Neutral Citation Number: [2023] EWHC 2147 (Ch)

Case No: BL-2021-000092

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 22nd August 2023

Before :

Richard Farnhill
(sitting as a Deputy Judge of the Chancery Division)

- -

Between :

(1) ADVANCED MULTI-TECHNOLOGY FOR MEDICAL INDUSTRY
(2) CARAMEL SALES LTD
(3) DAVID POPECK

Claimants

- and -

UNISERVE LTD

Defendant / Respondent

- and –

MAXITRAC LTD

Third Party / First Applicant

- and –

Dr ANDREW STEAD

Fourth Party / Second Applicant

- -
- -

Mr Mark Vinall (instructed by **Capital Law Limited**) for the **Applicants**
Mr David Walsh (instructed by **Holman Fenwick Willan LLP**) for the **Respondent**

Hearing date: 10 August 2023

- -

JUDGMENT

Richard Farnhill (sitting as Deputy High Court Judge for the Chancery Division) :

Introduction

1. The Applicants seek to discharge a worldwide freezing order made initially *ex parte* by Peter Knox KC, sitting as a judge of the High Court, on 16 December 2022 and continued by Meade J on 21 December 2022 (the **Order**). The Applicants had notice of the latter hearing but did not attend.

2. The Order arose out of these proceedings, in which Uniserve is sued for breach of a contract for the supply and purchase of disposable face masks (the **Supply Contract**) and of a related commission agreement (the **Commission Contract**) by the Claimants. Uniserve denies liability but has also brought a Part 20 claim against the Applicants on the basis that if it is liable to the Claimants, the Applicants are in turn liable for breach of their contract with Uniserve (the **Maxitrac Contract**).

3. Following the service of the Claimants' original Reply in August 2021 Uniserve sought permission to amend its original Part 20 Particulars. Before any amendment was made the Claimants made a largely unsuccessful application for summary judgment, which further delayed amendment of the original Part 20 Particulars. Permission to amend was ultimately granted on 25 November 2022 by Deputy Master Lampert and the Amended Part 20 Particulars (which I will refer to simply as the Part 20 Particulars) were served on 28 November 2022, ahead of the *ex parte* application before Mr Knox KC.

4. It is recognised, and indeed was recognised at the time, that the return date hearing followed very soon after the initial making of the Order. Meade J therefore granted the Applicants until 30 January 2023 to apply to vary or discharge the Order without needing to show any material change in circumstances. They did not do so, only issuing this application on 21 July 2023.

5. The Applicants accepted, shortly before the hearing of this application, that they did not have the evidence to challenge the Order on the ground that there was no real risk of risk of dissipation. Instead they challenged it on the basis that Uniserve has no good arguable case against them and, in any event, there was a failure to comply with the duty of full and frank disclosure. Uniserve resisted the application both on the merits and on the basis that there had been undue delay in making the application.

The underlying dispute

6. While an application for a freezing order is not intended to be a dress rehearsal for the trial, given that the arguability of the case is contested some analysis of the dispute and the facts underpinning it is inevitable.

7. Maxitrac was incorporated on 11 April 2019; Dr Stead was its sole shareholder and sole director. Initially it appears to have operated on a small scale: its financial statements for the year 2019-2020 recorded current assets of £1,026 and sums falling due within a year of £8,501.

8. That position was transformed with the outbreak of Covid-19. Dr Stead had a network of contacts from his work as a business consultant that he considered he could use to source personal protective equipment (**PPE**). Uniserve had an agreement to supply PPE to the Department of Health and Social Care (**DHSC**). On 29 March 2020, through an exchange of emails between Dr Stead and Uniserve, Maxitrac and Uniserve entered into a contract under which Maxitrac was to act as Uniserve's agent in dealing with potential suppliers of PPE. The arrangement was formalised in the Maxitrac Contract on 2 June 2020, under which Dr Stead also guaranteed Maxitrac's obligations. The degree of the transformation is striking: between 25 April and 28 August 2020 Uniserve paid Maxitrac £42,510,000.

9. Following an introduction by Maxitrac, on 21 April 2020 Uniserve entered into the Supply Contract with the First Claimant for the supply of 80 million disposable face masks. On the same day Uniserve entered into the Commission Contract with the Second and Third Claimants.

10. Production of the face masks by the First Claimant was delayed. The Supply Contract provided for the first six million units to have been ready in a single batch by 28 April 2020. In fact, the first units were delivered for inspection on 12 May 2020 and by 20 May 2020 only one million units had been shipped to the UK. In the Amended Reply and Defence to Counterclaim, which, for convenience, I shall refer to simply as the Reply, the Claimants accept that those delays constituted either a repudiatory breach of the Supply Contract or a basis for termination under its terms.

11. They deny that termination ever happened, however. Rather, it is alleged by the Claimants in their Amended Particulars of Claim (the **Particulars of Claim**) that in a telephone call on or around 22 May 2020 Dr Stead, as agent for Uniserve, and Mr Khader of the First Claimant orally agreed a revised schedule for delivery of the remaining 79 million units. It is further alleged that Dr Stead wrote to Mr Khader on 22 May 2020 setting out the revised agreement and Dr Khader confirmed it in an email on 26 May 2020.

12. Uniserve admits that the emails were sent, although denies that they constituted a variation of the Supply Contract. Uniserve also accepts that Dr Stead forwarded the 26 May 2020 email to Mr Chaplin of Uniserve soon after it was sent to the First Claimant.

13. From 30 May to 17 June 2020 Uniserve took delivery of and paid for multiple shipments of face masks. Internally, however, Uniserve's management were unhappy with the delays and had identified an alternative supplier. From 5 June 2020 Uniserve was seeking approval from DHSC to source face masks from BYD Auto Industry Company Ltd (**BYD**) as a substitute for the First Claimant. Mr Liddell, of Uniserve, also wrote to Dr Stead stating his willingness to engage BYD even without DHSC approval in advance: "*I think we will have to take a bit of a flier on this as I don't trust* [the First Claimant] *to deliver*." Later that day he stressed: "*OK how to we get out of the Hitex contract* [with the First Claimant]". Dr Stead responded: "*First we see if we get the 2M, 3M, 5M and 7M, they miss one, its* [sic] *over, they already know that (even by a day) with*

60M from BYD, that's the 80 even if they do it, I think that even if they scrape in with the 7M week, they may struggle to get the 8M week as things stand."

14. On 7 June 2020 Uniserve signed a supply agreement with BYD for 60 million surgical face masks.

15. Uniserve admits in its Amended Defence and Counterclaim (the **Defence**) that it ceased to collect any PPE from the First Claimant after 17 June 2020. Emails provided to the Applicants on disclosure (the **Bonnett emails**) further evidence this, showing that on 18 June 2020 Mr Bonnett, of Uniserve, informed the freight handler (**Majlan**), that it was not to collect any more masks from the First Claimant.

16. Uniserve asserts, again in the Defence, that the First Claimant failed to make deliveries in accordance with the alleged amended Schedule on 21 and 28 June and 5 July 2020 in any event. Those were further grounds to terminate the Supply Contract and Uniserve pleads in the Defence pleads that:

> Uniserve did so terminate the Supply Contract through its agent Dr Andrew Stead by 11th July 2020 at the latest. In particular, on 11th July 2020, Mr [sic] Stead wrote to Mr Khader on at least two occasions:
>
> 10.7.1 Explaining in one message that: "*it was made very clear to you that the contract was finished last time we spoke*."
>
> 10.7.2 And in another that: "*The last time we spoke I told you clearly that you (Hitex) had breach* [sic] *the terms of the contract and that it was therefore cancelled/finished due to the breach and the lack of timely supply … it was 'clearly stated' that the contract was in breach, the contract had ended as a result.*"

17. The Reply admits that the emails were sent but denies they amounted to a termination, stating: "*The emails do not purport to terminate the Supply Contract but simply refer obliquely to an earlier oral statement that the Supply Contract had in some unspecified manner been 'cancelled' or 'finished' or 'ended', none of which was correct.*"

18. Uniserve's primary position is therefore that it was entitled to and did terminate the Supply Contract, such that no sums are due under it and the damages claim is baseless. That, in turn, means that no sums could be earned under the Commission Contract and so, again, there is no basis for a claim in debt or for any corresponding damages claim.

19. The Part 20 claim is pleaded in the alternative, such that it is premised on the Claimants succeeding in whole or in part. The Part 20 Particulars rely on the following terms of the Maxitrac contract:

> 3.2 [Maxitrac] shall ensure that:

> (d) availability / deliveries occur on time, as per the agreed schedule (and [Maxitrac] shall inform Uniserve of any delays in availability / delivery, together with reasoning [sic] as to why);
>
> (f) availability of Goods is notified to Uniserve so that they are able to be collected in a timely manner once ready to dispatch.
>
> 4.2 [Maxitrac] warrants and undertakes to Uniserve that:
>
> (b) each supplier has manufacturing and warehousing capacity sufficient to comply with its obligations under the relevant [Supply Contract]
>
> 8.1 Subject to clause 8.2, [Maxitrac] shall be liable to Uniserve for, and shall indemnify and keep Uniserve indemnified against:
>
> (a) any loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings in respect of:
>
> (i) any breach of this Agreement by Maxitrac, including (without limitation) any breach of its obligations under Clauses 3 or 4

20. Uniserve alleges that the Particulars of Claim evidence a breach by Maxitrac of clause 3.2(d) of the Maxitrac Contract and that any liability it has to the Claimants was caused by breaches of clauses 3.2(f) and 4.2(b). This was further addressed in Uniserve's response to a Part 18 Request (relating specifically to the alleged breach of clause 3.2(d)) which provided: "[Uniserve] *will rely upon the fact that the 'Dates of Delivery' identified in the Supply Contract … alternatively as varied … were not adhered to … and that this alone, alternatively combined with the breach(es) of clause 3.2(d) related to the failure to inform … meant that the Defendant was not in a position to collect deliveries when, on the Claimants' case, they later became available for collection.*"

21. The Part 20 Defence (which has yet to be amended) responded in the following terms (at paragraph 5(f)):

> The allegation that Uniserve's putative liability to the Claimants has been caused by the alleged breaches is incomprehensible and is liable to be struck out. If clause 3.2(f) and/or clause 4.2(b) were engaged, then that would evidence a breach of contract on the part of [the First Claimant]. [The First Claimant's] breach of contract would not cause Uniserve to be liable to [the First Claimant]. It would potentially cause [the First Claimant] to be liable to Uniserve, but that is a different thing.

22. Uniserve also relies on an implied term, which was part of the amendment to the Part 20 Particulars. Given its importance to both parties, it merits quoting at some length:

> 3.3A A term was also implied into the … Maxitrac Contract as a matter of law (viz. necessarily to give business efficacy or to give effect to the parties' obvious but unexpressed intentions) and/or pursuant to section 13 and/or 14 of the Supply of Goods

and Services Act 1982 that [Maxitrac] (as Uniserve's agent) would obey Uniserve's instructions relating to the Maxitrac Contract and/or that it would execute those instructions with reasonable dispatch, and/or that it would perform its duties in connection with the … Maxitrac Contract with reasonable skill and care.

…

3.5A.1 As admitted by the Claimants in paragraph 6 of their Reply, by 26th May 2020, [the First Claimant] was in repudiatory breach of the Supply Contract and Uniserve was entitled to terminate the same.

3.5.A.2 By this time or at the latest 5th June 2020, [Maxitrac] knew or ought to have known that Uniserve was contemplating terminating the Supply Contract and that Uniserve did not want its right to do so to be jeopardised.

3.5.A.3 In this regard, Uniserve will rely, in particular, upon: (i) an email from Iain Liddell to [Dr Stead] sent on 10th May 2020 which said "*we have to cancel*"; (ii) the fact that [Dr Stead] prepared a draft termination notice on 11th May 2020; (iii) the fact that by 20th May 2020, an alternative supplier had been identified in the form of [BYD]; and/or (iv) an email sent by Iain Liddell to [Dr Stead] on 5th June 2020 saying: "*Ok how do we get out of the Hitex contract?*"

3.5.A.4 The Claimants have pleaded at paragraph 6 of their Reply that after 26th May 2020, Uniserve affirmed the Supply Contract and/or waived any breach of the Supply Contract such that it lost the right to terminate the same. The conduct relied upon by the Claimants surrounds the alleged agreement to and/or performance of the Revised Schedule as pleaded at paragraphs 13 to 17 of the Particulars of Claim. Those allegations are repeated including the Claimants' allegation that Uniserve was acting at the time by its agent, [Maxitrac].

3.5.A.5 There is an automatic joinder of issue with the Claimants' case in its Reply. If, however, the Claimant's case as outlined in paragraph 3.5.A.4 above is accepted by the Court, Uniserve will say that any consequent liability to the Claimants for breach of the Supply Contract was caused by the Third Party's breach of the implied term identified in paragraph 3.3A above. Specifically, Uniserve will say that [Maxitrac] failed to perform its duties with reasonable skill and care because it: (i) agreed to the Revised Schedule without Uniserve's prior approval or consent … thereby affirming the Supply Contract and/or waiving any breach of the same; and/or (ii) failed to take any or any adequate steps to preserve Uniserve's right to terminate the Supply Contract, which it knew or ought to have known was

> contrary to Uniserve's wishes at the time, and instead affirmed the Supply Contract and/or waived any breach of the same.
>
> …
>
> 3.5.B.2 In early 2020, Uniserve expressly instructed [Maxitrac] to terminate the Supply Contract. …
>
> 3.5.B.3 The Claimants have pleaded at paragraph 8 of their Reply that the Third Party failed to terminate the Supply Contract effectively on behalf of Uniserve. Those allegations are repeated.
>
> 3.5.B.4 There is an automatic joinder of issue with the Claimants' case in its Reply. If, however, the Claimants' case as outlined in paragraph 3.5.B.3 above is accepted by the Court, Uniserve will say that any consequent liability to the Claimants for breach of the Supply Contract was caused by the Third Party's breach of the implied term identified in paragraph 3.3A above. Specifically, Uniserve will say that [Maxitrac] failed to follow Uniserve's instructions (within a reasonable time) and/or perform its duties with reasonable skill and care by failing effectively to terminate the Supply Contract by 11th July at the latest.

23. Maxitrac and Dr Stead have yet to amend their Part 20 Defence to respond to the implied terms case although their solicitors, Capital Law, have addressed it in correspondence in the run-up to this hearing and Dr Stead has addressed it in his evidence for this application.

24. Uniserve's position in these proceedings is therefore typical for a Part 20 Claimant: it denies the claim brought against it, but if that claim is successful it adopts the facts that underlie it with a view to recovering against another party, in this case Maxitrac and Dr Stead. The contingent nature of that claim underpins a key legal difference between the parties.

25. The current application was originally brought on three grounds: good arguable case; no real risk of dissipation; and breach of the duty of full and frank disclosure. As I have noted, Maxitrac accepts that the state of the evidence does not allow it to advance the second ground at this stage, such that I am to proceed on the basis that there is a real risk of dissipation.

Good arguable case

The test for good arguable case in contingent claims

26. The parties agree that to show a good arguable case Uniserve needed to establish that its Part 20 claim had a "*plausible evidential basis*", quoting *Lakatamia Shipping Co Ltd v Toshiko Morimoto* [2019] EWCA Civ 2203 at [38]. It was further agreed that a freezing order could be granted in respect of a contingent claim (see *Kazakhstan Kagazy plc v Zhunus* [2016] EWCA Civ 1036 at [27]).

27. Where the parties sharply diverged was the relevance of the underlying claim brought by the Claimants against Uniserve in determining whether Uniserve had a good arguable case against Maxitrac and Dr Stead.

28. The Applicants submit that I do need to consider the Claimants' case against Uniserve, and that it does not disclose a good arguable case. Since Uniserve's claim against the Applicants is premised on the Claimants succeeding, the weakness of the Claimants' case meant that Uniserve's Part 20 claim, in turn, could not be a good arguable case.

29. Uniserve submitted that I simply ignore the Claimants' claim and focus only on the strength of Uniserve's Part 20 claim. As it was put in the skeleton for this application, any issues with the Claimants' case "*are irrelevant to a good arguable case on the contingent Part 20 claim.*" That is somewhat at variance with what was said in Uniserve's skeleton before Mr Knox KC, in which it was asserted at paragraph 8.1(a) that at this stage "*those claims can properly be characterised as good arguable ones.*" It is worth noting that Uniserve was represented by Mr Peters, rather than Mr Walsh, before both Mr Knox KC and Meade J and that Mr Peters prepared the skeletons for those hearings. At both those hearings and before me the instructing solicitors were Holman Fenwick Willan. For current purposes, I am taking Uniserve's case to be that set out in Mr Walsh's skeleton before me, although I will come back to the apparent discrepancy in Uniserve's position at the different hearings in due course.

30. Mr Vinall observed, *Zhunus* did not need to address the point, since a good arguable case in the underlying claim had already been established (see paragraph [21]). I was told that no other case had considered the question.

31. In considering the relevance of the underlying claim against Uniserve I start with the decision of Mustill J, as he then was, in *The Niedersachsen* [1983] 2 Lloyd's LR 600. There, he emphasised at page 605:

> In these circumstances I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent. chance of success.
>
> In conclusion, I should add that it is particularly important in the present instance that the court should not be drawn into a premature trial of the action, rather than a preliminary appraisal of the plaintiff's case, for the parties have contracted for a determination by arbitrators, not by the Court, and nothing must be done to pre-empt the decision of the agreed tribunal.

32. He emphasised (at 603): "*That the judge hearing a Mareva application is not only entitled but bound to make some assessment of the plaintiff's chances of success at the trial is, I believe, not open to dispute.*"

33. Mustill J formulated the possible question for appeal in the following terms (ibid.): "*[W]hat probability of success at the ultimate trial is the plaintiff required to demonstrate, before an injunction can be properly granted or maintained?*"

34. The Court of Appeal approved Mustill J's approach (at page 613). It has been repeatedly endorsed since.

35. From that decision I draw three principles relevant to the question I must answer. First, the question of arguability relates to the case and not simply aspects of it. The "case" is not so wide as the claim as a whole; a claim may be advanced on a number of bases of varying strength, and each individual basis could stand or fall independent of the others. I do not, however, see that the arguability of a "case" can be said to have been made out if certain aspects critical to its success are not addressed.

36. Secondly, the question is to be assessed by reference to the prospects of success at the ultimate trial. In *The Niedersachsen* the question was what standard needed to be achieved – the probability of success – but again it is difficult to see how a party can say they have established the probability of success at trial to any standard if crucial elements of their case against the respondent to the freezing order application are simply not addressed.

37. Thirdly, and again this is well established, there is to be no mini-trial. I do not consider that detracts from what I say above, however. Hearings such as this one do not, and indeed cannot, scrutinise the evidence with the rigour of a full trial. Evidence is often not given by the parties (as is the case for Uniserve here) and in any event witnesses are rarely cross-examined; only limited documentary evidence is before the judge. Not all issues will be addressed in depth. That does not mean that issues that are central to showing liability are simply assumed, however.

38. My starting point is therefore that the principal issues that need to be established at trial are part of the inquiry into whether a party has demonstrated a good arguable case. Uniserve's claim against the Applicants hinges on it being subject to a successful claim from the Claimants. It needs therefore to establish that there is a good arguable case that it is so liable.

39. The importance of addressing all key issues in the case in order to show that it is properly arguable is reinforced by the scope of the duty of full and frank disclosure. As Gee on Commercial Injunctions (7th Ed, 2022) notes at 12-033 (emphasis added): "*The claimant must disclose* ***all defences to the claim*** *which the defendant has already raised, or* ***which are open to him****, though he need not indulge in speculation.*" There would be no point in making that disclosure if the judge were then simply to ignore it. Obvious defences to the contingent claim in this case, and ones that were advanced at length before me by Mr Vinall, are that the contingency upon which the claim turns factually never happened or legally could not give rise to a recoverable loss.

40. I am also conscious of the intrusive nature of the relief sought. As the point is put in Gee at 12-032: "*A stronger case must be shown than would justify relief of a less stringent kind.*" That is what justifies the need for the higher standard of good arguable case in freezing order applications than would apply for other injunctive relief. In *Fourie v Le Roux* [2007] UKHL 1 (which was quoted in part in *Zhunus* at [26] in addressing the need for an applicant to show it had a cause of action) Lord Bingham noted at [3] (emphasis added):

> In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant. One of those safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, **so as to show where and on what basis he expects to recover judgment against the defendant**.

41. An applicant can only sensibly be said to have shown the basis on which they expect to recover against the respondent if they have addressed all the main elements of their claim. Here, the arguability of the Claimants' claim against Uniserve is a critical aspect of the Part 20 claim; if the Claimants fail, the Part 20 claim inevitably also fails.

42. While there is no case directly addressing the point, in my view the suggestion that the strength of the claim against Uniserve is of very limited or no relevance in considering whether there is a good arguable case against the Applicants sits uncomfortably with the authorities.

43. Mr Walsh argued that there were compelling reasons of principle why the strength of the claim against his client should not be part of the consideration. It would, he submitted, be "perverse" if his client suffered in obtaining a freezing order against the Applicants simply because it had a strong defence against the Claimants.

44. The difficulty with that argument is that, as regards the Claimants, Uniserve and the Applicants have an identity of position. As Uniserve's defence improves, so too does the position of the Applicants because liability becomes less likely. Uniserve is, of course, permitted to run alternate and inconsistent positions; but any discomfort that comes from riding two horses in that way is not perverse; it is simply an inevitable consequence of the inconsistency.

45. By contrast, I have great sympathy with the position of Dr Stead and Maxitrac. As Gee at 12-032 and cases such as *Fourie* make clear, the jurisdiction to freeze assets is an intrusive one that attracts particular safeguards. The facts of this case make that clear: as a consequence of the Order Dr Stead has faced significant financial disruption and embarrassment, including the revocation of his debit card, visits from bailiffs and an insistence by his bank that transactions be, effectively, cleared by Uniserve's lawyers. I would regard it as unacceptable if this degree of intrusion were justified by, and quite possibly only by, ignoring any weaknesses in the claim that Uniserve seeks to pass, economically, onto Maxitrac and Dr Stead.

46. The final difficulty with Uniserve's position is that it could produce the result that a freezing order would be denied to the claimant but granted to a co-

defendant in the same proceedings based on the same loss arising from the same alleged breach. The point can be illustrated on the facts of *Zhunus*. That case involved allegations of fraud against D1, D2 and D3. D2 and D3 argued that they had not been fraudulent but, in the alternative, sought contribution against D1 on the ground that if they were fraudsters, he was a party to that fraud. A freezing order had been sought and obtained by C against D1, which is why there was no issue with good arguable case. Imagine, however, that C's application had failed because C had been unable to show a good arguable case. If, as Uniserve submits, the underlying claim is ignored then it would seem that D2 and D3 could succeed where C had failed in respect of the same loss, that being a prerequisite of a claim for contribution. That is, at best, a counter-intuitive outcome. As I have noted, the parties agree that there is no authority suggesting that the law adopts such an approach and for my part I do not believe that it does.

47. For all those reasons I consider that Uniserve does not succeed by showing only that it has a good arguable case against Maxitrac and Dr Stead in the abstract. It needs to show that there is a good arguable case on the facts of its claim, which necessarily involves showing that it faces a potential exposure to the Claimants. If the Claimants' case is very weak against Uniserve, necessarily Uniserve's case is weak against Maxitrac and Dr Stead and that in turn weakens the argument for so intrusive a remedy as a freezing order.

Does Uniserve have a good arguable case against Maxitrac and Dr Stead?

48. I start by addressing two general points that seemed to me not to have weight.

49. The first is the fact that no strike-out application has been made. I recognise that this was a factor that seems to have been given at least some weight by Mr Knox KC (see paragraph 1 of his judgment). I was much less persuaded by it for two reasons. First, as Mr Vinall notes, the test for strike-out is different. Secondly, in my experience parties can sometimes be reluctant to pursue a strike-out application even when they have advice that it is properly arguable, either for tactical reasons or simply because they do not want to risk an early setback and adverse costs consequences and would prefer what they perceive to be the better prospects of trial. When subjected to a freezing order that timing decision is taken out of their hands. Given the disruption that such an order typically causes (and which the evidence shows this Order in fact has caused) they may feel pressed to act. As Samuel Johnson noted, when a man is to be hanged in a fortnight, it concentrates his mind wonderfully. So, too, can the freezing of someone's assets be a spur to action. That Maxitrac and Dr Stead have not acted before therefore seems to me of limited relevance.

50. The second general point on which I place little if any reliance is the fact that the case has been considered by four other judges. I say that, of course, with all respect for those judges and their judgments. However, the exercise that they undertook is quite different to the one before me for two reasons.

51. First, they were not fully addressed on the Applicants' position. The point can be highlighted by the return date hearing before Meade J. That application was listed for 30 minutes with 30 minutes of pre-reading. Maxitrac and Dr Stead

were not represented and the stated purpose of the hearing, according to the skeleton served on behalf of Uniserve, was "*to enable* [Maxitrac and Dr Stead] *to raise any immediate issues arising out of the WFO in advance of the Christmas holidays.*" That was reflected by the submissions of Mr Peters, Uniserve's counsel before Mr Knox KC and at the return date hearing. In particular, he emphasised:

> The idea is, if [Maxitrac and Dr Stead] had a serious challenge to this order that they want to bring, that they should have time to do it. So, they have not had time to do so yet.

52. That was the basis on which Meade J gave further time for a challenge to the Order. There is a separate question of why Maxitrac and Dr Stead delayed in making that challenge. For current purposes, however, the point is that it has always been recognised that the Applicants before me have not had the proper opportunity to present a challenge up to this point.

53. Equally to the point, as I have noted above Uniserve's position before me seems somewhat different to its position before Mr Knox KC and Meade J. Before those judges Uniserve based its arguments for a freezing order on the Claimants having a good arguable case against Uniserve. Before me Uniserve asserted that the strength of the Claimants' claim was irrelevant. I see that as an important shift in position because it takes this case away from *Zhunus*, where the underlying claim was also a good arguable case. That was a decision upon which Mr Knox KC, rightly in my view given the case before him, placed some weight. Before me the position is somewhat different and merits fresh consideration.

54. In any event, I am mindful of the observation in Gee at 24-021 that the application to vary or discharge a freezing order takes the form of a complete rehearing. That could be prejudiced if I were to be influenced by the outcome of earlier hearings that turned on more limited evidence and submissions, particularly where those submissions were advanced on a different basis.

55. Turning to the specific points raised, Mr Vinall focussed significant fire on the original express terms case, which he submitted was especially weak. That seemed to me the wrong order in which to take things. At least elements of the express terms case now turn on the amendments, so it is wrong to address the unamended aspects of the claim in isolation. Of more significance are the claims on variation of the delivery schedule and termination of the Supply Contract.

56. The first limb of the implied terms case concerns the alleged variation of the delivery schedule in the period 20-26 May 2020. This was central to the decision of Mr Knox KC. Broadly, the Applicants accept that the original schedule in the Supply Contract was varied but assert that the variation was authorised by Uniserve. They rely on three bases:

    i) Dr Stead says, in his witness statements for this application, that the revision was agreed by Uniserve on 20 May in the course of a

conversation he had with Mr Liddell. Mr Williams' statement in reply served on behalf of Uniserve does not say anything on the point.

ii) As I have noted, the emails show that the revised schedule was sent to Uniserve on 28 May 2020. Dr Stead says in his statement that no objection was made to it; Mr Vinall suggested that had the action been unauthorised, one would have expected something to have been said. In fact, it appears from a letter sent by Dr Stead's lawyers on 11 July 2023 that the revised schedule was discussed by Dr Stead and Mr Liddell and that Dr Stead has a recording of that call. It has not been shared with Uniserve, however, was not referenced in Dr Stead's two witness statements for this application and no transcript of it was before me.

iii) Uniserve was required to provide 80 million masks to DHSC by the end of June 2020; Mr Vinall submitted that it was inherently unlikely that Uniserve would jeopardise its ability to service that contract by terminating the Supply Contract before it had a replacement supplier.

57. Taking those points in order, there was no need to respond to Dr Stead's assertions on the 20 May discussion to put the matter evidentially in issue. I agree that Mr Williams' statement in places is more submission than evidence and is thin in dealing with some critical issues. However, it does not stand in isolation. The Part 20 Particulars, which themselves are evidence given pursuant to a statement of truth, assert at paragraph 3.5.A.5 that no prior approval was given to the revised schedule. Dr Stead's response in his statement was that such approval was given. It is hard to see what Mr Williams would have contributed, evidentially, by repeating that it was not. Nor is there a great deal of colour that Uniserve can add to a flat denial; while a party asserting that a discussion happened can add details around when and in what circumstances it took place, a party denying that a conversation took place can hardly say, "It never happened, and this is the way in which it never happened."

58. Obviously, that argument of principle does not apply to the second point, what happened after Uniserve received the revised schedule. The position on this was somewhat unsatisfactory from both sides. Since both parties participated on the call, both could have given evidence about what they say transpired. Neither did. Mr Vinall suggested that one would expect Uniserve to have raised some objection to the revised schedule if they had not approved it, and there is no evidence that they did. Equally, if the point had been discussed in any way that favoured Dr Stead one might have expected him to quote from the call, since he has the recording of it. There was nothing.

59. What I am therefore left with is a lack of evidence either way with no obvious inference to be drawn. In my view that does not change things; it makes the case that there was no pre-approval for a variation of the delivery schedule in the Supply Contract neither more nor less arguable.

60. The third point is also one of inference, that Uniserve would not risk their agreement with DHSC. The difficulty with that is the evidence suggests that Uniserve was willing to take some risk in meeting the DHSC contract. When approval was not forthcoming for BYD to replace the First Claimant, Mr Liddell

observed on 5 June 2020: "*I think we will have to take a bit of a flier on this as I don't trust* [the First Claimant] *to deliver*." He signed a significant supply agreement with BYD very soon thereafter. There will be a question of how much risk Uniserve would take and whether the position was any different on 20 May to that which pertained on 5 June, but that cannot be assessed at this stage. The point is very plainly an arguable one.

61. Mr Vinall advanced a separate line of argument to the effect that if, as Uniserve alleged in the Defence, deliveries under the revised schedule were also late then any prior revisions to the schedule could not have prevented Uniserve from terminating: it would have accrued a fresh termination right in respect of those fresh breaches. The difficulty that I have with that argument is that the Claimants have put it in issue in the Reply. Mr Vinall emphasised that this was simply a part of the general traverse with no particulars. It is certainly the case that the denial is contained in a paragraph of the Reply generally joining issue with the Defence. That is not the same as relying on the requirement on the Defendant under CPR 16.7 to prove the matters raised in the defence. The Claimants have specifically stated that Uniserve's case – which is that deliveries were not made – is incorrect. Moreover, they have done that pursuant to a statement of truth, rather than simply relying on the default position under the CPR. It is therefore a factual dispute with evidence on both sides. Doubtless more evidence will be adduced in due course and the issue will be determined at trial. The purpose of this hearing is not to pre-empt that process; the point is an arguable one on the evidence as it stands.

62. It therefore seems to me, as it did to Mr Knox KC, that the implied terms case so far as it relates to the variation of the delivery schedule has a plausible evidential basis and is a good arguable case.

63. The second line on implied terms is that Maxitrac and Dr Stead were aware that Uniserve was contemplating terminating the Supply Contract for breach in May and early June 2020. If the Claimants are correct that the right to terminate was lost through affirmation or waiver of any breach by Maxitrac or Dr Stead that is also said to have been a breach of the implied term.

64. That part of the claim depends on two sets of discussions, an oral exchange between Dr Stead and Mr Khader and the email exchange between them that followed it. The emails are referred to at paragraph 10.7 of the Defence. The Claimants assert that the emails, which Uniserve relies on as having terminated the Supply Contract, must be read in light of the earlier discussion. Mr Vinall accepted that communications must be read in their context, but submitted that the language used in Dr Stead's emails was so clear as to be entirely unambiguous. It would be absurd, he suggested, to say that there was some magic to the word "terminated", such that no other word would suffice. The Claimants' argument against Uniserve on termination was, he contended, hopeless, and that was in turn fatal to Uniserve's claim against the Applicants.

65. I agree that a case premised on the need to use the particular word "termination" would not meet the good arguable case standard. In *Vitol SA v Norelf Ltd* [1996] AC 800 at 810-811 the House of Lords made the point very clearly:

> An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end.

66. The Claimants' pleaded case is broader than that, however. It asserts, essentially, that it was not the emails themselves that purported to terminate the Supply Contract; they simply recorded the earlier discussion. I have only seen the extracts of those emails in the Defence, but I accept that is an arguable reading of those extracts. In that earlier discussion, as the emails apparently record, Dr Stead stated that the Supply Contract had been "*cancelled*", "*finished*" or "*ended*". The Reply asserts that those statements were not correct. Thus, the Claimants' position is that the real action happened at the oral discussion stage and the emails wrongly record it.

67. Without more evidence of what was discussed, and given the breadth of the pleaded case, the Claimants' case theory lacks clarity, but if the subsequent email exchange was inaccurate it is arguable that it was ineffective. Nor is it fair to criticise Uniserve for not spelling out what the Claimant's case theory might be; of all the parties in this litigation, it is the one that has least visibility over what was said. The point is that the argument that the emails are taken out of context is supported by plausible evidence, the time for trial witness statements has not yet arrived and if the July emails have been taken out of context, as is alleged by the Claimants, they are not conclusive. The claim against Uniserve (and in turn the Part 20 claim) therefore meets the good arguable case standard, at least at this stage.

68. Mr Vinall made a further submission that in light of the Claimants' breaches after 11 July 2020 it would have been open to Uniserve to have terminated in respect of those breaches as well, which is what it should have done in order to mitigate its loss. That would mean Uniserve had no valid claim or only a claim for a much lower amount against the Applicants. Mr Walsh noted that Uniserve's primary case was that there had been a termination, which is evidenced by paragraph 10.7 of the Defence and the emails to which it refers, such that there was no reason to repeat the exercise. I accept that is at the very least plainly arguable. Whether Uniserve's conduct was reasonable is a factual matter to be determined at trial but there is an evidential basis to show that it acted in light of a belief that it reasonably held at the time. That is at least sufficient to make its case plainly arguable.

69. Mr Vinall had a further point about loss. Even assuming his clients were in breach of the Maxitrac Contract, through failing to terminate the Supply Contract, Uniserve was not entitled simply to breach the Supply Contract and expect the Applicants to pay whatever damages flowed from that. The difficulty with that submission is that it does not reflect Uniserve's case, which is that there was a termination. It was not looking to saddle anyone with the loss; for the reasons I have explained it has shown evidence that it believed it had terminated. There may be a debate, in the context of mitigation of loss under the Maxitrac Contract, about how reasonable that belief was, but the case is, again, plainly arguable.

70. Mr Vinall also advanced an attack on the claim in respect of the Commission Contract. There was a claim in debt, which he said could not work because the conditions for payment to the Second and Third Claimants had not been met. There was an alternate claim in damages for Uniserve's alleged failure to comply with the Supply Contract or to take reasonable steps to procure that each shipment arrived in the UK and was cleared by UK Customs within a reasonable time. Mr Vinall submitted that the Bonnett emails demonstrated that Uniserve's non-compliance with the Supply Contract, and any breach of the Commission Contract said to arise from such non-compliance, was a result of its commercial decision to proceed with BYD, rather than any action or inaction on the part of the Applicants. As such, even if there was a good claim for breach against Uniserve the onward claim against the Applicants failed because Uniserve could not establish causation.

71. The difficulty with that argument is twofold. First, it assumes that the Bonnett emails conclusively show that Uniserve had decided to proceed with BYD in any event. There is also evidence to the contrary, however, because it is clear from the emails that Uniserve linked engaging BYD with "*getting out*" of the supply contract. As such, the causation point is one that is factually arguable on both sides. Secondly, even if the Applicants could show that Uniserve had decided to proceed with BYD regardless of the consequences that does not, to my mind, conclude the analysis. Uniserve's motive for preferring BYD is irrelevant; what matters is whether Uniserve had the legal right to secure supplies of PPE from BYD and not the Claimants. If the Applicants breached the terms of the Maxitrac Contract by failing to terminate the Supply Contract it is properly arguable that they prejudiced Uniserve's position vis-à-vis the Claimants either because Uniserve would otherwise have had no obligations under the Supply Contract or because the Claimants' damages would have been reduced by the right to terminate the Supply Contract early applying the principle in *The Golden Victory* [2007] UKHL 12.

72. I regard the implied term element of the Part 20 Claim as plainly a good arguable case and would, in itself, support the full claim. In turn, that means it founded jurisdiction to make the Order with its current limit of £39 million.

73. Mr Vinall accepted, I think rightly, that if aspects of the claim constitute a good arguable case up to the value of assets frozen I have jurisdiction to continue the Order. He also noted, again I think rightly, that it remains important to consider the rest of the claim, since if elements of the claim are weak that may go to the exercise of the discretion.

74. Mr Vinall attacked Uniserve's reliance on alleged breaches of clauses 3.2(d), 3.2(f) and 4.2 of the Maxitrac Contract, which required Maxitrac to notify Uniserve of delays in deliveries and warranted the First Claimant's manufacturing capacity. Uniserve's claim is that because it did not know the First Claimant would deliver late it was not able to put in place appropriate shipping arrangements. The Applicants argue that was wrong as a matter of fact – Uniserve had already decided not to proceed with the First Claimant – and incoherent as a matter of law.

75. As a factual matter the Bonnett emails cut both ways. Certainly, they evidence that by mid-June Uniserve was looking to end the Maxitrac relationship, as indeed was also apparent from the emails between Uniserve and Maxitrac, in particular Mr Liddell's question to Dr Stead, "*OK how do we get out of the* [Supply Contract]?" They also evidence the way in which the late deliveries were causing logistical difficulties in terms of booking cargo space. Both sides of the case are arguable; causation will depend on what the trial judge makes of the totality of the evidence.

76. Where I think the Applicants are on significantly stronger ground is the legal point. Uniserve's argument is that if Maxitrac had performed its obligations, either the Claimants would have delivered on time or Uniserve would have known the Claimants would not deliver on time and could have made appropriate arrangements. But if the First Claimant delivered late that would give rise to a claim in favour of Uniserve against the First Claimant, not vice versa. As such, the facts that would give rise to a claim by Uniserve against Maxitrac could not also give rise to a claim by the First Claimant against Uniserve (quite the opposite, in fact). Maxitrac's alleged breach could not cause the loss that Uniserve seeks to recover under its Part 20 claim.

77. There still remains, of course, a possible claim against Maxitrac on those facts, breach of contract being actionable per se. But a claim for a declaration does not support a freezing order (see *Zhunus* at [27]). There may also be other losses that Uniserve might suffer, for example arising from the need to make alternate arrangements to meet the obligations to the DHSC. Such losses are not contingent on the outcome of any claim by the Claimants and not the subject of Uniserve's Part 20 claim, however, and so again would not support the Order.

78. Mr Walsh suggested that this claim was tied to the claim regarding the right to terminate. However, the pleaded claim in paragraph 3.5.B.4 of the Part 20 Particulars is based on an alleged breach of the implied term, not of any express term. Accordingly, while I accept there may be a good arguable case against Maxitrac for breach of the express term, there seems to me no good arguable case for the damages sought in respect of that breach.

79. There was a final point regarding the status of the Supply Contract. The Applicants submitted that the claim against Uniserve seemed to be premised on the Supply Contract remaining in force, and that was certainly Mr Knox KC's understanding (paragraph 4 of his judgment). Mr Vinall submitted that if the claim relied on the Supply Contract remaining in force, the First Claimant would have to have remained willing and able to tender the goods if it was to bring a claim, in support of which he referred to footnote 1641 to paragraph 46-370 of Chitty on Contracts (34th Ed, 2021). While that is right as a matter of law, there is no evidence to suggest that the First Claimant had in some way disqualified itself from performance. The Particulars of Claim detail the investment made in machinery and explain why the initial delays had occurred. The First Claimant's response to a Part 18 Request further explains that it still has 15 million units in storage and has raw materials in stock to produce 40 million units. There is nothing by way of contrary evidence to suggest that the First Claimant could no longer produce the face masks. Accordingly, it has at least an arguable case that it was entitled to bring a claim for damages.

80. Accordingly, while I find that Uniserve had a good arguable case on aspects of its express terms claim I do not consider that the claim premised on the failure to notify Uniserve of the lack of manufacturing capacity or delay in delivery meets that standard.

Full and frank disclosure

81. Again, the parties were agreed on the approach I should adopt, both relying on the summary of the principles set out by Carr J, as she then was, in *Alexander Tugushev v Vitaly Orlov* [2019] EWHC 2031 (Comm) at [7]. The following were particularly emphasised or significant here:

> …The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;
>
> …Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;
>
> …The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;
>
> …If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;
>
> …Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate.
>
> …The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;
>
> The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets,

> although a strong case on the merits will never be a good excuse for a failure to disclose material facts;
>
> The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.

82. The Applicants' starting point was that the weaknesses in Uniserve's case against Maxitrac (and in turn, so far as is relevant, the Claimant's claim against Uniserve) were not pointed out to the learned Judge. I make a number of points on that:

i) Plainly, Mr Knox KC's attention was not drawn to any of the arguments advanced before me regarding the potential weaknesses in the Claimants' position. To the contrary, as I have noted, he was directly told that the Claimants' claims "*can properly be characterised as good arguable ones*".

ii) It seems from the attendance note of the hearing before Mr Knox KC that the focus of that hearing was the implied terms case. Certainly that was the focus of the learned Judge's reasoning. However, the relevant question under *Tugushev* is the way the application was put, and that was not limited to the implied terms case. Neither the skeleton nor Mr Williams' affidavit in support of the application seeks to distinguish between the express and the implied terms cases. Both were in play.

iii) For reasons I have explained, the claim premised on clauses 3.2(d), 3.2(f) and 4.2 of the Supply Contract does not meet the standard of a good arguable case, essentially for the reasons set out in paragraph 5(f) of the Part 20 Defence. However, it was not enough to rely on the Part 20 Defence being before the learned Judge; as Gee at 12-033 makes clear, the duty applies equally to arguments that have been made. In my view this point was material to the express terms case and should have been drawn to the learned Judge's attention. The failure to do so was a breach of the duty of full and frank disclosure.

iv) Mr Vinall accepted that there was nothing to suggest that Uniserve was aware of the Bonnett emails themselves when the application was made, but said Uniserve's management must have been aware of their substance – that Uniserve had elected not to take further supplies of PPE from the First Claimant, having instead decided for commercial reasons to use BYD – and that should have been disclosed. I disagree. The learned Judge plainly was aware that Uniserve had refused to take delivery of the face masks – his judgment says as much at paragraph 2. He was also taken to the relevant paragraphs of the Part 20 Particulars demonstrating that Uniserve wanted to cancel the Supply Contract and that an alternative supplier had been identified. In my view, the court was not misled on this point at all, less still was it misled in any material respect.

v) Equally, I do not consider that the failure to address the liability cap was a breach of the duty of full and frank disclosure. The obligation was on Uniserve to draw the learned Judge's attention to arguments which it could reasonably anticipate Maxitrac or Dr Stead would wish to make. They have not pleaded the point, and while they are yet to amend the Part 20 Defence, it is equally a point they could have taken in respect of the unamended Part 20 Claim. While I note the observation in Gee at 12-033 that the party seeking the order *ex* parte is to disclose both defences that have been made and those that it is open to the other party to make, there is equally no need to speculate. Mr Walsh submitted before me that Uniserve's claim is based on a number of separate events, such that the total cap is well in excess of £39 million, and it seems to me reasonable for Uniserve and its lawyers to have concluded that this was why the argument had not been advanced and, in turn, why it was not open to the Applicants to assert it.

vi) Finally, there was the inclusion of the proviso in the Order requiring the Applicants to identify the source of funds. Initially this was a wider objection, but in the course of the hearing much of that was conceded as it became apparent that the proviso was not initially sought by Uniserve but was, instead, driven by the learned Judge. Mr Vinall submitted that Uniserve ought still to have pointed out the footnote in the Chancery Guide saying that the wording was unusual. I have no hesitation in rejecting that. Uniserve had not sought the wording in the first place and it was obvious that it was optional. It was equally obvious that the learned Judge required the wording to be reinserted because he considered this an exceptional case where a large amount of money was (and indeed still is) unaccounted for.

83. In my view there was a failure to disclose issues with the way that any breach of the express terms of the Maxitrac Contract could create a liability for Uniserve under the Supply Contract. The question is what is to be done about it.

84. The starting point, as Mr Vinall submits, is discharge of the Order. Against that must be balanced the following:

i) It is apparent from the judgment of Mr Knox KC and the attendance note of the hearing that his principal concern was the implied terms case. Accordingly, disclosing these issues would have been highly unlikely to influence his judgment. That is irrelevant to the question of materiality, but plainly is relevant to the question of what advantage Uniserve gained through the non-disclosure. It gained none at all.

ii) It seems to me unlikely in the extreme that the breach I have identified was deliberate. The argument was on the face of the Part 20 Defence, a short document, the learned Judge stated at the outset that he had been through the statements of case as one would expect and the point was irrelevant to the central thrust of Uniserve's successful case premised on the implied terms argument.

iii) The risk of dissipation remains a real one.

85. In the circumstances it would be wholly disproportionate to discharge the Order. It should be continued on its current terms. The issue is one that is relevant to costs, if anything.

Delay

86. The Order permitted the Applicants to apply to vary or discharge it without showing a material change in circumstances until 30 January 2023. This application was made almost six months after that window had closed.

87. The Applicants put their case on two bases: that there in fact had been a material change of circumstances in that they had become aware, following disclosure on 16 May, of the Bonnett emails instructing the shipping agents not to accept any further orders; and that in any event I ought to grant a retrospective extension to time.

Alleged material change

88. The Bonnett emails set out the exchange in which Mr Bonnett instructs Majlan not to accept any further deliveries from the Claimants after 18 or 19 June 2020, several weeks before it attempted to terminate the Supply Contract. The Applicants allege that this is highly relevant to the arguability of Uniserve's case on causation, since it tends to show that Uniserve had already decided to abandon the supply contract long before any issue arose on termination.

89. I accept that the Bonnett emails are new evidence going to the issues around Uniserve's decision to proceed with BYD and not the Claimants. Set against that, however:

i) As Mr Walsh submits, it is obvious simply from the statements of case (notably paragraph 9O.2 of the Defence) that Uniserve stopped dealing with the Claimants after mid-June.

ii) It is obvious from the emails between Uniserve and Maxitrac in early June that Uniserve was looking to engage BYD and stop working with the First Claimant, whom Uniserve no longer trusted to deliver.

iii) Mr Bonnett's email concerns non-acceptance of later deliveries. It is unclear how that could amount to a repuditation.

iv) Even if it could represent repudiation, as I have noted there is no suggestion that any act of repudiation, whether from Mr Bonnett or anyone else, was accepted. It is therefore also unclear how it could have any relevance to the Claimants' claim.

90. In the circumstances, while I accept the Bonnett emails are possibly relevant to the causation question, for reasons I have given I do not accept they mean that Uniserve ceases to have a good arguable case. They do not come close to showing that. What they do is to reinforce somewhat arguments that were

already in play. Accordingly, I do not consider them to represent a material change in circumstances.

Retrospective extension of time

91. Mr Vinall accepted that there had been a serious delay by the Applicants but said that in part that was for good reason and that justice required that they have their say, which to date they had not. I do not accept either limb of that submission.

92. The reasons advanced by the Applicants for the delay are not at all convincing. I accept that Capital Law became involved at around the time the deadline in the Order expired. I also recognise that Dr Stead is an individual and does not have a large team working on this, although it seems probable that the process has largely been run by his lawyers rather than Dr Stead personally. They were aware by 30 January 2023 of the need to apply to extend the time for varying the Order, which indeed they did seek from HFW. There is no obvious reason why a short application could not have been made as soon as they were formally instructed.

93. Moreover, I am concerned at the delay in instructing lawyers in the first place being advanced as a justification by someone who is plainly sufficiently resourced to pay for legal advice, should he so choose. The sequence of events was as follows:

    i) On 9 December 2022 Dr Stead sold two cars for a total of just under £160,000, leaving his account in credit to the tune of £145,000.

    ii) Over the next 10 days the balance in that account reduced to a little over £7,250. Mr Walsh focussed in particular on a large number of payments to TikTok, noting that it was a social media platform, somewhat suggesting that this tied to the question of dissipation. If that was the thrust of the submission I do not accept it. TikTok is, of course, a social media platform but one that, like many social media platforms, commercial parties use to monetise their products. There is no evidence before me about how Dr Stead was using it, such that these expenditures could easily be business related. In any event, up to that point he had not been served with the Order.

    iii) Following service, Dr Stead was introduced to Capital Law, his current solicitors, in the first week of January 2023. He did not speak to them until 16 January, however and they did not write to Uniserve's lawyers until 30 January.

    iv) At the time, Dr Stead expected to be put in funds by a US entity called SecurCapital, which owed money to one of his businesses. The money never arrived.

    v) Only in mid-April, three months later, did Capital Law tell HFW that Dr Stead proposed to sell another vehicle to cover their fees. That vehicle

was sold on 20 April, less than a week later, and Capital Law was instructed.

94. As I have noted, it is irrelevant for these purposes how Dr Stead chose to spend his money between 9 and 19 December 2022; the Order had not been served on him and in any event the expenditure may have constituted legitimate business or living expenses. What is relevant is that Dr Stead has previously, where needed, funded those expenses through the sale of cars and had a further car or cars available to fund his legal expenses. Had he acted promptly in early January 2023 there is nothing to suggest that Capital Law could not have been involved much sooner.

95. I accept that they would need time to come up to speed, but an application for more time to apply to vary or discharge the Order, had such an application been needed, was a simple one that would not require a full understanding of the facts.

96. I do not accept that Dr Stead can now say he was unable to fund legal advice sooner, therefore. His own evidence suggests that he was; he chose to wait and see if he could fund his legal advice from another source, rather than to determine whether he could fund it at all. The situation he currently faces was a consequence of that decision.

97. I do accept, of course, that the Applicants should be given the opportunity to have their say. That is precisely what Meade J did by allowing them to make an application to vary or discharge without showing a change in circumstance until 30 January 2023. Not only did they not take that opportunity, they did nothing to preserve it by seeking further time before 30 January.

98. Accordingly, I would, in any event, have refused this application on the ground that the Applicants were seriously out of time, something for which they had no good justification.