Neutral Citation Number: [2021] EWHC 3379 (Comm)

Case No: BL-2021-MAN-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QB)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 14 December 2021

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

F&T TERRIX LIMITED	**Claimant**
- and -	
CBT GLOBAL LIMITED	**Defendant**

- -
- -

Melody Ihuoma (instructed by **Fieldfisher LLP, Manchester**) for the **Claimant**

Roy Dano Chalmers (company representative) for the **Defendant**

Hearing dates: 18-19 November 2021
Written closing submissions 26 & 29 November 2021
Draft judgment circulated: 8 December 2021

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 2pm on 14 December 2021.
I direct that pursuant to CPR PD 39A paragraph 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.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction

1. This claim and counterclaim arise out of a contract, made in June 2020 at the height of the first Covid lockdown, for the sale of 100,000 pairs of nitrile protective gloves by the defendant to the claimant at £8 per boxed pair, total £800,000. The claimant contends that the defendant breached the contract by failing to deliver. The defendant contends that the claimant breached the contract by failing to comply with a requirement to provide a bank escrow for the balance of £720,000 payable after the deposit of £80,000. The claimant claims the return of the deposit and damages. The defendant counterclaims damages.

2. The trial took place over 2 days. The defendant had been legally represented until October 2021, when its solicitors ceased acting. The trial had been listed as an attended trial, but the day before the defendant applied to adjourn on the basis that its two directors and witnesses had been exposed to someone suffering from Covid. I refused, but directed that the trial should take place remotely. On day 1 the defendant renewed its application to adjourn, this time to seek and obtain legal representation. I refused, on the basis that it would not be fair to do so, especially since the defendant had failed to adduce evidence that it had made reasonable efforts to obtain legal representation or to inform the claimant of its intentions and was unable to pay the costs thrown away by the claimant if I was to adjourn.

3. The claimant was represented by counsel, Ms Ihuoma, who produced an impressive, detailed and helpful opening written submission and who presented the case for the claimant with skill and fairness. The defendant was represented by one of its two directors, Mr Chalmers, who conducted the case for the defendant with determination and vigour. Having allowed Mr Chalmers some time to prepare his cross-examination and due to the non-availability of the claimant's second witness on day 1 the evidence took the full 2 days allocated. I acceded to Mr Chalmers' preference for closing principal and responsive written submissions, which I have received and read. I now produce my judgment.

4. The claimant's principal witness was its director Mr Richard Coffey. He was a reasonable witness but was prone to argument and avoidance in his answers and did not in my view have a particularly clear or objective recollection of the detail of events. The claimant also called Mr Gary Taylor who was a representative of the defendant but who also acted, in effect, as an intermediary between the two parties. He was a reasonable and, I thought, genuinely fair-minded witness who, most usefully, had been able to produce the WhatsApp text messages he had exchanged with Mr Chalmers over the relevant period, which proved invaluable in filling in the gaps between emails.

5. The defendant's principal witness was Mr Chalmers. Like Mr Coffey he was prone to argument and avoidance in his answers and did not in my view have a particularly clear or objective recollection of the detail of events. The defendant's second witness was its other director, Mr Jean-Pascal Tetti, who had less detailed involvement and suffered from the same flaws in his evidence as Mr Coffey and Mr Chalmers.

6. In short, this is a case where the surest guide to the truth lies in the contemporaneous documents and the inferences which can be drawn from those documents, especially where consistent with the evidence of Mr Taylor. Where I have to choose between the conflicting evidence of Mr Coffey and Mr Chalmers I must exercise particular care.

7. The defendant has not helped itself by its inability to disclose anything in the way of documentary evidence relating to its dealings with its supplier, Precious Mountain Ent Corp of Taiwan, beyond what appears to be a draft unsigned supply agreement. I am prepared to accept the evidence of Mr Chalmers and Mr Tetti that the majority of their communications with Precious Mountain was by WhatsApp text message. However, I am simply unable to accept their vague assertions that they had been unable to produce these messages due to having replaced their smartphones (according to Mr Chalmers on more than one occasion) since summer 2020 and having failed to back up or been unable to retrieve those messages. Their unwillingness to provide this relevant information, especially in circumstances where they knew from an early stage that there was a dispute which was likely to end in litigation, and their failure to disclose any documentary evidence of their dealings with Precious Mountain beyond the draft written agreement, does not assist their case.

The non-delivery - the relevant facts

8. Although there was some dispute as to the details, the initial contact between the parties came about and the parties then entered into a contract because: (a) the claimant was searching for a supplier of protective gloves because they believed they had buyers to whom they could sell them on at a profit; (b) Mr Taylor was a representative for the defendant, who had also become acquainted and friendly with Mr Coffey and, having been approached by Mr Coffey, recommended the defendant as a reputable supplier, as indeed he believed them to be; (c) the claimant was keen to proceed at the defendant's asking price and was also prepared to pay an initial deposit of £8,500 up front in order to demonstrate its genuineness.

9. On 8 June 2020 Mr Chalmers for the defendant emailed Mr Coffey of the claimant, confirming receipt of the £8,500, attaching an invoice and what he described as "a detailed procedure which roadmaps this transaction", and confirming that on receipt of the deposit he could confirm delivery to London Heathrow for Monday 15 June 2020. The roadmap was set out in the attached document, entitled "acquisition process", which set out a number of specified "steps" with accompanying "points to note". Step 1, the claimant sending a purchase order, had already been undertaken. Step 2 was for payment of the balance of the deposit of £72,500 to bring the overall deposit up to 10%.

10. Step 3 is key and worth setting out in full. It read: "Concurrently with the deposit, Buyer evidences 90% balance payment in escrow at bank". The accompanying "point to note" read: "Buyer to have LC or SBLC to evidence available credit payable to CBT, assignable to the manufacturer". It is common ground that LC is short for Letter of Credit and SBLC is short for Standby Letter of Credit.

11. Step 4 read: "CBT confirms Purchase Order with the Manufacturer", with the point to note reading: "CBT and Manufacturer have already agreed the order and required deposit and payment capability evidence to commence the order".

12. The following steps detailed the process whereby the defendant would agree with the manufacturer and notify the claimant of the delivery details and the certification / inspection process, with step 8 stating that "on completion of [any inspection process required by the claimant under step 7] or on collection, escrow payment of 90% released and paid directly to supplier".

13. Finally, step 9 referred to future dealings, stating that: "Buyer confirms order for following week of between 100,000 – 200,000 boxes", with the point to note reading: "The price of GBP 8 is guaranteed for 3 months for a purchase quantity of between 100,000 - 200,000 boxes of gloves. A price guarantee and extension to tenor shall be agreed at start of month 3".

14. The claimant's email of 9 June 2020 confirmed that it would pay the deposit and that "Gary [Taylor] will be in touch reference to mechanics".

15. Both parties plead that the contract was thus formed by an exchange of correspondence and conduct on 8 and 9 June 2020, whereby on the 9 June 2020 the claimant accepted the defendant's offer made on 8 June 2020.

16. The defendant's email sent later that day at 15:56 hours confirmed receipt of payment. Mr Chalmers added: "I have been on the call with Gary and he has informed of the details you require". He said that delivery had been arranged to London Heathrow for 15 June 2020. He said that he would send a follow-up email shortly with further details on the glove specification and branding and "pictures of the product packaging" - which was also referred to as "proof of life" or "POL". The claimant replied, thanking the defendant and saying "look forward to the final information".

17. The second email, in fact sent the next day on 10 June 2020 at 19:33 hours, described itself as an "official email to confirm your order". It confirmed the delivery details and the glove specification as stated above. It said that "proof of life" will be provided once the product is ready; the explanation made clear that what was being referred to was a video-clip showing the gloves "ready to leave the factory and labelled with our company name, the date and destination". The email stated: "Prior to us receiving the bill of Lading, please ensure the Escrow is set up and ready so we can show proof to the Factory for the goods to leave its origin". It concluded: "I will send another update once product is ready and the SGS [a type of inspection to confirm product quality and quantity compliance] is confirmed".

18. The numerous WhatsApp messages passing between Mr Chalmers and Mr Taylor around this time confirm that at the same time as these emails were being exchanged directly between the claimant and the defendant, Mr Taylor was in regular contact with both men as well as with Mr Tetti, passing on information and requests in both directions, as must have been apparent to everyone.

19. At 07:12 hours on 9 June 2020 Mr Taylor reported that he had explained to Mr Tetti that "he [Mr Coffey] doesn't work with LC". There is no suggestion in the subsequent messages that the defendant regarded this as a problem. Instead, a message from Mr Chalmers on 10 June 2020 at 18:37 hours, consistent with the email sent at the same time, stated the need for the claimant to be able to "show escrow" once the defendant has "the proof of life the goods are ready to be shipped". On 10 June 2020 at 20:09 hours Mr Taylor reported that "Rick [Coffey] is on this tomorrow for Escrow".

20. Over the following days the claimant, through Mr Taylor, was pressing the defendant for confirmation that the gloves were going to be delivered on the 15 June. The claimant has disclosed a purchase order issued by its buyer on 11 June 2020, showing that the claimant had agreed to resell the gloves for £960,000, a gross margin of £160,000. There is no reason in my judgment to regard this as anything other than genuine, and the contrary has not been asserted.

The defendant was reassuring Mr Taylor that the gloves would be delivered on 15 June, emphasising that the first task was to obtain the proof of life.

21. On 12 June 2020 the Manchester branch of Handelbanken bank sent an email to the defendant at 17:09 hours headed "Mr Richard Coffey - proof of funds", which read: "I can confirm that our client has access to sufficient funds to clear a £800,000 transaction as of today's date. I trust this will suffice but if you need any further information please do not hesitate to contact me".

22. The only direct response was on the following day, 13 June 2020, when the defendant responded to Handelbanken, copied to the claimant, simply confirming that it had received the email, without commenting one way or another whether it was accepted as sufficient to satisfy the escrow requirement. In an earlier WhatsApp message sent on 12 June 2020 Mr Chalmers had said that he had "seen the email" and that he was "getting POL [and] will send once we have it". I have no doubt that the email referred to was the email from Handelbanken, since there is no evidence of any other being sent on that date. There was no suggestion from the defendant that what had been provided was not acceptable, although equally there was no statement that it had been accepted as complying with the escrow requirement.

23. The 15 June was a Monday. Over the weekend there was a similar pattern of WhatsApp chasing messages and reassuring responses, with Mr Chalmers continuing to state that the first step was for it to obtain and send over the proof of life. Nothing further was said by either Mr Chalmers or Mr Taylor about the escrow requirement.

24. However, by lunchtime on 14 June there was a change of tone, with the defendant stating that there was a risk that the gloves would not be delivered and finally, on the morning of 15 June, the defendant said that its suppliers had "moved the goal post at the last minute and asked us to increase our minimum order after committing and we've been working on resurrecting the deal. We are trying to secure some product which is already on ground". There was no suggestion that the reason why the suppliers had not delivered was because the claimant had not provided an escrow in the required terms nor that the defendant could not be held responsible for the non-delivery because of that failure.

25. Thus the 15 June 2020 came and went without the goods having arrived or delivery having taken place and without the claimant having provided the formal escrow account. No steps were taken by either party on 15 June 2020 to seek to treat the contract as discharged through breach of condition or repudiatory breach by the other. I shall address what happened subsequently later in this judgment.

26. At this point I must instead review the evidence as to what was said and done at the same time as the communications referred to above were taking place.

27. Neither party in its statements of case pleaded a positive case that these written email exchanges were added to or varied in some way by oral communications.

28. In his witness statement Mr Coffey said at [16], without providing details, that: "We had in fact discussed the matter and all parties agreed that it was impossible for an escrow account to be put together within just 5 working days. There are stringent requirements for escrow accounts and I provided CBT proof that I and F&T would have the funds to complete on the deal, which CBT was happy with". Mr Taylor said nothing in his witness statement beyond verifying his WhatsApp messages with Mr Chalmers.

29. In his witness statement Mr Chalmers, referring to the Handelsbanken email, said at [14] that: "On receipt of this email, I contacted Mr Coffey and told him that the Handelsbanken email and its attachments did not comply with the Escrow or Credit Requirement as set out in the Acquisition Process Document". He asserted that it was due to this breach by the claimant that the good were not delivered.

30. In cross-examination Mr Coffey maintained that he had a discussion along the lines of [16] of his witness statement. He said that he understood that providing an escrow would mean using lawyers and taking time and that instead he proposed and Mr Chalmers agreed to the claimant providing proof of funds instead. He said that this happened after receipt of the acquisition process document. He denied that after receipt of the Handelsbanken email Mr Chalmers had told him that this would not suffice. He agreed that the monies in the Handelsbanken account were his personal monies rather than the claimant company's monies.

31. In his cross-examination Mr Taylor agreed that he had understood at the time that the requirement for an escrow did mean a formal escrow account, arranged and held by a law firm or reputable financial organisation, which required the buyer to lodge funds in the escrow account to be released on satisfaction of the agreed terms. He said that he was aware that Mr Coffey had said that he wanted to arrange his own escrow account with his own escrow agents and did not want to use a third party escrow agent and send monies outside his control. He believed that this was around the same time as the deposit was paid, but he could not recall the details. He referred to Mr Coffey seeking to use his existing escrow agent in London, from which it is clear that he was referring to subsequent events with KFX post 15 June 2021. He gave the impression that all this was not something with which he was directly involved. He also agreed that he would not have regarded the Handelsbanken email as an acceptable formal escrow account. He also agreed that he would not have viewed the later letter of support from KFX as an acceptable formal escrow account.

32. In his cross-examination Mr Chalmers agreed that there had been a discussion in which Mr Coffey had said that the claimant did not want to provide a letter of credit or standby letter of credit. However he was clear that he had said that this would not be necessary only so long as the claimant set up a formal escrow with a credible company which established that funds were available to pay the balance and would be released on completion so as to give its supplier confidence to proceed. He said that proof of funds would not have satisfied its supplier and he would not have agreed and did not agree to this or that the Handelsbanken email was acceptable.

33. He accepted, as he had to, that he had not responded in writing to say that the Handelsbanken email was unacceptable and that in consequence the supplier would not deliver and that this was the claimant's fault. He said that he had been prepared to allow the claimant time to arrange a formal escrow account, but again could not point to having said this in writing. He repeated his evidence in his witness statement that he had spoken to Mr Coffey and said that the Handelsbanken email was unacceptable as an escrow, although he was in my view unable to explain why there was nothing to this effect in, or referred to in, the WhatsApp messages where he was still discussing delivery as if there was no problem.

34. I have already made reference to Precious Mountain. All that the defendant had disclosed was an unsigned supply contract, dated only as "XX June 2020", which purported to demonstrate a contract to supply the same quantity of goods as the subject of the contract between the claimant and the defendant and at a lesser price (allowing for the rate of exchange between sterling and US dollars). It made provision for the defendant to pay the purchase price into an escrow account

to be set up with a specified company which apparently provided an escrow service, following which Precious Mountain would apparently enter into a contract with the manufacturer to purchase the goods. It appears that a deposit would be paid from the escrow account straight through to the manufacturer. It appears from clause 4.1 that production and thus delivery would only start once the monies had been paid into the escrow account, which in itself also required that the contract be signed and at the same time the deposit paid out.

35. It must follow, in my judgment, that for the defendant to have had any reasonable confidence that it could have supplied these products from this supplier on 15 June 2020 under the terms of this contract it would have had to have been executed a number of days beforehand and the escrow set up and the monies paid - on any view this would have needed to be done by the Friday 12 June before the delivery on Monday 15 June. Yet the defendant has failed to provide a copy of a signed contract or any emails confirming that its terms were agreed without signature or indeed that any escrow account was opened or monies paid in. Precisely how the defendant intended to comply with these requirements was not explored or explained. Logically, it could only have been either by providing the necessary funds from its own separate resources or by the claimant being prepared either to use the same escrow company, with the funds then passed straight through to the escrow account between the defendant and Precious Mountain, or some other escrow arrangement which allowed the same to happen.

36. The evidence of Mr Chalmers and Mr Tetti was vague and non-committal at best and wholly inconsistent at worst as to whether or not they ever entered into any binding legal commitment with Precious Mountain. Mr Chalmers was unwilling, despite my prompting, to confirm whether or not any deposit had ever been paid to Precious Mountain. They did not suggest that any escrow account had been opened with the company named in the agreement. In short, I am more than satisfied that the defendant never entered into any binding agreement with Precious Mountain, never opened or paid into any escrow account, never paid any deposit, and never had any binding commitment from Precious Mountain to supply the goods in question.

The non-delivery - the competing cases and my decision

37. The claimant's case as pleaded in the Particulars of Claim is simply that the defendant was obliged to deliver on 15 June 2020 and that its failure to deliver was a repudiatory breach. The defendant's case as pleaded in the Defence and Counterclaim is that the acquisition process introduced a condition precedent to delivery, which was that the claimant provided a formal escrow account and a letter of credit (or standby letter of credit), with which condition the claimant never complied, and which was itself a repudiatory breach. In its Reply and Defence to Counterclaim the claimant contended that: (a) on a proper construction, the letter of credit requirement was not an additional requirement to the escrow requirement; (b) on a proper construction, the escrow requirement was not a condition precedent to the defendant's delivery obligation; (c) either or both such requirements were waived in particular by the defendant failing to state that the Handelsbanken email did not comply with such requirements or give notice that it required strict compliance.

38. In her opening written submissions Ms Ihuoma repeated and amplified these submissions by reference to the facts and the law and I will address the arguments as advanced in the Reply.

(a) Was the letter of credit requirement an additional requirement to the escrow requirement?

39. As to the first point, I accept the claimant's argument that on a proper construction, the letter of credit requirement was not an additional requirement to the escrow requirement. Even if that analysis was wrong, I would also accept that on the evidence as it has emerged at trial it is clear that the defendant waived any right to require a letter of credit in addition to an escrow.

40. As to the construction argument, the claimant's argument is put on the basis that: (a) it is commercially implausible that the parties would agree that the claimant should be required to provide two separate secured payment methods, one being an escrow account and the other being a letter of credit; (b) since it is only the escrow requirement which is stated as a step to be taken, whereas the letter of credit is simply stated to be a "point to note", I can safely conclude that there has simply been an error of drafting and the letter of credit requirement can be rejected as inserted in error.

41. The starting point is the meaning of step 3, when read in the context of the contractual documents as a whole, and applying the by now very well-established processes of construction applicable to business contracts: see the principles recently referred to and summarised by the Master of the Rolls, Sir Geoffrey Vos, in Britvic plc v Britvic Pensions Ltd [2021] EWCA Civ 867 at [16-21].

42. What step 3 requires is that the claimant should "evidence 90% balance payment in escrow at bank". Having regard to my findings above I am satisfied that by the time the contract was concluded there had been no written or oral exchange in which what was meant by this was discussed and agreed. Thus I must determine what is meant by reference to the objective meaning of the words used as they would have been understood by persons in the position of the parties. Since there is no pleaded case or evidence that this term has a recognised definition, I must start from first principles.

43. Other than sophisticated financial organisations, most non-lawyers would not, I think, understand the meaning of the word without recourse to legal advice. A lawyer would understand that a delivery by escrow means a delivery on a conditional basis and that this would apply as much to a payment into an escrow account as to a delivery of a deed: see the decision of the Court of Appeal in A/Wear UK Ltd (in administration) [2013] EWCA Civ 1626, cited in Chitty on Contracts 34th edition par. 43-031 fn. 206 in the context of stakeholder contracts. Goode and McKendrick on Commercial Law 6th edition refers at fn. 58 to par. 24.16 to an escrow account as being: "A mechanism commonly used in the case of investment securities .. to transfer the debtor's holding to another account in his name but designated as a pledge or escrow account and under the control of the creditor or his escrow agent".

44. It follows, in my judgment, that the meaning of step 3, objectively ascertained, is that the claimant would have to provide evidence that the balance had been paid into a designated escrow bank account in the name of the claimant on condition that it be held there by the bank for the benefit of the defendant and released to the defendant on collection of the goods or completion of the inspections referred to in the acquisition process. In my judgment step 8 is also relevant here, because it states expressly that payment of the escrow is to be made directly to the "supplier". Although the supplier is no defined, and although the word "manufacturer" is used elsewhere, there can be no doubt that the reference to the supplier and manufacturers are intended as references to the organisation which is supplying the goods to the defendant. This is important, because the points to note under step 3 require that what is to be provided is assignable to such person. That is clearly in my judgment must be intended to fortify the requirement that such person be paid the balance direct. Although strictly irrelevant, I am fortified by the fact

that this conclusion accords very closely with the contemporaneous understanding both of Mr Chalmers and of Mr Taylor.

45. Indeed, this appears to be broadly in accordance with what Mr Coffey also understood, albeit that he says that he persuaded Mr Chalmers to dispense with this requirement and accept proof of funds with a bank. I have no doubt that by 12 June 2021 the requirement for a formal escrow account remained in place and that nothing which had been written or said amounted to an agreement to the effect that all the claimant needed to do was to provide proof of funds. In short, there is no plausible evidence that there was some oral agreement to this effect, as Mr Coffey alleged in his witness statement and in cross-examination. It is striking that this was not pleaded nor asserted in prior correspondence. Mr Coffey has never provided details of the agreement. It is not supported by Mr Taylor when, if that had been discussed and agreed, it can in my judgment reasonably be assumed that Mr Taylor would have been aware and made some reference to it in contemporaneous WhatsApp messages.

46. It follows in my judgment that on the very particular facts of this case the escrow requirement is inconsistent with there being a further and entirely separate requirement that a letter of credit is also provided which may be assigned to the manufacturer and that the obvious and simple explanation is that the defendant through mistake inserted the text "LC or SBLC" instead of "escrow account". I accept Ms Ihuoma's submission that to have a formal escrow agreement under which - on my construction of this agreement - the funds are transferred to a separate bank account in the name of the claimant and held on terms which provide for it to be held to the control of the defendant to be paid out on satisfaction of the conditions in step 8 and to be assignable to the supplier would render any conceivable need for there to be additionally a formal letter of credit or standby letter of credit issued by the same or another bank completely redundant.

47. Furthermore, it is also plain from the evidence to which I have referred that by the time of the "official email to confirm your order" sent on 10 June 2020 any separate requirement for a letter of credit had plainly been dropped. Since I am satisfied that a contract was not finally concluded until this email was sent and accepted (by the claimant confirming through Mr Taylor that he would obtain the escrow tomorrow), it follows that the terms of the contract as concluded did not contain this additional requirement. Even if it was the case that the contract was formed on 9 June 2020 I am satisfied that the same oral and written exchanges would amount to a clear waiver on which the claimant relied to its detriment, so that the defendant could not subsequently seek to rely on the absence of a letter of credit as justification for non-delivery.

(b) Was the escrow requirement a condition precedent to the defendant's delivery obligation?

48. In her written opening submissions Ms Ihuoma submitted that, whilst the requirement for payment of the deposit was a condition precedent to the defendant's delivery obligation, the same was not so as regards the escrow requirement. I am unable to accept this submission. In my judgment it is wholly inconsistent with the terms of sections 3 and 4 of the acquisition process, to which I have already referred above, especially the points to note in steps 3 and step 4, making clear that the requirement is for an assignable escrow account to be provided which is the "payment capability evidence to commence the order". It is also inconsistent with step 8, since the assignable escrow account plainly has to be in place at the point of delivery in order for payment to be made on delivery.

49. Ms Ihuoma alternatively submitted that since the escrow requirement was required to be satisfied "concurrently with the deposit", and since it is common ground that this did not happen, on the defendant's case the claimant had been in breach as from 9 June 2020 but that the defendant had plainly waived any right to complain about such breach, having continued to represent that it was willing to proceed with the transaction. However, on my analysis the final contract document was the email of 10 June 2020, which required the escrow to be "set up and ready so we can show proof to the factory for the goods to leave its origin". Thus, on this analysis, the claimant would not have been in breach of this obligation until such time as the defendant had notified the claimant that the "product was ready and the SGS was confirmed" so that the defendant could provide the proof needed for the goods to leave the factory.

(c) Was the escrow requirement waived by the defendant failing to state that the Handelsbanken email did not comply with such requirements or give notice that it required strict compliance?

50. I am satisfied that from receipt of the Handelsbanken email onwards the defendant said absolutely nothing at all about the Handelsbanken email, other than to formally acknowledge receipt. I do not accept Mr Chalmers' evidence that he told Mr Coffey that it was unacceptable. That evidence suffers from essentially the same weaknesses as apply to Mr Coffey's evidence discussed above; again it seems unlikely that, if Mr Chalmers had said something to that effect, Mr Coffey or Mr Taylor would not have made some reference to it in an email or WhatsApp message at the time. Equally, however, I accept that there is no basis for any suggestion that he ever communicated with Mr Coffey or Mr Taylor to state in terms that the Handelsbanken email was acceptable.

51. In her written submissions Ms Ihuoma referred in helpful detail to the law on waiver, referring in particular to the analysis of the Court of Appeal in Kosmar Villa Holidays v Trustees of Syndicate 1243 [2008] EWCA Civ 147 for the helpful summary of the doctrines of waiver by election and waiver by estoppel at pars. 36 to 38. As she submitted:

    (a) Waiver by election applies where a party is entitled to alternative, inconsistent rights. This is a state of affairs which typically arises where one party has repudiated the contract or otherwise committed a breach of the contract which entitles the innocent party either to bring the contract to an end. In such a case it requires that party A, with knowledge of the relevant facts, acts in a manner consistent only with his having chosen one of the two alternative and inconsistent courses of action open to him; he is then held to have made his election unconditionally. The election can be communicated by words or conduct in clear and unequivocal terms. An election, once made, is final and binding.

    (b) Waiver by estoppel applies where a person having legal rights against another unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; in such circumstances, if the other acts or desists from acting, in reliance on that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with the representation he will, to that extent, be precluded from doing so.

52. She also relied upon waiver by acquiescence, which she submitted applies where A is aware that B is making a mistake as to their respective rights and obligations and a reasonable man would expect the party against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to B's attention. She relies in this respect upon the decision of Webster J in Pacol Ltd v Trade Lines Ltd [1982] 1 Lloyds Law Reports 456. In that case Webster J held, applying

the decision of the Court of Appeal in Spiro v Lintern [1973] 1 WLR 1002, that where the agents of ship charterers knew that the claimant cargo owners could only pursue a claim for damage to the cargo under the bill of lading against the shipowners, their knowledge that the owners were under the mistaken impression that the charterers were the parties to be sued, meant that they were under a duty to alert the cargo owners to the true facts, since a reasonable person would have expected them, acting honestly and reasonably, to have done so, and that their failure to do so had the effect that the charterers were estopped by silence or acquiescence from denying that they were the party liable under the bill of lading. The editors of Chitty on Contracts 34th edition appear to treat this as an example of equitable estoppel (see paragraph 6-093 and ff, where the case is discussed at fn. 406). In my view it illustrates that, even in the absence of a positive representation, there may be circumstances in which a failure to speak out, when a reasonable person would have expected the defendant to do so, may justify a finding that there has been a representation by or conduct or, exceptionally, by silence, sufficient to found an estoppel.

53. Ms Ihuoma submitted that the failure by Mr Chalmers to say anything at all to the effect that the Handelsbanken email was unacceptable, coupled with his repeated assurances to Mr Taylor over this period that all was in order and that the gloves would be delivered on 15 June 2020, was sufficient to amount to waiver by election, estoppel or acquiescence.

54. I accept that in the subsequent WhatsApp messages Mr Chalmers gave no indication that there would be no delivery on 15 June 2020 unless the claimant provided a compliant formal escrow account. However, as Mr Chalmers said, he was trying to be flexible to make the contract happen. Moreover, although Mr Chalmers was not prepared to admit this, it is plain in my judgment from the "admissions" when they eventually came on 14 and 15 June 2020 that the defendant had never been in a position to deliver the gloves on 15 June 2020. At no time had he sent a further email, as stated in the official email of 10 June 2020, confirming that the product was ready and the SGS confirmed.

55. Moreover, there is no evidence at all that Precious Mountain had ever committed to supplying this particular consignment. There is no evidence that Precious Mountain had ever sent a proof of life to confirming that it was ready, willing and able to supply this particular consignment. There is no evidence whatsoever to support a conclusion that this was because Precious Mountain was not prepared to do so without the claimant entering into a formal escrow account and that as a result the defendant was not willing or able to comply with its obligations with Precious Mountain. If Precious Mountain had been saying that it was ready, willing and able to supply on 15 June and would proceed with the necessary steps once the defendant complied with the necessary steps required under the draft contract and if, as seems to have been the case, the only way in which the defendant could have complied was to ensure that the claimant opened and paid into an escrow account which would have enabled the defendant to proceed, then I have no doubt that Mr Chalmers would have chased the claimant and Mr Taylor for this to be done and made it clear that without compliance there was no prospect of delivery by 15 June.

56. What is plain from these WhatsApp messages in my judgment is that Mr Chalmers, knowing that the supplier was not ready, willing or able to confirm, was not pressing for a formal escrow account at that stage. I have no doubt that he was, as he eventually admitted, hoping to be able to supply from some other source instead. That explains why he was not pressing for an escrow to be set up which was specific to Precious Mountain. Effectively, he was hedging his bets and hoping either that some alternative source would emerge or that if Precious Mountain said that they could supply he could then request the claimant to provide the necessary escrow account.

57. However, it cannot be said in my judgment that he made any express representation to the effect that the defendant had accepted that the proof of funds provided by Handelsbanken was sufficient compliance with the formal escrow requirement. The crucial question in my judgment is whether such a representation can be inferred from conduct or silence. In my judgment this is such a case. In my judgment one would have expected someone in the position of the defendant to have said something if it did not regard the Handelsbanken email as acceptable compliance with the escrow requirement. That is especially so, in circumstances where the defendant must have known that the claimant would have needed to take further steps as a matter of urgency if it was to obtain delivery of the goods on 15 June 2020 if the defendant stood on its strict contractual right to require a formal escrow account to be in place.

58. The defendant cannot credibly say that it was simply assuming that the claimant was taking steps behind the scenes to comply by the 15 June 2020. The defendant must, on any objective analysis, have been aware that the claimant would expect the defendant to say if it was not prepared to deliver on 15 June 2020 due to the absence of a formal escrow account assuming everything else was in place. The almost constant exchanges as between Mr Chalmers and Mr Taylor over the weekend, which Mr Chalmers must have known would be relayed to the claimant, made it plain to the defendant that the claimant was proceeding on the basis that the Handelsbanken email was accepted as sufficient to enable delivery to be made against payment.

59. In such circumstances the defendant was providing repeated assurances that there was no problem in terms of what the claimant had done or not done to prevent the goods from being delivered on the 15 June 2020. In my judgment the combination of what was being said, coupled with what was not being said, amount to a sufficient clear representation by conduct or silence to amount to a sufficient representation.

60. I must also however consider whether the claimant can prove detrimental reliance. Mr Coffey did not address this in his witness statement. In cross-examination he suggested that if the defendant had made it plain on receipt of the Handelsbanken email that this was unacceptable and nothing less than a formal escrow account would do he might have been able to do something with the bank. Mr Chalmers challenged this by pointing to a later stage in the dealings when, whilst the parties were seeking to agree an alternative supply proposal, the claimant was asked to and did agree to provide an escrow, but was either unwilling or unable to provide a formal escrow account and, instead, was only willing or able to provide a letter of support from a foreign exchange company (known as KFX) which in my view provided no more, and indeed less, comfort, than the Handelsbanken email.

61. The evidence as to what happened later is relevant but not determinative in itself. That is because the crucial question is whether, had the defendant made it plain to the claimant either on Friday evening or on the following day, Sat.13 June 2020 that the Handelsbanken email was not acceptable, the claimant would have been ready, willing and able to at least attempt to take steps to comply with the formal escrow requirement. The circumstances as they existed later were different.

62. I am satisfied that at this time Mr Coffey was unwilling to provide a formal escrow agreement unless he had no choice, because he was unwilling to put the necessary funds into a ring-fenced account and, thus, outside his control for the time period between conclusion of the contract and delivery of the product. I am also satisfied that he did not want to incur the cost of that exercise unless there was no choice.

63. I do however accept, in the light of the content of the Handelsbanken email, that Mr Coffey would have been able to provide funds to put into a formal escrow account had there been no other option.

64. No evidence has been provided either way as to whether this could have been done over the weekend of 13 and 14 June 2020 so as to enable delivery to take place on 15 June 2020. I can accept that in international trade things can move very quickly if they have to and that weekend working can and does occur. However, there is no hard evidence from anyone, from Mr Coffey, Mr Taylor or otherwise, that Mr Coffey's access to liquid funds, coupled with his or Mr Taylor' pre-existing contacts within the banking or wider financial trading services sector, was sufficient to enable him to move at speed so as to provide a formal escrow account set up with sufficient funds in it to enable delivery on 15 June 2020. I bear in mind that the formal escrow account would have to have been made assignable to the supplier so as to comply with what I have found to be the contractual requirements in place as between the parties.

65. If I had to be satisfied on the balance of probabilities that the claimant could and would have complied with the escrow requirement in time for delivery to take place on 15 June 2020 then I would not have been able to make that finding on the evidence before me. However, I am satisfied on the evidence before me that: (a) the claimant could have made a genuine attempt to do so and there was at least a prospect that he would have been able to do so; (b) since the defendant had not provided proof of life so as to trigger the time for the formal escrow account to be in place by 15 June 2020 and since the defendant was not in fact able to deliver on 15 June 2020 in any event, the longer the time went on from 15 June 2020 the more likely it is that the claimant would have been able to comply had Mr Coffey known that this is what it had to do.

66. To state the obvious, if Mr Coffey had known that if he did not provide a formal escrow account his company would lose the deposit and a profit of £150,000 it is inconceivable in my judgment that he would not have made vigorous attempts to do so. He lost the opportunity to do so which, in my judgment, represented a loss of a genuine opportunity.

67. In the circumstances I am satisfied that the claimant has proved sufficient detrimental reliance. This is important because it is unable in my judgment to rely upon waiver by election in my view. That is because under the terms of the contract the claimant was not in repudiatory breach or breach of condition through its failure to provide the formal escrow requirement. The defendant had already said in its email of 10 June 2020 that the claimant needed to be able to "show escrow" once the defendant has "the proof of life the goods are ready to be shipped". That never happened. The defendant was never able to deliver on 15 June 2020. Thus, it cannot be argued that the defendant was entitled to treat the contract as at an end due to the claimant's breach or, thus, that its failure to do so in some way amounted to an election between inconsistent rights, where there is no need to show detrimental reliance.

68. It follows, in my judgment, that as at 15 June 2020 the position was that the defendant had waived its right to insist on the claimant providing a formal escrow account as a condition precedent to the defendant's obligation to deliver.

69. Although there was some investigation as to what happened next, in my judgment nothing happened which alters the impact of that finding.

70. Thus, on 16 June 2020 the defendant gave repeated assurances that if nothing was delivered by the end of the day it would refund the claimant's deposit. However, despite repeated requests

for the return of the deposit, nothing happened. On 21 June 2020 Mr Chalmers said that the funds would be repaid "waiting on factory to return the funds", but as I have said I am satisfied that this was untrue because there is no evidence that the defendant had ever paid anything to the supplier, whether the deposit or otherwise. Despite chasing emails from the claimant on 22 and 30 June 2020 and the threat of a winding-up petition on 3 July 2020 the deposit was not repaid.

71. Beginning on 8 July 2020 the parties discussed whether it would be possible to revive the transaction. It is agreed that this was on the basis of an increase in the price. The defendant contends that this was because Precious Mountain had refused to supply the goods at the original price because of the claimant's failure to provide a formal escrow account. That is disputed and there is no contemporaneous evidence to support the defendant's account. Indeed, there is no contemporaneous assertion by the defendant, in email or WhatsApp message, that it was the claimant's failure to provide a formal escrow account which had scuppered the original agreement. Thus I reject the defendant's case in this respect.

72. The claimant was willing to consider entering into a replacement transaction at a higher price but, as stated in its email of 13 July 2020, only on the basis that if it did not materialise the defendant would repay the deposit. The defendant made reference to the need for an escrow, but was no more specific as what was required. When that transaction did not materialise the defendant made a further proposal on 18 July 2020, on this occasion identifying a specified escrow agent, First Sentinel plc. The impression received from the email is that this is simply the defendant passing on the same escrow requirement details as it has received from the proposed supplier. That did not materialise either and on 22 July 2020 the defendant proposed a further transaction, for a different type of gloves, where the requirement for an escrow was also stated to be on the basis of what the supplier required. The claimant's response was that having taken advice they would "stick to our normal commercial transaction through FX and put in place a legal obligation to ensure payments are made. We are then in control [of] our funds". This was a reference to KFX, referred to above, who had provided a letter to the defendant dated 16 July 2020 to confirm that it was holding over $2.8 million under Mr Coffey's account for the purpose of foreign exchange activity. Again, however, that transaction did not materialise and on the same day the claimant's then instructed lawyers wrote to say that unless the deposit was repaid within 14 days proceedings would be issued. Nothing happened and on 7 September 2020 the claimant's current lawyers, having been instructed, sent a pre-action letter of claim seeking the return of the deposit, interest and costs.

The claim

73. The claim as pleaded is as follows:

    (a) The return of the deposit, £80,000.

    (b) The loss of profit on the resale transaction, not less than £160,000.

    (c) Further loss of profit on what was said to be an option under the contract of a further delivery the following week on the same terms, £160,000.

    (d) Damages for the loss of opportunity to use the sums claimed for further profitable transactions, assessed at a commercial borrowing rate, at 7% pa compounded monthly.

74. In my judgment the claimant is plainly entitled to recover its deposit on the basis that on my findings as above it was paid in respect of a transaction which the defendant, in breach of contract, failed to complete. I return in the following section of this judgment, where I consider the alternative scenarios, to what would be the position of the reason why the transaction did not complete was either wholly or in part the fault of the claimant, but the principles applicable to such scenarios have no application to claim for the recovery of a deposit which is repayable because the claimant justifiably terminated the contract because of the defendant's breach of its delivery obligation.

75. As regards claim (b), I accept that the claimant is entitled to be put in the position it would have been had the defendant delivered the goods on 15 June 2020 under the sale contract. As I have said, I am satisfied that the claimant did enter into a resale contract on 11 June 2020 for £960,000. It is worth noting, however, that there was no delivery date stated on the purchase order and, although it is clear from the contemporaneous correspondence that the claimant was pressing for delivery on 15 June 2020 so it could fulfil its onward obligation, there is no suggestion in the claimant's evidence or in the contemporaneous documents that the purchaser terminated the resale contract due to non-delivery.

76. Instead, Mr Coffey refers in his witness statement to the discussions he entered into with the defendant to seek to obtain an alternative product. He makes reference to his unwillingness to pay a substantially higher price than the £8.00 per item agreed under the contract with the defendant, which is understandable. He also seeks, however, to justify his refusal to enter into an alternative transaction at a lesser price (£8.70 per item) on the basis of his refusal to provide a formal escrow account. I do not regard this as reasonable, since the fact is that the claimant had entered into the original contract on the basis of such a term and there is no basis or evidence for considering that he could have secured an alternative supply without entering into such a term, in circumstances where one is considering international trade supplies of a high demand contract in volatile trading conditions. Nor does he provide any evidence of investigating any other suppliers to save his onward resale deal, even at a reduced profit.

77. Ms Ihuoma rightly accepted that the claimant was under a duty to act reasonably to mitigate its loss. In my judgment the claimant did not, on the facts of this case, act reasonably to do so. I appreciate that this is an issue which was not investigated by the defendant in these terms in cross-examination, although Mr Chalmers did contest in cross-examination the defendant's refusal to offer any escrow other than by reference to the KFX letter, which he - rightly - characterised as unacceptable as an escrow. Nonetheless it is for the claimant to bring forward proper evidence to demonstrate that it is entitled to recover what is, in context, a substantial claim for loss of profit which, it must be remembered, was not claimed in the initial claims and only arose for the first time in the Particulars of Claim.

78. I think that it is possible on the evidence before me to make a reasonable estimate of the loss which the claimant would have suffered had it acted reasonably and either accepted the defendant's best alternative offer or gone into the market and obtained an alternative elsewhere. If the claimant had accepted the best offer of £8.70 per unit then it would have still made a gross profit of £70,000. Allowing for saved costs, including the costs of providing the formal escrow (which were quoted by one company, Advisory Konnect, at 0.3%) as well, no doubt, as transactional fees and other costs, I consider that a fair assessment would be £50,000.

79. I am not satisfied that there is any basis for claiming any further loss on some "option" basis. Item 9 of the acquisition process document cannot be read in my judgment as amounting to the

grant of a binding option whereby the defendant committed itself to entering into a contract for then sale of between 100,000 and 200,000 further boxes of gloves at £8 per boxes for the following week. It is not found anywhere else in the contract documents and in my judgment no reasonable person would regard this as a contractual offer of an option which was capable of acceptance by or was accepted by the claimant. Thus I do not allow this claim.

80. As to the claim for interest as damages, in my judgment that is far too speculative a claim to succeed. I accept that a claim for interest in damages may be made in principle. Ms Ihuoma referred me to the judgment of Stuart-Smith J in Peacock v Imagine Property Developments Ltd [2018] EWHC 1113 (TCC), in which at [143] he referred to and agreed with the summary of principles provided by Males J in Equitas Ltd v Walsham Brothers & Company Ltd [2013] EWHC 3264 (Comm) at [123]. In this case, there is no evidence that the claimant can recover anything as damages other than in relation to the loss of the return of the deposit and even there the evidence of Mr Coffey really amounts to no more than him saying that having put up a certain amount of money to fund the claimant company, including this deposit, he was unwilling to put up more. However if, as he says, by putting up more he would have been able to enable his company to make substantial profits on further transactions, then that is what he could and should have done and it would in my judgment be unjust to allow his company to recover such losses on the basis that it had access to funds in principle but its controlling mind was not prepared to back his own judgment. Further, there is no evidence as to what it would have cost for the company to borrow money to fund these further transactions. In short, in my judgment this is a case where the normal measure of a commercial interest rate on damages awarded is proper compensation, and I will deal with the appropriate rate once this judgment has been handed down.

Alternative scenarios

81. In the break between the end of the evidence and the production of written closing submissions I invited the parties to provide representations as to what might be the position if I was to find that although the claimant remained obliged to provide a formal escrow account and did not do so, i.e. it failed on its waiver argument, nonetheless the defendant was unable to supply the goods on 15 June 2020 for - as I have found - reasons which were entirely unrelated to the failure to provide a formal escrow account.

82. Although in the end I have found that the requirement was waived, it may be helpful if I explain briefly what I would have found had I concluded that it was not. In short, on the evidence recorded above what is clear is that the defendant at no point gave notice to the claimant that unless it complied with the escrow requirement it would be in breach and the defendant would be entitled to treat that breach as a repudiation of the contract. Instead, the defendant made promises to repay the deposit and then sought to arrange a replacement contract with different terms, none of which materialised. The parties thereafter effectively gave up on any attempt either to perform the original contract or to agree a replacement contract. The claimant was not entitled to treat the defendant as in breach, because it continued to refuse to perform its obligation to provide a formal escrow account, and the defendant never gave notice as above.

83. In such circumstances I would have found that the parties are to be treated through their conduct as having mutually agreed to treat the contract as at an end so far as either had any right to seek to perform the contract or require the other to do so.

84. I would therefore have needed to consider whether or not the claimant's alternative pleaded case for reimbursement of the deposit on a restitutionary basis would have succeeded. In her closing written submissions Ms Ihuoma properly drew my attention to the commentary at paragraphs 14-01 to 14-03 of Goff & Jones The Law of Unjust Enrichment 9th edition, which deals with the recovery of deposits in restitution. At 14-02 it is said that it is necessary to identify the basis of the payment and, in particular, whether or not it was agreed that the vendor should be entitled to retain the deposit if the purchaser did not carry out the transaction, by examining everything which passed between the parties. At 14-03 reference is made to the decision of the Court of Appeal in Omar v El-Wakil [2001] EWCA Civ 1090 where the editors state that facts were that the purchaser of a house had paid a deposit, but was unable to find the funds to complete the purchase; the vendor was also unable to complete, since the agreed purchase price was insufficient to redeem an outstanding mortgage on the property and he had no other funds available. They note that Pill LJ, with whom Lord Phillips MR agreed, held that "the principle that the deposit was paid as a security for the performance of the contract by the claimant should prevail". Although the right to recover the deposit was based on default by the vendor, and such default had also occurred: "… the availability of the right to recover required the existence of an ability and willingness on the part of the purchaser to complete".

85. I also note that in her judgment Arden LJ succinctly summarised the general principles applicable to all cases at [31] as follows:

> "Neither party contends that the "deposit" was not a deposit but a part payment of the price due under the Corringham contract. In that case, a claim in restitution for money had for money had and received might have been available (see generally *Dies v British and International Finance Corporation* [1939] 1KB 724). Nor has either party argued that the deposit was a form of penalty. Accordingly the prima facie position is that the deposit belongs to Mr El-Wakil because, in the normal way, where a contract provides for the payment of a deposit it is taken to belong to the other party to the contract if the party paying the deposit defaults in performance of the contract: see for example *Howe v Smith* (1884) 27 Ch, D 89, 97-8."

86. In this case, the defendant's invoice dated 9 June 2020 was stated to be for "10% deposit of total net price paid for purchase of [the goods]". The acquisition process also referred to it as a deposit, although it also made clear that it was the balance of 90% which was to be provided by and paid for through the formal escrow account. Nothing was said about the circumstances in which the deposit might or might not be forfeit or repaid.

87. In my judgment, on a proper application of such principles the position here is that this payment, whilst a part payment, was also expressly described as a deposit. It follows in my judgment that the claimant would not have been entitled to the repayment of the deposit, on the basis that on a proper construction of the contract it was only repayable where it was solely the fault of the vendor that the contract was not completed.

88. In her closing submissions Ms Ihuoma made an alternative submission that the defendant, in affirming that it would return the deposit, was estopped from maintaining, in response to the restitution claim, that the deposit is forfeit, on the basis that the claimant relied on this representation insofar as it took steps to provide the defendant with its bank details in order to obtain the refund of the deposit, and continued to engage in discussions with the defendant in the hope of obtaining its deposit. However, in my judgment, even if the defendant's assurances could properly be regarded as a representation, I do not accept that the matters relied upon would have amounted to sufficient detrimental reliance to found an estoppel.

89. Finally, had I found that the claimant was in breach and that the defendant was entitled to maintain a claim for damages, I would have needed to decide whether it had proved its pleaded claim for payment of the profit it says it would have made on the contract (£100,000) less the deduction of the deposit (£80,000), being £20,000.

90. I am satisfied that since the defendant has failed to prove that it entered into any contract with Precious Mountain and since the defendant has also failed to prove that the claimant's breach (in this scenario) of contract was the cause of Precious Mountain's refusal to make delivery, the defendant has not proved any loss of profit which it could have claimed against the claimant in this alternative scenario.

Conclusion

91. However, on my actual findings the claimant is entitled to judgment in the sum of £130,000. Questions of interest and costs and all other matters can be dealt with after judgment has been handed down.