, Holden would have set in that counterfactual or what reasonably anticipated demand would be in that counterfactual. On the evidence, its damages case was addressed only to a counterfactual scenario in which Holden performed an obligation to ensure the availability of supply of new Holden vehicles to group members. The plaintiff's evidence addressed to the breach of the endeavour to supply obligation (which was insufficient to establish that breach) did not extend to what would have been necessary to establish damages for breach of that obligation.

311 The plaintiff did not formulate a common question in relation to the damages counterfactual that was addressed to a breach of clause 9.1(g) of the Dealer Agreement and clause 7.17.14.3 of the Wholesale Standards.

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148 *Euromark Ltd v Smash Enterprise Pty Ltd & Ors (No 3)* [2023] VSC 490, [15] and the authorities there; *Amcor Ltd v Barnes* [2016] VSC 707, [1042]-[1045]; *Amann Aviation*, 83 (Mason CJ and Dawson J).

149 See *RW & ME Smith Pty Ltd v Boral Resources (Vic) Pty Ltd* [2022] VSCA 216, [27], [31]-[33].

312 It is unnecessary to answer the questions that were formulated (common question 4, sub-paragraphs (a)-(f)). I have considered the parties' evidence and submissions but it would not be productive to answer the questions on a hypothetical basis. Doing so would require positing a contractual construction contrary to the construction I have determined, and would involve a number of assumptions, given the uncertain content of the supply obligation.

CERTIFICATE

I certify that this and the 126 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Nichols of the Supreme Court of Victoria delivered on 20 March 2025.

DATED this 20th day of March 2025.