Neutral Citation Number: [2019] EWHC 2201 (QB)

Case No: HQ12X00614

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/08/2019

Before:

MR MARTIN CHAMBERLAIN QC
SITTING AS A DEPUTY HIGH COURT JUDGE

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Between:

GOKNUR GIDA MADDELERI ENERJI IMALAT ITHALAT IHRACAT TICARET VE SANATI A.S (GOKNUR)	**Claimant**
- and –	
ORGANIC VILLAGE LTD	**Defendant**

- -

Mr Matthew Bradley (instructed by **Hudson Morgan Williams)** for the **Claimant**
Mr Cameron Maxwell Lewis (instructed by **Hugh Jones LLP**) for the **Defendant**

Hearing dates: 24 – 28 June 2019

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Approved Judgment

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

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Mr Martin Chamberlain QC:

Introduction

1 Mr Cengiz Aytacli and Ms Nerin Bilgin are husband and wife. They became involved in the organic food and drinks business some time before 2007, when they established the Defendant ("OV"), a limited company incorporated and based in England. In 2005, they met Mr Osman Aslanali, who was and is Managing Director of the Claimant ("Goknur"), a multinational company incorporated and based in Turkey whose business includes the bottling and sale of fruit juices and soft drinks.

2 Mr Aytacli met Mr Aslanali at an organic trade show in 2005, where Goknur was exhibiting its juices. OV became a supplier of Goknur's juices. In the UK, OV and one other company were the only such suppliers. In other countries, OV was one of many. By an agreement signed on 19 January 2010, Goknur and OV entered into a "Sleeving Machine and Purchase Agreement" by which Goknur agreed to purchase a "sleeving machine", which affixed labels to bottles, in return for which OV agreed to pay Goknur EUR 1,000 per month and committed to purchasing Goknur's juices for at least 3 years.

3 It was a term of the contract between Goknur and OV that the juices supplied by Goknur to OV would be "not from concentrate" ("NFC"), which means that they would have no added (exogenous) water – so that their contents would conform to what was on the labels. In March 2011, Colibri SARL, a French competitor of OV's, had a sample of OV's pomegranate juice tested and claimed that it contained added water. As a preliminary to proceedings in France, the *huissier de justice* (a French court-appointed official) was instructed to take random samples of OV's juices from some of the outlets to which they had been supplied. The samples were tested by the Eurofins laboratory, which found that they contained added water. Meanwhile, OV ordered 6 batches of fruit juice between 2 June and 25 August 2011. It decided to test the juices itself and sent samples to the Food and Environment Research Agency ("FERA"), where they were tested by Dr Simon Kelly. In an analytical report dated 27 November 2011, he concluded that all of the bottled fruit juice samples except the cherry contained added water.

4 Meanwhile, in early November 2011, Colibri began proceedings against OV in the Commercial Court at Nanterre, claiming EUR 100,000 in respect of "misleading commercial practice". On 14 November 2011, OV wrote to Goknur rejecting the "faulty" stock and asking Goknur not to bank its cheques. The cheques were in due course stopped and the batches were never paid for, though about half of the goods were sold on by OV at a profit. On 2 December 2011, OV's then solicitors, Simmons & Simmons, sent a letter before claim to Goknur. On 23 December 2011, Goknur responded saying that the matter was the responsibility of its subsidiary Drops Gida San & Ticaret AS ("Drops") and noting that there was no proof that the products sampled were Goknur's.

5 On 16 February 2012, Goknur issued a claim form claiming £104,185.54 in respect of the 6 batches ordered by and delivered to OV in the summer of 2011. In due course, OV counterclaimed for £352,015.04 in respect of losses which it said flowed from Goknur's supply of juices that did not conform to the contractual description. In addition to the claim for breach of contract, there were also claims under the Misrepresentation Act 1967 and/or in the tort of deceit.

The history of the proceedings

6 Since the claim was issued, there have been a large number of interlocutory hearings. There are decisions not only by Master Kay QC (the assigned master) but also by no fewer than by 12 High Court judges and one deputy High Court judge. An objective observer might reasonably question whether the time and money spent by the parties on these proceedings, and the judicial resources deployed in determining them, have been proportionate to the sums and issues in dispute.

7 I do not propose to summarise, or even record, all these interlocutory applications and cross-applications. Most are now irrelevant to the issues before me. Two, however, form an important part of the background. First, on 9 January 2013, Master Kay QC made an order by consent for a joint expert report by Dr Kelly. Dr Kelly tested samples that had been taken from warehouses in Hungary France and England by Turkish consular officials on the joint instruction of Goknur and OV. He produced an expert report on 28 June 2013 concluding that all the juices apart from the cherry juice contained added (exogenous) water. At a later stage in the litigation, Goknur applied to adduce further expert evidence with a view to demonstrating that Dr Kelly's methodology and conclusions were unreliable. That application was heard over four days in 2016. In a judgment handed down on 22 February 2017, Master Kay QC declined to permit further expert evidence. His judgment was appealed but the appeal was dismissed by Lavender J on 20 June 2017. The consequence is that Goknur has no evidential basis on which to dispute the expert conclusions drawn by Dr Kelly, though (as will become clear) it does dispute what inferences can properly be drawn from those conclusions.

8 Secondly, on 14 July 2017, Master Kay ordered that, unless by 24 July 2017 Goknur complied with a previous costs order, the claim would be struck out. It did not comply and the claim was automatically struck out. Only the counterclaim therefore remains.

The issues and the parties' positions on them

9 The issues between the parties were helpfully reduced to writing by Mr Matthew Bradley, who appeared for Goknur. I made some minor amendments. Mr Cameron Maxwell-Lewis, who appeared for OV, did not suggest that any other issues arise. I have re-ordered the list as follows:

Liability

(1) Did the juices supplied by Goknur to OV contain added exogenous water at the time of supply? OV says that the evidence shows that the juices did contain added water, so that the contract and misrepresentation claims are made out. Goknur says they did not contain added water at the time of supply, but accepts that if they did it was in breach of contract and is also liable under the 1967 Act for representing that the juices were "NFC" and contained "no added water".

(2) If Goknur's representations that the juices supplied were "NFC" and contained "no added water" were false, did Goknur lack an honest belief in their truth at the time they were made? OV says that Goknur must have known these representations were false when made. Goknur says there is no evidence to support such an inference.

(3) Can OV maintain a claim for loss in respect of the supply of cherry juice? Goknur says that, given that Dr Kelly's report shows that the cherry juice (unlike the other juices) did not contain added exogenous water, there can be no claim in respect of the supply of that juice; OV says that this point is not open on the pleadings.

Quantum

(4) Was it within the reasonable contemplation of the parties at the time of contracting (2011) that, if OV had to cease purchasing organic NFC fruit juices from Goknur by reason of Goknur's defective supply of the same, OV would be unable to obtain alternative supplies of the same juices on the open market? If not, does that fact constitute a bar to OV's claims for lost profits and in particular future lost profits?

(5) Did OV fail to mitigate its losses by (a) failing to make sufficient efforts to obtain alternative suppliers of organic NFC fruit juices after it rejected Goknur's goods on 14 November 2011 and/or (b) disposing of c. 8,600 cases of juice supplied by Goknur, worth £53,659.54, without making sufficient efforts to sell it? If so, what reduction to the quantum (if any) of OV's losses should be made so as to reflect such a failure?

(6) OV now concedes that it must give credit for the £50,526 worth of goods it sold, but never paid for. Must it also give credit for (a) the profit which OV made on those goods, estimated at £23,513.72; (b) the sum of £74,506 it earned in consultancy fees in the financial year ending 31 March 2013, as earnings in the nature of profits made in mitigation of its losses?

(7) There being no dispute (subject to the points above) as to the quantum or recoverability of the heads of loss described by the parties' quantum experts in their joint report as items 6 to 11, and Goknur not challenging OV's figure of £24,972 as the appropriate figure for "Item 1", how should OV's loss of future profits claim be assessed?

(8) In the event that the Court disallows OV's claims for "Items 1 & 12 (lost profits)", as described in the quantum experts' joint report, and subject to the questions above, should OV recover as losses: (a) £15,471 for sleeving agreement payments (Item 2); (b) £1,500 for quality control costs (Item 3); (c) £9,490 for French legal costs?

Procedural matters

OV's evidence

10 OV's factual evidence was from Mr Aytacli and Ms Bilgin. Mr Aytacli had given 13 witness statements over the course of this litigation. He affirmed and adopted them all. OV's expert evidence was from Mr Christopher Lake, an accountant.

11 At the conclusion of OV's factual evidence, Mr Maxwell-Lewis applied to admit a witness statement of Michael Thorpe dated 12 September 2013. Mr Thorpe was the managing director of a company that ran a warehouse in Basingstoke where OV stored its juices. Mr Maxwell-Lewis said that Goknur had been aware of the statement for some 6 years and it had been placed without objection in the trial bundles. OV had not

understood its contents to be contentious. I drew the parties' attention to the general rule in CPR r. 32.2(1) that "any fact which needs to be proved by the evidence of witnesses is to be proved… at trial by their oral evidence given in public"; and to r. 32.5(1), which provides that a party who has served a witness statement and wishes to rely at trial on the evidence of the witness who made it "must call the witness to give evidence unless the court orders otherwise or he puts the statement in as hearsay evidence".

12 On 27 June 2019, the fourth day of trial, Mr Maxwell-Lewis produced an application notice seeking relief from sanctions and a hearsay notice pursuant to CPR r. 33.2, supported by a fourteenth witness statement of Mr Aytacli. The application was made on the basis that it was not now possible to locate Mr Thorpe. The application was opposed for reasons contained in a witness statement by Ismail Sik, one of Goknur's solicitors, and elaborated upon by Mr Bradley. I refused it, for reasons to be given in this judgment. My reasons are these.

13 By CPR r. 33.2(4)(b), a hearsay notice must be served "no later than the latest date for serving witness statements". That was as long ago as July 2018, so the hearsay notice was nearly a year late. There is no doubt that relief from sanctions is therefore required. In deciding whether to grant such relief, it is necessary to apply the three-stage test set out by the Court of Appeal in *Denton v T.H. White Ltd* [2014] 1 WLR 3926.

14 First, to permit this evidence to be given in written form now would be to countenance a serious and significant breach of the time limit imposed by r. 33.2(b). I did not accept that Mr Maxwell-Lewis could draw any comfort from the fact that Goknur has had the statement for over 6 years. As he fairly accepted, he could point to no document from or on behalf of Goknur indicating that its contents were admitted; and in those circumstances, the natural assumption (given CPR rr. 32(1) and 32.5(1)) would be that Mr Thorpe would be giving evidence orally and would be available to be cross-examined. To admit his evidence as hearsay would deprive Goknur of the opportunity to test it.

15 Second, the explanation for delay was (essentially) that the matter was overlooked until a relatively late stage. That was regrettable, but it was not the fault of Goknur; and it was not a good reason to deprive Goknur of the opportunity to challenge this evidence.

16 Third, looking at all the circumstances, there was considerable force in the point made in Mr Sik's witness statement, and by Mr Bradley, that OV's efforts to trace Mr Thorpe appear to have been rudimentary at best. They did not include obvious avenues, such as searches of the records at Companies House or on publicly accessible websites. Even if the hearsay application had been made on time, I would not have granted it without considerably better evidence demonstrating that more strenuous efforts had been made to contact him.

Goknur's evidence

17 Goknur's factual evidence was from Mr Aslanali. On quantum, its expert evidence was from Mr David Rabinowitz, an accountant.

18 At the start of the trial, on the afternoon of 24 June 2019, Mr Bradley sought to rely on a second witness statement of Mr Aslanali, together with an exhibit running to some 114 pages of document, some in Turkish and without translations. These had been filed at

court and supplied to OV's representatives just before the start of the hearing. Mr Maxwell-Lewis was initially minded to consent to its admission, but I indicated that any application to rely on the statement would have to be properly explained and would require relief from sanctions, given that the date set for exchange of witness statements of fact was as long ago as July 2018. On the morning of the second day, 25 June 2019, Mr Bradley handed up a witness statement from his instructing solicitor Mr Zafer Armutlu, in support of his application for relief from sanctions and for permission to rely on the second statement of Mr Aslanali. Having considered this, Mr Maxwell opposed the application. I refused it and indicated that I would give reasons in this judgment. They are as follows.

19 There can be no doubt that, where (as here) directions are given for the exchange of witness statements by a particular date, an application to rely on a further witness statement after that date – even from a witness who has already served one – requires relief from sanctions. Applying the three-stage approach in *Denton*, there is no proper basis for granting such relief.

20 First, this was a serious and significant breach. The statement is not just a few days late: it is nearly a year late. The admission of this new evidence on the first day of trial would have been likely to cause serious prejudice to OV. The evidence went to Goknur's case that OV could have mitigated its loss. It identifies particular companies from whom, Goknur says, OV could have sourced alternative supplies of juice. If I were to admit that evidence at this stage, OV would be prejudiced because it would be unable to make its own enquiries with the companies concerned with a view to rebutting the evidence. The difficulties are compounded by the fact that some of the documents exhibited are in Turkish. This is in breach of a specific direction made by Master Kay on 13 July 2012. Even if it were not, although Mr Aytacli and Ms Bilgin speak Turkish, I do not. It would be necessary for the documents to be translated if reliance were to be placed on them. This would add further delay and cost.

21 Second, the explanation proffered for the delay in producing this statement was unimpressive. Mr Armutlu says that the late application has come about "primarily because of our late instruction in the case", which he explains was on 12 June 2019. He adds: "Whilst it is a little early for me to say with confidence that the failure to adduce this evidence was attributable to the fault of my client's previous representatives, I know that my clients changed representation because of their general dissatisfaction with how the case had been run." Mr Armutlu is (properly) careful not directly to impugn the conduct of Goknur's previous representatives. There was certainly nothing before me on the basis of which I could find them to be at fault. No adequate explanation was given as to why, if Goknur was dissatisfied with them, it waited until 12 days before the start of the trial to instruct Mr Armutlu and his firm.

22 Third, I considered all the circumstances of the case. There was nothing to stop Mr Bradley from exploring in cross-examination OV's case that it could not have sourced alternative supplies of juice elsewhere. But it would be unfair to OV to allow that to be done by reference to extensive documentary evidence (some of it in Turkish) which would have prompted further enquiries if it had been served in accordance with directions. I have borne in mind Mr Bradley's point that Mr Aytacli referred in a witness statement dated 12 June 2013 to "some 832 emails (not exhibited hereto) of my efforts to find alternative suppliers"; that when these were requested on 21 June 2019 the

response was that they were unavailable because they had been stored on a damaged laptop; and that this response had prompted Mr Aslanali to file his second witness statement. This could all be explored by Mr Bradley in cross-examination. It did not affect my conclusion. Goknur could have requested the emails before the date for exchange of factual evidence or, in any event, much earlier than the first day of the trial.

The joint expert evidence

23 The joint expert evidence was contained in a report of Dr Kelly dated 15 April 2013. As I have said, there is no other expert evidence. Mr Bradley thus accepts that it is not open to him to challenge its methodology or conclusions.

24 Dr Kelly explained as follows:

> "Samples of bottled fruit juice were received directly from the Turkish embassies in London, Budapest and Marseille. All bottled samples arrived in good condition without any signs of tampering apart from two broken sample bottles that were received from the Turkish embassy in Marseille."

25 Dr Kelly had the samples sent to a laboratory in Germany for oxygen isotope analysis. This works by measuring the ratio of ^{18}O:^{16}O isotopes in the water. Water contained in fruit has a different ratio of isotopes from ground or tap water. Dr Kelly found on the basis of the results of this analysis that, apart from the cherry juice, all the samples tested contained added water. The quantity varied from 25% (in the pomegranate juice from Marseille) to 78% (in the red grape juice from London). He concluded as follows:

> "Using our current authentic fruit juice database for comparison, all of the bottled fruit juice samples, except cherry, appear to contain added water. An explanation of the uncharacteristically low oxygen isotope values is that the juices have been produced from concentrate and diluted with tap or ground water. Alternatively, the samples in question could have been produced with freshly squeezed juices and extended with tap water and other components such as sugar and fruit acids."

26 The term "exogenous", used in some of the documents, describes water which comes from a source other than the fruit itself (such as ground or tap water). It is important to use this qualifier because, as Mr Aslanali's evidence made clear, some manufacturing processes involve extracting water from the fruit and then adding it back in at a later stage of the process. Dr Kelly's findings establish that, apart from the cherry juice, all samples tested had added exogenous water.

Issue (1): Did the juices supplied by Goknur to OV contain added exogenous water at the time of supply?

27 The answer to this question is clear: all the juices in the relevant batches supplied by Goknur to OV, apart from the cherry juice, contained added exogenous water at the time of supply. I reach that conclusion for five reasons.

28 First, the expert evidence is as I have described. Although it was at one point suggested by Mr Aslanali that exogenous water may have entered the fruit in the process of washing

the fruit or entered the juice in the process of hosing down the equipment, he was clear that that could have accounted for no more than 5% or 10% by volume. Apart from the cherry juice, all the samples had at least 25% added exogenous water; one had as much as 78%. Very sensibly, Mr Bradley did not contend that washing could account for this. The only question was whether the samples tested were as supplied by Goknur to OV or had been tampered with by someone beforehand.

29 Second, in his skeleton argument, Mr Bradley made much of the fact that Goknur did not know that when the samples were taken by Turkish consular officials Mr Aytacli and Ms Bilgin would be present; and for that reason they did not send a representative. In those circumstances, it was submitted that Goknur "unfortunately cannot accept that the samples tested are bona fide". But, on a fair reading of the correspondence about the visit of Turkish consular officials to the three warehouses in England, France and Hungary, there was no attempt to mislead Goknur, which could have insisted upon its representatives being present when the samples were taken. Moreover, the Turkish consular officials well understood that they were there because of a dispute between two companies run by Turkish nationals. There is nothing to suggest that they were anything other than neutral: Mr Bradley properly disavowed any positive submission that they had been complicit in tampering with the samples. It is difficult to see how bottles could have been opened and tampered with at these warehouses without those officials detecting that this had happened. The Turkish consular officials were careful to record the batch codes of the juices they took. I find that, had the consular officials considered that the juices had been tampered with, they would have said so. There is also documentary evidence that the juices were released by them directly to Dr Kelly on the express joint instruction of Goknur and OV. Mr Aslanali's suggestion that this document might have been a forgery had no evidential basis and I reject it.

30 Third, in closing, the main thrust of Mr Bradley's submissions was that Mr Aytacli may have watered down the juice (one of the possibilities adverted to by Dr Kelly) so as to make it go further. To establish Mr Aytacli's propensity to engage in conduct of that kind, Mr Bradley pointed to the judgment of Peter Smith J in *Coca-Cola Co. v Aytacli* [2003] EWHC 91 (Ch), giving reasons for committing Mr Aytacli to prison for contempt of court on 30 January 2003. The application to commit followed a trial at which the same judge found that Mr Aytacli had participated in an operation to import into the UK from Turkey bottles of cola resembling those used by Coca-Cola; to affix fake labels to them; and to sell the counterfeit bottles. The application succeeded in respect of two contempts, including the making of false statements in documents verified by a statement of truth without an honest belief in their truth: see [11(2)] and [59]-[60]. Mr Aytacli was committed to prison for four months. I accept that the findings made against Mr Aytacli are capable of bearing on his propensity to engage in dishonest conduct in the course of carrying on a drinks business and on his credibility generally, but I must also bear in mind that the judgment relied upon related to conduct that took place about a decade before the conduct at issue here. More importantly, the suggestion that OV watered down the juices supplied by Goknur does not accord with the weight of other evidence. An operation to water down the juices would not have been straightforward. On Mr Aytacli's own evidence (uncontradicted in this respect), it would have involved sophisticated machinery capable of adding not just water but also other ingredients in sterile conditions and then resealing the bottles. (The need to add other ingredients, such as sugars and fruit acids, is also attested to in the excerpt from Dr Kelly's report set out at paragraph 25 above.) All this would have been quite different from the relabelling operation the subject

of Peter Smith J's judgment. It would have required dedicated premises and cost a significant amount of money. It could not have been done in the three warehouses in Basingstoke, Marseille and Budapest to which Goknur supplied the sealed bottles. Moreover, the uncontested evidence was that the juice was supplied directly by Goknur (or its subsidiary) in bottles with OV's label already affixed to the three warehouses, where it was held to OV's order by the warehouse owners. That being so, an operation of the kind posited by Mr Bradley would have required the bottles to be taken from each of the three warehouses (in England, France and Hungary) to a plant or plants where the watering down would take place and then returned to the warehouses from where they had come with the original batch codes intact. There is no trace of evidence that any such thing happened; and the cost and organisation involved makes it inherently implausible.

31 Fourth, Mr Bradley says that, had Mr Thorpe, the manager of the Basingstoke warehouse, been called as a witness, there would have been an opportunity to cross-examine him as to Mr Aytacli's access to the warehouse and as to the circumstances in which the samples had been selected. That is correct, but it does not advance Goknur's case. Mr Thorpe's evidence is not before the court. Goknur could itself have sought evidence from those involved in the management of the warehouses if it had wished to do so. In the absence of any such evidence, I have to proceed on what is before me and reach a view about what happened on the balance of probabilities. The evidence as to the circumstances pertaining at the warehouses came from Mr Aytacli and Ms Bilgin. Mr Aytacli's evidence was that the warehouses were owned by independent logistic services companies. Mr Aytacli did not have access to these warehouses. If he wanted to visit he would be accompanied by a member of staff of the logistics company. Ms Bilgin's evidence was consistent with this. She said that she and Mr Aytacli had never been to the French warehouse before they attended with the Turkish consular officials. There was no reason to doubt any of this evidence.

32 Fifth, Mr Aslanali gave detailed evidence that it would not have made commercial sense to provide juice made from concentrate to OV. As I shall explain, that evidence is relevant to issue 2. But, as Mr Aslanali also emphasised, Goknur is a substantial undertaking with a turnover of more than £100 million. For much of these proceedings (although not at trial), its case was that it was not liable for the breach of contract or misrepresentations alleged in the counterclaim because it was not Goknur but its subsidiary Drops that had assumed responsibility for supplying OV. In my judgment, it is possible that an error was made in respect of some batches by someone working either for Goknur or for Drops, which resulted in juices made from concentrate being supplied. Having considered the evidence as a whole, I consider it more likely than not that this occurred.

33 For completeness, I ought to deal with three matters – two relied upon by Mr Bradley and one by Mr Maxwell-Lewis – which I found of little assistance in resolving this issue. Mr Bradley drew attention to a passage in the evidence in which he asked Mr Aytacli whether there was a factory like the one in Peterborough from which the counterfeiting operation was run, in which he had watered down the juices. Mr Aytacli answered "no comment". I did not consider that to be significant. A witness may answer "no comment" because he wants to avoid perjuring himself; but he may also give that answer because he regards the allegation being put to him as unworthy of comment. In this case, when Mr Aytacli's evidence is considered as a whole, I am satisfied that the import of the response was the latter: immediately after his "no comment" answer, he went on to deny the substance of what was being put to him.

34 Mr Bradley placed some reliance on the fact that OV had its own on-site representative, Ms Yurdaer, who had access to Goknur's production plant and would sometimes stay overnight there. At one point it was suggested that Ms Yurdaer would have known if the juices were being produced from concentrate. The problem with this is that, as Mr Aslanali accepted in cross-examination, Ms Yurdaer was present only when the juices, contained in the drums in which they had been stored, were being bottled for OV. She would not necessarily be present for the part of the process in which the fruit juices were manufactured and transferred to drums in the first place. This part of the process would take place seasonally, depending on the type of fruit. She was not, therefore, in a position to know what was in the drums. Mr Bradley then suggested that OV could have asked her to take samples. No doubt that is true, but given that she was OV's agent, I doubt whether Mr Aslanali would have trusted samples taken by her any more than he trusted the samples collected in the presence of Mr Aytacli by the Turkish consular officials.

35 Mr Maxwell-Lewis, for his part, placed reliance on alerts issued by the Food & Drug Administration in the USA about Gonur's products. Mr Maxwell-Lewis said that these showed that Goknur had sold adulterated products before. I find it difficult to assess the significance of these alerts and have no proper basis to doubt the evidence of Mr Aslanali that the reports relied on related to isolated incidents of contamination which are relatively commonplace in a large business such as his. They accordingly do not influence my finding on issue 1.

Issue (2): If Goknur's representations that the juices supplied were "NFC" and contained "no added water" were false, did Goknur lack an honest belief in their truth at the time they were made?

36 Mr Maxwell-Lewis submitted that, once it is established that the representations were false, it must follow that Goknur knew them to be so. It will be clear from what I have said in paragraph 32 above that I do not agree. I can see no reason why Goknur would have deliberately sought to supply to OV juices that did not conform to the contractual specification. The importance to Goknur of its reputation was obvious from Mr Aslanali's evidence. It explains in large part why this litigation has been so hard fought despite the relatively low sums at stake. Mr Aslanali would have been alert to the possibility that juices might be sampled and tested (whether by competitors in the market or by regulatory authorities). If he had made the representations knowing that the juices were not as represented, he would have been taking a substantial risk. OV's order was, in the context of Goknur's business as a whole, a small one. Even if (contrary to Mr Aslanali's evidence) supplying juice made from concentrate would have benefited Goknur financially, the benefit would have been small. I consider it much more likely that Goknur (and those in control of it) believed the representations were true when they were made; and that their falsity was the result of a mistake made by a person or persons working for Goknur or for its subsidiary Drops.

37 My conclusion on this issue is bolstered by my impression of Mr Aslanali as a witness. Mr Aslanali gave detailed evidence about the process by which different types of fruit juice are manufactured. He has many years of experience in the industry and is plainly an expert in the production of fruit juices. He has built a successful multinational business and has high personal standards. He struck me as an honest witness, albeit sometimes too ready to ascribe improper motivation to others and not ready enough to contemplate error

by those in his employ. Having heard and assessed his evidence, I consider it very unlikely that he or anyone else in control of Goknur would have made false representations, knowing them to be false or reckless as to whether they were so.

Issue (3): Can OV maintain a claim for loss in respect of the supply of cherry juice?

38 In my judgment, the answer to this question is straightforward. There is nothing to suggest that the cherry juice supplied by Goknur to OV was other than in accordance with the contractual specification and the representations made. So, OV cannot maintain a claim for breach of contract or misrepresentation in respect of it.

39 OV's argument to the contrary depends on two points – one a pleading point and one a point of substance. In my judgment, neither has any merit.

40 As to the first, at paragraph 10 of the Amended Reply and Defence to Counterclaim, Goknur "denied that any goods supplied by Goknur were defective". It was therefore for OV to prove, in respect of all the goods supplied, that they were defective. There has never been any suggestion that the cherry juices were defective (as OV made clear at paragraph 20D of its Re-Re-Amended Defence and Counterclaim). So, it is open to Goknur to deny liability in respect of the cherry juice.

41 As to the substance, Mr Maxwell-Lewis notes that the first report of Dr Kelly did not distinguish between the cherry juice and the other juices; and in those circumstances OV was entitled to reject them all. I do not accept that. OV was entitled to reject only those juices that, in fact, did not conform to the contractual specification. The parties have proceeded throughout on the basis that it is Dr Kelly's expert report prepared for these proceedings that contains his definitive conclusions. His report is clear that the cherry juices did not have added exogenous water. In those circumstances there is no proper basis on which OV can dispute that they conformed to the contractual description.

Can OV claim its alleged lost profits as a head of damages under the 1967 Act or in the tort of deceit?

42 In the original list of issues as drafted by Mr Bradley, there was a question whether OV could claim its lost profits as a head of damages under the 1967 Act or in the tort of deceit. In the light of my findings under issue 2 above, the question of the approach to damages in the tort of deceit does not arise. So far as misrepresentation under the 1967 Act is concerned, Mr Maxwell-Lewis did not suggest that lost profits could be claimed. He was right not to do so. Damages under the 1967 Act are assessed on the tortious basis: *McGregor on Damages* (20th ed.), §49-053. The correct approach, therefore, is to identify the sum necessary to put OV in the same position as if the representation had not been made. There can, therefore, be no claim for lost profits under the 1967 Act.

Issue (4): Was it within the reasonable contemplation of the parties at the time of contracting (2011) that, if OV had to cease purchasing organic NFC fruit juices from Goknur by reason of Goknur's defective supply of the same, OV would be unable to obtain alternative supplies of the same juices on the open market? If not, does that fact constitute a bar to OV's claims for lost profits and in particular future lost profits?

43 The recoverability of lost profits as contractual damages was considered by Devlin J in *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459, at 489-490. He held materially as follows:

> "…everybody who sells to a merchant knows that he has bought for re-sale, and it does not, as I understand it, make any difference to the ordinary measure of damage where there is a market. What is contemplated is that the merchant buys for re-sale, but if the goods are not delivered to him he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has suffered no damage; if the market has risen the measure of damage is the difference in the market price. There are, of course, cases where that ordinary measure of damage is not applicable because something different is contemplated. If, for example, a man sells goods of special manufacture and it is known that they are to be re-sold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. In such a case the loss of profit becomes the appropriate measure of damage. Similarly, it may very well be that in the case of string contracts, if the seller knows that the merchant is not buying merely for re-sale generally, but upon a string contract where he will re-sell those specific goods, and where he could only honour his contract by delivering those goods and no others, the measure of loss of profit on re-sale is the right measure."

44 That passage has been cited and applied on many occasions: for a recent example, see the decision of the Court of Appeal in *Euro-Asian Oil SA v Credit Suisse AG* [2018] EWCA Civ 1720, [71]-[72] (Simon LJ, with whom King LJ and Dame Elizabeth Gloster agreed). The principles set out by Devlin J in *Kwei Tek Chao* apply to cases of non-delivery. However, as Mr Bradley submitted, where the buyer has lawfully rejected goods, the measure of damages and applicable principles are the same: see *McGregor*, §25-058. All this is also consistent with the *prima facie* measure of damages in sale of goods cases where breach of warranty is made out: Sale of Goods Act 1979, s. 53(3).

45 Mr Bradley submitted that there was no evidence that it was within the reasonable contemplation of the parties that OV would be unable to source alternative supplies of juice in the event that it had to cease obtaining juice from Goknur. In his skeleton argument, he added: "At issue in this case is fruit juice, not weapons-grade uranium."

46 In assessing this submission, I bear in mind that the contract between Goknur and OV was not simply for the supply of fruit juice; it was for the supply of NFC organic fruit juice. I also bear in mind – as Mr Aytacli emphasised in his evidence – that the availability of fruit is seasonal and that the orders the subject of these proceedings were (in light of the Sleeving Agreement) for labelled bottles of juice. But notwithstanding these matters, Mr Aslanali's uncontradicted evidence was that, given manufacturing processes which eliminate the natural micro-organisms present in fruit, it is possible to store fruit juices for up to 2 years; OV's orders were relatively small; and there was no evidence to suggest that the parties would have contemplated that it would be impossible to source labelled bottles elsewhere.

47 These were not "goods of special manufacture" in the sense in which Devlin J used that phrase in *Kwei Tek Chao*. Nor was this a "string contract". There is no evidence to

suggest that OV said at the time of contracting that its customers had required or ordered juices of any particular provenance. That being so, the assumption must be that any organic NFC juice would do. Looking at the matter objectively at the time of the contract between Goknur and OV, the parties would in my judgment have contemplated that OV, if it had to secure alternatives, could and would go into the market and do so. There is accordingly nothing to displace the presumption that the ordinary measure of damage described by Devlin J in *Kwei Tek Chao* applies (and the *prima facie* measure in s. 53(3) of the 1979 Act). As he explained, that ordinary measure excludes a claim for lost profits.

Issue (5): Has Goknur shown that OV failed to mitigate its losses by (a) failing to make sufficient efforts to obtain alternative suppliers of organic NFC fruit juices after it rejected Goknur's goods on 14 November 2011 and/or (b) disposing of c. 8,600 cases of juice supplied by Goknur, worth £53,659.54, without making sufficient efforts to sell it? If so, what reduction to the quantum (if any) of OV's losses should be made so as to reflect such a failure?

48 The burden of proving a failure to mitigate is on the party alleging such failure, in this case Goknur: see *McGregor*, §9-020. Goknur relies upon two failures to mitigate on the part of OV: first, the failure to make sufficient efforts to obtain alternative suppliers of organic NFC fruit juices; and second, destroying without making sufficient efforts to sell about 8,600 cases of juice, worth £53,659.43.

49 Mr Aytacli knew from an early stage that mitigation was in issue, which is why he dealt with it in paragraphs 37 to 42 of his first witness statement dated 12 June 2013. In paragraph 37, Mr Aytacli explained:

> "I began by contacting all those companies listed on the Turkish Fruit Juice Manufacturers Association website. Most were not in the organic trade and were not prepared to make the investment, commitment to time, obtaining of accreditation, cleaning of plant and changes to production to be so. Most of these companies were major suppliers of conventional juices shipping maybe 20-25 containers a day. It was not worth their while changing their trading practices for our orders of 1-2 containers of organic juice. I have some 832 emails (not exhibited hereto) of my efforts to find alternative suppliers."

50 Goknur requested disclosure of these 832 emails by email on 9 September 2013. In paragraph 22 of a further statement dated 23 September 2013, Mr Aytacli objected to disclosure of the emails in these terms:

> "…we object to disclose this material sought at this stage. It may go to quantum and mitigation of loss. It has nothing to do with Goknur selling us defective goods, fraudulently, by misrepresentation and/or in breach of contract. We do not have the resources of the Claimant, which we are told has a turnover of $115 million. Each request for a new type of document is time consuming and difficult for us to comply with. My wife who deals with the accounting matters also works in full time employment. We ask that a time limit be placed on the documents that the Claimant can request."

(It was at that time envisaged that liability and quantum would be determined separately.)

51 It seems, however, that no application for disclosure was made; that when OV came to give standard disclosure, it did not include the 832 emails (even though the issue of mitigation was squarely in dispute); and that Goknur did not raise the point again until shortly before trial. On 21 June 2019, the working day before the start of the trial, OV's solicitor replied as follows:

> "I now have instructions from my client with respect to the emails referred to at paragraph 37 of Cengiz Aytacli's witness statement dated 12th June 2013.
>
> You will note that after referencing these emails within his witness statement, Mr Aytacli states in brackets that these emails are not exhibited hereto.
>
> They were not exhibited then, nor were they disclosed later on in 2013 during the standard disclosure process, because unfortunately these emails have been lost.
>
> My client's laptop was damaged past the point of recovery in either late 2012 or early 2013 and the emails contained on this laptop were not recoverable. My client's email account is not one that is accessible online via any computer and at the time they did not have a server in place to back up these email [sic].
>
> We are therefore unable to disclose these emails and they have not previously been disclosed as they were lost just as the proceedings were beginning."

52 Mr Bradley pointed out that the explanation given on 21 June 2019 (which attributed the failure to exhibit the emails in 2013, as well as the inability to produce them now, to the damaged laptop) is not the same as that given in the witness statement of 23 September 2013 (which said nothing about a damaged laptop and cited concerns about proportionality as the reason why disclosure was opposed). Mr Bradley took up the issue in cross-examination. Mr Aytacli's response was that the 832 emails were in a folder called "suppliers" or "new suppliers"; that he had omitted to mention the damaged laptop in 2013 because at that stage he was still hopeful the emails could be recovered from the email service provider, NetNation; but that NetNation had not kept a copy.

53 IT problems of the general kind described are, of course, not unknown. There are, however, a number of aspects of this explanation that are difficult to accept. First, and most obviously, Mr Aytacli's reference on 19 June 2013 to the number of emails (832) suggests that he had access to the relevant folder at that time (contrary to what is now asserted). Second, Mr Aytacli does not seem to have had any difficulty in accessing and disclosing other emails sent and received over the same period of time. Third, if – as Mr Aytacli said – there had been ongoing efforts to recover the missing emails from the service provider, it is surprising that no mention was made of those efforts in *inter partes* correspondence either at the time or when standard disclosure came to be given. For these reasons, I do not accept Mr Aytacli's evidence that there were 832 emails to or from suppliers about sourcing alternative supplies of organic NFC fruit juice.

54 The position is accordingly as follows. Goknur bears the burden of proving that OV failed to mitigate its loss. But it is entitled to start from the agreed position that there are many

sellers of fruit juice in the market and that fruit juice manufactured in sterile conditions can be stored for up to two years. Mr Aytacli sought to counter this by giving evidence about the 832 emails between him and potential alternative suppliers, but I have rejected that evidence. I therefore conclude on the balance of probabilities that OV failed to make reasonable efforts to mitigate its loss.

55 Separately, there is the question whether Goknur can show that OV failed to make sufficient efforts to sell the 8,600 cases of juice which it ultimately destroyed. Mr Aytacli's evidence on this was that it would simply not have been economical to sell the juices: they would have to be relabelled; and this would be very costly. The trouble with this is that, as with the evidence about the 832 emails, there were no documents to back up the suggestion that relabelling would have been uneconomic. Some of the juice was sold before OV realised that it did not conform to what was on the label. There was nothing in the evidence to suggest that it was unsaleable (though of course the labels would have had to be changed once it was realised that they were not accurate). So, I conclude that OV also made insufficient efforts to sell the juice which it ultimately destroyed.

56 Given my findings under issue 4 above and under issues 6-8 below, it appears likely that the reduction to be applied to reflect my findings on this issue does not matter to the overall outcome. If that should prove to be wrong, I invite further submissions on the issue following the handing down of this judgment.

Issue (6): OV concedes that it must give credit for the £50,526 worth of goods it sold, but never paid for. Must it also give credit for (a) the profit which it made on those goods; (b) the sum of £74,506 it earned in consultancy fees in the financial year ending 31 March 2013, as earnings in the nature of profits made in mitigation of its losses?

57 The concession that OV must give credit for the £50,526 worth of goods which Goknur delivered to it, and which it sold but never paid for, was made for the first time by Mr Maxwell-Lewis in oral submissions. No such concession was made in relation to the profit earned on those goods. That profit, Mr Maxwell-Lewis says, is not a benefit which flowed either from the breach or from any act of mitigation.

58 I reject this submission. Looking at the matter from first principles, contractual damages are designed to put the wronged party in the position in which it would have been had the contract been properly performed. If – as here – a party receives defective goods, does not pay for them and then sells them at a profit before it becomes aware of the defect, it would receive an unjust windfall if it did not give credit for what it received from the on-sale. I do not see why a distinction should be drawn between the part of what it receives that represents profit and the part that represents what it would have paid its supplier. Both the £50,526 (the value of the goods received) and the profit earned on that sum (estimated by Goknur, using figures supplied by OV's expert, at about £23,500) are benefits flowing from Goknur's breach. OV must in my judgment give credit for these sums.

59 The sum of £74,506 in respect of the consultancy fees earned by OV raises a different issue. Ms Bilgin's evidence was that of this figure about £28,000 was generated by her from work which she had done for a client she had worked for since before the current dispute. That part of the consultancy fees was not, therefore, on any view, work done in

response to Goknur's breach. There was nothing to cause me to doubt that evidence and I accept it. The remainder (£46,506) was, on Mr Aytacli's own evidence, work done because, given OV's inability to sell the defective goods, he had to find a way of replacing lost income. He did so; and, Mr Bradley submits, to the extent that this produced a benefit for OV, the benefit was directly causally related to the breach. Mr Bradley submitted that it did not matter that the money earned from consultancy arose from a completely different economic activity, relying on the decision of the Supreme Court in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU* [2017] 1 WLR 2581. At [16] of his judgment in that case, Lord Clarke (with whom the other members of the panel agreed) cited 11 propositions relied upon by the first instance judge in that case. The eighth was as follows:

> "There is no requirement that the benefit must be of the same kind as the loss being claimed or mitigated… but such a difference in kind may be indicative that the benefit is not legally caused by the breach…"

At [30] Lord Clarke endorsed that proposition and added this:

> "As I see it, difference in kind is too vague and potentially too arbitrary a test. The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation."

60 These passages must, however, be read in the context of three other principles set out in the excerpt from the judgment of the first instance judge cited at [16] (and not doubted by Lord Clarke):

> "(3) The test is whether the breach has caused the benefit; it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit, or merely triggered his doing so.... Nor is it sufficient merely that the benefit would not have been obtained but for the breach...
>
> (4) In this respect it should make no difference whether the question is approached as one of mitigation of loss, or measure of damage; although they are logically distinct approaches, the factual and legal inquiry and conclusion should be the same...
>
> (5) The fact that a mitigating step, by way of action or inaction, may be a reasonable and sensible business decision with a view to reducing the impact of the breach, does not of itself render it one which is sufficiently caused by the breach. A step taken by the innocent party which is a reasonable response to the breach and designed to reduce losses caused thereby may be triggered by a breach but not legally caused by the breach."

61 Mr Aytacli's decision to provide consultancy services to replace income he would otherwise have made by trading in fruit juice was, on the evidence, *occasioned* by the breach. It was, on the evidence, a business decision taken with a view to reducing the impact of the breach on OV. But it did not arise out of the transaction giving rise to the

breach. It was not *caused* by the breach in the relevant sense – its *cause* was Mr Aytcali's decision to divert some of his time to consultancy services instead of trading in fruit juice. So, OV does not, in my judgment, have to give credit for any of the consultancy fees received.

Issue (7): There being no dispute (subject to the points above) as to the quantum or recoverability of the heads of loss described by the parties' quantum experts in their joint report as items 6 to 11, and Goknur not challenging OV's figure of £24,972 as the appropriate figure for "Item 1", how should OV's loss of future profits claim be assessed?

62 Given my findings and conclusions under issue (4) above, this issue does not arise.

Issue (8): In the event that the Court disallows OV's claims for "Items 1 & 12 (lost profits)", as described in the quantum experts' joint report, and subject to the questions above, should OV recover as losses: (a) £15,471 for sleeving agreement payments (Item 2); (b) £1,500 for quality control costs (Item 3); (c) £9,490 for French legal costs?

63 The claim for payments made under the Sleeving Agreement is explained by Ms Bilgin at paragraph 37 of her witness statement of 3 August 2018 as follows:

> "This [Sleeving Agreement] was cut short and the Defendant was therefore denied the full three years of trade and subsequently the potential profit. In the circumstances the Defendant is entitled to the return of all monies paid to the Claimant thereunder."

64 I do not see how it could be said that OV is entitled, in a claim in respect of defective goods, to reclaim money paid under the Sleeving Agreement for goods previously delivered that were not defective. So, I do not allow the claim for £15,471 under this head.

65 The claim for quality control costs is explained by Ms Bilgin in paragraph 37 of her witness statement of 3 August 2018. The costs were those incurred when OV engaged Ms Yurdaer to check that the labels had been properly applied. This was after complaints that the labels were not presentable. But these costs do not arise from the breach of contract alleged in these proceedings. So, I do not allow the claim for £1,500 under this head.

66 As for the French legal fees, Mr Bradley says that there is no evidence to support the claim that these were incurred as a result of Goknur's breach. Mr Maxwell-Lewis, for his part, points to invoices from OV's French lawyer, Edouard Ichon. In my judgment, these, together with the summons from Colibri are sufficient to establish that OV incurred legal expenses in the sums claimed and I allow these costs.

Conclusion

67 For the reasons set out above, OV's counterclaims for breach of contract and for misrepresentation under the 1967 Act succeed. I will invite the parties to make submissions as to whether any award of damages is appropriate, and if so what the award should be, in the light of my findings on the disputed issues as to quantum. If further

findings are required, I will invite submissions as to these after the handing down of the judgment.