

**IN THE GENERAL DIVISION OF  
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2023] SGHC 144**

Suit No 254 of 2020

Between

Konica Minolta Business Solutions Asia  
Pte Ltd

*... Plaintiff*

And

NPE Print Communications Pte Ltd

*... Defendant*

Counterclaim of Defendant

Between

NPE Print Communications Pte Ltd

*... Plaintiff in Counterclaim*

And

Konica Minolta Business Solutions Asia  
Pte Ltd

*... Defendant in Counterclaim*

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**JUDGMENT**

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[Contract — Contractual terms — Partly written and partly oral agreements]  
[Contract — Remedies — Damages]

[Commercial Transactions — Sale of goods — Breach of contract]

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**Konica Minolta Business Solutions Asia Pte Ltd**

**v**

**NPE Print Communications Pte Ltd**

**[2023] SGHC 144**

General Division of the High Court — Suit No 254 of 2020

Goh Yihan JC

8–11, 15–18, 22, 23 November 2022, 3, 24 February 2023

17 May 2023

Judgment reserved.

**Goh Yihan JC:**

1 The plaintiff, Konica Minolta Business Solutions Asia Pte Ltd (“Konica”), is a private company limited by shares and is in the business of, among others, supplying wholesale printing machinery and equipment as well as retail sale of cameras and other photographic-related goods. Importantly for the present case, Konica is the manufacturer and supplier of the industrial ink-jet digital printer known as Accurio Jet KM-1 (“KM-1”). The defendant, NPE Print Communications Pte Ltd (“NPE”) is, in turn, a private company limited by shares in the business of, among others, commercial printing, including the business of food packaging and printing on demand.

2 Konica commenced this suit against NPE principally for the balance 80% of the purchase price of the KM-1 that NPE had purchased from Konica (*ie*, \$1,326,800 or “the Balance Sum”). Konica’s case, which it characterises as

“bristling with simplicity”,<sup>1</sup> is that NPE breached the terms and conditions stated in Konica’s Order Form that was signed between the parties on 2 November 2018 (“KM-1 Order Form”) by not making payment of the Balance Sum. Konica further submits that NPE is also in breach of those terms by not paying the accrued and the committed print charges (“the Click Charges”). In its defence, NPE argues, among others, that on the terms of the true agreement between the parties, the Balance Sum never fell due and payable. Instead, due to the malfunctioning of the KM-1 and its complete shutdown, NPE has incurred losses, including the payment of the 20% down payment (*ie*, \$331,700 or the “Down Payment”). NPE counterclaims damages for its losses against Konica on the alternative bases of misrepresentation or breach of contract.

3       Reduced to its core, the present case comes down to two primary issues. First, given that neither Konica nor NPE dispute the existence of an agreement between them for the sale and purchase of the KM-1 (subject to such agreement being rescinded for misrepresentation), what are the exact terms of this agreement? Second, depending on what those terms are, have the parties each performed their obligations under the agreement? While NPE mounted a counterclaim founded alternatively on misrepresentation, I find that its case is better dealt with as a claim in breach of contract for reasons that I will explain below. Ultimately, the resolution of these issues is made more difficult than it has to be for a transaction of this nature due to the inadequately drafted documentation, as well as various allegations of undocumented and often verbal discussions conducted between the parties.

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<sup>1</sup> Plaintiff’s Closing Submissions p 5 at para 17.

4 After considering the parties’ submissions and the relevant material, I have decided to award (a) Konica some damages in respect of the Click Charges, and (b) NPE damages of \$894,910 on the basis that Konica had breached its contractual obligations. I explain the reasons for my decision below.

### **The undisputed facts**

5 I start with the undisputed facts, along with some observations. On or around June 2018, NPE was interested in purchasing a KM-1. Konica’s salesperson, Mr Lewis Lim, introduced the KM-1 to NPE’s managing director, Mr Francis Chia. Mr Lewis Lim did so by providing Mr Francis Chia with a brochure of the KM-1 (“KM-1 Brochure”).<sup>2</sup> The pair met on further occasions between July and October 2018. During this period, there was no KM-1 physically in Singapore for NPE to review or inspect. It should be noted that Mr Lewis Lim had left Konica’s employment on 30 August 2019 and Konica has not called Mr Lewis Lim as a witness in support of its case.

6 Because there was no KM-1 physically in Singapore, Mr Lewis Lim had suggested to Mr Francis Chia to send materials, such as media content, to Konica Japan for test printing. On 20 September 2018, NPE sent these materials to Konica Japan for test printing to be conducted on two-sided polyethylene (“PE”) coated paper. NPE’s materials were printed out using a KM-1 in Japan. In or around October 2018, Mr Lewis Lim sent Mr Francis Chia the test print samples from Japan. Mr Francis Chia was impressed by the test print samples.

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<sup>2</sup> Defendant’s Bundle of Documents (“DBOD”) at p 1303.

He became even more interested in purchasing a KM-1 because he felt that it was rare to have such good quality two-sided prints on PE material.<sup>3</sup>

7 On 29 October 2018, Mr Lewis Lim presented a written proposal in respect of the KM-1 (“KM-1 Proposal”) to Mr Francis Chia. There were two versions of the KM-1 Proposal in evidence. They are both dated 29 October 2018 and are identical except for the offer price, which is \$1,900,000 in the one produced by NPE,<sup>4</sup> and \$1,550,000 in the one produced by Konica in discovery.<sup>5</sup> NPE’s case is that the offer price had been reduced in the version with the price marked as \$1,550,000. But since NPE had not seen this latter version prior to discovery, I will only refer to the version that has \$1,900,000 as the offer price.

8 The KM-1 Proposal is fairly detailed and contains several constituent documents. These constituent documents include: (a) a cover letter (“the Proposal Cover Letter”) signed off by Konica’s Mr Lewis Goh (“Mr Goh”), who is a Senior Account Manager,<sup>6</sup> (b) a brochure about the KM-1 that is similar to but not an exact copy of the KM-1 Brochure (“the Proposal Brochure”),<sup>7</sup> (c) a document titled “Proposal” that lists various package prices, included accessories, a sample service contract with two options, various terms and conditions, as well as an appendix of various spare parts (“the Proposal

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<sup>3</sup> Transcript, 17 November 2022, p 32 at line 30 to p 33 at line 4; Chia Wing Kwong’s AEIC pp 10–11 at para 35.

<sup>4</sup> Plaintiff’s Bundle of Documents (“PBOD”) Vol 2 at p 380; Exhibit FC-5 in Chia Wing Kwong’s AEIC at p 98.

<sup>5</sup> PBOD Vol 2 at p 361.

<sup>6</sup> Exhibit FC-5 in Chia Wing Kwong’s AEIC at p 87.

<sup>7</sup> Exhibit FC-5 in Chia Wing Kwong’s AEIC at pp 88–97.

Details”),<sup>8</sup> and (d) a signature page for both parties to sign off on (“the Proposal Signature Page”).<sup>9</sup>

9 At this point, I make three observations about the KM-1 Proposal. First, while the Proposal Cover Letter stated that Mr Francis Chia had visited Japan on 6 to 7 September 2018 to evaluate the KM-1’s print quality and capabilities, this is clearly untrue as by October 2018, Konica would have known that such a visit never took place. As such, Konica is wrong to characterise this as an “invitation” from Mr Goh to Mr Francis Chia for the latter to visit Konica’s office in Japan.<sup>10</sup> Second, while it is true that neither Konica nor NPE signed off on the Proposal Signature Page, Konica is not correct to suggest that it follows that neither party signed or acknowledged the KM-1 Proposal at all.<sup>11</sup> This is because Konica’s Mr Goh had clearly signed off on the Proposal Cover Letter, which is part of the KM-1 Proposal. Further, it makes no sense for Konica to present Mr Francis Chia with a proposal that it never acknowledged or intended to honour. On the contrary, the Proposal Cover Letter states that the KM-1 Proposal was vetted by no less than three individuals of various seniority at Konica, including Mr Lewis Lim. Third, the offer price of the KM-1 on the Proposal Details was stated to be \$1,900,000.<sup>12</sup> While there are two other prices quoted on the page, I understand those to be the pre-discounted prices.

10 After negotiations, on or around 2 November 2018, Konica presented the KM-1 Order Form to NPE for the purchase of the KM-1 at \$1,658,500,

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<sup>8</sup> Exhibit FC-5 in Chia Wing Kwong’s AEIC at pp 98–109.

<sup>9</sup> Exhibit FC-5 in Chia Wing Kwong’s AEIC at p 110.

<sup>10</sup> Plaintiff’s Closing Submissions pp 2–3 at para 6.

<sup>11</sup> Defendant’s Closing Submissions p 4 at para 6.

<sup>12</sup> Exhibit FC-5 in Chia Wing Kwong’s AEIC at p 98.

including taxes.<sup>13</sup> Mr Goh and Mr Francis Chia signed this Order Form on behalf of Konica and NPE, respectively. At this point, I make some observations about the Order Form. Most broadly, while the KM-1 Order Form contains several terms and conditions, it is decidedly bare. For example, the KM-1 Order Form does not even make clear what the terms of payment are. All that it states under the section titled “Terms of Payment” is that the “Down Payment” is 20%, amounting to \$331,700 with taxes. There is otherwise no provision on when the Balance Sum is due and how that is to be paid, whether by instalments or otherwise. Further, while the KM-1 Order Form refers to a “Service Click Model” under the section titled “Service Contract”, it merely lists the cost of the impressions made by the KM-1 subject to a minimum charge of \$10,000 per month. There is otherwise no mention of what the “service” to be provided is, in contrast to the description of the “Service Click Model” in the Proposal Details. In my view, for reasons that I will develop later, the KM-1 Order Form could not have been intended by the parties to constitute the entirety of their true agreement. Indeed, even by Konica’s own pleaded case – which it appears to have dropped in its Closing Submissions – the KM-1 Order Form is subject to other terms, namely (a) the General Terms of its Products and Services Agreement and/or (b) further implied terms (which appear to be based on the said General Terms).<sup>14</sup>

11 Returning then to the undisputed facts, due to the space and environmental requirements for housing the KM-1, NPE carried out customisation works at their premises from December 2018 to January 2019. Following this, the components of the KM-1 were delivered to NPE’s premises

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<sup>13</sup> Exhibit FC-6 in Chia Wing Kwong’s AEIC at p 113.

<sup>14</sup> Statement of Claim at para 5.

on 19 January 2019. NPE accepted the components of the KM-1 by signing and acknowledging Konica’s delivery note dated 19 January 2019.

12 The installation of the KM-1 by Konica’s engineers took place over more than a month and was completed on 4 March 2019. On or around 4 March 2019, Konica requested NPE to sign the “Completion of Installation” form (“COI”). Mr Francis Chia obliged but annotated in his handwriting that this did not constitute acceptance of the KM-1 and that commissioning had yet to be completed. However, before the installation was completed, NPE had started to use the KM-1. In particular, from late February 2019 to 5 March 2019, NPE sent some printed test samples from the KM-1 to a testing agency for confirmation that the prints carried out by the KM-1 would be food safe and could be used to fulfil NPE’s production of food packaging.

13 On 29 March 2019, Konica sent its invoice to NPE for the full purchase price of KM-1. This invoice stated that the payment term for this sum is 30 days. When NPE did not pay up, Konica reminded NPE on several occasions thereafter to make full payment of the Down Payment. In response, NPE made a total payment of \$331,700 in fulfilment of the Down Payment in the following manner: (a) \$100,000 on 4 April 2019 and (b) \$231,700 on 6 August 2019. This meant that by 6 August 2019, NPE had fully paid the Down Payment. Despite all this, NPE consistently encountered problems with the KM-1. In April 2019, a WhatsApp chat group was created between representatives from Konica and NPE in which NPE raised issues and/or problems faced with the KM-1 (“WhatsApp Chat Group”). Such messages were sent often over the course of several months.

14 On 1 January 2020, Konica’s Mr Davion Than (“Mr Than”) informed Mr Francis Chia that Konica would be sending a “Tiger Team” consisting of representatives from Konica Japan to address the issues with KM-1. Between 29 January 2020 to 7 February 2020, Konica’s Tiger Team visited NPE to troubleshoot the KM-1. However, issues with the KM-1 persisted. On 7 April 2020, despite the Tiger Team visit, NPE faced a complete breakdown of the KM-1. NPE’s Mr Soh Ting Poh then wrote to Konica to request assistance. On 8 April 2020, Konica initially sent NPE a quotation of \$428.00 for services to be rendered in relation to assistance sought for the complete breakdown. However, on 14 April 2020, Konica sent NPE a different quotation in the sum of \$60,512.83 for the same services. NPE did not accept the quotation and the KM-1 has therefore remained non-operational since.

15 On 20 April 2020, Konica’s technicians attended at NPE’s premises and carried out a complete shutdown of the KM-1. Konica’s reason for the shutdown was that “the machine will not be running” and that it was purportedly important that the machine be shut down “when the machine is not in use for [a] long period of time”.<sup>15</sup>

### **Whether Konica succeeds in its case against NPE?**

#### ***The parties’ general cases***

16 With these facts in mind, I come now to consider Konica’s case against NPE. Its case is that NPE is in breach of the parties’ agreement as contained in the KM-1 Order Form because NPE has failed to make payment of the Balance Sum as well as the Click Charges. Konica’s position in its Closing Submissions,

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<sup>15</sup> PBOD Vol 1 at p 681.

which appears be different from its pleaded case, is that the KM-1 Order Form contains *all* the terms of the parties’ agreement and does *not* include terms of its Products and Services Agreement.<sup>16</sup> Konica therefore now accepts that the General Terms in the Products and Services Agreement cannot form part of the parties’ agreement as contained (so it says) in the KM-1 Order Form because, among others, there is no reference in the KM-1 Order Form to the Products and Services Agreement. Since NPE does not seek the incorporation of any terms from the Products and Services Agreement, I will not deal with this Agreement further.

17 In contrast, NPE’s defence is that the parties’ agreement is not contained solely in the KM-1 Order Form. Instead, the KM-1 Proposal forms part of the parties’ agreement.<sup>17</sup> It points out that the KM-1 Proposal was described in the Proposal Cover Letter as a “new offer”.<sup>18</sup> In addition, the KM-1 Proposal also contains statements about the KM-1’s description, capabilities, and specifications.<sup>19</sup> Indeed, Konica’s witness, Mr Yoshihisa Uchiyama (“Mr Uchiyama”), agreed that the specifications in the KM-1 Proposal, specifically towards the end of the Proposal Brochure, are levels which the KM-1 “should” perform to.<sup>20</sup> In gist, NPE submits that the critical provisions of the KM-1 Proposal were incorporated into the eventual agreement between the parties.<sup>21</sup>

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<sup>16</sup> Plaintiff’s Closing Submissions p 5 at para 19; p 7 at para 20.

<sup>17</sup> Defendant’s Closing Submission p 5 at para 7(a).

<sup>18</sup> Defendant’s Closing Submission p 5 at para 8.

<sup>19</sup> Defendant’s Closing Submissions p 5 at para 9.

<sup>20</sup> Transcript, 10 November 2022, p 16 at line 4.

<sup>21</sup> Defendant’s Closing Submissions p 6 at para 12.

18 Further, NPE also says that on 2 November 2018, which is the day the KM-1 Order Form was signed, Mr Francis Chia and Mr Lewis Lim orally agreed that the first payment of the Down Payment would be payable on or after delivery of the KM-1, and the Balance Sum and Click Charges would be payable upon the KM-1 being commissioned.<sup>22</sup> As such, NPE submits that the material terms of the parties' agreement included the following:<sup>23</sup> (a) implied conditions that the description and specifications of the KM-1 would comply with the description and specifications set out in the KM-1 Proposal, (b) the purchase price would be \$1,550,000, subject to taxes, and the Service Click Model would apply, (c) the Down Payment would be payable on or after the delivery of the KM-1, and (d) the Balance Sum and Click Charges would be payable after the KM-1 was commissioned.

19 In response, Konica insists that the KM-1 Proposal does not form part of the parties' agreement for the following reasons.<sup>24</sup> First, the contents of the KM-1 Brochure and the KM-1 Proposal are not part of or referred to in the KM-1 Order Form. Second, the parties did not sign the KM-1 Brochure and the KM-1 Proposal. Third, NPE did not insist that the Proposal Brochure or the Proposal Details be annexed to the KM-1 Order Form, especially if they are so important. Fourth, the Proposal Brochure and the Proposal Details are essentially promotional and marketing material intended as advertising puffs and not intended to be part of the parties' agreement. Further, Konica also disputes the existence of an oral agreement<sup>25</sup> between Mr Francis Chia and

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<sup>22</sup> Defendant's Closing Submission pp 6–7 at paras 13 and 15(c); Chia Wing Kwong's AEIC pp 13–14 at para 42.

<sup>23</sup> Defendant's Closing Submissions pp 6–7 at paras 15 and 40.

<sup>24</sup> Plaintiff's Closing Submissions pp 7–8 at para 22.

<sup>25</sup> Plaintiff's Closing Submissions p 9 at para 24.

Mr Lewis Lim because, among others, the alleged terms of the oral agreement are different from and unrelated to the terms of the KM-1 Order Form. Further, the alleged terms of the oral agreement are ambiguous and there is no exact or realistic date by which the agreement could have been concluded.

***The relevant issues***

20 In my view, the parties' general cases raise the following broad issues, which I will address in turn.

- (a) First, what are the terms of the parties' agreement? Specifically, are these terms to be found only in the KM-1 Order Form, or are they to be found elsewhere as well?
- (b) Second, depending on what those terms are, is NPE obliged to pay the Balance Sum and the Click Charges to Konica?

***What are the terms of the parties' agreement?***

*The specific issues*

21 In my view, the broad issue of ascertaining the terms of the parties' agreement requires the further consideration of several specific issues. First, did the parties intend for their agreement to be contained solely within the KM-1 Order Form, or did they intend for it to comprise terms beyond that? This issue flows from Konica's primary argument that the parties' agreement is encompassed wholly within the KM-1 Order Form, and it would therefore be inappropriate to refer to terms outside of that document.

22 Second, if the parties' agreement does comprise terms beyond those in the KM-1 Order Form, can such terms be located in (a) the KM-1 Proposal, and

(b) the alleged oral agreement between Mr Lewis Lim and Mr Francis Chia on 2 November 2018? This issue follows from NPE’s argument that the parties’ agreement contains terms from both these other sources.

*My decision: the parties’ agreement comprises terms beyond those in the KM-1 Order Form*

- (1) The parties did not intend the KM-1 Order Form to comprise the entirety of their agreement

23 With these specific issues in mind, I find that the parties did not intend the KM-1 Order Form to comprise the entirety of their agreement. To begin with, the relevant principles are not in doubt. In the Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (“*Zurich Insurance*”), V K Rajah JA observed (at [40]) that in determining whether contracting parties intended that a document contains all the terms of their agreement, a court may look at extrinsic evidence, including the surrounding circumstances, and apply a normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties’ agreement. In contrast, as the learned judge observed (at [112]), if the contractual terms are ambiguous on their face, it is likely that the contract does not contain all the terms of their agreement. The application of these principles leads me to conclude that the parties did not intend the KM-1 Order Form to contain all the terms of their agreement.

24 First, it is clear that the KM-1 Order Form<sup>26</sup> is not complete on its face. In fact, its clauses are ambiguous. For example, a clause refers to a “Service

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<sup>26</sup> PBOD Vol 1 at p 1.

Click Model” but, apart from providing for the applicable charges, it does not explain what services are provided for under that model. Also, another clause expressly states that the “maintenance scheme” is “TBA” (to be affirmed). Further, the KM-1 Order Form provides no indication as to when and how the Balance Sum is to be paid. Given this, the parties must have contemplated that the KM-1 Order Form is to be read with other documents so as to constitute their true agreement.

25 Second, the KM-1 Order Form does not contain an entire agreement clause or a similar clause which indicated that the parties intended for their agreement to be encompassed entirely within its four corners (for the relevance of such clauses, see *Zurich Insurance* at [131]). The closest possible clause is contained in note 3 of the KM-1 Order Form, which reads “Konica ... agrees to sell to the Buyer and the Buyer agrees to buy the above said upon the terms and conditions set out overleaf 20% of the agreed price of the KMBS Product(s) shall be levied upon cancellation of order”. While this clause provides that NPE purchases the KM-1 subject to the terms and conditions in the KM-1 Order Form, it does not say that it is subject to those terms and conditions *only*.

26 Third, on Konica’s *own* pleaded case, the KM-1 Order Form has to be read subject to (a) the General Terms of its Products and Services Agreement and/or (b) further implied terms (which appear to be based on the said General Terms).<sup>27</sup> While Konica has dropped this argument in its Closing Submissions, the fact that it pleaded this in the first place shows that, even by its own admission, the KM-1 Order Form is incomplete and needs to be read with other documents in order to function. For the avoidance of doubt, I make no finding

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<sup>27</sup> Statement of Claim at para 5.

as to whether the KM-1 Order Form is to be read subject to these external terms that Konica had pleaded originally. Indeed, in its reply to NPE’s Closing Submissions, Konica again admits that there is a gap in the KM-1 Agreement in that it does not say when the Balance Sum is to be paid.<sup>28</sup> Konica cannot have it both ways – it cannot argue that the KM-1 Agreement represents the entirety of the parties’ agreement but then seek to imply a term as to when the Balance Sum is payable when it suits its case.

27 Accordingly, I find that the parties had not intended for the KM-1 Order Form to comprise the entirety of their agreement. The next question then is, where else are the terms of the parties’ agreement to be located?

(2) The parties’ agreement includes the terms in the KM-1 Proposal

28 I first consider whether the parties’ agreement includes the terms in the KM-1 Proposal. Specifically, these terms as pleaded by NPE are that the description and specifications of the KM-1 would comply with the descriptions and specifications set out in the KM-1 Proposal. In my view, the legal question is whether, in the parties’ true agreement, there were other terms incorporated apart from those contained in the KM-1 Order Form. In this regard, whether the terms contained in a separate document are incorporated into a present agreement may be important, especially when contracting parties intend to supplement an otherwise bare agreement with more detailed terms subsequently. The Court of Appeal had the occasion to deal with this issue in *RI International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 (“*RI International*”). In that case, the court had to consider whether a set of terms to arbitrate in Singapore, found in a detailed contract note which the

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<sup>28</sup> Plaintiff’s Reply Submissions p 5 at para 14.

appellant sent to the respondent shortly after their deal was concluded by an e-mail confirmation, was incorporated as part of the contract between the parties in the context of the international rubber commodities market.

29 While *RI International* concerned the incorporation of terms sent *after* the initial agreement was concluded, this is not materially significant in relation to whether the terms found in a document available to contracting parties *before* the present agreement was concluded can be incorporated in the latter. In this regard, Sundaresh Menon CJ held in *RI International* (at [51]) that the law adopts an objective approach towards questions dealing with the incorporation of terms. Thus, whether the terms of the contract note was incorporated into the parties' agreement depended on the parties' objective intentions as gleaned from their correspondence and conduct. While not strictly relevant in the present case, the court noted that the relevant background includes the parties' industry, the character of the document that contained the terms in question, as well as the course of dealings between the parties.

30 Applying these principles, I find that the parties' agreement comprises the terms in the KM-1 Proposal. I do not, however, think that the contents of the KM-1 Brochure, *ie*, the first brochure that Mr Lewis Lim showed Mr Francis Chia in June 2018, form part of the parties' agreement. Nor do I understand NPE to be arguing for this outcome. In coming to this conclusion, I disagree with Konica's arguments against the terms in the KM-1 Proposal being part of the parties' agreement.

31 First, it is not relevant that the contents of the KM-1 Proposal are not part of or referred to in the KM-1 Order Form. In so far as the KM-1 Order Form does not expressly spell out the contents of the KM-1 Proposal, this is the whole

point of seeking the incorporation of terms by reference: if the terms are already expressly contained in the KM-1 Order Form, there would have been no need for NPE to argue for the relevance of the terms in the KM-1 Proposal. Also, it is not entirely true that the contents of the KM-1 Proposal are not referred to in the KM-1 Order Form. As I explained earlier at [10], the KM-1 Order Form refers to the “Service Click Model”, which is expressly referred to and elaborated on in the KM-1 Proposal.

32 Second, it is immaterial that the parties did not sign the KM-1 Proposal because the whole point of incorporation by reference is to seek the inclusion of terms that had not been incorporated by signature. Indeed, the lack of a signature on one of the contractual documents between parties does not prevent the incorporation of the terms contained therein (see *RI International* at [76]). Also, it is not strictly correct that the KM-1 Proposal was not signed by the parties. As I alluded to above at [9], the Proposal Cover Letter was signed by Mr Goh on behalf of Konica. Similarly, while it is true that NPE did not insist on the inclusion of the KM-1 Proposal as an annexure to the KM-1 Order Form, that is not relevant if, on an objective analysis, the parties did intend for the terms of the KM-1 Proposal to be incorporated.

33 Third, it surely cannot be said that the terms of the KM-1 Proposal are “advertising puffs”. In this regard, Chao Hick Tin J (as he then was) explained in the High Court decision of *Bestland Development Pte Ltd v Thasin Development Pte Ltd* [1991] SGHC 27 that “[a] praise by a man of his own goods or undertaking is a matter of puffing and pushing and does not amount to a representation”. However, ultimately, the context in which the statement was made matters. Thus, in the Court of Appeal decision of *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886, the bank had stated that

its services “were amongst the best when compared to other international banks”. In that specific context, the court disagreed with the trial judge that this statement was a mere sales puff. Delivering the judgment of the court, Menon CJ held (at [87]) that such statements must be properly evaluated in light of the degree or obviousness of its untruth, the circumstances of its making and, in particular, the expertise and knowledge attributable to the person to whom it is made. Menon CJ concluded (at [89]) that the statement was not obviously untrue and had been made in the context of a presentation to a potential client. That potential client would be entitled not to have treated the statement as mere hyperbole.

34 From an objective standpoint, there are several indicators of why Konica did not intend for the terms in KM-1 Proposal to be mere puffs. First, the Proposal Cover Letter states that the KM-1 Proposal is a “new *offer*” [emphasis added]. This “offer” must have been seriously intended by Konica to be legally binding upon acceptance. Second, the Proposal Brochure clearly provides for a list of specifications of the KM-1. These go beyond mere vague unverifiable hyperbole such as, for example, that the machine can print “ultra-fast” (for more examples, see John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 5th Ed, 2019) (“*Misrepresentation, Mistake and Non-Disclosure*”) at para 3-15). The statements in the KM-1 Proposal therefore exceeded being mere puffs and were actual details of how the machine is to function. On this point, Konica’s witness, Mr Uchiyama, agreed that the specifications in the KM-1 Proposal, specifically those contained towards the end of the Proposal Brochure, are levels which the KM-1 “should” perform to.<sup>29</sup> Indeed, the Proposal Cover Letter even states that the “KM-1 will reflect and

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<sup>29</sup> Transcript, 10 November 2022, p 16 at lines 1 to 5.

provide a *complete solution* for [NPE’s] consideration and investment” [emphasis added],<sup>30</sup> suggesting that the specifications of the KM-1 contained in the Proposal Letter were part of the parties’ bargain. Third, the KM-1 Proposal provides for a final offer price<sup>31</sup> which, again, is liable to be accepted. Fourth, there is a Service Contract<sup>32</sup> which provides for two options, and one of those options was chosen in the KM-1 Order Form. This shows that the two documents are meant to be read together. Finally, while not directly relevant in the present case, there is a detailed “Partnership Alliance/Marketing Incentive Support”<sup>33</sup> for NPE’s KM-1 as the first of its kind in Singapore. Indeed, the final price of \$1,550,000, as provided for in a revised KM-1 Proposal and which was ultimately reflected in the KM-1 Order Form, is based on NPE’s status as a “special partner” and the owner of the “1st Unit” of the KM-1 in Singapore.<sup>34</sup>

35 Given the context in which the eventual price of \$1,550,000 was arrived at, and the detailed provisions concerning how Konica and NPE are to work together to promote the KM-1 in Singapore, I find it difficult to accept that the parties never intended for the terms of the KM-1 Proposal to form part of their agreement. Ultimately, it would be surprising if a company such as Konica would hold out its proposal for the sale of an industrial printer worth more than \$1,000,000, with detailed technical specifications as to how it is to perform, to be a mere puff. Instead, I find that the parties clearly intended for the terms of the KM-1 Proposal to form part of their eventual agreement. For the purposes

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<sup>30</sup> Chia Wing Kwong’s AEIC at p 87.

<sup>31</sup> Chia Wing Kwong’s AEIC at p 98.

<sup>32</sup> Chia Wing Kwong’s AEIC at p 100.

<sup>33</sup> Chia Wing Kwong’s AEIC at p 101.

<sup>34</sup> Chia Wing Kwong’s AEIC at p 98.

of this case, these terms would be that the description and specifications of the KM-1 would comply with the description and specifications set out in the KM-1 Proposal.

36 For these reasons, I accept NPE’s argument that the terms of the KM-1 Proposal form part of the parties’ agreement. In particular, Konica agreed that the description and specifications of the KM-1 would comply with the description and specifications set out in the KM-1 Proposal. I will return to this point when considering NPE’s counterclaim.

(3) The parties’ agreement includes the oral agreement between Mr Lewis Lim and Mr Francis Chia

37 For similar reasons, I also find that the parties’ agreement that came into existence when the KM-1 Order Form was signed on 2 November 2018 includes an oral agreement between Mr Lewis Lim and Mr Francis Chia. In sum, I find that the reason why the payment terms for the Down Payment and the Balance Sum were not clearly spelt out in the KM-1 Order Form is because the parties had entered into an oral agreement on this issue.

38 However, even though the KM-1 Order Form does not address the payment terms, the burden is still on NPE to prove the existence of an oral agreement on the same. In essence, NPE advanced two pieces of evidence: (a) Mr Francis Chia’s testimony that such an oral agreement had been concluded with Mr Lewis Lim, and (b) Mr Cheok Eng Boon’s (“Mr Cheok”), who was NPE’s expert witness at trial, testimony that commissioning was a common practice in the printing industry and that this should support the existence of the oral agreement.

39 Of the two pieces of evidence, I place little to no weight on Mr Cheok’s evidence. First, I did not think he was a credible witness as there were fundamental reasons to doubt his independence. By his own claim, he was at NPE’s premises almost every day<sup>35</sup> to “spy” on the KM-1.<sup>36</sup> I find it hard to believe that he would not have developed a relationship with Mr Francis Chia that put his independence as an expert into play. Second, Mr Cheok was inconsistent in his evidence when cross-examined. For example, while he had said in his AEIC that he had formed his opinion from documents given to him by NPE’s solicitors,<sup>37</sup> he said in court that he had done so based on first-hand observations.<sup>38</sup> Mr Cheok maintained this testimony even after I had asked him to clarify his version of events.<sup>39</sup> He later claimed that he had been at NPE’s premises for “almost every day” in 2019,<sup>40</sup> which I find to be inherently incredible. Third, Mr Cheok agreed under cross-examination that he was not familiar with Konica’s procedure and hence his opinion was confined only to his experience in the companies he had worked in.<sup>41</sup>

40 Instead, the primary basis for my finding that the alleged oral agreement had been entered into is Mr Francis Chia’s evidence to this effect. Significantly, this evidence was *not* challenged by any contrary evidence raised by Konica, or under cross-examination. Indeed, Konica’s counsel did not challenge Mr Francis Chia’s evidence about the oral agreement during trial. More

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<sup>35</sup> Transcript, 18 November 2022, p 52 at lines 5 to 12.

<sup>36</sup> Transcript, 18 November 2022, p 50 at lines 23 to 29.

<sup>37</sup> Cheok Eng Boon’s AEIC pp 3 and 5 at paras 8 and 10.

<sup>38</sup> Transcript, 18 November 2022, p 43 at lines 13 to 18.

<sup>39</sup> Transcript, 18 November 2022, p 44 at lines 19 to 25.

<sup>40</sup> Transcript, 18 November 2022, p 52 at lines 5 to 12.

<sup>41</sup> Transcript, 18 November 2022, p 45 at line 7–p 46 at line 11.

fundamentally, NPE has pleaded that Mr Francis Chia and Mr Lewis Lim orally agreed that the Balance Sum should only be paid upon commissioning of the KM-1.<sup>42</sup> This was a fact that only Mr Francis Chia and Mr Lewis Lim could have known. Despite this, Konica did not call Mr Lewis Lim as a witness at trial. To be fair, Mr Cheok conceded under cross-examination that he had not checked whether commissioning was part of any of the guidelines suggested by the Print & Media Association of Singapore.<sup>43</sup> In the same vein, Mr Cheok was also not able to confirm that the major printer manufacturers practised commissioning.<sup>44</sup> However, while Mr Cheok’s evidence relates to the question of whether commissioning is *generally* an industry practice, it remains that Konica did not challenge Mr Francis Chia’s evidence that, for this *specific* transaction, Mr Lewis Lim had agreed orally with him that the Balance Sum is only to be due after commissioning. On a balance of probabilities, I find that Mr Francis Chia’s version of events is not unbelievable, and I accordingly accept Mr Francis Chia’s evidence that the parties had orally agreed that the Balance Sum was only to be paid after the commissioning of the KM-1 had been completed.

41 Moreover, there are objective reasons to support an oral agreement to this effect between Mr Francis Chia and Mr Lewis Lim. First, Konica did not raise any objection until the present suit that Mr Francis Chia had written on the COI document dated 4 March 2019 that “THIS DOES NOT CONSTITUTE ACCEPTANCE OF MACHINE HEREOF AND COMMISSIONING OF

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<sup>42</sup> Defence and Counterclaim (Amendment No 2) (“D&CC No 2”) p 9 at para 16.2.

<sup>43</sup> Transcript, 18 November 2022, p 45 at lines 27 to 31.

<sup>44</sup> Transcript, 18 November 2022, p 45 at lines 12 to 26.

MACHINE IS YET TO BE APPROVED [*sic*”<sup>45</sup> Second, Konica’s Mr Than had emailed NPE on 1 January 2020 to explain that the Tiger Team’s visit was to carry out “Machine maintenance, verification + commissioning etc”.<sup>46</sup> I find that this is an implicit recognition that commissioning had yet to be carried out. Third, Konica’s witness, Mr Uchiyama, testified that there was a process of “function confirmation” to determine that all the touted specifications of the machine were met, even if this was a different term from “commissioning”.<sup>47</sup> Fourth, Mr Goh, formerly from Konica, testified that commissioning is part of Konica’s typical process which enabled it to charge its customers click charges.<sup>48</sup>

42 Further, Konica’s own conduct is also consistent with the position that it will not demand for the Balance Sum until after commissioning is done. For instance, even after the KM-1 was delivered in March 2019, and after an invoice was issued on 29 March 2019<sup>49</sup> for the payment of the entire purchase price of the KM-1, Konica had only sought payment from NPE in respect of the Down Payment and did not seek payment of the full purchase price until 9 October 2019. This was admitted by Ms So Boon Choo (“Ms So”), Konica’s Finance Manager, during cross-examination.<sup>50</sup> This is also evident from Konica’s internal emails between Ms Magdalene Tham (Konica’s former employee) (“Ms Tham”) and Ms So. In particular, on 25 March 2019, Ms Tham emailed Ms So, among others, that her “message [was] very firm to Francis [that] we

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<sup>45</sup> Chia Wing Kwong’s AEIC at p 132.

<sup>46</sup> Chia Wing Kwong’s AEIC at p 864.

<sup>47</sup> Transcript, 10 November 2022, p 30 at lines 13 to 25.

<sup>48</sup> Lewis Goh Jian Wei’s AEIC p 6 at para 12(m).

<sup>49</sup> So Boon Choo’s AEIC at p 16.

<sup>50</sup> Transcript, 16 November 2022, p 28 at lines 15 to 27.

[*ie*, Konica] *need[ed] the 20%* by this week which [was] non-negotiable” [emphasis added].<sup>51</sup> This clearly shows that, when the KM-1 was delivered in March 2019, parties *only* contemplated the Down Payment amounting to 20% of the purchase price to be payable *at that time*. Indeed, even by June 2019, which was three months after the KM-1 had been delivered, Konica only demanded for the Down Payment and not the entire purchase price. This is evidenced by way of a WhatsApp message from Ms Tham to Mr Francis Chia on 11 June 2019, where she stated that she would have a management meeting the next day and that she “[had] to answer to the balance 20% depos.it. [*sic*]”.<sup>52</sup> Given the strong evidence to the contrary, I am not persuaded by Konica’s argument that Mr Than’s use of the word “commissioning” in his email dated 1 January 2020 was not meant in the sense of commissioning being a condition precedent to the payment of the Balance Sum.<sup>53</sup>

43 Finally, it is not clear what Konica’s case is as to when the Balance Sum was due and payable. In this regard, Ms So testified that 20% of the purchase price was necessary for any delivery of the equipment. This much is provided for by Note 2 of the KM-1 Order Form. However, she then maintained that the Balance Sum was due to be paid upon the completion of installation on 4 March 2019.<sup>54</sup> She then changed her testimony on the stand and said that by Konica’s “official payment term”, the Balance Sum was to be paid within 30 days.<sup>55</sup> However, she could not point to such a term in the KM-1 Order Form, nor was

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<sup>51</sup> So Boon Choo’s AEIC at p 154.

<sup>52</sup> Chia Wing Kwong’s AEIC at p 119.

<sup>53</sup> Plaintiff’s Reply Submissions p 6 at para 21.

<sup>54</sup> Transcript, 16 November 2022, p 9 at lines 14 to 24.

<sup>55</sup> Transcript, 16 November 2022, p 10 at lines 15 to 18.

Konica’s “official payment term” exhibited before the court.<sup>56</sup> Ms So then said that the formal payment terms could be found in the invoice, which she accepted would have been issued *after* the parties had signed the KM-1 Order Form.<sup>57</sup> However, legally, this meant that the invoice was not part of the parties’ agreement.

44 For these reasons, I accept NPE’s argument that there was an oral agreement between Mr Francis Chia and Mr Lewis Lim, and by extension, between NPE and Konica, for the Balance Sum to be paid only after commissioning.

***Whether NPE breached the parties’ agreement?***

*The parties’ arguments*

45 While I have found that there was an oral agreement between the parties that the Balance Sum would only be paid after commissioning, NPE next has to show that Konica had not, in fact, commissioned the KM-1 so that the Balance Sum did not become due. This requires a consideration of the meaning of “commissioning”. In this regard, it is not NPE’s pleaded case that in the conclusion of the oral agreement between Mr Francis Chia and Mr Lewis Lim, the parties had discussed what “commission” meant. Instead, all that NPE pleaded was that the Balance Sum “would be payable by [NPE] to [Konica] upon commissioning of the KM-1 machine, which to-date, has not occurred”.<sup>58</sup>

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<sup>56</sup> Transcript, 16 November 2022, p 10 at lines 11 to 18.

<sup>57</sup> Transcript, 16 November 2022, p 10 at lines 19 to 27.

<sup>58</sup> D&CC No 2 p 9 at para 16.2.

46 The parties spent some time at trial arguing whether Konica understood the meaning of “commissioning” and if the KM-1 was so commissioned. On the one hand, Konica’s witnesses all uniformly maintained that they have never heard of the word “commission” in their work with Konica, although Mr Uchiyama testified that there was a process of “function confirmation” that should be done during installation.<sup>59</sup> On the other hand, both Mr Francis Chia and Mr Cheok’s evidence is that commissioning involves confirmation by both the purchaser and supplier that (a) the printer has been duly installed, (b) training has been provided to the purchaser’s employee(s) on operating the printer, (c) adequate test prints have been conducted, and (d) the printer runs according to its touted standard specifications.<sup>60</sup> Mr Francis Chia further points out previous commissioning practices in relation to NPE’s purchase of printers from Canon and Fuji Xerox.<sup>61</sup>

*My decision: NPE did not breach the parties’ agreement by not paying the Balance Sum*

(1) The meaning of “commissioning”

47 In my judgment, I do not think that “commissioning” entails as many steps as Mr Francis Chia and Mr Cheok say. In particular, I am not convinced that “commissioning” involves the provision of training by Konica to NPE. This is because the provision of training does not seem to be a common feature amongst *all* printer vendors. Instead, what is common across the “commissioning” process involving these previous purchases is what

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<sup>59</sup> Transcript, 10 November 2022, p 30 at lines 13 to 27.

<sup>60</sup> Chia Wing Kwong’s AEIC p 16 at para 48; Cheok Eng Boon’s AEIC pp 5–6 at para 13.

<sup>61</sup> Chia Wing Kwong’s AEIC p 16 at para 50 and p 17 at para 51.

Mr Uchiyama referred to as a “function confirmation”. Thus, in Canon’s “Machine Installation and Commissioning Document”, the relevant parts provide as follows:<sup>62</sup>

Training
Operator H/W Training: <i>Detail Operation Training was conducted as below: from 2 – 3 April 2018</i>
Operator S/W Training: <i>from 2 – 3 April 2018</i>

#### **Commissioning**

##### **Contract**

1. *In accordance to the Terms and Conditions of Sales Agreement, Canon Singapore Pte Ltd has delivered, implemented and tested the Printing System and its accessories in good order.*

2.

As such, Canon’s commissioning practice appears to be that operator training would be provided and that the printing system and its accessories would be certified to be “delivered, implemented and tested” in good order.

48 In comparison, in Fuji Xerox’s “Certificate of Commissioning”, the relevant clause only refers to the installation and confirmation of the printer’s functions, as follows:<sup>63</sup>

<sup>62</sup> Chia Wing Kwong’s AEIC at p 128.

<sup>63</sup> Chia Wing Kwong’s AEIC at p 130.



49 This is not to say that I think that Mr Francis Chia is being untruthful in this regard, even if I do not find Mr Cheok’s evidence to be credible. Rather, I think that, at the point of agreement between Mr Francis Chia and Mr Lewis Lim, which is the appropriate juncture at which to assess what “commissioning” is supposed to mean between the parties, both Mr Francis Chia and Mr Lewis Lim did not have a common understanding that “commissioning” would involve all the details which Mr Francis Chia has now advanced in his case. However, I do find that the parties commonly understood, and hence agreed, that “commissioning” would entail a process of function confirmation, *ie*, a process by which the KM-1 is tested against its touted standard specifications during the installation process. This is consistent with the examples from NPE’s past purchases of printers from Canon and Fuji Xerox, where the documentary evidence suggests such a process during installation. This is also consistent with the evidence of Mr Uchiyama, where he said the following during his cross-examination:<sup>64</sup>

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<sup>64</sup> Transcript, 10 November 2022, p 31 at lines 1 to 5.

Q I mean during the Tiger Team’s visit. And by “function confirmation” which is a term you used, it would mean that the machine was established and tested to perform to its specifications.

A *There is a procedure to do that during the installation.* But if you ask whether it was done during Tiger Team’s visit, no.

[emphasis added]

Evidently, Mr Uchiyama said that there was a procedure whereby the KM-1 would be tested to perform to its specifications during the installation. On the basis of the evidence, I find that this is the meaning of “commissioning” which Mr Francis Chia and Mr Lewis Lim commonly understood and agreed to in the course of concluding their oral agreement. Hence, the Balance Sum would be due and payable only upon the KM-1 being tested to perform to its touted standard specifications after it has been installed.

(2) The KM-1 was never commissioned and the Balance Sum was never payable

50 With this in mind, it is clear that the KM-1 did not undergo any process of commissioning. When the KM-1 was installed on 4 March 2019, Konica’s Mr Timothy Wong (“Mr Wong”) presented the COI to Mr Francis Chia to sign. While Mr Francis Chia qualified his acceptance by writing that he did not accept that the COI constituted the commissioning of the KM-1, what is objectively telling is that the checklist under the section “Installation Results” in the COI was not ticked or marked:<sup>65</sup>

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<sup>65</sup> Chia Wing Kwong’s AEIC at p 132.



### Completion of Installation

1) Customer Information

Customer Code:	A2N0749
Company Name:	NPE PRINT COMMUNICATIONS PTE LTD
Delivery Note No:	1001521709
Delivery Date	08/01/2019

2) Equipment

Model	Print Engine KM-1
Serial Number	A78G101100058
Equipment Number	50055775

3) Installation Results

Function Enablement	-
Connectivity	Yes

	Results	Remarks
Copy Function	<input type="checkbox"/> Tested	
Print Function	<input type="checkbox"/> Tested	
Scan Function	<input type="checkbox"/> Tested	
Fax Function	<input type="checkbox"/> Tested	

51 Indeed, Konica has also not provided any evidence that the various tests of “Copy”, “Print”, and other functions were completed. This is moreover inconsistent with a similar COI provided by Konica’s Mr Wong in relation to another printer that NPE had purchased from Konica in 2018. For the COI in that purchase, the checklist under the section “Installation Results” in the COI were indeed ticked or marked:<sup>66</sup>

<sup>66</sup> Wong Siew Wing Timothy’s AEIC at p 8.



### Completion of Installation

1) Customer Information

Customer Code:	A2N0749
Company Name:	NPE PRINT COMMUNICATIONS PTE LTD
Delivery Note No:	1001504224
Delivery Date	31/12/18

2) Equipment

Model	AccurioPrint C3070
Serial Number	AAC3041000084
Equipment Number	50056101

3) Installation Results

Function Enablement	C/P/S YES
Connectivity	Yes

	Results	Remarks
Copy Function	<input checked="" type="checkbox"/> Tested	
Print Function	<input checked="" type="checkbox"/> Tested	
Scan Function	<input checked="" type="checkbox"/> Tested	
Fax Function	<input type="checkbox"/> Tested	W/L

52 As such, for the reasons above, I find that Konica never tested the KM-1 to be able to perform to its touted standard specifications after it was installed. Accordingly, the Balance Sum never fell due and payable. NPE is therefore not in breach of the parties' agreement and is not liable to pay Konica the Balance Sum. As such, I dismiss Konica's claim for the Balance Sum.

#### *Whether Konica is entitled to the Click Charges?*

##### *The parties' arguments*

53 I turn then to Konica's claim for the Click Charges. Konica has claimed \$165,216.69 in printing charges incurred as of 17 March 2020, or what is

technically known as the “Click Charges”.<sup>67</sup> NPE’s defence<sup>68</sup> is that (a) Konica is not entitled to the Click Charges because its entitlement to such is dependent on the KM-1 being commissioned, and this has not been done; and (b) the sum claimed is an inaccurate calculation of what is due and payable because it includes charges for prints before commissioning and charges for prints that were defective and spoiled, as well as charges supposedly incurred after the KM-1 was shut down.

*My decision: Konica is entitled to some of the Click Charges it claims*

54 I find that Konica is entitled to some of the Click Charges it claims. To begin with, it cannot be seriously disputed that the KM-1 Order Form does, in general, provide for Konica’s entitlement to Click Charges, which are largely based on the number of “impressions” that the KM-1 makes:<sup>69</sup>

**<200,000 impressions : \$0.050**  
**200,001> impressions : \$0.040**  
**Minimum charge of S\$10,000 inclusive 200,000 impressions per month.**  
**Reconcile annually.**

55 However, I do not think that Konica is entitled to *all* of the Click Charges it claims. I have *not* come to this conclusion on the basis that NPE has shown that a term could be incorporated to the effect that Konica cannot start charging for Click Charges until after commissioning was done. Mr Francis Chia certainly did not advance such a position in his evidence. Indeed, the only evidence NPE advanced in this regard was Mr Cheok’s evidence that in the printing industry, commissioning is essential before “the supplier may begin to

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<sup>67</sup> Plaintiff’s Closing Submissions p 42 at para 65.

<sup>68</sup> Defendant’s Closing Submissions p 14 at paras 39–40.

<sup>69</sup> PBOD Vol 1 at p 1.

charge its customers ‘click charges’, i.e. fees that are chargeable to the customer for the use of the printer”.<sup>70</sup> However, for reasons I have given above at [39], I do not place much weight, if at all, on Mr Cheok’s evidence. Thus, in so far as NPE seeks to avoid the Click Charges by the incorporation of a relevant term by custom or trade practice, I find that a major plank of its evidence in support of this position has fallen away through the unreliability of Mr Cheok’s evidence.

56 Instead, I find that Konica is entitled to only some, and not *all*, of the Click Charges it claims because it has not tendered an accurate quantum of what is due and payable. Instead, all that it has pleaded is that it is entitled to \$165,216.69 on the following basis:<sup>71</sup>

The Defendant shall pay for impression (printing) charges of less than 200,000 impressions at the rate of S\$0.05 per impression and if greater than 200,001 impressions at the rate of S\$0.04 per impression subject to a minimum charge of S\$10,000.00 of 200,000 impressions per month. The number of impressions is registered in an internal meter within KM-1.

In essence, Konica says that NPE is liable to it for that sum for printing charges incurred until 17 March 2020<sup>72</sup> under the rates above, which are contained in the KM-1 Order Form.<sup>73</sup>

57 In this regard, NPE points out that, by Konica’s own evidence advanced at trial, Konica has included charges for prints that were defective and spoilt. As admitted by Ms So, while Konica had agreed to issue a credit invoice for the

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<sup>70</sup> Cheok Eng Boon’s AEIC p 7 at para 16(c).

<sup>71</sup> Statement of Claim at para 4.9.

<sup>72</sup> Statement of Claim at para 9.2.

<sup>73</sup> Plaintiff’s Closing Submissions p 5 at paras 19.2–19.3.

copies that were deemed spoilt, the parties could not agree on the correct number of defective copies and this resulted in no credit invoice being issued.<sup>74</sup> While not entirely clear to me, Konica also appears to claim charges incurred *after* the complete shutdown of KM-1 on 20 April 2020.<sup>75</sup> In this regard, Ms So also took what I consider to be the completely unreasonable position that NPE needed to pay Click Charges even if the KM-1 had broken down completely.<sup>76</sup>

58 I find that it must be implied in the parties’ agreement that prints which were defective and spoilt must surely not be within the chargeable Click Charges. By definition, these defective and spoilt prints would not be “impressions” which Konica can legitimately claim for. Furthermore, this implication would be consistent with Ms So’s evidence that Konica had arranged for Mr Wong to visit NPE’s premises to verify the spoilt prints.<sup>77</sup> Accordingly, I conclude that Konica is not entitled to portions of the Click Charges that can be attributed to defective and spoilt prints. I also find that it must be implied in the parties’ agreement that the Click Charges would cease to be chargeable once the KM-1 is shut down. It would not make sense for NPE to incur printing charges after this time. For completeness, Konica is also not entitled to any Click Charges in respect of a different C3070 printer that is not part of the current suit.

59 The result is that Konica is entitled to a portion of the Click Charges. The fact is that NPE had possession and use of the KM-1 and expended ink for

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<sup>74</sup> Transcript, 16 November 2022, p 21 at lines 10 to 12.

<sup>75</sup> Transcript, 16 November 2022, p 16 at lines 27 to 32; p 17 at line 1.

<sup>76</sup> Transcript, 16 November 2022, p 16 at lines 30 to 32; p 17 at line 1.

<sup>77</sup> Transcript, 16 November 2022, p 20 at lines 29 to 30–p 21 at lines 1 to 3.

3,521,330 prints between 13 February 2019 to 20 April 2020,<sup>78</sup> until NPE's solicitors wrote to Konica's solicitors on 21 April 2020 requesting that the KM-1 be removed from NPE's premises.<sup>79</sup> It cannot be that NPE is not liable to pay *any* Click Charges unless its primary case that those charges do not fall due until the KM-1 is commissioned succeeds (see [54] above). The problem for Konica is that it has advanced the *singular* sum of \$165,216.69 in its pleadings.<sup>80</sup> In this regard, it is trite law that a plaintiff claiming damages must prove its loss (see the Court of Appeal decision of *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [27]). In this case, fortunately for Konica, there is clear evidence that NPE had made impressions using the KM-1 and that Konica is thus entitled to at least a portion of the Click Charges that it claims. The only question that remains is that of quantification after taking into account the defective and spoilt copies. Accordingly, I direct the parties to file further submissions within 21 days of this decision in relation to the quantum of the Click Charges that Konica is entitled to. In so far as the parties may disagree as to how many defective and spoilt prints there are,<sup>81</sup> the parties are to submit on whether, even on NPE's best case as to the number of such prints, it would affect the minimum threshold of 200,000 impressions per month. To be clear, given that the trial is now over, the parties are not permitted to tender any fresh evidence on their own accord.

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<sup>78</sup> Plaintiff's Closing Submissions p 16 at para 34; So Boon Choo's AEIC at p 102.

<sup>79</sup> Defendant's Closing Submissions at p 35.

<sup>80</sup> Statement of Claim at para 9.2.

<sup>81</sup> Defendant's Closing Submissions p 14 at paras 41–42.

**Whether NPE succeeds in its counterclaim against Konica?**

***The parties' general cases***

60 I turn now to NPE's counterclaim against Konica. In gist, NPE's case is that Konica's written and oral misrepresentations on the capabilities of the KM-1 induced NPE into purchasing the printer.

61 As regards the alleged written representations, NPE's case is that such representations are found in the KM-1 Proposal, which states that the KM-1 would:<sup>82</sup>

- (a) have a high productivity of 3,000 sheets per hour;
- (b) be compatible with diverse paper types;
- (c) be compatible with paper thickness of 0.06 to 0.6mm; and
- (d) have a machine design that minimises downtime.

62 In a similar vein, NPE argues that the oral representations made by Mr Lewis Lim were that the KM-1:<sup>83</sup>

- (a) would be able to print efficiently on all materials, including one-sided as well as two-sided prints on polyethylene; and
- (b) would print at a speed of 3,000 sheets per hour for single-sided prints for papers of all kinds of materials.

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<sup>82</sup> Defendant's Closing Submissions p 16 at para 48.

<sup>83</sup> Defendant's Closing Submissions p 17 at para 50.

As a result of these alleged misrepresentations, NPE says that the parties' agreement should be rendered voidable, and the parties should be restored to their original positions before entering into their agreement.<sup>84</sup> In the alternative, NPE also pleads that Konica has breached (a) the parties' agreement that comprises the written representations referred to above, or (b) ss 13 and 14 of the Sale of Goods Act 1979 (Cap 393, 1999 Rev Ed) ("SGA").<sup>85</sup>

63 Konica's defence is founded on a number of grounds. First, Konica disputes that Mr Lewis Lim even made the alleged oral representations to Mr Francis Chia.<sup>86</sup> Second, as for the written representations, Konica says that the KM-1 Proposal is not part of the KM-1 Agreement for three reasons:<sup>87</sup> (a) the contents of the KM-1 Proposal are not referred to in the KM-1 Order Form; (b) there are no relevant contemporaneous or proximate emails or letters which show that NPE saw the KM-1 Proposal as contractually relevant or important; and (c) the KM-1 Proposal is essentially a promotional and marketing-based document which was intended to contain advertising puffs and was not intended to be part of the agreed terms between the parties. As such, Konica submits that NPE is not justified in picking the specifications stated in the KM-1 Proposal to allege that these were misrepresentations.<sup>88</sup> Third, and more generally, Konica says that the alleged misrepresentations do not consider the effect of the operating conditions under which the KM-1 was utilised, such as the paper used by NPE and the competence of NPE's operators.<sup>89</sup> In essence,

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<sup>84</sup> Defendant's Closing Submissions p 25 at para 86.

<sup>85</sup> Defendant's Closing Submissions p 30 at para 106.

<sup>86</sup> Plaintiff's Closing Submissions pp 9–11 at paras 24–25.5.

<sup>87</sup> Plaintiff's Closing Submissions p 8 at paras 22.1–22.3.

<sup>88</sup> Plaintiff's Closing Submissions p 17 at para 36.2.

<sup>89</sup> Plaintiff's Closing Submissions pp 14–15 at paras 31.4–31.5.

Konica's point is that NPE had misused or mishandled the KM-1, which means that any malfunction of the KM-1 was due to NPE's fault and not any representations it had made to NPE.

***The proper characterisation of NPE's claim and the relevant issues***

64 I begin with the proper characterisation of NPE's case. Starting with the alleged written representations, NPE's *primary* case is that the *written representations*, being part of the KM-1 Proposal, are terms of the parties' agreement.<sup>90</sup> Accordingly, it is only if such representations are not terms that NPE pursues an *alternative* cause of action in misrepresentation.<sup>91</sup> Separately, in relation to the alleged *oral representations*, while NPE seemingly maintains its case of misrepresentation, in my view, the better way of analysing the situation is that those oral representations, if made, were later reduced into writing by the parties in the KM-1 Proposal. This is because the oral representations were made only about a week before the KM-1 Proposal was provided to Mr Francis Chia,<sup>92</sup> and indeed, the specifications listed in the KM-1 Proposal allegedly reflected that which Mr Francis Chia had earlier conveyed to Mr Lewis Lim (see [61]–[62] above).

65 Preliminarily, NPE can only pursue its primary claim in breach of contract if the alleged representations, regardless of whether they are viewed as being entirely written or being partly written and partly oral, are incorporated into the contract as terms (see *Misrepresentation, Mistake and Non-Disclosure* at para 8-04). Therefore, the legal issue raised here is whether the relevant

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<sup>90</sup> Defendant's Closing Submissions p 16 at para 48.

<sup>91</sup> Defendant's Closing Submissions p 16 at para 49.

<sup>92</sup> Chia Wing Kwong's AEIC pp 6–7 at paras 23–25.

statement made by Konica is an express contractual term or a mere representation standing outside the contract itself. Although there are no concrete guidelines, a textbook has furnished the following three broad guidelines towards deciding if a statement has become a term of the contract (see Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Ed, 2001) at pp 247–251).

- (a) First, at what stage of the transaction was the crucial statement made?
- (b) Second, was the oral statement followed by a reduction of the terms to writing? If so, the court must decide whether the intention of the parties was that the contract should be comprised wholly within the written document or whether the contract was intended to be partly written and partly oral.
- (c) Third, had the person who made the statement special knowledge or skill as compared to the other party? If so, the court would be more willing to infer an intention to make the statement concerned an express term of the contract.

66 When these three guidelines are applied to Mr Lewis Lim's representations, both written and oral, it is clear that they had become terms of the parties' agreement, as partially found in the KM-1 Proposal. This is because (a) the representations were made relatively close to the conclusion of the parties' agreement in the KM-1 Order Form in November 2019, (b) the oral statements, in particular, were reduced into writing in the KM-1 Proposal, specifically in the section about the "Specifications" of the KM-1, and (c) Mr Lewis Lim obviously has special knowledge of the KM-1. While Konica

has said that Mr Lewis Lim is not a technical person but a salesperson,<sup>93</sup> it must be that Mr Lewis Lim, being a representative of Konica and holding out the KM-1 for sale, can reasonably be taken to have more knowledge about the KM-1 than Mr Francis Chia.

67 To similar effect is the Court of Appeal decision of *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd and another appeal* [2012] 1 SLR 427 (“*Anti-Corrosion*”). In that case, the court considered whether certain assurances given by the respondent to the appellant in respect of a purchase of paint were “contractual terms or non-binding representations merely intended to induce the other party to enter into the contract without imposing any responsibility for breach of contract” (at [26]). In answering this question, the court approved (at [27]) of Lord Denning MR’s comments in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623 (“*Dick Bentley*”), where the learned Master of the Rolls opined (at 627–628):

... if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it.

68 On the facts of that case, the court opined (see *Anti-Corrosion* at [27]) that the statements in question “were clearly important” to the appellant’s representative, who was purchasing the paint for the purpose of particular usage.

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<sup>93</sup> Plaintiff’s Closing Submissions pp 16–17 at para 36.1.

If the assurances had not been given, the appellant’s representative would not have accepted the proposed paint system and entered into the contract with the respondent. Applying *Dick Bentley*, this raised a *prima facie* ground for inferring that such statements were intended as a warranty. And since the respondent undeniably had greater expertise and knowledge of its own products than the appellant, the inference that the statements were intended to be a warranty could not be rebutted.

69 Applying these principles to the facts of this case, I find that NPE’s case is really not founded on misrepresentation but rather is premised on breach of contract. Just like in *Anti-Corrosion*, by Mr Francis Chia’s own evidence, Mr Lewis Lim’s statements as to the capabilities of the KM-1 were clearly “imperative” to NPE and gave it the assurance to enter into the KM-1 Agreement.<sup>94</sup> Further, the gist of Mr Lewis Lim’s statements were reduced into writing in the KM-1 Proposal (see [64] above).

70 Accordingly, since I have already concluded that the terms in the KM-1 Proposal are part of the parties’ agreement, I will not need to go into NPE’s secondary claim in misrepresentation. Instead, the only issues that I need to consider in relation to NPE’s claim are (a) whether Konica had breached these terms, and (b) if so, the damages due to NPE. To be clear, the statements which I find have been incorporated as terms in the parties’ agreement are as follows:

- (a) the KM-1 can achieve a high productivity of 3,000 sheets per hour;
- (b) the KM-1 is compatible with diverse paper types;

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<sup>94</sup> Chia Wing Kwong’s AEIC pp 7–8 at paras 24–25.

- (c) the KM-1 is compatible with paper thickness of 0.06 to 0.6mm;  
and
- (d) the KM-1’s machine design is one that minimises downtime.

For convenience, I will refer to these as “the Terms”.

71 However, I also accept Konica’s argument that the Terms must be read subject to the KM-1 being operated in accordance with how it was meant to be used. Otherwise, it makes no sense to say that Konica has breached the Terms when NPE had misused the printer.

***Whether Konica breached any of the Terms in the parties’ agreement?***

*The parties’ arguments and the relevant issues*

72 In essence, NPE’s case is that Konica has breached the Terms because the KM-1 did not fulfil its touted specifications, and NPE raises three aspects in particular. First, the service logs of the KM-1 do not show that the printer had at any point reached a printing speed of 3,000 sheets per hour.<sup>95</sup> Second, the KM-1 was unable to print on sticky papers and was therefore not able to print on diverse paper types.<sup>96</sup> Third, the KM-1 did not minimise downtime and, on the contrary, required frequent downtime for cleaning and servicing.<sup>97</sup> NPE then further contends that the failure of the KM-1 to perform to its touted

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<sup>95</sup> Defendant’s Closing Submissions p 19 at para 63.

<sup>96</sup> Defendant’s Closing Submissions pp 19–20 at paras 64–65.

<sup>97</sup> Defendant’s Closing Submissions p 20 at para 67.

specifications cannot be attributed to NPE’s improper usage, mishandling and/or failure to maintain the KM-1 against the result of wear and tear.<sup>98</sup>

73 In response, Konica mainly addresses NPE’s allegations in relation to the printing speed of the KM-1 and its ability to print on diverse paper types. First, as regards printing speed, Konica’s position is that NPE’s allegations fail to take into account factors such as:<sup>99</sup> the actual operating conditions that the KM-1 was under; the materials applied to the paper used and whether the printing was one-sided or two-sided; the types and sizes of the papers used; mishandling on the part of NPE; whether the KM-1’s settings were wrongly set; and lack of knowledge on the part of NPE’s operators, among others. Konica submits that these factors would explain why the printing speed of the KM-1 fell below 3,000 pages per hour.<sup>100</sup> But, in any event, Konica points out that its expert, Mr Wilfred Nathan (“Mr Nathan”), has given evidence that there were 12 instances between 28 February 2019 and 14 April 2020 where the KM-1 printing speed reached 2940 prints per hour.<sup>101</sup>

74 Second, in relation to the KM-1’s ability to print on diverse paper types, Konica makes the same point that NPE’s allegations fail to take into account the same factors listed at [73] above.<sup>102</sup> Further, Konica points to the total number of prints made between 13 February 2019 to 14 April 2020, which it alleges amounts to 3,504,804 prints in total.<sup>103</sup> It says that, bearing this in mind, it is

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<sup>98</sup> Defendant’s Closing Submissions p 20 at paras 68–77.

<sup>99</sup> Plaintiff’s Closing Submissions pp 14–15 at paras 31–32.

<sup>100</sup> Plaintiff’s Closing Submissions p 20 at para 37.2.

<sup>101</sup> Plaintiff’s Closing Submissions p 20 at para 37.3.

<sup>102</sup> Plaintiff’s Closing Submissions p 14 at para 31.

<sup>103</sup> Plaintiff’s Closing Submissions p 16 at para 34.

reasonable and logical to conclude that the KM-1 could print on diverse types of paper. If it were otherwise, NPE would have terminated and returned the KM-1 to Konica early in the day and would have not proceeded to pay the Down Payment and/or apply for the Enterprise Singapore Grant or the UOB Loan to fund the purchase of the KM-1.<sup>104</sup>

75 Third, Konica also relies on a Facebook post that NPE put up in praise of the KM-1. Konica's argument in that regard is that NPE's complaints about the KM-1's defects are inconsistent with that Facebook post and is further evidence that the KM-1 has performed up to its touted specifications.<sup>105</sup> Ultimately, Konica maintains that it is not in breach of the KM-1 Agreement.

76 In my view, the following issues arise as a result of the parties' arguments:

- (a) first, whether Konica had breached the Terms based on a technical comparison of the KM-1's performance against its touted specification; and
- (b) second, whether there was any misuse of the KM-1, since it is implied that the KM-1's performance to its promised specifications are premised on the lack of misuse.

For convenience, I will deal with the two issues together.

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<sup>104</sup> Plaintiff's Closing Submissions p 16 at para 34.

<sup>105</sup> Plaintiff's Closing Submissions p 19 at para 37; p 21 at para 37.5.

*My decision: Konica has breached some of the Terms*

(1) Term in relation to the promised speed

77 In my judgment, Konica has breached the term in relation to the promised print speed. Even on Konica’s own expert evidence, the KM-1 has never on any occasion achieved the printing speed of 3,000 sheets per hour for single-sided prints for all materials. The KM-1’s service logs introduced by Mr Nathan do not show that the printer had at any point reached a printing speed of 3,000 sheets per hour. While there is an entry of 19,320 pages per hour,<sup>106</sup> Mr Nathan regards that as an abnormal reading.<sup>107</sup> Further, as NPE rightly submits,<sup>108</sup> Mr Nathan’s calculation is based on multiplying the maximum printing speed per minute by sixty, so as to make up an hour.<sup>109</sup> The final print speed per hour was thus obtained on the assumption that the printer was able to maintain that speed throughout the hour with no deceleration occurring. Practically, it would be expected that the print speed would be lower.

78 Further, I should note that Mr Nathan’s evidence on the printing speed was restricted to a narrow dataset. Indeed, when I asked Mr Nathan during the trial how he had selected the 61 dates that formed the basis of his analysis, he candidly replied that he had chosen to collate data from dates where the KM-1 reflected higher printing speeds.<sup>110</sup> Similarly, Ms Barker had pointed out to Mr Nathan during cross-examination that the selected dates are February and

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<sup>106</sup> Wilfred Adrian Nathan’s AEIC at p 56.

<sup>107</sup> Transcript, 15 November 2022, p 24 at lines 5 to 9.

<sup>108</sup> Defendant’s Closing Submissions p 19 at para 63.

<sup>109</sup> Transcript, 15 November 2022, p 28 at lines 12 to 22.

<sup>110</sup> Transcript, 15 November 2022, p 25 at lines 24 to 27.

March 2019, followed by a long gap until October 2019.<sup>111</sup> Mr Nathan's response was that his dataset was meant to reflect the *highest* print speeds per hour achieved during the whole period and that there were indeed lower print speeds in the time gap that was pointed out to him.<sup>112</sup> In my view, it is unsatisfactory that, for 7 months, the KM-1 was not even able to achieve a print speed of more than 2,500 pages per hour, which was seemingly the criteria that Mr Nathan used in selecting the dates that formed the basis of his expert evidence.<sup>113</sup> Accordingly, I am of the view that Mr Nathan's evidence cannot be interpreted in Konica's favour.

79 I therefore find that the KM-1 cannot achieve a print speed of 3,000 pages per hour for single-sided prints. This is clearly contrary to the specifications of the KM-1. While Konica now argues that the print speeds would be different based on each user's experience, I find that the meaning of the term in the parties' agreement must be that, if the KM-1 was used in the way it was meant to be, it would achieve a print speed of 3,000 pages per hour. Indeed, I should note that the specification of 3,000 pages per hour in the KM-1 Proposal is unqualified; it does not state that the KM-1 can print "up to" 3,000 pages but simply states 3,000 pages. Assessing this promised specification against Mr Nathan's optimistic calculations, the fact that the KM-1 has only managed to achieve the highest print speed of 2,940 prints per hour on *12 occasions in the period of over a year* (28 February 2019 to 14 April 2020) is telling that the KM-1 has failed to print up to its promised speed. Moreover, while Konica submits that various factors would have affected the

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<sup>111</sup> Transcript, 15 November 2022, p 26 at lines 21 to 26.

<sup>112</sup> Transcript, 15 November 2022, p 27 at lines 3 to 9.

<sup>113</sup> Transcript, 15 November 2022, p 25 at lines 22 to 25.

print speed of the KM-1 (see [73] above), Konica has not provided any concrete evidence of the existence of such factors in the first place.

(2) Term in relation to compatibility with diverse paper types

80 I also find that Konica has breached the terms in relation to the KM-1’s compatibility with diverse paper types. To recapitulate, Konica takes the position in its Closing Submissions that since 3,504,804 prints were recorded from 13 February 2019 to 14 April 2020, it is reasonable and logical to conclude that NPE was satisfied with the paper types that the KM-1 could print on (see [74] above). However, I find that this conclusion is inconsistent with the testimonies given by Konica’s own witnesses, Mr Chew Yong Hooi (“Mr Jayson Chew”) and Mr Vasudevan Krishnan (“Mr Krishnan”), who were both involved in the technical servicing of the KM-1.<sup>114</sup> In this regard, they have given evidence that the KM-1 was incompatible with sticky papers.<sup>115</sup> Parenthetically, I note that this would have been significant to NPE given that, according to Mr Jayson Chew, the PE material was “ordinarily sticky”.<sup>116</sup> When Mr Jayson Chew’s observation was suggested to Mr Krishnan during cross-examination, he qualified this by saying that the stickiness varies from lot to lot.<sup>117</sup> Be that as it may, given that I have found that it is a term of the KM-1 Agreement that the KM-1 should be able to print on diverse paper types, the admission that the KM-1 was incompatible with sticky paper, such as those

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<sup>114</sup> Chew Yong Hooi’s AEIC p 2 at para 3; Vasudevan Krishnan’s AEIC p 2 at para 3.

<sup>115</sup> Chew Yong Hooi’s AEIC p 5 at para 11; Transcript, 8 November 2022, p 27 at line 32–p 28 at line 1.

<sup>116</sup> Chew Yong Hooi’s AEIC p 5 at para 11;

<sup>117</sup> Transcript, 8 November 2022, p 28 at lines 2 to 5.

made from PE, suffices for me to preliminarily conclude that there was a breach of that term.

81 I turn now to consider Konica’s position that the KM-1’s incompatibility with diverse paper types was occasioned by NPE’s misuse of the KM-1. While Konica did not directly address me on the point of the KM-1’s compatibility with diverse paper types *per se*, it makes a related point that the alleged breakdowns were due to what I can surmise are three reasons that it puts forward.<sup>118</sup> First, NPE misused and/or mishandled the KM-1 machine through improper, inappropriate or inaccurate adjustments of the settings of the KM-1. Second, NPE used and fed curled, irregular, uneven or sticky paper into the KM-1 or otherwise failed to clean the print heads and filters regularly. Third, NPE inadequately maintained, or failed to maintain, the KM-1 regularly despite its heavy usage. Simply put, Konica argues that there was nothing wrong with the mechanical parts or components and the function and printing operations of the KM-1.<sup>119</sup>

82 The first and second reasons may be dealt with jointly since they both suggest that the KM-1 was operated in the wrong manner. In short, I am not convinced that this suggestion is made out. On the first reason that the wrong settings were used, Konica’s witness, Mr Tan Peng Hian (“Mr Tan”), gave evidence that NPE used the wrong settings, which allegedly caused the papers to jam.<sup>120</sup> However, apart from his testimony, I find no other objective basis to conclude that NPE had indeed operated on the wrong settings.

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<sup>118</sup> Plaintiff’s Closing Submissions pp 25–26 at para 42.

<sup>119</sup> Plaintiff’s Closing Submissions p 26 at para 42.4.

<sup>120</sup> Transcript, 11 November 2022, p 82 at lines 2 to 13.

83 I turn then to the second reason. Indeed, Konica’s witnesses, all of whom were involved in the technical servicing of the machine, testified that they had noticed that the NPE was using rolled PE paper as opposed to pre-cut paper. This caused the paper to be curly.<sup>121</sup> Further, Mr Jayson Chew also testified that NPE had stored its PE paper in an unsatisfactory environment, which gave rise to the stickiness.<sup>122</sup> He elaborated that the stickiness was likely to cause the feeder of the KM-1 to not pick up the paper properly, thereby causing jams and or spoiling the prints.<sup>123</sup> In essence, Konica’s argument is that it would not be fair to expect the KM-1 to be able to deal with defective paper such that it cannot be said that the KM-1 was not compatible with diverse paper types.

84 In my judgment, I conclude that Konica has not established that the KM-1’s problems were caused by NPE’s misuse of the KM-1 by NPE’s use of curly or sticky papers. In this regard, Konica’s evidence is that Mr Krishnan’s email dated 13 February 2020, which was copied to Mr Francis Chia, had alluded partially to this issue.<sup>124</sup> In particular, he said:

We have shown you the paper condition which has curl at the lead edge and at the side edge. Due to which the sheet lifting error is happening frequently and there are some paper attack on the head modules as well.

(Kindly refer to the enclosed photos and video)

While Mr Krishnan’s email had alluded to this issue, it is important that the numerous service reports did not expressly highlight any issue with NPE’s use

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<sup>121</sup> Chew Yong Hooi’s AEIC pp 4–5 at para 11; Vasudevan Krishnan’s AEIC p 7 at para 15.1.1; Tan Peng Hian’s AEIC p 2 at para 8.1.

<sup>122</sup> Chew Yong Hooi’s AEIC p 5 at para 11.

<sup>123</sup> Chew Yong Hooi’s AEIC p 5 at para 11.

<sup>124</sup> Vasudevan Krishnan’s AEIC at p 29.

of curly or sticky paper. Indeed, many of Mr Jayson Chew’s service reports repeated the same common vague phrases, with an example being “Other symptom Others Not applicable (no defective p Guide customer production [sic]”.<sup>125</sup> For all these reports, it is unclear what the “[o]ther symptom[s]” were in that regard. More broadly, there was simply no indication in these reports that NPE’s use of curly or sticky paper had contributed to the KM-1’s problems. I would have thought that if there was truly a problem caused by NPE’s use of curly or sticky paper, this would have been highlighted in the numerous service reports.

85 Moreover, it is also telling that there was no reference to NPE’s use of curly or sticky paper being an issue in the WhatsApp group established between the parties. Indeed, when Ms Barker cross-examined Mr Tan, he could not point to any conversation in the WhatsApp group chat referring to NPE’s use of defective paper as having caused the problems with the KM-1.<sup>126</sup>

86 Having concluded that Konica has not established, on the first and second reasons, that the KM-1 was operated incorrectly, I turn to the third reason Konica raises, which is that the issues with the KM-1 were attributable to inadequate maintenance on the part of NPE. On this point, I accept Konica’s argument that NPE has taken the risk of not entering into a maintenance contract with Konica. When the parties signed the KM-1 Order Form, there was a “maintenance scheme” to be advised or agreed.<sup>127</sup> Whatever the term used, this amounts to an agreement to agree in the future in relation to a maintenance

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<sup>125</sup> See, for example, Chew Yong Hooi’s AEIC at p 232.

<sup>126</sup> Transcript, 11 November 2022, p 36 at line 20–p 39 at line 21.

<sup>127</sup> PBOD Vol 1 at p 1.

package. NPE made a lot of Konica’s technicians providing “maintenance” on the KM-1 as an admission that Konica is obliged to provide such maintenance, and in doing so, has taken it upon itself to repair these problems.<sup>128</sup> I reject this contention. Instead, I agree with Konica’s witnesses, such as Mr Jayson Chew, that Konica had provided these services out of goodwill to NPE as there is no independent evidence to show that Konica was under an obligation to provide maintenance services.<sup>129</sup>

87      However, the lack of a service maintenance agreement does not absolve Konica of the responsibility of providing a working KM-1 to begin with. In this regard, Konica pointed out that since NPE allegedly made 3,504,804 prints between 13 February 2019 to 14 April 2020, this shows that NPE had no problems with the KM-1 compatibility to print on diverse types of paper. The implication, as Konica argues, is that if NPE had any compatibility issues, they would have returned the KM-1 instead of using it to make a supposedly high volume of prints for more than a year.

88      I reject Konica’s contention because it first assumes that the figure was large for a commercial printer operating for that duration, which in my view is untrue. To begin, this figure, while seemingly large, must be understood in the context of the KM-1’s touted specifications. In this regard, even if I were to take the 3,504,804 prints at face value (that is to say, I assume that every print is without defect), I agree with NPE that this quantity, over 14 months, demonstrates very low mileage for a commercial printer of such size and complexity. Assuming that the KM-1 was able to print at 3,000 sheets per hour

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<sup>128</sup> Defendant’s Closing Submissions p 23 at para 76.

<sup>129</sup> Transcript, 9 November 2022, p 10 at lines 6 to 9.

as touted and it ran 20 hours per day (having day and night shift operators who managed productions 10 hours each), it should have been able to print 60,000 sheets *per day*, which was NPE's target.<sup>130</sup> In one month, assuming the KM-1 operated 26 days a month excluding Sundays, the KM-1 should have been able to print 1,560,000 prints. Over 13 months, the KM-1 should have printed approximately 20,280,000 sheets. Against this backdrop, the KM-1 has printed 3.5 million prints over 13 months. This is approximately only 17% of the expected optimum production level.

89 Accordingly, I do not think that Konica can rely on the fact that NPE had printed 3,521,300 prints to say that the KM-1 had functioned well. This figure, as I have explained, needs to be considered in relation to the KM-1's touted specifications. Returning to the maintenance point, I do not find that Konica can hide behind NPE's decision not to enter into a service maintenance agreement to explain the various defects that the KM-1 had. To my mind, the KM-1's performance at only 17% of its expected optimum production level cannot be explained by the lack of maintenance due to NPE's decision not to enter into a service maintenance agreement with Konica.

(3) Term in relation to the minimisation of downtime

90 However, I do not find that Konica has breached the term that the KM-1 "minimises" downtime. To begin with, I disagree with NPE that the mere fact that its operators had to clean the KM-1 every three hours and perform normal wiping every eight hours means that the KM-1 does not minimise downtime. There is simply no basis of comparison with an industry standard for me to make that finding. More broadly, while NPE has advanced several instances of

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<sup>130</sup> Chia Wing Kwong's AEIC p 27 at para 68(d).

downtime, the problem is that the pleaded term is rather vague. It is unclear to me what the threshold at which the KM-1 can be said not to have “minimised” downtime is. NPE has not advanced any evidence of a comparable machine against which I could assess the KM-1’s operation time.

91 Lastly, as a more general argument that is not directed at any particular term, Konica has placed much reliance on a Facebook post that NPE put up on 24 May 2019, touting the virtues of the KM-1. Konica’s argument is that if NPE had seen it fit to announce the virtues of the KM-1 over Facebook and did not take the post down until after 6 July 2021, this shows that the KM-1 had performed to its specifications.<sup>131</sup> I disagree with Konica’s reliance on the Facebook post. I accept that the post was made on 24 May 2019,<sup>132</sup> which was barely a few months after the installation was completed. Although the KM-1 had experienced printing errors by then, NPE would have legitimately considered those problems to be teething ones, and hence still saw it fit to tout the KM-1’s virtues online as they wanted to market themselves as “a different operator in the local market”.<sup>133</sup> Moreover, I also accept Mr Francis Chia’s explanation that the Facebook post had remained online because NPE had forgotten to take it down due to the sudden changes and business demands brought about by the COVID-19 pandemic.<sup>134</sup> More broadly, I would be very slow to attribute implicit agreement with any statement made on a social media post just because the original poster had not taken it down. This seems contrary to how social media posts work, where the practice is that posters do not

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<sup>131</sup> Plaintiff’s Closing Submissions p 21 at para 37.5.

<sup>132</sup> Transcript, 17 November 2022, p 45 at line 29.

<sup>133</sup> Transcript, 17 November 2022, p 49 at lines 5 to 6.

<sup>134</sup> Transcript, 17 November 2022, p 49 at lines 1 to 5.

purposefully take down posts even if they have changed their minds as to the views expressed therein.

92 For these reasons, I find that Konica has breached the terms relating to the speed and the types of paper that the KM-1 can handle.

***Whether Konica breached the implied conditions provided for in ss 13 and 14 of the Sale of Goods Act?***

*The parties' arguments*

93 Further and in the alternative, NPE further avers that pursuant to ss 13 and 14 of the SGA and given the various oral representations and written representations, it was an implied condition of the parties' agreement that the KM-1 would be able to perform up to its specifications.<sup>135</sup>

94 Apart from denying that it has breached any implied conditions, Konica's response is to rely on s 35 of the SGA. It says that NPE accepted delivery and installation of the KM-1 by expressly or impliedly intimating to Konica its acceptance through the following actions:<sup>136</sup> (a) NPE signed the KM-1 Order Form without any qualifications and paid the Down Payment; (b) NPE duly prepared part of its premises to accommodate the KM-1; (c) the KM-1 and its components were delivered to NPE on 19 January 2019; (d) NPE used the KM-1 substantially thereafter; and (e) NPE posted the Facebook post which alludes to its acceptance of the KM-1.

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<sup>135</sup> Defendant's Closing Submissions pp 27–28 at paras 95–96.

<sup>136</sup> Plaintiff's Closing Submissions pp 27–30 at para 43.

*My decision: Konica has breached these implied conditions*

95 For similar reasons as above, I find that Konica has breached these implied conditions.

(1) Section 13(1) of the SGA

96 First, in relation to s 13(1) of the SGA, this provision provides that “where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description”. In this regard, it is clear that where goods are described by the contract, and the buyer contracts in reliance on that description, this amounts to a sale by description (see the High Court decision of *Darwish M K F Al Gobaishi v House of Hung Pte Ltd* [1995] 1 SLR(R) 623 at [82]). Applied to this case, the sale of the KM-1 was a sale by description as I have found that the specifications of the KM-1 contained in the KM-1 Proposal and the Terms both constituted part of the parties’ agreement. NPE clearly relied on this description.

97 Further, for the reasons above at [72]–[89], I find that the KM-1 did not correspond with this description in so far as it did not perform to its touted specifications. There is accordingly a breach of the implied condition under s 13 of the SGA.

(2) Section 14 of the SGA

98 Under s 14 of the SGA, when the seller sells goods in the course of a business, there is also an implied condition that goods supplied under the contract are of “satisfactory quality”. In this regard, ss 14(2A) and 14(2B) of the SGA spell out the factors to be considered when determining goods of satisfactory quality. These factors include, among other things, the description

of the goods, the price, durability, and fitness for all the purposes for which the goods in question are commonly supplied.

99 For the reasons given above (at [72]–[89]) in relation to Konica’s breach of the Terms, I find that the KM-1 is not of “satisfactory quality”. Konica has therefore also breached the implied condition under s 14 of the SGA. In particular, I find that the KM-1 has failed to perform to its touted specifications and that, on balance, this was not due to NPE’s misuse of the machine. Also, on balance, it is clear that the KM-1 was not functional for a significant period of time.

(3) Section 35 of the SGA

100 I disagree with Konica that NPE had accepted the KM-1 under the terms of s 35 of the SGA. According to Konica, NPE allegedly did so by acting in a manner in relation to it which was inconsistent with the ownership of Konica. By Konica’s argument, NPE had so acted by signing the KM-1 Agreement, preparing its premises for the KM-1, using the KM-1 for its customer jobs, posting a video on its Facebook page complimenting the KM-1, paying the 20% purchase price, obtaining a loan to finance the purchase, and using the KM-1 to make approximately 3,521,330 prints between 27 February 2019 to 20 April 2020.<sup>137</sup>

101 In my view, NPE’s actions were not inconsistent with Konica’s ownership of the KM-1. First, it is undisputed that Mr Francis Chia had written on the COI that “THIS DOES NOT CONSTITUTE ACCEPTANCE OF [the]

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<sup>137</sup> Plaintiff’s Closing Submissions pp 27–28 at para 43; p 34 at para 53.

MACHINE”.<sup>138</sup> Moreover, the only two references to “acceptance” on the COI were struck out and replaced with the word “installation”.<sup>139</sup> Indeed, Mr Goh, who was with Konica at the time of the KM-1’s delivery to NPE, testified that Konica’s finance team was not pleased with Mr Francis Chia’s handwritten note.<sup>140</sup> This was presumably because they knew that this did not constitute proper acceptance of the KM-1. Regardless of this hesitation, Konica eventually accepted the COI knowing that it contained Mr Francis Chia’s handwritten comments. Hence, I do not think that Konica can deny any knowledge that Mr Francis Chia had expressly *not* accepted the KM-1.

102 Second, even on Konica’s own case, the KM-1 Order Form states that the title to the KM-1 shall remain vested in Konica “until the full purchase price shall have been paid”.<sup>141</sup> Following from this, until the purchase price had been paid, parties must have contemplated that NPE would have access and use of the KM-1 machine, including to carry out the printing of customer jobs. Therefore, it cannot be said that NPE’s usage of the KM-1 constituted acceptance.

103 Third, while it is true that the KM-1 has been delivered to NPE’s premises since March 2019, NPE has consistently voiced out its dissatisfaction with the machine to Konica. Thus, on 9 October 2019, Mr Francis Chia wrote to Konica stating that NPE “need[ed] immediate solutions to these issues, failing which, [it would] have no choice but to return the machine”.<sup>142</sup> NPE has

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<sup>138</sup> Chia Wing Kwong’s AEIC at p 132.

<sup>139</sup> PBOD Vol 1 at p 3.

<sup>140</sup> Lewis Goh Jian Wei’s AEIC p 14 at para 45.

<sup>141</sup> PBOD Vol 1 at p 2.

<sup>142</sup> Chia Wing Kwong’s AEIC at p 776.

also given Konica notice of their intention to reject the KM-1 at various times. As such, it cannot be said that NPE has accepted the KM-1. Similarly, while NPE has used the KM-1 during the period in which it was at its premises, this by itself cannot constitute acceptance since NPE had, in the period concerned, consistently voiced its concerns about the machine.

104 Fourth, for the same reasons above in relation to whether the issues with the KM-1 could be attributed to NPE’s misuse of the KM-1, I dismiss Konica’s attempt to rely on the Facebook post. In my view, this is not relevant in determining whether NPE had accepted the KM-1.

105 For all these reasons, I find that Konica has breached the implied conditions under ss 13 and 14 of the SGA. I also find that Konica cannot rely on NPE’s supposed acceptance of the KM-1 under s 35 of the SGA to resist these claims.

***Whether Konica can rely on the exclusion clause in the KM-1 Order Form?***

106 As a final defence, Konica seeks to rely on the exclusion clause found in the KM-1 Order Form. This clause provides as follows:<sup>143</sup>

[Konica] shall not under any circumstances whatsoever be liable for any loss (which expression in this clause includes injury, damage or delay) or any consequence of any such loss arising out of any malfunctioning of or defect in the equipment.

107 In my judgment, Konica cannot rely on this clause because it is unreasonable and therefore ineffective under the Unfair Contract Terms Act 1977 (Cap 396, 1994 Rev Ed) (“UCTA”). As a preliminary matter, it is clear

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<sup>143</sup> PBOD Vol 1 at p 2.

that s 3 read with s 6(b) of the UCTA apply to the present case. First, s 1(3) of the UCTA provides that ss 2 to 7 apply only in situations pertaining to “business liability”, which is defined as “liability for breach of obligations or duties arising from things done or to be done by a person in the course of a business (whether his own business or another’s)”. It is clear that the present situation pertains to business liability since Konica’s liability arises from breach of its obligations in the course of its business of selling printers. Second, as for the specific application of s 3 of the UCTA, s 3(1) provides that it has to be shown either that one of the contracting parties “deals as consumer” or that one of the contracting parties deals “on the other’s written standard terms of business”. Both conditions are satisfied here: NPE is clearly dealing as a consumer purchaser of the KM-1, and the KM-1 Order Form is clearly a standard term of business that Konica employs in such transactions. Accordingly, I find that s 3 applies.

108 The effect of s 3(2) is that Konica cannot exclude or restrict liability for its breach of contract in reliance of an exclusion clause unless the clause satisfies the requirement of reasonableness. In this regard, the test of reasonableness is found in s 11 of the UCTA and is to be considered with reference to the factors found in paragraph (b) of the Second Schedule to the UCTA. While these factors are, strictly speaking, only applicable to ss 6 and 7 of the UCTA, they are routinely considered with respect to situations involving s 3 as well, and I shall do the same in the present case.

109 Applying those factors to the exclusion clause that Konica seeks to rely on, I am of the view that the clause is unreasonable. First, the relative bargaining power of the parties is an important factor. In the present case, both parties are commercial parties. While Konica is a larger commercial entity than NPE, it

stands to reason that NPE has other printer options. As such, this is at best a neutral factor. Second, Konica sold expensive machinery to NPE and provided a description of the goods and of its qualities, knowing that NPE would be relying on that description for its production. It would be unconscionable for Konica to be able to exclude liability for a machine that does not perform to its touted description/specifications, and it would be unreasonable to exclude damages and losses suffered by NPE as a result of the non-conforming and non-performing machine which had caused more trouble than good for NPE.

110 Ultimately, the specific factors considered above answer the overarching question of whether there has been full acceptance of the clause in question subject to public policy exceptions. Full acceptance in this context means fully informed consent to the term in question with no hard choice to be made (see generally Andrew Phang Boon Leong & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2nd Ed, 2021) at para 1449). Seen in totality, the exclusion clause in the KM-1 Order Form was merely part of a standard form which likely left little room for negotiation. In other words, NPE was simply dealing on Konica's terms, at least in respect of the KM-1 Order Form. This further affirms my conclusion that the exclusion clause is unreasonable.

111 For all these reasons, I find that Konica cannot rely on the exclusion clause. As such, given that I have found that Konica is in breach of some of the Terms or the implied conditions under the SGA, Konica is liable to pay damages to NPE. The remaining question is the quantum of those damages.

***The damages that NPE is entitled to***

112 I come now to ascertain the damages that NPE is entitled to as a result of Konica's breaches. In this regard, NPE claims the following amounts:<sup>144</sup>

- (a) \$331,700, being the return of the Down Payment.
- (b) \$38,157.60, being the expenses that NPE had incurred to create a suitable environment to place the KM-1.
- (c) \$394,910, which comprises (i) \$290,910 from March 2019 to April 2020 which it incurred in overtime pay by deploying its staff to work overtime to carry out the print jobs on other printing machines, and (ii) \$104,000 from additional costs of materials and consumables which it had to incur as a direct consequence of reprinting whenever the print jobs by the KM-1 were of unsatisfactory quality.
- (d) \$500,000 being the purchase of a replacement printer, the Ryobi 924.

113 Preliminarily, it is clearly established that the breach of contract in question must have in fact *caused* the alleged damage for which damages are sought (see the Court of Appeal decision of *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782). The test for causation in contract law asks: but for the breach of contract, would the non-breaching party still have suffered the loss in question? In this case, I am satisfied that but for Konica's breaches, NPE would not have in fact suffered all of the losses that it claims to have suffered, except for the Down Payment which it would have had to pay in

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<sup>144</sup> Defendant's Closing Submissions p 32 at para 118.

any case, and which I do not allow as a claim in damages for another reason below.

114 Turning now to the assessment of damages, I first summarise my conclusions. Briefly, I find that NPE is: (a) not entitled to the return of the Down Payment, and (b) not entitled to the expenses it incurred to create a suitable environment to place the KM-1 in; but it is (c) entitled to the costs of deploying its staff to work overtime and of procuring additional materials and consumables, and (d) entitled to the cost of purchasing a replacement printer. I now explain my reasons.

*The applicable principles*

115 The applicable principles governing the remedies available to a party who succeeds in a claim for breach of contract are well-established. Fundamentally, the general aim of damages for breach of contract is to *compensate* the non-breaching party and such compensatory damages are generally assessed by reference to the non-breaching party's pecuniary loss (see the Court of Appeal decision of *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [127]). Ultimately, compensation in the form of an award of damages aims to place the non-breaching party in the same position *as if the contract had been performed* (see the Court of Appeal decision of *Hong Fok Reality Pte Ltd v Bima Investment Pte Ltd and another appeal* [1992] 2 SLR(R) 834 at [24]). Indeed, this is consistent with the usual aim of damages, which is to eradicate the consequences that fall within the scope of duty breached (James Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2021) (“*McGregor on Damages*”) at para 1-001).

116 To do so, the court needs to identify what the non-breaching party has “lost” by reason of the breach, and this is achieved by comparing the position he would have been in were the contract not breached, with the position he is now in because of the breach (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) (“*The Law of Contract*”) at para 21.002). In general, two typical types of losses which the law recognises that the non-breaching party may have suffered are losses in the form of his *expectation* or in the form of his *reliance* (see *The Law of Contract* at para 21.032). Expectation loss refers to “the value of the benefit that the claimant would have obtained but for the breach of contract, or, to put it another way, the gains the claimant expected as a result of the full performance of the contract”; in contrast, reliance loss refers to “the costs and expenses the claimant incurred in reliance on the defendant’s contracted-for performance, but which were wasted because of the breach of contract” (see the Court of Appeal decision of *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR 1056 at [24]).

117 Parenthetically, a non-breaching party is only entitled to either expectation loss or reliance loss, and not both. This is to prevent double recovery since an award of damages for either expectation loss or reliance loss serves the *same* purpose of placing the non-breaching party in the same position as if the contract had been performed. I pause to qualify, however, that this is a general rule aimed at preventing double recovery, and it should *not* in principle preclude a claim in both expectation and reliance losses where there would be no double recovery, in the sense of putting the non-breaching party in an even better position than it would have been in had the contract been wholly performed.

118 If the non-breaching party elects to be compensated for its expectation loss, which NPE has done, the next question turns to quantifying the damages that should be awarded. In doing so, one method is to make an award of damages based on the “cost of cure”. This is measured in terms of what it would cost the non-breaching party to procure some entity other than the breaching party to provide that which the breaching party failed to provide. In other words, it is the cost of obtaining *substitute* performance (see *The Law of Contract* at para 21.003). Additionally, as I observed on another occasion, the measure of damages sought to be recovered must satisfy the objective conception of reasonableness if the cost of cure greatly exceeds the diminution in value, if any (see the High Court decision of *JSD Corp Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 (“*JSD Corp*”) at [86(a)]). One factor in assessing reasonableness is whether the cost of cure would be “out of all proportion to the good to be obtained” (see the House of Lords decision of *Ruxley Electronics and Constructions Ltd v Forsyth* [1995] 3 WLR 118 at 133, *per* Lord Lloyd of Berwick). Additionally, the intention to cure is a weighty factor in the inquiry of reasonableness (see *JSD Corp* at [82]). On the premise of the foregoing discussion, I turn now to the various amounts that NPE is seeking.

*Application to the present facts*

119 First, NPE is not entitled to the return of the Down Payment, as I have found that its claim succeeds on breach of contract, and not misrepresentation. More specifically, I have found that there was a valid contract that was breached, and that is not voidable for misrepresentation. Therefore, in quantifying the expectation loss of NPE, the Down Payment should not be included in the award of damages because NPE would have, in any event, been

contractually entitled to pay the Down Payment if the contract had been fully performed.

120 Second, on the premise that NPE has elected to recover its expectation loss, it is not entitled to recover the costs associated with creating a suitable environment to place the KM-1 in. This is, in substance, a reliance loss that is associated with the costs and expenses that NPE incurred in reliance on Konica's contracted-for performance, but which were wasted because of the breach of contract. But since NPE has elected to recover its expectation loss, there would be double recovery if I were to allow this amount to be included in the award of damages. This is because an award of damages to compensate the expectation loss of NPE would already have taken into account the costs and expenses incurred in reliance of the KM-1 Agreement being fully performed (see the High Court decision of *Van Der Horst Engineering Pte Ltd v Rotol Singapore Ltd* [2006] 2 SLR(R) 586 at [54]–[55]). Therefore, if this amount were again included, NPE would be put in a better position than it would have been in had the contract been wholly performed.

121 Third, NPE is entitled to recover the costs of deploying its staff to work overtime and of procuring additional materials and consumables. Had the KM-1 worked according to its promised specifications, it would have printed at a higher rate. However, because the KM-1 did not, these additional costs were incurred as part of substitute measures to meet the production rate that was promised by Konica. Having perused the documentary evidence setting out the measures that were taken, I find these measures to be reasonable in the circumstances where NPE might have breached their contractual obligations with other customers if it had failed to meet the contractually stipulated deadlines with them.

122 Fourth, I find that NPE is entitled to recover the cost of procuring the Ryobi 924 as a substitute printer to the KM-1, in order to meet the production rate that was contractually promised but which the KM-1 failed to deliver. In including this amount in the award of damages, I am of the view that it would not put NPE in a better position than it would have been in had the parties' agreement been fully performed. The position that NPE would have been in but for the breach is that it would have had a printer with the production capacities that were contractually promised and, on the uncontradicted evidence of NPE, the Ryobi 924 is a replacement printer with suitable capabilities.<sup>145</sup> Moreover, NPE would not be left with *both* the KM-1 and the Ryobi 924, but only the Ryobi 924. Konica would in all likelihood, if it has not already done so, remove the KM-1 from NPE's premises. This is given that cl 1 of the Terms and Conditions of the KM-1 Order Form provides that [t]itle to the equipment [*ie*, KM-1] shall remain vested in Konica Minolta Business Solutions Asia Pte Ltd ... until the full purchase price shall have been paid". As such, allowing this claim is entirely consistent with the compensatory aim of this award of damages.

123 For completeness, I do not think that the reasonableness requirement in *JSD Corp* would apply to this claim since the "cost of cure", which is \$500,000, does not appear to greatly exceed the diminution in value of a non-functioning KM-1. But even if it applies, I find that the cost of procuring the Ryobi 924 is reasonable given that it is already much less as compared to the \$1.5m purchase price of the KM-1. More importantly, there is no dispute that the Ryobi 924 had indeed been procured, which clearly evidences NPE's intention to cure the effects of Konica's breaches of contract. Indeed, I am convinced that NPE "is seeking compensation for a genuine loss and not merely using a technical breach

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<sup>145</sup> Defendant's Closing Submissions p 26 at para 91.

to secure an uncovenanted profit” (see the English High Court decision of *Radford v De Froberville* [1977] 1 WLR 1262 at 1270).

124 Finally, I am also satisfied that the claims in NPE’s costs in deploying its staff to work overtime and of procuring additional materials and consumables, and of procuring the Ryobi 924, are not too remote. Indeed, given that Konica dealt with NPE with the knowledge that NPE was in the business of commercially supplying prints to its customers, a reasonable person in the situation of Konica at the time of the contract would have considered these damages to be a foreseeable consequence and not an unlikely consequence if the KM-1 failed to perform as contractually promised. In addition, there is no allegation that NPE had not sufficiently mitigated its losses. In the circumstances, an award of damages of \$894,910 is appropriate.

### **Conclusion**

125 In conclusion, I dismiss the entirety of Konica’s claim save for a portion of the Click Charges against NPE.

126 I award NPE damages of \$894,910, being in effect the damages which it sought except for a refund of the Down Payment, and the sum it spent preparing its premises for the KM-1.

127 In sum, I find that Konica had supplied a defective KM-1 to NPE. Konica’s case is not helped by the incomplete documentation that it has relied on to support its claim. Indeed, it is surprising that it would rely on the KM-1 Order Form as constituting the entirety of the parties’ agreement when, by its own case, the said document is not complete. While NPE did not conclude a service maintenance agreement with Konica, that did not absolve Konica of the

responsibility of delivering a working machine. Neither did that absolve Konica of the responsibility of working to rectify the problems posed by a non-working machine. While Konica has referred to the apparently high number of prints the KM-1 had put out, this number must be considered in the context of how many prints the KM-1 ought to have put out in the period. Also, while Konica has sought to cast the blame of the defective performance of the KM-1 on NPE, I find that this is not borne out by the documentary evidence. Indeed, there was no satisfactory explanation of why there was absolutely no mention of NPE's supposed use of curly or sticky paper in either the service reports or the WhatsApp chat group. NPE is therefore entitled to damages for Konica's breaches. However, I accept that Konica is entitled to some of the Click Charges it claims. In this regard, it is only fair that NPE should pay for the prints that it successfully obtained using Konica's ink and materials. It would be unjust if Konica were deprived of payment for the benefit that it accrued to NPE by reason that it delivered a defective machine.

128 Unless they are able to agree, the parties are to write in with their submissions on: (a) the quantum of the Click Charges that Konica is entitled to, and (b) costs within 21 days of this decision, limited to no more than 15 pages.

Goh Yihan  
Judicial Commissioner

Ong Lian-Yi Gregory and Chua Yuet Min Matthew  
(David Ong & Co) for the plaintiff;  
Deborah Evaline Barker SC, Beitris Yong Pei Juan and  
Farahna Alam (Withers KhattarWong LLP) for the defendant.

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