Neutral Citation Number: [2022] EWHC 264 (Ch)

Case No: BL-2021-000092

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Date: 10/02/2022

Before :

JOANNE WICKS QC

Sitting as a Deputy High Court Judge

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Between :

(1) ADVANCED MULTI-TECHNOLOGY FOR MEDICAL INDUSTRY **(2) CARAMEL SALES LIMITED** **(3) DAVID POPECK**	**Claimants**
- and -	
UNISERVE LIMITED	**Defendant**

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Mr E Knight (instructed by **Trowers & Hamlins LLP**) for the **Applicants**
Mr J Collins QC and Mr D Walsh (instructed by **Holman Fenwick Willan LLP**) for the **Respondent**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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JOANNE WICKS QC

JOANNE WICKS QC sitting as a Deputy High Court Judge:

Introduction

1. This is an application for summary judgment brought by the Claimants against the Defendant. The claim relates to a contract for the sale and purchase of personal protective equipment, specifically masks, entered into at the height of the COVID-19 pandemic in April 2020 ("**the Supply Contract**"), and a related introduction and supply agreement ("**the Commission Contract**").

2. The First Claimant ("**Hitex**") is a manufacturer of medical supplies and devices based in Jordan. The Second Claimant ("**Caramel**") is an English company and the Third Claimant ("**Mr Popeck**") is its sole director and shareholder.

3. The Defendant ("**Uniserve**") is an English company in the business of supply of goods and logistics. The Third Party ("**Maxitrac**") was its agent. The Fourth Party, Dr Andrew Stead, is the sole director of Maxitrac, and also guaranteed Maxitrac's obligations to Uniserve.

4. Under the Supply Contract, Hitex agreed to supply 80 million masks to Uniserve on various dates in April – July 2020. It claims that Uniserve, in breach of contract, failed to receive and pay for some of the masks and it claims damages of US$23,100,000 and interest. Uniserve's defence is that Hitex failed to meet its contractual obligations as regards delivery of the masks and that it terminated the Supply Contract for Hitex's breaches.

5. Caramel claims against Uniserve the sum of US$300,000 which was part of the price under the Supply Contract and the subject of invoice UK004 ("**the UK004 Debt**") and interest and which it contends was assigned to it by Hitex. Uniserve denies that the UK004 Debt was effectively assigned to Caramel in compliance with the terms of the Supply Contract.

6. Caramel and Mr Popeck also claim £19,250,000 from Uniserve, which they contend is due under the Commission Contract, alternatively damages, and interest. Uniserve denies that that or any sum is due under the Commission Contract or that it is in breach of it.

7. Uniserve has brought Part 20 proceedings against Maxitrac and Dr Stead for declarations that they are liable in damages or to indemnify Uniserve to the same extent that Uniserve is liable to the Claimants and that Dr Stead is liable to Uniserve as guarantor of Maxitrac. Those claims are denied.

The Application

8. The application before me ("**the Application**") was brought by application notice issued on 23 July 2021. It was not supported by a witness statement, but in Section 10 of the form the Claimants indicated their intention to rely on certain documents appended to the form (forming part of Initial Disclosure), in addition to the Statements of Case.

9. The Application was originally for summary judgment on

(1) Hitex's claim against Uniserve on liability only, with damages and interest to be assessed;

(2) Caramel's claim against Uniserve for the UK004 Debt; and

(3) the whole of Caramel and Mr Popeck's claim on the Commission Contract, alternatively on liability only with damages and interest to be assessed.

However, prior to the hearing of the Application, the relief in (3) above ceased to be pursued by way of summary judgment application. It follows that the court is not concerned with the Commission Contract on this Application. Nor is it concerned with the Part 20 proceedings, save to the extent that the existence of those proceedings impacts on the Application against Uniserve.

10. Uniserve had a number of criticisms of the form of the Application. These were voiced first in its witness statement in response to the Application, made by Andrew James Williams, a partner of Holman Fenwick Willan LLP dated 3 December 2021, and developed in submissions. I shall deal with each of these in turn.

11. First, it was contended that the mandatory requirements for an application notice for summary judgment had not been complied with. CPR PD24 paragraph 2(3) states:

"*The application notice or the evidence contained or referred to in it or served with it must-*

(a) identify concisely any point of law or provision in a document on which the applicant relies, and/or

(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates

and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial."

As Floyd LJ said in *Price v Flitcraft* [2020] EWCA Civ 850 at [86], the requirement in paragraph 2(3)(b) is important because it prevents a claimant making an application and claiming the case to be straightforward when, in truth, he or she knows otherwise. In the present case the Claimants have inserted into Section 3 ("*What order are you asking the court to make and why?*") the statements "*The Defendant has no real prospect of successfully defending the claims*" and "*The Claimants know of no other reason why the disposal of the claims should await trial*." It is true that the first statement is not a statement of the Claimants' belief but on instructions Edward Knight, Counsel for the Claimants, confirmed that it is in fact his clients' belief. In the circumstances of this case I have no reason to doubt that the Claimants do hold the belief stated (although whether I agree with it is a different matter) and Uniserve is not prejudiced by this error of procedure. It would not be appropriate in the circumstances to order under CPR 3.10(a) that the application notice be treated as invalid (nor did Uniserve seek such an order) and it would be sufficient remedy in my judgment if my order on the Application formally records the confirmation which Mr Knight gave on instructions. Uniserve argued that it was necessary for the statement that "*the Claimants know of no other*

reason why the disposal of the claims should await trial" to be stated in evidence, but I do not agree. The Practice Direction requires the statement to be made either in the application notice or in the evidence and the entry in Section 3 of the notice is sufficient.

12. Secondly, it is said that the precise nature of the application which Hitex makes is unclear, since summary judgment is sought on liability only with damages to be assessed, but at paragraph 4(d) of the grounds in support of the Application, it is asserted that *"[Hitex] is entitled to damages pursuant to section 50 of the Sale of Goods Act 1979 and at common law*." Mr Knight explains that as Hitex seeks an order for damages to be assessed, it needs to assert an entitlement to damages. In my view Hitex's position is sufficiently clear and if Uniserve were genuinely in any doubt they would have asked for clarification in correspondence after having been served with the Application.

13. Thirdly, the Claimant's solicitor states that the facts stated in section 10 are true, but it is contended by Uniserve that section 10 is completed so as not to contain facts but only a statement that the Claimants will rely on the appended documents in addition to the Statements of Case. In those circumstances, the Statement of Truth is effectively superfluous. I cannot see any reason why this should prejudice Uniserve or invalidate the application notice.

14. Fourthly, in Section 10 ("*What information will you be relying on, in support of your application?*) the Claimant's solicitor has not ticked the box referring to statements of case but instead states in the part of Section 10 which is available for the inclusion of evidence that statements of case will be relied on. Mr Williams says that it is "*unclear to me what reliance the Claimants place on the statements of case in support of the Application*". In my judgment there is nothing at all unclear: it is quite clear that the Claimants intend to rely on all of their Statements of Case.

15. Fifthly, complaint is made that at the time the application notice was served, the Reply had not been served, but the grounds on which the Application was made anticipate a claim of affirmation or waiver which was pleaded in it. If Uniserve was in any doubt about the nature of Hitex's case on this issue, that doubt would have been resolved when the Reply was served, which was before Mr Williams made his witness statement. In my view there is nothing in this point either.

16. Although I have rejected Uniserve's complaints about the application notice (save in respect of the issue addressed at paragraph 11 above), I agree with Uniserve that making the Application without a supporting witness statement was not best practice in a claim of this nature and scale. Had the Claimants produced a supporting witness statement there may have been a greater concentration on what exactly it had to prove for the purposes of the Application and an earlier identification of the issues between the parties which were argued before me.

17. Mr Williams' witness statement explains the difficulties which Uniserve has had in obtaining relevant documents and understanding the events on which the claim is based. All material dealings relating to the operation and maintenance of the Supply Contract were between Maxitrac or Dr Stead and the Claimants and often excluded Uniserve. He says that requests to the Claimants to provide further disclosure (beyond Initial Disclosure) have not borne fruit and that Dr Stead has also refused to co-operate. These matters are particularly relevant when considering to what extent there will be

additional evidence available to the Trial Judge which is not before the court on this Application.

Jurisdiction

18. By CPR 24.2:

"*The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –*

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

19. The principles applicable to applications for summary judgment were summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 at [15] as follows:

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;
ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];
iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;
iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];
v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it

should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

The Supply Contract

20. The Supply Contract is dated 21 April 2020, though it was not signed until 23 April 2020. It has 6 parts to it: a cover sheet headed "Terms and Conditions for the Supply of Goods"; a part called "Order Form" in which provisions are set out in tabular form and then four schedules, Schedule 1 being "Key Provisions"; Schedule 2 "General Terms and Conditions"; Schedule 3 "Definitions and Interpretations" and Schedule 4 "Additional Special Conditions".

21. The Supply Contract was signed in the Order Form section. For each party there is an execution box headed "*Signed by the authorised representative of Uniserve/the Supplier*" with the name and position of each signatory given and a signature and date completed in manuscript. Iain Liddell signed for Uniserve and Samen Al Gharabli for Hitex.

22. The Terms and Conditions for the Supply of Goods provide:

"...The Supplier [i.e. Hitex] shall supply to Uniserve, and Uniserve shall receive and pay for, the Goods on the terms of this Contract…

The Definitions in Schedule 3 apply to the use of all capitalised terms in this Contract."

23. The Order Form provides in Box 3:

"*Unless the Contract otherwise requires, capitalised terms used in this Order Form have the same meanings as in Schedule 3*".

Box 4 states that the Goods to be supplied are Type IIR Surgical Disposable Fluid Resistant Masks, with 80 million units scheduled, the dates and amounts for delivery being:

28 April 2020	6 million units
5 May 2020	5 million units

12 May 2020	5 million units
19 May 2020	5 million units
26 May 2020	5 million units
2 June 2020	7 million units
9 June 2020	7 million units
16 June	7 million units
23 June	7 million units
30 June 2020	7 million units
7 July 2020	7 million units
14 July 2020	7 million units
21 July 2020	5 million units

The masks were to be supplied "*ex works*" and collected by Uniserve.

24. Box 6 of the Order Form states that the term shall commence on 21 April 2020:

"*And the Expiry Date shall be 8th July 2020, unless it is otherwise extended or terminated in accordance with the terms and conditions of the contract*."

25. Box 9 of the Order form uses the description "*Uniserve Authorised Representative(s)*". This has been completed:

"*For general liaison your contact will continue to be*

Iain Liddell

[email address given]

or, in their absence,

Bruce Chaplin

[email address given]"

26. Equally, Box 10 denotes the "*Supplier's Authorised Representative(s)*". This has been completed:

"*For general liaison your contact will continue to be*

Mohamad Alsakka [email address given]

or, in their absence,

David Popeck [email address given]"

27. Box 11 is described as "*Address for notices*" and gives an address for each of the parties plus "*Attention Iain Liddell*" under Uniserve's address and "*Attention Mohamad Alsakka*" under Hitex's, together with these gentlemen's email addresses.

28. By clause 5.1 of Schedule 1

"*Time is of the essence as to any delivery dates under this Contract and if the Supplier fails to meet any delivery date this shall be deemed to be a breach incapable of remedy for the purposes of Clause 12.4 of Schedule 2*."

29. The relevant provisions of Schedule 2 are as follows

"*12.4 Either Party may terminate this Contract by issuing a Termination Notice to the other Party if such other Party commits a material breach of any of the terms of this Contract which is:*

i) *Not capable of remedy…"*

"*17.2 Any change to the Goods or other variation to this Contract shall only be binding once it has been agreed in writing and signed by an authorised representative of both Parties*."

"*22.1 Subject to clause 15.5 of Schedule 2, any notice required to be given by either Party under this Contract shall be in writing quoting the date of the Contract and shall be delivered by hand or sent by prepaid first class recorded delivery or by email to the person referred to in the Key Provisions or such other person as one Party may inform the other Party in writing from time to time."*

"*23.1 the Supplier shall not, except where clause 23.2 of this Schedule 2 applies, assign, Sub-contract, novate, create a trust in, or in any other way dispose of the whole or any part of this Contract without the prior consent in writing of Uniserve, such consent not to be unreasonably withheld or delayed...*

23.2 Notwithstanding Clause 23.1 of this Schedule 2, the Supplier may assign to a third party ("Assignee") the right to receive payment of any sums due and owing to the Supplier under this Contract for which an invoice has been issued. Any assignment under this Clause 23.2 of this Schedule 2 shall be subject to…

23.2.3 Uniserve receiving notification of the assignment and the date on which the assignment becomes effective together with the Assignee's contact information and bank account details to which Uniserve shall make payment…"

"26.4 the delay or failure by either Party to insist upon the strict performance of any provision, term or condition of this Contract or to exercise any right or remedy consequent upon such breach shall not constitute a waiver of any such breach or any subsequent breach of such provision, term or condition.

26.10 This Contract, any variation in writing signed by an authorised representative or each Party and any document referred to (explicitly or by implication) in this Contract or any variation of this Contract, contain the entire understanding between the Supplier and Uniserve relating to the supply of the Goods to the exclusion of all previous agreements, confirmations and understandings and there are no promises, terms, conditions or obligations whether oral or written, express or implied other than those contained in or referred to in this Contract…"

The Parties' Cases as to performance of the Supply Contract

30. Hitex admits that it did not make any of the deliveries scheduled under the Supply Contract for 28 April, 5, 12 and 19 May 2020. It seems that there were some difficulties with the machines used to manufacture the masks. The first shipment was of 500,000 masks, and was collected by Uniserve on 16 May 2020 and paid for. The second was of a further 500,000 masks and was collected by Uniserve on 20 May 2020 and paid for. It is accepted that Hitex's failures to meet the original delivery dates were breaches of the Supply Contract and, in light of clause 5.1 of Schedule 1, they must have been repudiatory breaches deemed incapable of remedy for the purpose of the termination provisions at clause 12.4 of Schedule 2.

31. Hitex however contends (in paragraph 14 of the Particulars of Claim) that the Supply Contract was varied so as to substitute a revised schedule of delivery dates for the original ones. In this regard it relies upon an exchange of emails on 22 and 26 May 2020. On May 22 Dr Stead sent an email to Ashraf Khader, Hitex's Operations Manager, as follows:

"[Dear] Ashraf,

As per our telephone call, can you please confirm the agreed schedule for mask availability for this contract

Sunday 31st May 1M Masks

Sunday 7th June 1M Masks

Sunday 14th June 2M Masks

Sunday 21st June 5M Masks

Sunday 28th June 5M Masks

Sunday 5th July 5M Masks

Sunday 12th July 7M Masks

Sunday 13th July 7M Masks

Sunday 20th July 8M Masks

Sunday 27th July 8M Masks

Sunday 3rd August 8M Masks

Sunday 10th August 8M Masks

Sunday 17th August 8M Masks

Sunday 24th August 8M Masks

= 80M Masks Delivered.

Kind regards"

The email at the end bears Dr Stead's name, showing him as "*Managing Director, Maxitrac Limited*" and gives a phone number, his email address and the company's website address. Hitex's pleaded case is that the dates shown in this email were the dates on which the masks would be available for inspection, prior to collection the following Wednesday and shipping to the UK on the Thursday.

32. Mr Khader replied on 26 May 2020, copied to various other people:

"*Dear Andrew,*

Good Day,

Sorry for delaying in replying as we were on holiday for the last days and today we resumed working; however kindly be noted that the schedule [below] is agreed as discussed and according to the plan of receiving the new machines.

Best Regards,"

The email then bears Mr Khader's name, job title and Hitex's logo, followed by various telephone numbers.

33. It will be noted that if the numbers of masks shown in Dr Stead's email of 22 May are added up, the total is 79 million, rather than 80 million. Hitex's pleaded case (paragraph 15 of the Particulars of Claim) is that the date of 31 May was "*nominal, to reflect the shipments already complete*" (i.e. the 1m masks apparently shown as to be available on 31 May represented the 1m masks which had already been collected) and that the total of "*80M Masks Delivered*" was an error, which went unnoticed by either party.

34. Uniserve's Defence does not plead to paragraph 14 of the Particulars of Claim, although when pleading to paragraphs 15-20 it says "*No admissions are made as to whether the Revised Schedule was ever agreed for and on behalf of Uniserve*." In response to a request for further information asking specifically how Uniserve pleaded to paragraph 14, it responded:

"*It is denied that the Revised Schedule was agreed by Uniserve, as alleged. Specifically, by 17.2 of Schedule 2 to the Supply Contract, any "variation to this Contract shall only*

be binding once it has been agreed in writing and signed by an authorised representative of both Parties." The exchange of emails referred to in paragraph 14 does not meet these requirements because they were not "signed by an authorised representative of both Parties." In this regard, Uniserve will rely, as necessary, upon the identification of the "Uniserve Authorised Representative(s)" in box 9 of the Order Form to the Supply Contract (viz Messrs Liddell and Chaplin) and/or the entire agreement clause at clause 26.10 of Schedule 2 to the Supply Contract."

35. Hitex, in my view reasonably, took this pleading to mean that the only challenge to the contention that the Supply Contract had been varied rested on the application of clauses 17.2 and 26.10 and in particular the allegation that because the exchange of emails did not involve Mr Liddell or Mr Chaplin, being those identified as "Uniserve Authorised Representatives", it did not comply with the requirements of clause 17.2. As Mr Knight submitted on behalf of Hitex, Uniserve did not plead in its response to the request for further information that Dr Stead was not authorised to enter into a variation on its behalf (Maxitrac's agency for Uniserve having been admitted); it did not plead that the exchange of emails was too uncertain to amount to a contractual variation; that any agreement was conditional or that there were any other terms which were agreed. Moreover, I note that Mr Williams' witness statement, in paragraph 34, treats Uniserve's case on this point as being set out in, and implies that it is confined to, the response to the request for further information.

36. Hitex's case is that Uniserve subsequently inspected a third shipment of 1m masks on 7 June and collected it on 10 June 2020. However, its shipping agent then informed Hitex that it had been instructed to collect only half of the 2m units falling to be inspected on 14 June, with the remaining half being collected later. Uniserve subsequently collected the first half on 17 June but failed to collect any further masks. Except that it admits paying US$300,000 on 3 June and a further US$300,000 on 25 June 2020, Uniserve does not admit these facts.

37. Uniserve contends that Hitex's failure to meet the original delivery dates was a repudiatory breach and/or one which was incapable of remedy within the meaning of clause 12.4 and that it terminated the Supply Contract through Dr Stead as its agent by 11 July 2020 at the latest. Hitex's response, in paragraph 6 of its Reply, is that by reason of the acceptance of deliveries and the agreement of the revised schedule for deliveries, Uniserve affirmed the Supply Contract and amended its terms such that the failures to meet the deliveries originally scheduled for 28 April and 5, 12 and 19 May 2020 no longer represented breaches of contract, or alternatively that Uniserve thereby waived any breach.

Hitex's Application for Summary Judgment

38. The central issues relevant to this part of the Application are:

    (1) whether the Supply Contract was varied by the emails of 22 and 26 May 2020; and

    (2) whether the Supply Contract was affirmed, or Hitex's breaches waived, before Uniserve purported to terminate it for those breaches.

If Uniserve has a real prospect of success on these issues, then summary judgment should not be granted on the Application. Other points of law identified in the application notice fall away for one reason or another.

Variation of Supply Contract

39. As I have indicated, Hitex understood the challenge to the allegation that the Supply Contract was varied to depend on the question whether clause 17.2 required any variation to be made by those identified as the "Uniserve Authorised Representatives" in the Order Form. In fact, James Collins QC for Uniserve, took a series of points, which I shall address in this section. Mr Knight did not contend that the hearing of the Application should be adjourned but he did argue that these points were not now open to Uniserve and addressed them in reply.

40. In my view, a respondent to an application for summary judgment cannot resile from an admission made in its pleadings without obtaining the court's permission under CPR 14 PD paragraph 7.1. Where it has not admitted a particular fact or aspect of the issue on which summary judgment is sought, however, it may seek to demonstrate that the applicant has no real prospect of success on the issue on any grounds available to it consistent with that non-admission. It is, however, unsatisfactory for respondents to summary judgment applications to raise points which have not been pleaded or at least addressed in their evidence in response to the application: when deciding whether to make an application for summary judgment, applicants are entitled to expect that a respondent's pleaded case represents the case they have to meet and also that they will have the opportunity to reconsider the wisdom of continuing with the application when they receive the respondent's evidence. Raising new points at the last minute risks an application for an adjournment or an order for costs. In addition, raising issues which are not properly foreshadowed in the pleadings, evidence or even skeleton arguments enhances the risk that relevant authorities are not cited to the court.

Clauses 17.2 and 26.10: "an authorised representative"

41. Both parties agreed that clauses like cl. 17.2 of Schedule 2 are effective to prescribe particular methods by which any variation to a contract may be made: *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119.

42. The issue which is clearly raised by Uniserve's response to the request for further information is whether the "authorised representatives" referred to in cl. 17.2 must be the people identified in Boxes 9 and 10 of the Order Form as "Uniserve Authorised Representative(s)" and "Supplier's Authorised Representative(s)". If so, the exchange of emails on 22 and 26 May 2020 did not satisfy clause 17.2.

43. Clause 26.10 adds nothing in this respect to clause 17.2. If a variation is properly made under clause 17.2 it will form part of the "entire agreement" in clause 26.10; otherwise it will not.

44. Mr Knight submits that the phrase "authorised representative" is at large. He relies on the fact that the parties have deliberately not chosen to use capital letters for this phrase, despite the Supply Contract using capitalised words and phrases to denote defined terms throughout. He points out that even within clause 17.2 itself, there are three defined terms ("Goods", "Contract" and "Parties"), all of which are shown with capitals,

consistent with the provision at the start of the Supply Contract that "*The Definitions in Schedule 3 apply to the use of all capitalised terms in this Contract*" and the similar provision in Box 3 of the Order Form. Moreover, he notes that clause 17.2 does not use the term "the Uniserve Authorised Representative" but simply "authorised representative". The purpose of Boxes 9 and 10, he says, is to identify a point of contact for general liaison. It is commercially unworkable for the Supply Contract to identify an alternative person for agreeing contractual variations "*in the absence*" of the first: how, asks Mr Knight, is Hitex to know whether Mr Liddell is sufficiently "absent" to empower Mr Chappell to agree to a variation in his place? The provision of an alternative point of contact for general liaison makes perfect sense, but the provision of an alternative person for entering into contractual variations does not. No weight can be attached to the fact that the Supply Contract in some places uses the word "representative" and in some the phrase "authorised representative". Reading the Supply Contract as a whole, it appears that the parties were well aware that defined terms are capitalised and cannot have intended to give any specific meaning to an uncapitalised term which does not even reflect the purported definition of the phrase.

45. Mr Collins argues that the Order Form does identify the authorised representatives of Uniserve. He suggests that the court cannot take "authorised representative" in clause 17.2 to mean anybody who is authorised, since that would overlook the part of the Supply Contract which is independently negotiated. Where the contract wishes to introduce more flexibility, it does so: for example, clause 2.2 of Schedule 2 refers to "*a duly authorised agent, employee or location representative of Uniserve*"; clause 4.1 of Schedule 2 refers to "*any person authorised by Uniserve*". Had clause 17.2 been intended to be that broad, that is the language it would have used.

46. In my judgment, Mr Knight is right on this point. The "authorised representative" referred to in clause 17.2 is any representative of Uniserve or Hitex who is duly authorised to enter into variations of the Supply Contract. The clause does not use the same language as the Order Form, nor does it capitalise the phrase so as to direct the reader to a defined term. Boxes 9 and 10 expressly identify people for "*general liaison*" who may well be people with day-to-day management roles rather than those who are authorised to sign contractual variations. Moreover, I agree with Mr Knight that the references to alternative people in Boxes 9 and 10 are unworkable in the context of contractual variations, but make perfect sense for the purpose of general liaison.

47. Consequently, I am of the view that Uniserve has no real prospect of establishing that the exchange of emails was not a variation within clauses 17.2 and 26.10 simply because it did not involve those identified in Boxes 9 and 10 of the Order Form.

Evidence of variation and its terms

48. In their skeleton argument (and then only briefly), Mr Collins and Mr Walsh raised the possibility that the exchange of emails on 22 and 26 May 2020 was not even an attempt to vary the Supply Contract. They argued that it does not follow from discussion of a revised schedule that there was a contractual variation. This argument was expanded in oral submissions: Mr Collins submitted that the email exchange does not purport to be an offer and acceptance, rather it invites confirmation to something that had already been agreed by telephone; that it does not purport to be or even evidence a variation to the Supply Contract but rather suggests a discussion about performance of it and that, if it is a variation, it was not a variation on the terms which Hitex alleges. This is because

there is no reference in the emails to the 31 May 2020 date being "nominal" or the 1m masks against that date representing those which had already been delivered, rather than a further supply to be made, nor is there any evidence of a mistake having been made when the total was given as 80m masks, rather than 79m.

49. Mr Knight in reply submitted that all these matters could have been pleaded by Uniserve on the basis of what it knew at the time of its Defence, simply by looking at the documents on which Hitex rely in their Particulars of Claim and which were provided with Initial Disclosure. He submitted that a general non-admission (in paragraph 10.9 of the Defence) is inadequate to enable Uniserve to run these defences now.

50. For the reasons given above, I do consider it is open to Uniserve to seek to resist summary judgment on this basis. Furthermore, in my judgment, Uniserve has a real prospect of showing at trial that the email exchange does not constitute or evidence a variation of the Supply Contract having the effect which Hitex alleges. In this context it is important to note that Hitex's case is that the effect of the variation was not simply to substitute new dates for future deliveries of masks, but also to remove from Uniserve the right to any remedy for the failure to meet the deliveries scheduled for 28 April and 5, 12 and 19 May 2020: see Reply paragraph 6. This does not appear from the emails between Dr Stead and Mr Khader and it is not an obvious inference from the agreement of a revised schedule of future deliveries.

51. Moreover, I agree with Mr Collins that his client has a real prospect of showing that the 31 May date was not "nominal" and that the agreement anticipated that 1m further masks would be made available for inspection on 31 May, in addition to the 1m which had already been supplied to Uniserve, and that therefore there was no mistake in the figure of 80m masks which appears at the end of Dr Stead's email. That seems an obvious possible finding when one reads the emails against the background facts and in the absence of any evidence to explain why it would have made sense to agree a "nominal" date for future inspection of masks already delivered.

52. This is a case where the alleged variation was not made wholly in writing but rather the emails follow on from a telephone call, which is referred to in Dr Stead's email. There is no evidence before me of what was said in that call or in any previous discussions, following Hitex's failure to achieve the first four delivery dates in the Supply Contract: a failure which, as Mr Collins says, meant that it had, by the date of the emails, supplied only 1m of the 21m masks which it had contracted to supply. The Trial Judge will have the benefit of further disclosure and witness evidence, including from Maxitrac and Dr Stead, which is not available on this Application and which could very well cast a different light on the email exchange from the case which Hitex makes.

53. Consequently, in my view the issue as to whether the Supply Contract was varied with the effect for which Hitex contends is a matter which needs to be determined at trial and it is not appropriate to grant summary judgment on this issue.

Whether representatives "authorised"

54. In the course of making his oral submissions about the effect of clause 17.2, Mr Collins disputed whether the extent of Dr Stead's authority extended to making a variation to the Supply Contract on Uniserve's behalf. He clarified during Mr Knight's reply that he was not seeking to argue that Mr Khader lacked actual authority to agree a variation

on behalf of Hitex, merely that he was not the "authorised representative" capable of entering into a variation which satisfied clause 17.2.

55. I entertain serious doubts as to whether this point is open to Uniserve on its pleadings. Paragraph 5 of the Particulars of Claim states:

"*At all material times, Maxitrac Limited ("Maxitrac") acted as the agent of Uniserve and had actual or ostensible authority to do so. Andrew Stead is the sole director of Maxitrac*."

This is admitted by paragraph 2 of the Defence. Moreover, paragraph 14 of the Particulars of Claim expressly pleads that in making the alleged variation Uniserve was "*acting by its agent, Maxitrac, or in any event*". The defence to this paragraph is set out in the response to the request for further information set out in paragraph 34 above, which denies that the variation was made but "*specifically*" on the basis that the emails were not from and to "authorised representatives". By paragraph 10.6 of the Defence, Uniserve pleads

"*Further, no admissions are made as to whether the Revised Schedule was ever agreed for and on behalf of Uniserve*",

which would, on one reading at least, dispute Dr Stead's authority to enter into the alleged variation, although it is not directed to the averment of agency in paragraph 14. However, the extent of Maxitrac's, and therefore Dr Stead's, authority is something within the knowledge of Uniserve and if it wanted to allege that Dr Stead's actual or ostensible authority was sufficiently limited to prevent Uniserve being bound by a variation agreement entered into by him, one would expect to see a clear positive averment in the Defence.

56. In any event, on the evidence available to me there is no real prospect of Uniserve demonstrating that Dr Stead, as sole director of Maxitrac, was not sufficiently authorised to vary the terms of the Supply Contract. The evidence on behalf of Uniserve, through Mr Williams is that "*in its dealings with the Claimants, Uniserve principally acted through its agent, Maxitrac Ltd*" and he describes Dr Stead as Maxitrac's "*alter ego*". In the Part 20 proceedings, Uniserve repeats paragraphs 1 to 32 of the Particulars of Claim (which includes the assertion of agency in paragraph 14) and, as Mr Knight submitted, although it claims against Maxitrac for negligence in the carrying out of its agency, it makes no claim that Maxitrac or Dr Stead exceeded it.

57. However, given my finding in paragraph 53 above that the issue as to whether the Supply Contract was varied will have to go to trial, this conclusion does not change the outcome of the Application and is not binding on the Trial Judge.

Whether variation "signed"

58. Mr Collins in his oral submissions also argued that the emails of 22 and 26 May 2020 were not "signed" by Dr Stead or Mr Khader, within the meaning of clause 17.2 of Schedule 2. This was not an issue which in my view had been raised in Uniserve's response to the request for further information on paragraph 14 of the Particulars of Claim. Whilst this response pleaded that the exchange of emails did not satisfy the requirements of clause 17.2 because they were not "*signed by an authorised*

representative of both Parties", the response makes clear that in this regard Uniserve would rely on the identification of the Uniserve Authorised Representative(s) in Box 9 of the Order Form. It does not say that Uniserve would rely on the absence of any signature to the emails. Mr Williams' witness statement says, however, at paragraph 34.2 that

"*The emails were obviously not signed by Mr Liddell or Mr Chaplin, or by anyone else for that matter either*"

which might be said to raise the issue, though not clearly enough for Mr Knight to have understood that it was being raised. Neither Counsel addressed this issue in their skeleton arguments and, except that I drew Counsel's attention to the decision of Judge Pearce in *Neocleous v Rees* [2019] EWHC 2462, [2020] 2 P & CR 4 and invited submissions on it, no authority was cited on the meaning of "signature" in contractual, statutory or other contexts.

59. Given that I have decided in paragraph 53 above that the issue of the alleged variation is a matter which will have to go to trial, and given that this issue took Mr Knight by surprise and was not fully argued, it seems to me that I should say no more about it. If this point is to be pursued, Uniserve's pleading will have to be amended to raise it squarely and the Trial Judge will have the benefit of more comprehensive arguments and citation from authority than I have had.

Affirmation/Waiver of Breach

60. Hitex's case is that even if the email exchange of May 2020 did not effect a variation to the Supply Contract, Uniserve affirmed the Supply Contract by (a) agreeing to the revised schedule of deliveries and (b) accepting late delivery. It says it was therefore not open to Uniserve to terminate the Supply Contract for Hitex's repudiatory breach. The phrase "waiver of breach" is used in the Reply to mean an affirmation of this nature. As the affirmation issue was pleaded only in Hitex's Reply, there is no pleaded case from Uniserve in response to it: it is covered by the general joinder of issue. Mr Williams' witness statement makes clear, however, that Uniserve relies on clause 5.1 of Schedule 2 and clause 26.4 of Schedule 2 in relation to any allegation of affirmation by acceptance of late delivery. He also says that evidence from Maxitrac and Dr Stead would be highly pertinent to the circumstances in which the goods were accepted, which would colour the question whether acceptance amounted to an affirmation or waiver of breach.

61. Mr Knight referred me to *The "Kanchenjunga", Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391, in which Lord Goff discusses the circumstances in which a contracting party is held to an election to affirm the contract following the other party's breach. That case concerned the nomination of a port by charterers of a ship which was not a safe port which they were entitled to nominate. Lord Goff said (at 399):

"*The present case is concerned not so much with repudiation as with an uncontractual tender of performance...The other party is entitled to reject the tender of performance as uncontractual; and, subject to the terms of the contract, he can then, if he wishes, call for a fresh tender of performance in its place. But if, with knowledge of the facts giving rise to his right to reject, he nevertheless unequivocally elects not to do so, his*

election will be final and binding upon him and he will have waived his right to reject the tender as uncontractual."

Lord Goff also cited a judgment of Devlin J, as he then was, in *The Stork* [1954] 2 Lloyd's Rep 397, in which he said:

"*there is a difference between a contractor who does not discharge his obligation at all and one who does so imperfectly. In the latter case, the contract gives the other party the right to elect to treat the imperfect performance as if it were a fulfilment of the contract (even if he knows that in fact it is not), and to claim damages if any result from the imperfection. This is a right which is, I think, common to every class of contract*."

Mr Knight submitted that these principles were applicable here. Non-contractual performance, in the form of the revised schedule and late delivery of the goods, had been tendered and accepted. This prevented Uniserve terminating the Supply Contract for Hitex's breaches, but, unlike the alleged variation, would leave intact its right to damages for them.

62. Mr Knight accepted that clause 26.4 would apply to prevent inaction on Uniserve's part constituting an affirmation, and that such inaction would include a simple receipt of the goods on a date other than that provided for in the Supply Contract, but contended that it did not extend to a positive agreement to a revised schedule for deliveries.

63. Mr Collins submitted that Mr Knight's arguments glossed over an important distinction between breaches which pre-date, and those which post-date, the action said to constitute affirmation. At common law, a repudiatory breach gives rise to the right in the innocent party to elect whether to terminate the contract or affirm it. The decision to affirm the contract prevents the innocent party relying on that particular breach for terminating it, but does not prevent termination for a future breach. Absent a contractual variation, the right to terminate for future breaches is only extinguished if there is an estoppel binding the innocent party. In *Westbrook Resources Ltd v Globe Metallurgical Inc* [2009] EWCA Civ 310, Moore-Bick LJ set out the distinction at [12]:

"*It is well established that if a party to a contract who is entitled to receive performance of an obligation by a stipulated date represents to the other that he is willing to accept performance out of time and the other relies on that representation, he cannot insist on performance by the date originally stipulated. If the representation is made before the time for performance has come, the waiver will operate by way of equitable estoppel. If it is made after the time for performance is past it may also take effect as an election to affirm the contract."*

Hitex has not, Mr Collins submitted, pleaded the elements of an estoppel and would in any event have to show, in the light of clause 17.2, that there were some words or conduct unequivocally representing that the variation to the delivery schedule was valid notwithstanding its non-compliance with clause 17.2 and that something more would be required for this purpose than the informal agreement to accept late delivery: *Rock Advertising*, above at [16].

64. Mr Collins accepted that there was little between himself and Mr Knight as regards breaches which pre-dated any action which was relied on as affirmation. He recognised that once Uniserve accepted late delivery of a particular tranche of goods, it could not

terminate on the basis that those goods had been delivered late. But that would not prevent termination for later breaches. Even if the exchange of emails in May 2020 could prevent termination for the breaches which took place before that exchange, they could not prevent termination for later breaches. Each time Hitex failed to make a delivery in accordance with the Supply Contract, Uniserve obtained a fresh right to terminate for that breach.

65. In reply, Mr Knight argued that the exchange of emails in May 2020 really amounted to two representations: first, that Uniserve would not terminate for past breaches and secondly that it would accept delivery on the dates shown in Dr Stead's email as being good performance of the Supply Contract. The reliance on that second representation is obvious, he submitted, namely the subsequent production of millions of masks.

66. In my judgment a claim of estoppel is not open to Hitex on its pleaded case. It has not pleaded the elements of an estoppel; in particular it has not pleaded any words or conduct which are claimed to amount to a representation that the variation to the delivery schedule was valid despite non-compliance with clause 17.2. It has also not pleaded any reliance on such a representation.

67. I agree with Mr Collins that each failure to make a delivery in accordance with the contractual schedule was a separate and repudiatory breach of contract and one which the contract deems incapable of remedy. An agreement to accept a revised schedule of deliveries would in my judgment constitute an affirmation of the Supply Contract and such an affirmation would not have to comply with clause 17.2. It could be effected by any form of communication by or on behalf of Uniserve, through words or conduct, that it was treating the Supply Contract as continuing. In my view the email exchange of 22 and 26 May 2020 was an affirmation of the contract. However, in the absence of a contractual variation or estoppel, the delivery dates and amounts in the Supply Contract remained unchanged and obliged Hitex to deliver 7m masks on 2, 9, 16, 23, 30 June and 7 July 2020, which it did not do. The collection of 1 million masks on 10 and 17 June 2020 would appear to be a "*delay or failure…to insist upon the strict performance*" of the Supply Contract and therefore to fall within clause 26.4 of Schedule 2. But even if that were not the case, fresh breaches occurred on 23 and 30 June and on 7 July which entitled Uniserve to terminate the Supply Contract.

68. It is in issue between the parties as to whether or not Uniserve did, effectively, terminate the Supply Contract, either at common law or pursuant to clause 12.4 of Schedule 2. However, neither Counsel addressed me orally on this question because whether or not the Supply Contract was effectively terminated, in the absence of a variation or effective affirmation Hitex would not be entitled to the relief it seeks.

69. I therefore conclude that Uniserve has a real prospect of success on the issue as to whether there was an effective affirmation of the Supply Contract.

70. Given my conclusions on the variation and affirmation issues, it follows that Hitex's application for summary judgment on this Application should be dismissed.

Caramel's Application for Summary Judgment

71. Caramel's claim against Uniserve is for the UK004 Debt, namely a debt of US$300,000 (equivalent to £223,380.49 as at 23 December 2020) and interest. The debt represents

the price for the shipment of 1m masks collected by Uniserve on 17 June 2020. US$300,000 was paid by Uniserve to Hitex on 25 June 2020 but Caramel and Hitex claim that it had been assigned to Caramel on 21 June 2020, and notice given to Uniserve on 22 June 2020. Consequently, Hitex claims to have appropriated the payment to a later invoice.

72. The validity of this claim therefore depends on the question whether the UK004 Debt was effectively assigned to Caramel by Hitex. Clause 23.2 of Schedule 2 provides that the right to receive payment of any sums due and owing under the Supply Contract for which an invoice has been issued may be assigned, subject to various matters. The matter in clause 23.2.3 is:

"*Uniserve receiving notification of the assignment and the date upon which the assignment becomes effective together with the Assignee's contact information and bank account details to which Uniserve shall make payment*."

73. Mr Al Gharabli marked on Invoice UK004 "*We hereby Assign this Invoice and Payment to Caramel Sales Ltd For the full amount due*" and signed and dated it and there is no contention that this was not effective to assign the UK004 Debt, subject to satisfaction of clause 23.2.

74. By way of notification under clause 23.2.3, Caramel relies on an invoice, number 126 2020 dated 21 June 2020, which is addressed to "*Uniserve Limited, Upminster Court, !33* (sic) *Hall Lane, Upminster Essex Rm14 1AL*", in the amount of £250,000. The payment is described as:

"*To assignment of Hitex invoice dated 7th June 2020 UK 004 for a value of 300000 USD converted into pound sterling. Assignment attached*."

The invoice bears Caramel's name and address and its bank details. Uniserve's case is that that invoice was insufficient to satisfy clause 23.2.3 because any notification given under that clause must comply with the provisions of clause 22.1 of Schedule 2, which this did not, since it did not "*quote the date of the Contract*", nor was it delivered "*by hand or sent by prepaid first class recorded delivery or by email to the person referred to in the Key Provisions or such other person as one Party may inform the other Party in writing from time to time.*"

75. The documents in the bundle indicate that Mr Popeck of Caramel informed Dr Stead by email on 21 June 2020 that the UK004 Debt had been assigned to Caramel (he actually said it had been assigned to him, but he attached the invoice showing assignment to Caramel). Dr Stead replied that Caramel still had to create an invoice for the amount assigned. Mr Popeck sent an email to Dr Stead on 22 June 2020 at 05:56 saying "*invoice attached*", but Dr Stead replied "*Sorry, but I need a proper invoice on a letter head, not a spreadsheet*". At 08:53 on 22 June Mr Popeck emailed "*Here is the invoice duly assigned…surely this should be sufficient proof to generate the payment?*", to which Dr Stead replied "*Ok, will send through*". I am asked to infer that the invoice from Caramel (126 2020) was the attachment to that email, although its description ("*the invoice duly assigned*") would tend to indicate that what was attached was Hitex's invoice UK004. There is no evidence as to whom Dr Stead sent the invoice when he said he would "*send it through*", though following further chasing from Mr Popeck, on

25 June Dr Stead indicated that authority for the payment "*is waiting to be signed by CEO then will be sent immediately*".

76. As I have indicated, payment of US$300,000 was made by Uniserve on 25 June 2020. The banking document evidencing this gives "INV-2020 UK004" as the "payment details".

77. Mr Knight contends that that the Supply Contract provides for two independent procedures. Clause 22.1 does not cover a notification of assignment within clause 23.2.3, rather it provides its own separate code for how such notifications should be given and the details they must contain. Such a notification may be given by the assignee, rather than Hitex. He submitted that clause 23.2.3 is notably differently phrased from other provisions in the Supply Contract which use the word "notice", such as clause 18.5 (concerned with Force Majeure events); clause 12.5 (termination notices) and Box 6 of the Order Form (which allows for extension of the term of the contract). In reply he recognised that there were other provisions in the Supply Contract using the word "notification" and fairly accepted that some of them (such as clause 4.4, which deals with rejection of the goods) appear to use the word "notification" in the same way as "notice", but he contended that in other clauses (clauses 7.1.16, 12.3.1, 15.5), "notification" is used to mean something different from a "notice". In the context of these other provisions, and reading the Supply Contract as a whole, Mr Knight argued, the notification under clause 23.2.3 need not be in writing and could be given by a person other than a party (such as the assignee).

78. Mr Collins, on the other hand, contends that clause 23.2.3 requires compliance with clause 22.1. There is, he submits, no difference between a "notification" under clause 23.2.2 and a "notice" to which clause 22.1 applies. This is made apparent by the opening words of clause 22.1, which subject that clause to clause 15.5. Clause 15.5 of Schedule 2, which is concerned with dispute resolution by mediation, does not refer to "notices", but it provides that

> "…*either Party may terminate the mediation process by notification to the other Party (such notification may be verbal provided that it is followed up by written confirmation).*"

Consequently, Mr Collins says, the fact that there is a carve-out from clause 22.1 for a verbal "notification" indicates that the parties were using the word "notification" and "notice" interchangeably in the Supply Contract and that a "notice" in clause 22.1 would otherwise cover a "notification" under clause 15.5.

79. From a commercial perspective, Mr Collins says, notice of an assignment is important since if, after receipt of proper notice, Uniserve pays the assignor, it may also have to pay the assignee. Thus clause 22.1 is an important protection for Uniserve, which needs to be able to quickly identify who a payment should be made to. Even if it were possible for an assignee to give notification of assignment, that notification would still be given on behalf of Hitex because it is Hitex which must satisfy the conditions of clause 23.2 before an assignment is valid.

80. One difficulty with clause 22.1 is that it refers to "*the person referred to in the Key Provisions*", but there is no clause in the Key Provisions in Schedule 1 identifying a person on whom notices should be served. Mr Collins contends that this must be a

reference to the Uniserve Authorised Representative or Supplier's Authorised Representative identified in Boxes 9 and 10 of the Order Form. It seems to me, however, that it must be intended to be a reference to the person identified in Box 11, "Address for notices", namely Mr Liddell for Uniserve and Mr Alsakka for Hitex. Box 11 gives the reader all the information needed for compliance with clause 22.1, namely the address of the relevant party, the person for whose attention notices must be sent and the email address of that person.

81. In my view the arguments for and against the application of clause 22.1 to notifications of assignment within clause 23.2.3 are finely balanced. However, it is exactly the kind of question which is susceptible to determination on an application for summary judgment: it is a short point of construction which does not depend on findings of fact and in respect of which the parties have had a full opportunity to put their arguments. It is right, therefore, that I decide it.

82. I have concluded that clause 22.1 does not apply to notifications of assignment.

83. I do not reach this conclusion because there is any particular difference between a "notice" under clause 22.1 and a "notification" under clause 23.2.3. Out of context, there may perhaps be nuances of difference in meaning between those two words: for example, it makes sense to speak of "a notification" given orally, whereas it would not be usual to speak of "a notice" given orally (though one might refer to "oral notice having been given"). However, in the context of the Supply Contract, the parties seem to have drawn no hard and fast distinction between "notices" and "notifications". The best example of this blurring of the two concepts is the one to which Mr Collins draws attention, namely that clause 22.1 is subject to clause 15.5, but clause 15.5 does not refer to any notice, only a notification.

84. Clause 22.1 is expressed to apply where notice is required to be given "*by either Party under this Contract*." However, clause 23.2.3 does not require that notification of the assignment and supporting information be given by anybody in particular. It requires only that it is received by Uniserve. The person most likely to give the notification (and to be in a position to provide the assignee's contact details and bank account details) would be the assignee. I do not consider Mr Collins' argument, that where an assignee gives notification under clause 23.2.3 it does so on behalf of the assignor, to be compelling. The assignee gives notification in their own interests, to ensure that payment is directed to them.

85. One can see that it may be very important for contractual notices generally to be directed to an identified senior person at Uniserve or Hitex, whose name is shown in Box 11. It would also be important for the notice to quote the date of the contract, so that it can be readily identified. But clause 23.2.3 is concerned with debts which are already the subject of a particular invoice. In that context, it is more important that notification of the assignment of the debt described in the invoice, together with the date on which the assignment is effective and details of the assignee's contact and bank account details, be passed to the accounts department of Uniserve making payment. It therefore makes commercial sense, in my view, for notifications of assignment to be treated differently from the general run of contractual notices.

86. Although Caramel would have been assisted if it had produced a witness statement which explained how exactly it contended the details required by clause 23.2.3 had been

received by Uniserve, in my judgment there is no real prospect of Uniserve showing at trial that it did not receive Invoice UK004 duly endorsed with the assignment (which itself made clear that it was effective immediately) and Invoice 126 2020 which gave Caramel's contact information and bank account details. The invoice attached to Mr Popeck's email of 22 June at 08:53 can only have been Caramel's invoice 126 2020, since it was what Dr Stead had requested, and he was satisfied with it. It may be that receipt by Dr Stead, on behalf of Maxitrac as Uniserve's agent, would be sufficient. Even if not, the obvious inference from the email communications between Mr Popeck and Dr Stead is that Dr Stead had passed the documents on to Uniserve, who considered the request for payment at CEO level before authorising it to be made on 25 June 2020, unfortunately (for Uniserve) to Hitex rather than Caramel.

87. I therefore conclude that Uniserve has no real prospect of success in its defence to Caramel's claim for the UK004 Debt.

Other Compelling Reason for Trial

88. Uniserve argued that if I concluded that there was no real prospect of success on its defence to Hitex's claim, I should nevertheless find that there was another compelling reason for trial because substantially more evidence would become available as a consequence of disclosure and witness evidence, including in the Part 20 proceedings. Given that I have concluded that there is a real prospect of success in its defence to Hitex's claim, I do not need to consider this limb of CPR 24.2(a)(ii).

89. On the other hand, there is no compelling reason why the issue of Caramel's debt should go to trial. That is a discrete issue which is, as I have said above, appropriately dealt with on a summary judgment application.

Conclusion

90. For the reasons given above:

(1) Hitex's application for summary judgment is dismissed; but

(2) summary judgment is granted on Caramel's claim for the UK004 Debt. I invite Counsel to address me on the question of interest on that debt.