Neutral Citation Number: [2021] EWHC 2439 (Comm)

Case No: CL-2020-000699

**IN THE HIGH COURT OF JUSTICE**
**OF ENGLAND AND WALES**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

The Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 3 September 2021

**Before** :

**DAVID EDWARDS QC (SITTING AS A JUDGE OF THE HIGH COURT)**

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**Between :**

| | |
|---|---|
| **LOCAL BOY'Z LIMITED** | **Claimant** |
| **- and -** | |
| **MALU NV** | **Defendant** |

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**Tamara Kagan** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
**Helen Swaffield** (instructed by **VC LAW LTD**) for the **Defendant**

Hearing dates: 23 June 2021

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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 3 September 2021.

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DAVID EDWARDS QC

## David Edwards QC :

## Introduction

1. The present application is an application by the Claimant, Local Boy'z Limited ("Local Boy'z"), for summary judgment against the Defendant, Malu NV ("Malu"), on the whole of its claim.

2. The application, made by Application Notice dated 19 February 2021, is made pursuant to CPR 24.2 on the grounds (as Local Boy'z asserts) that Malu has no real prospect of successfully defending the claim and that there is no other compelling reason why the case should be disposed of at a trial.

3. The application is supported by the first witness statement of Henry Priestley, a partner at Reynolds Porter Chamberlain LLP ("RPC"), Local Boy'z solicitors, dated 19 February 2021. A witness statement dated 10 May 2021 from Roger Van Craen, the owner and President of Malu, was served in response. On 4 June 2021 Mr Priestley served a second witness statement in reply.

4. At the hearing, I heard submissions from Tamara Kagan of counsel on behalf of Local Boy'z and from Helen Swaffield of counsel on behalf of Malu. I am grateful to them both (and to those instructing them) for their assistance.

## The Contracts

5. Local Boy'z is a company incorporated in the United Kingdom. Its business is predominantly the import of goods into, and the sale of goods in, the United Kingdom. Malu is a company incorporated in Belgium that carries on business as an importer.

6. In April and May 2020, against the background of the Covid-19 pandemic, Local Boy'z and Malu entered into a number of contracts of sale whereby Malu sold and Local Boy'z purchased various quantities of face masks.

7. The contracts were for face masks of two different types, each connoting a different form of mask with a different level of protective effect. Adopting the terms used by the parties in the documents and in their submissions, these were:

   i) KN95 masks; and

   ii) Type IIR masks.

   Both types of masks were manufactured in China, and were imported by Malu into the EU. Local Boy'z sold the masks on to an English company, UK Packaging Supplies Limited ("UK Packaging"), which itself supplied them to third parties.

8. Basic details concerning the contracts of sale are set out in Schedule 1 (the KN95 masks) and Schedule 3 (the Type IIR masks) to the Amended Defence and Counterclaim, the contents of which (aside from the question of whether the sums identified by Malu in the schedules as outstanding are, in fact, due) do not appear to be in dispute.

9. There is, however, a dispute between the parties as to how many contracts of sale there were.

10. Malu's pleaded case is that there was one "framework" contract for each type of face mask, i.e., one KN95 contract and one Type IIR contract, under which orders were placed by Local Boy'z at different times for different quantities of masks at different prices with invoices being issued at the time of, and in amounts reflecting, each delivery. Local Boy'z pleaded case, in contrast, is that there were as many contracts of sale between the parties as there were invoices.

11. Whilst this difference does not appear critical to the dispute between the parties, neither parties' case, as it seems to me, properly reflects the facts demonstrated by the documents exhibited to Mr Priestley's and Mr Van Craen's respective witness statements. Specifically:

    i) In circumstances where Malu's supposed "framework" contracts are not alleged to have obliged Local Boy'z to purchase any particular quantity of masks at any particular price for delivery at any particular time, it is difficult to regard these as contracts of sale, or indeed as binding contracts at all;

    ii) So far as Local Boy'z case is concerned, however, although multiple invoices were issued, these often appeared to reflect partial or instalment deliveries of a larger quantity of masks that had been the subject of a single order (and a single order confirmation) and thus a single contract of sale.

12. It is, of course, perfectly possible for parties to agree in advance upon a set of terms that will become part of any contracts of sale that are subsequently entered into between them if and when orders are placed. It seems to me that this is essentially what Mr Van Craen was saying when he said in paragraph 13 of his witness statement that orders would be placed "without repeating all of the frame terms".

13. As indicated in Schedules 1 and 3 to the Amended Defence and Counterclaim, the entire quantity of ordered KN95 masks was delivered by Malu on dates between 10 April and 15 May 2020, and some, but less than half, of the ordered Type IIR masks were delivered on 20 and 21 May 2020. In each case, at Local Boy'z request, the masks were delivered by Malu directly to UK Packaging.

## The Regulatory Regime

14. The regulatory regime is of some importance, in particular in relation to the dispute between the parties in relation to the KN95 masks, and it is appropriate that I set it out at an early stage.

### (i) KN95 masks

15. The KN95 designation is a performance rating under the Chinese regulatory regime applicable to filtering half masks, i.e., to masks that contain one or more layers of filtering material and cover the nose, mouth and chin.

16. The closest equivalent standard to KN95 under the UK regulatory regime is BS EN149:2001+A1:2009 ("the EN149 Standard"). This is a harmonised EU standard

reflecting the essential requirements set out in EU legislation governing personal protective equipment ("PPE"), namely EU Regulation 2016/425 ("the PPE Regulation").[1]

17. The PPE Regulation provides in part as follows:

> *"Article 5*
>
> **Essential health and safety requirements**
>
> PPE shall meet the essential health and safety requirements set out in Annex II which apply to it.
>
> …
>
> *Article 8*
>
> **Obligations of manufacturers**
>
> 1. When placing PPE on the market, manufacturers shall ensure that it has been designed and manufactured in accordance with the applicable essential health and safety requirements set out in Annex II.
>
> 2. Manufacturers shall draw up the technical documentation referred to in Annex III ('technical documentation') and carry out the applicable conformity assessment procedure referred to in Article 19 or have it carried out.
>
> Where compliance of PPE with the applicable essential health and safety requirements has been demonstrated by the appropriate procedure, manufacturers shall draw up the EU declaration of conformity referred to in Article 15 and affix the CE marking referred to in Article 16.
>
> …
>
> *Article 10*
>
> **Obligations of importers**
>
> 1. Importers shall place only compliant PPE on the market.
>
> 2. Before placing PPE on the market, importers shall ensure that the appropriate conformity assessment procedure referred to in Article 19 has been carried out by the manufacturer. They shall ensure that the manufacturer has drawn up the technical documentation, that the PPE bears the CE marking and is accompanied by the required documents, and that the manufacturer has complied with the requirements set out in Article 8(5) and (6).

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[1] The events at issue all took place before the end of the transition period and the departure of the UK from the EU has no impact on them.

…

*Article 11*

**Obligations of distributors**

1. When making PPE available on the market, distributors shall act with due care in relation to the requirements of this Regulation.

2. Before making PPE available on the market, distributors shall verify that it bears the CE marking, is accompanied by the required documents and by the instructions and information set out in point 1.4 of Annex II in a language which can be easily understood by consumers and other end-users in the Member State in which PPE is to be made available on the market and that the manufacturer and importer have complied with the requirements set out in Article 8(5) and (6) and Article 10(3) respectively.

…

*Article 14*

**Presumption of conformity of PPE**

PPE which is in conformity with harmonised standards or parts thereof the references of which have been published in the Official Journal of the European Union shall be presumed to be in conformity with the essential health and safety requirements set out in Annex II covered by those standards or parts thereof.

*Article 15*

**EU declaration of conformity**

1. The EU declaration of conformity shall state that the fulfilment of the applicable health and safety requirements set out in Annex II has been demonstrated.

…

*Article 16*

**General principles of the CE marking**

The CE marking shall be subject to the general principles set out in Article 30 of Regulation (EC) No 765/2008.

*Article 17*

**Rules and conditions for affixing the CE marking**

1. The CE marking shall be affixed visibly, legibly and indelibly to the PPE. Where that is not possible or not warranted on account of the nature of the

PPE, it shall be affixed to the packaging and to the documents accompanying the PPE.

2. The CE marking shall be affixed before the PPE is placed on the market.

3. For category III PPE, the CE marking shall be followed by the identification number of the notified body involved in the procedure set out in Annex VII or VIII.

   The identification number of the notified body shall be affixed by the body itself or, under its instructions, by the manufacturer or his authorised representative.

…

*Article 18*

**Risk categories of PPE**

The PPE shall be classified according to the risk categories set out in Annex I

*Article 19*

**Conformity assessment procedures**

The conformity assessment procedures to be followed for each of the risk categories set out in Annex I are as follows:

…

(c) Category III: EU type-examination (module B) set out in Annex V, and either of the following:

   (i) conformity to type based on internal production control plus supervised product checks at random intervals (module C2) set out in Annex VII;

   (ii) conformity to type based on quality assurance of the production process (module D) set out in Annex VIII.

…

*Article 32*

**Operational obligations of notified bodies**

1. Notified bodies shall carry out conformity assessments in accordance with the conformity assessment procedures provided for in Annexes V, VII and VIII.

…

*Article 38*

**Procedure at national level for dealing with PPE presenting a risk**

1. Where the market surveillance authorities of one Member State have sufficient reason to believe that PPE covered by this Regulation presents a risk to the health or safety of persons, they shall carry out an evaluation in relation to the PPE concerned covering all relevant requirements laid down in this Regulation. The relevant economic operators shall cooperate as necessary with the market surveillance authorities for that purpose.

   Where, in the course of the evaluation referred to in the first subparagraph, the market surveillance authorities find that the PPE does not comply with the requirements laid down in this Regulation, they shall without delay require the relevant economic operator to take all appropriate corrective action to bring the PPE into compliance with those requirements, to withdraw the PPE from the market, or to recall it within a reasonable period, commensurate with the nature of the risk, as they may prescribe.

   The market surveillance authorities shall inform the relevant notified body accordingly.

…

2. Where the market surveillance authorities consider that non-compliance is not restricted to their national territory, they shall inform the Commission and the other Member States of the results of the evaluation and of the actions which they have required the economic operator to take."

18. For the purpose of Article 18 of the PPE Regulation, KN95 masks fall into Category III. As such, the relevant conformity assessment procedures are those contained in Article 19(c) which require:

i) An EU type-examination: as set out in Annex V, this is a conformity assessment procedure in which a Notified Body examines the technical design of the PPE and verifies and attests that the design meets the applicable requirements of the regulation; and

ii) A conformity to type procedure, either based on internal production controls plus supervised product checks (Module C2) as set out in Annex VII, or based on quality assurance of the production process (Module D) as set out in Annex VIII.

19. So far as the conformity to type procedure is concerned, both Annexes VII and VIII (consistently with Article 17 of the PPE Regulation) provide for the application of a CE marking to the product and for the issuance of a declaration of conformity. Clause 6 of Annex VII, for example, states:

"6. CE marking and EU declaration of conformity

6.1 The manufacturer shall affix the CE marking and, under the responsibility of the notified body referred to in point 3, the latter's identification number to each individual item of PPE that is in conformity with the type described in

the EU type-examination certificate and satisfies the applicable requirements of this Regulation.

6.2 The manufacturer shall draw up a written EU declaration of conformity for each PPE model and keep it at the disposal of the national authorities for 10 years after the PPE has been placed on the market. The EU declaration of conformity shall identify the PPE model for which it has been drawn up."

20. The EN149 Standard recognises three classes of filtering half masks according to their filtering efficiency and maximum total inward leakage, referred to as FFP1, FFP2 and FFP3 masks. The standard sets out various performance criteria that the masks must achieve. FFP1 masks provide the lowest and FFP 3 masks the highest degree of protection.

21. On 13 March 2000, in the context of the Covid-19 pandemic, the European Commission issued Commission Recommendation (EU) 2020/403 "on conformity assessment and market surveillance procedures within the context of the COVID-19 threat" ("the PPE Recommendation"). As its recitals make clear, its general purpose was to ensure the availability of PPE during the pandemic by temporarily relaxing certain requirements of the PPE Regulation.

22. The substantive provisions of the PPE Recommendation include the following:

"7. Where market surveillance authorities find that PPE … ensure an adequate level of health and safety in accordance with the essential requirements laid down in [the PPE Regulation] …, even though the conformity assessment procedures, including the affixing of CE marking have not been fully finalised according to the harmonised rules, they may authorise the making available of these products on the Union market for a limited period of time and while the necessary procedures are being carried out.

8. PPE or medical devices not bearing the CE marking could also be assessed and part of a purchase organised by the relevant Member State authorities provided that is ensured that such products are only available for the healthcare workers for the duration of the current health crisis and that they are not entering the regular distribution channels and made available to other users."

23. In April 2020 the Office for Product Safety & Standards ("the OPSS"), the national regulator for consumer products in the UK, issued a document entitled "Guidance for new high volume manufacturers of COVID-19 Personal Protective Equipment" ("the OPSS Guidance"). As apparent from paragraph 8, quoted below, the OPSS Guidance provided for the relaxation of the requirements of the PPE Regulation permitted by the PPE Recommendation.

24. Paragraphs 4, 5 and 8 of the OPSS Guidance are in the following terms (the underlining and bold type appears in the original):

"4. What are the essential safety requirements for PPE intended to protect against COVID 19?

The manufacture of PPE is normally governed by product safety legislation. The relevant legislation is [the PPE Regulation]. Even though the UK left the European Union on 31 January 2020, this still applies during the Transition Period and has been adopted in an amended form into UK law so that it continues to apply to the UK market after the Transition Period has ended. [The PPE Regulation] is enforced in the UK by the Personal Protective Equipment (Enforcement) Regulations 2018.

The essential health and safety requirements that apply to PPE are listed in Annex II of [the PPE Regulation]. You can find them in Annex II to [the PPE Regulation].

For PPE intended to protect against COVID-19 the process by which new PPE will be assessed for compliance with essential requirements has been changed.

To ensure you have met the essential health and safety requirements, you should manufacture the PPE either:

a) in line with a relevant European Standard,

b) in accordance with a standard referenced in the WHO guidelines or

c) to an alternative technical solution that meets the essential health and safety requirements and delivers adequate safety.

There are Standards relevant to PPE for COVID-19 available free from the British Standards Institution.

There are also WHO guidelines.

5. Do I need to have the PPE conformity assessed?

Normally, yes and this includes Type Approval and quality assurance procedures as set out in [the PPE Regulation]. However, for COVID-19 related PPE these have been eased, depending on how you are placing your PPE on the market.

The extent to which the conformity assessment rules have been eased depends on whether you are manufacturing COVID-19 related PPE for Government/NHS purchase or are more generally placing it on the market.

…

8. What do I need to do to have my COVID-19 related PPE approved for sale to other users in the UK, if it is not being purchased by the Government/NHS for NHS use?

Before PPE intended to protect UK workers in any environment from COVID 19 can be placed on the UK market, it must meet the essential safety requirements under [the PPE Regulation, Annex II] and be assessed in line with the regulatory easements in [the PPE Recommendation].

This means that your product does not need to complete formal conformity assessment procedures including Type approval by a Notified Body, however:

1. Your product must be **in the process** of conformity assessment with a Notified Body, you can choose any mentioned in the table below and

2. The Notified Body must attest that your product would pass the conformity assessment process if it was to complete the process.

All relevant UK Notified Bodies have been informed of this procedure and the Notified Body that you choose should guide you through the fast track process of conformity assessment.

The Notified Body after its assessment, which will include simplified product testing, will inform whether your product meets the essential requirements or not.

If the product is deemed by the Notified Body as meeting essential safety requirements, you can begin selling it.

If the product is deemed by your chosen Notified Body not to be capable of meeting essential safety requirements they will tell you why, and it will then be up to you to address any issues and reapply to that Notified Body or choose another should you wish."

25. Ms Kagan summarised the effect in the UK of the changes brought in by the PPE Recommendation in paragraph 17 of her skeleton argument:

> "17. Accordingly, KN95 masks could only be sold as PPE if:
>
> (a) they had undergone full testing by a Notified Body for conformity to the EN149 Standard and were affixed with a CE mark (i.e., in accordance with the PPE Regulation); or
>
> (b) they were in the process of a conformity assessment with a Notified Body and the Notified Body confirmed they had an adequate level of health and safety in accordance with the essential requirements of the PPE Regulation, in which case the masks could be placed on the market without a CE mark (i.e., in accordance with the PPE Recommendation)."

26. This summary appears accurately to reflect the terms of the PPE Regulation, the PPE Recommendation and the OPSS Guidance applicable in the UK.

27. It appears, however, as Mr Van Craen said in paragraph 21 of his witness statement, that other EU member states issued their own national guidelines. Mr Van Craen exhibited to his statement an email he sent to Mr Mucklow of Local Boy'z on 30 April 2020 which attached a directive issued by the Belgian Federal Public Service Economy, explaining changes that had been made in Belgium in light of the PPE Recommendation.

28. This directive, headed "Conditions that deliveries of FFP2 and FFP3 face masks must fulfil in order to be released", provides in part as follows (the underlining and bold type appears in the original):

> "For PPE masks, documents such as the EU declaration of conformity and the EU type-examination certificate issued by a notified body must be present in order to demonstrate the conformity of the products.
>
> In view of the exceptional situation, we take into account deviations from these rules for CE marking and conformity assessment as described in [the PPE Recommendation].
>
> We can exceptionally accept masks that do not bear the CE marking, provided it is ensured that such products are made available only during the current crisis and do not enter regular distribution channels.
>
> For the evaluation of the conformity assessment certification of mouth masks, we also exceptionally take into account certification or test reports according to equivalent international standards.
>
> These alternative standards can be:
>
> …
>
> **China: GB 2626-2006 KN100, KP100, KN95, KP95**
>
> …
>
> This list can also be found on: *https://www.cdc.gov/coronavirus/2019-ncov/hcp/respirators-strategy/crisis-alternate-strategies.html*.
>
> Conformity can be demonstrated by test reports or by a certificate from a third party. If sufficiently documented (certificates, test reports according to a standard, accredited laboratory and all documents can be linked to the batch or goods concerned), this can be accepted as an alternative.
>
> We are aware that Chinese face masks are currently being tested by Chinese inspection bodies/laboratories according to European Standard EN 149. Normally, this can only be done by European notified bodies, but if the inspection body figures on the following list from the Chinese authorities, we will accept these certificates:
>
> *https://www.cnas.org.cn/english/findanaccreditedbody/04/896740.shtml*.
>
> Certificates from laboratories that are NOT on the list will NOT be accepted."

29. Mr Van Craen's evidence (see paragraphs 22 and 33 of his witness statement) was that the KN95 masks sold to Local Boy'z had passed custom and safety inspections carried out upon importation by the Belgium national authorities and were available for sale across the EU.

30. Returning to England, in the case of PPE intended for use or operation by persons at work sections 3 to 5 of the Personal Protective Equipment (Enforcement) Regulations 2018 ("the 2018 Regulations") identify the market surveillance authority responsible for enforcement of the PPE Regulation in Great Britain as the Health and Safety Executive ("the HSE").

31. Section 8 of the 2018 Regulations creates a number of offences where economic operators contravene the PPE Regulation, including by failing to comply with a requirement of a market surveillance operator made under Article 38. A requirement imposed by a notice served by a market surveillance authority under Article 38 such as the HSE is capable of being appealed within a limited period of time.

**(ii) Type IIR masks**

32. Type IIR masks are a type of surgical mask. They are not classified as PPE, and they are not regulated under the PPE Regulation.

33. The requirements for the design, manufacturing and placing on the market of Type IIR masks are, instead, set out in Council Directive 93/42/EEC of 14 June 1993 concerning medical devices ("the Medical Devices Directive"). The provisions of the Medical Devices Directive include the following:

> "*Article 3*
>
> **Essential requirements**
>
> The devices must meet the essential requirements set out in Annex I which apply to them, taking account of the intended purpose of the devices concerned.
>
> …
>
> *Article 9*
>
> **Classification**
>
> 1. Devices shall be divided into Classes I, IIa, IIb and III. Classification shall be carried out in accordance with Annex IX.
>
> …
>
> *Article 11*
>
> **Conformity assessment procedures**
>
> …
>
> 5. In the case of devices falling within Class I, other than devices which are custom-made or intended for clinical investigations, the manufacturer shall, in order to affix the CE marking, follow the procedure referred to in Annex VII and draw up the EC declaration of conformity required before placing the device on the market.
>
> …
>
> *Article 17*
>
> **CE marking**

1. Devices, other than devices which are custom-made or intended for clinical investigations, considered to meet the essential requirements referred to in Article 3 must bear the CE marking of conformity when they are placed on the market.

2. The CE marking of conformity, as shown in Annex XII, must appear in a visible, legible and indelible form on the device or its sterile pack, where practicable and appropriate, and on the instructions for use. Where applicable, the CE marking must also appear on the sales packaging.

   It shall be accompanied by the identification number of the notified body responsible for implementation of the procedures set out in Annexes II, IV, V and VI."

34. Annex I of the Medical Devices Directive sets out the essential requirements referred to in Article 3. These include, in clause 13, a requirement for a medical device to be accompanied by the information needed to use the device safely, comprising the details on the label and, where required, instructions for use.

35. Type IIR masks are a Class I medical device for the purposes of Article 9 of the Medical Devices Directive. The relevant conformity assessment procedures for the purposes of Article 11 are, therefore, those set out in Annex VII. Annex VII contains procedures for an EC declaration of conformity, summarised in clause 1 as follows:

    "1. The EC declaration of conformity is the procedure whereby the manufacturer or his authorized representative established in the Community who fulfils the obligations imposed by Section 2 and, in the case of products placed on the market in a sterile condition and devices with a measuring function, the obligations imposed by Section 5 ensures and declares that the products concerned meet the provisions of this Directive which apply to them."

36. The relevant European harmonized standard governing Type IIR face masks is EN 14683:2019, and its British equivalent BS EN 14683:2019 ("the EN14683 Standard"). As with the EN149 Standard applicable to KN95 masks, this sets out a number of performance criteria which medical face masks, including Type IIR masks, must achieve.

## The Dispute

37. The problems that have given rise to the present action initially arose in relation to the KN95 face masks. The chronology that follows is essentially drawn from the documents exhibited to Mr Priestley's and Mr Van Craen's respective witness statements.

38. On 11 June 2020 the HSE issued a safety alert warning in relation to the use of KN95 face masks as PPE. The alert said that about 90 percent of the concerns and queries being received by the HSE in relation to PPE at that time involved KN95 masks, which were often accompanied by fake or fraudulent paperwork, and that the HSE had acted to prevent a large number of such items from entering the supply chain.

39. On 17 June 2020 the HSE wrote to UK Packaging in connection with a recent supply of KN95 face masks that UK Packaging had received. The HSE's letter, the heading of which referred to the PPE Regulation and the 2018 Regulations, stated in part as follows (the bold type and underlining appears in the original):

> "The regulations above cover the supply of PPE into the UK. They require suppliers of PPE to ensure all items of PPE they supply comply with all applicable Essential Health and Safety Requirements (EHSRs) set out in these regulations. Suppliers must also be able to produce all the required information and documentation necessary to demonstrate this **when asked to by a Competent National Authority**.
>
> I have examined the documentation you provided along with the KN95 masks in question and they were not acceptable demonstration of the required conformity.
>
> The HSE Safety Alert of June 11, 2020 on the KN95 gives further information …
>
> …
>
> If you believe that these items (KN95 masks) in your stock meet the Essential Health & Safety Requirements and/or BS EN 149 please send across the documentation to demonstrate this by **Monday, June 22, 2020**.
>
> **For clarity, I would need as a minimum**:
>
> - The EC Type Examination Certificates clearly applying/linked to the specific items you hold in stock.
>
> - The corresponding Declarations of Conformity.
>
> **It is an offence to supply PPE that does not comply with the legal requirements. If you do not possess bona fide documentation to demonstrate that the product you are supplying complies, you should act immediately to cease supplying them and initiate actions to withdraw previously supplied items.** If you have taken this action please respond to confirm this by **Monday, June 22, 2020**.
>
> **Note**: You have received this letter because we have evidence that demonstrates you have supplied or offered these items for supply/sale and **more formal action may follow if you do not respond to this letter**."

40. A copy of the HSE's letter was passed on by UK Packaging to Local Boy'z, and then on 18 June 2020 onwards by Mr Mucklow to Mr Van Craen. Mr Van Craen responded to Mr Mucklow by email later on 18 June 2020 attaching a number of documents, which were subsequently submitted to the HSE on 22 June 2020 as attachments to an email from UK Packaging.

41. In its 22 June 2020 email, responding to the HSE's 17 June 2020 letter, UK Packaging queried what documentation the HSE had already received, but went on to say that:

> "Working on the assumption that you are referring to the mask 'KN95' shown in the attached documentation, then we have received all of the relevant information,

from our UK based supplier, for the product to be sold as PPE. I attach for your reference the following documentation:-

- The original Test Report;
- The EC Type Examination Certificate issued by PRS confirming FFP2 standard; and
- The Declaration of Conformity

As you will see, they all relate to the same product Test No. WSZ FHL No. W0086. You will also be aware that PRS are a Notified Body for PPE but for ease of reference, please see the below link and the attached as proof.

…

I trust this meets with your approval.

If your request relates to a different product, please can you provide further information in order for us to be able to identify the product and assist with your enquiries."

42. The documents attached to this email were:

i) A Test Report, no. (2020) WSZ FHL NO. W0086 dated 7 May 2020, issued by Jiangsu Guojian Testing Technology Co., Ltd. ("Jiangsu"). This referred to testing of a sample of KN95 masks of Zhi Wei brand, specification ZW-01, sample grade FFP 2 said to have been conducted between 25 April and 6 May 2020 to the EN149 Standard;

ii) An EU Type-Examination Certificate (Module B), no. CW/PPER/16/06/2020 dated 2 June 2020 issued by Polski Rejestr Statkow SA ("PRS"). The certificate referred to the product as a particle filtering half mask type ZW9501, class FFP 2 manufactured by Changxing Zhiwei Clothing Materials Co., Ltd ("Zhiwei") to the EN149 Standard. The list of approval limitations referred to the PPE Recommendation, but the head of the document stated:

> "THIS IS TO CERTIFY that Polski Rejestr Statkow S.A. (PRS) did undertake the EU type-examination procedure for the product identified below which was found to be in compliance with the requirements of Annex V to [the PPE Regulation]";

iii) An EC Declaration of Conformity issued by Zhiwei dated 16 June 2020. This referred to the product as a KN95 face mask, the standard as the EN149 Standard and stated that the product was in conformity with the PPE Regulation. It said that the product had been assessed in accordance with PRS report CW/PPER/16/06/2020 and Jiangsu Test Report no. WSZ FHL No. W0086 giving production dates between 3 and 18 April 2020.

43. The HSE responded to UK Packaging's 22 June 2020 email on 25 June 2020. In its email, the HSE said that the documentation that had been sent would be reviewed and

it asked for confirmation that UK Packaging did not have other batches of KN95 masks in stock covered by different documentation. The HSE's email observed that:

> "The Declaration of Conformity attached is dated 16/06/2020 and as you will be aware, will only cover the relevant stock including and after this date."

All the KN95 masks sold by Malu to Local Boy'z had, of course, been delivered by 15 May 2020, approximately a month before the date of the Declaration of Conformity.

44. This email was passed on to Mr Van Craen, who responded by email on 25 June 2020 explaining that he disagreed with the HSE's suggestion that the Declaration of Conformity was inapplicable to sales of the KN95 masks prior to 16 June 2020:

> "We fully disagree with the reply of the HSE and don't understand that these people don't analyse the documents properly.
>
> The EC Declaration of conformity on goods delivered to you is:
>
> 1. Referring to all invoices from the factory to Malu NV, and thus referring to all deliveries from Malu NV to Local Boyz. If needed we can provide blanked copies of the invoices from the factory proving the link between the factory's deliveries and our invoices to you.
>
> 2. Clearly mentioning the production dates of the masks and thus proving that the productions to LB are corresponding with the actual deliveries."

45. On 16 July 2020, having sent the interim email response described above, the HSE wrote to UK Packaging in fuller terms. Its letter, explained that the HSE had carried out a technical assessment of the product, and that it was not satisfied with the documentation provided (the bold type and underlining again appears in the original):

> "As the relevant Market Surveillance Authority, HSE has made a technical assessment of this product and **determined that it should not be placed on the market** as we do not believe it meets the Essential Health and Safety Requirements (EHSR) of [the PPE Regulation]. We have made our assessment against the EHSR of [the PPE Regulation] and the requirements of [the EN 149 Standard]:
>
> - This is a KN95 respirator and the supplied documentation contains inconsistencies.
>
> - The product identifier differs in the Declaration of Conformity, the Module B Type Examination Certificate and the Testing Report. The CE marking on the respirator image shown in the Testing Report does not conform to the requirements of the EU PPE Reg. As a result of these facts, it cannot be determined that this product is a CE marked FFP2 respirator to EN 149.
>
> - In line with the KN95 Safety Alert issued by HSE in June 2020, this product may not be suitably protective.
>
> - As this is an ear loop respirator model, HSE judge that this would achieve a very low fit test pass rate. Consequently, it would not be suitably protective for downstream users.

- This product should not be placed on the market and sold for use as PPE.

**These findings confirm these items are non-compliant and you are now expected to immediately withdraw all your stocks of these items from sale. You should also contact your customers to whom you supplied these items to inform them of this decision and arrange a recall.**"

46. This letter was forwarded to Mr Van Craen, who responded by email on 20 July 2020 (according to the email, after speaking to the factory in China) explaining that he disagreed with the HSE's position. His comments were interleaved with the points made by the HSE, which, for ease of reading, I have italicised in the extract below:

"We both disagree with the comments of the HSE for the following reasons:

- *This is a KN95 respirator and the supplied documentation contains inconsistencies.*

The HSE is not specifying what according to them are the 'inconsistencies'. They also do not mention how they test, which sample, batch number, etc. No test report, nothing at all.

Our provided documentation is very clear and correct. Besides, they should not forget that the regulations and legislation, prescribed by the EU and Belgium changed since the start of the pandemic and the documentation changed accordingly.

We also have the impression that, since they started to contact you, they come with new remarks, questions, etc. Every time we reply, they come up with another argument.

They should not forget that all our imports were controlled by Belgian Customs and Government who approved all the documents that we provided and checked the goods several times physically. We delivered same goods in Belgium and Germany without any problem.

- *The product identifier differs in the Declaration of Conformity, the Module B Type Examination Certificate and the Testing Report. The CE marking on the respirator image shown in the Testing Report does not conform to the requirements of the EU PPE Reg. As a result of these facts, it cannot be determined that this product is a CE marked FFP2 respirator to EN 149.*

We do not agree. See our previous comments. At the start of the pandemic, the regulation to allow a CE marking was accepted, because of the crisis, if both a Declaration of conformity and a Test Report were provided by a laboratory which was approved by the EC and appeared on the CNAS list. When the outbreak started the factory applied immediately for approval by a Notified Body. This document was provided to you additionally. For your information: the factory is continuously producing only one type of KN95 mask. All documents provided refer clearly to batch numbers, certificate numbers and test reports, there is no doubt that this product is a CE marked FFP2 respirator to EN149.

- *In line with the KN95 Safety Alert issued by HSE in June 2020, this product may not be suitably protective.*

The KN95 Safety Alert applies indeed to KN95 which are 'not CE approved'. Since the KN95 are CE marked this product is suitably protective.

- *As this is an ear loop respirator model, HSE judge that this would achieve a very low fit test pass rate. Consequently, it would not be suitably protective for downstream users.*

Although we know that the correct fitting is achieved it can be improved by adding a plastic band which we can provide if you need it. In the annex you find the picture".

47. I observe that Mr Van Craen's reference to a "Test Report … provided by a laboratory which … appeared on the CNAS list" is obviously a reference to the requirements of the directive issued by the Belgian Federal Public Service Economy referred to at paragraph 28 above.

48. For the purpose of preparing a response to the HSE, Local Boy'z obtained the assistance of Steve Lane of Lane IP, a London firm specialising in intellectual property. An email dated 23 July 2020 from Mr Mucklow to Mr Van Craen set out what appear to have been Mr Lane's thoughts and recommendations on the issues raised by the HSE.

49. One of Mr Lane's recommendations was that witness statements should be obtained from Mr Van Craen and from the Notified Body, PRS, explaining the discrepancy in the product identifier shown in the documents. Mr Van Craen provided comments on Mr Lane's recommendations in an email he sent to Mr Mucklow on 24 July 2020 in which he said:

"If the barrister [Mr Lane was not, in fact, such] wants me to make official statements, I suggest he makes a draft which I can sign.

…

Contacting now the NB for statements will take several days because they are very busy, holiday etc."

50. In the event, UK Packaging replied to the HSE by email dated 5 August 2020. The email explained the comments that UK Packaging had received from Local Boy'z in response to the HSE's 16 July 2020 letter as follows:

"We understand your findings for issuing a Withdrawal Notice are as follows:

- The supplied documentation contains inconsistencies in relation to the Product Identifier;

- The CE marking does not conform to the Regulation; and

- As this is an ear loop respirator model, HSE judge that this product would achieve a very low fit test pass rate.

At the outset, we acknowledge the importance of ensuring all PPE meets with the necessary requirements and that KN95 masks in particular come under more scrutiny than most given that there have been instances of fake Manufacturers and/or Notified Bodies involved in the circulation of these products. This is undoubtedly what has led to your own Notification issued in June in relation to this type of mask and we encourage you raising these issues with us to ensure all the necessary checks are made.

I am also sure you will agree that your June Notification makes it very clear that KN95 masks are applicable PPE, if the CE marking is genuine, and that the Notified Body has done a proper assessment via the EU-Type Examination report. There is also of course a 'Presumption of Conformity of PPE' pursuant to Article 14 of the Regulation but we accept that, now the issue has been raised, it is incumbent upon us to prove that the Documentation in question meets these Regulations.

With this in mind, please find attached the following documentation:-

- A Witness Statement signed by Bing Lu of [Jiangsu] (the Testing Company);
- A Witness Statement signed by Sally Zhang of [Zhiwei] (the Manufacturer);
- A Witness Statement signed by Przemyslaw Galka of [PRS] (the Notified Body); and

The Statements we believe speak for themselves but specifically they confirm that the Product Identifier contained some minor inconsistencies but that this has been explained as a difference in approach to nomenclature, not that the samples were different. The Manufacturer name is also consistent - Changxing Zhiwei Clothing Materials Co., Ltd – across all the Documentation. The product sample number is consistent – W0086 – across all Documentation. The Issue date of the Test report (7 May 2020) is the same as that stipulated in the EU-Type Examination report. The Letter of Conformity refers to Report no. CW/PPER/16/06/2020 which is the report No. for the EU Type Examination Report.

We therefore believe this explains any minor inconsistencies in the Product Identifier.

In relation to the CE marking, it does in our opinion conform as it has been 'affixed, visibly, legibly and indelibly'. There is a minor inconsistency in that the Notified Body number does not appear on the masks themselves, but it does appear on the Letter of Conformity – see NB1463 which is the number for [PRS]. The Letter of Conformity would be provided to all customers upon purchase of the masks thereby ensuring proof of Certification is clear and unambiguous to the end-user.

Finally, in relation to the low test pass rate, the Testing Company [Jiangsu] undertook the relevant tests and passed the product for FFP2 standard."

51. As can be seen, the email from UK Packaging enclosed three witness statements. The first was a statement from Sally Zhang of Zhiwei, the manufacturer of the KN95 masks.

Ms Zhang explained that a consignment of face masks had been sold by her company to Malu. She exhibited three documents:

i) The Test Report (2020) WSZ FHL No. W0086 dated 7 May 2020 issued by Jiangsu;

ii) An EU Type-Examination Certificate No. CW/PPER/16/06/2020 issued by PRS on 2 June 2020; and

iii) An EC Declaration of Conformity issued by Zhiwei dated 16 June 2020.

*i.e.*, the same documents as those referred to in paragraph 42 above.

52. The second witness statement was a statement from Bing Lu, the Chief Tester of Jiangsu. He attached a copy of the test report and confirmed that his company had tested the masks in accordance with the PPE Regulation and the EN 149 Standard. He addressed the HSE's observation about difference in nomenclature in the product identifier and also the suggestion of low fit.

53. The final witness statement was a statement from Przemyslaw Galka, the Certification Division Director of PRS. He confirmed that PRS had issued the EU Type-Examination Certificate dated 2 June 2020 and explained that the product identifiers ZW-01 and ZW9501 referred to the same product and simply reflected PRS's practice of including the number "95" in the identifier as a reference to the KN95 mask type.

54. In fact, although it was not included as an attachment to UK Packaging's email to the HSE, a fourth witness statement had been prepared: a statement dated 3 August 2020 signed Mr Van Craen under a statement of truth. In paragraphs 2 and 3 of this statement ("the August 2020 statement") Mr Van Craen stated the following (emphasis added):

> "2. My company has more than 40 years' experience of dealing in fashion and textiles. In April 3rd 2020 I placed an order with Changxing Zhiwei Clothing Materials Co Ltd … for KN95 textile-based FFP 2 Respirators meeting the standards for personal protective equipment ('PPE') in accordance with the requirements of [the PPE Regulation] and [the EN 149 Standard] ('Compliant Respirators') these being the products we wished to sell within the EU. It was an express term of the contract that the Compliant Respirators should comply with the EU, UK and other Member State standards for PPE under [the PPE Regulation] and [the EN 149 Standard].
>
> 3. A consignment of these Compliant Respirators was sold by my Company to the UK company Local Boyz Limited and from them to UK Packaging Supplies Limited. Again, it was an express term of my Company's arrangement with Local Boyz Limited that the Compliant Respirators should comply with the EU, UK and other Member State standards for PPE under [the PPE Regulation] and [the EN 149 Standard] and be fit for use as such."

55. Ms Kagan relied on these paragraphs in support of Local Boy'z case that it was an express term of the contracts of sale for the KN95 masks that Malu, and not Local Boy'z, would be responsible for UK regulatory compliance.

56. Mr Van Craen protested in paragraph 65(vi) of his witness statement about the admission and use of his 3 August 2020 statement on this application, and in paragraph 7 of her skeleton argument for the hearing, Ms Swaffield said that an application would be made to me to exclude the use of the 3 August 2020 statement on the following grounds:

> "Malu will apply to exclude the use of statement used by the Claimant and signed by its Managing Director Roger Van Craen (RVC) for the reasons set out in para 6 of the Amended Defence [5:30] and explained in RVC para 65(vi). It was procured for use in another process relating to the HSE investigation, pursuant to CPR 32.12 and subject to the collateral use protections at 32.12.1 White Book page 144 and similarly 31.22 subsequent use of disclosed documents – 31.22.1 White Book page 1094. It is similar to unused material in a criminal investigation (31.22.1). An application to restrict its use will be made, given the circumstances."

57. In the event, when I asked Mr Swaffield whether an application was being made to exclude reliance upon Mr Van Craen's 3 August 2020 statement, she said that it was not, although she reserved her position for trial. As I had indicated in argument, I struggled to see how it could be excluded on any of the bases identified, although, given the absence of any application, this is not a point I have to decide.

58. On 21 September 2020 Mr Mucklow sent an email to Mr Van Craen saying that he had been made aware that the HSE was having the KN95 face masks that Malu had supplied independently tested in a recognised laboratory, Mr Mucklow assumed in the UK. Mr Mucklow added:

> "After speaking with our legal advisers their suggestion is that Malu must independently get the masks tested in a European laboratory, something like SGS which is going to be recognised by HSE.
>
> If HSE come back and say that the masks have failed their independent testing and we do not have something to demonstrate that you have tested the masks in a European laboratory and they are fit for purpose you are going to have a substantial problem."

59. Some eight days later, on 29 September 2020, the HSE wrote to UK Packaging in response to its 5 August 2020 email. As is apparent from the extract below, the HSE was not satisfied with the explanations given and the documents supplied, and it maintained its previous position that the masks were not approved and must be withdrawn from the supply chain:[2]

> "We acknowledge these witness statements and have made our assessments against the Essential Health and Safety Requirements (EHSRs) of the [PPE Regulation] and the requirements of [the EN 149 Standard]. The findings from our assessment are:

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[2] On 11 November 2020 Local Boy'z itself received a similar letter from the HSE, making essentially the same points.

1. This product is incorrectly CE Marked. A category III PPE item must have the 4-digit number for the Notified Body alongside the CE mark.

2. We have also not seen a production conformity assessment certificate (i.e. Module C2 or Module D certificate) from a Notified Body.

3. The testing report claims this has been tested against EN149:2001+ (including the Total Inward Leakage Test) and has passed at FFP 2 standard. However, no facial dimensions are provided within the test report for the Total Inward Leakage test (which is a requirement of a compliant EN149 test report).

4. As this is an ear loop respirator model, the HSE judge that this would achieve a very low fit test pass rate. **

Therefore, the determination of HSE as the relevant Market Surveillance Authority, for PPE is that the **ZHI WEI brand, ZW-01 Spec 22.5 x 17 cm model of KN95 mask manufactured by Changxing Zhiwei Clothing Materials Co Ltd should not be placed on the UK market as PPE** as we do not believe it meets the Essential Health and Safety Requirements (EHSR) of [the PPE Regulation]. We also note the CE Marking on the respirator image shown in the Testing Report does not conform to the requirements of [the PPE Regulation] for a Cat III PPE Product.

My letter of July 16, 2020 informed you that the findings from our assessment confirm these items are non-compliant and directed you to halt any further sales/supplies of these items. I acknowledge you responded promptly on 17/07/2020 to confirm you had implemented this with immediate effect. **We have not approved these items for supply and these restrictions must remain in place**.

Please respond by **Monday October 5, 2020** to confirm that these items remain withdrawn from supply and you will continue your actions to ensure this remains the case. This response should also include details on how many items are affected by this withdrawal from sale.

The HSE Safety Alert for KN95 remains in place and our prior approval must be secured before any make/brand of KN95 masks (i.e. masks made to the Chinese GB 2626-2006 standard – replaced on July 1, 2020 by GB 2626-2019 standard) are supplied in the UK as PPE."

60. This letter, which was passed on to Mr Mucklow, prompted Local Boy'z on 6 October 2020 to say that it would be returning the KN95 masks to Malu, implicitly rejecting them. In his 6 October 2020 email, responding to a statement of account sent to him by Mr Van Craen, Mr Mucklow said this:

"2. As you know we have significant problems with the masks that we have been delivered from yourself. In fact they have been on stop as a result of HSE's instructions in the UK for some considerable time. We have just heard that the latest documentation which has been supplied is not and has not been sufficient to convince them to withdraw their instruction to UK Packaging that these goods should not be sold or offered for sale and in fact they have

> been asked to recall any stock supplied to their customers under the official protocol here. In the circumstances these masks will be returned to us from UK Packaging and are clearly unsellable without the permission of HSE. Obviously as the importer of these masks into the EU and subsequently into the United Kingdom the responsibility for ensuring that the masks comply with the EU guidelines are yours. We need to make arrangements for these masks to be collected by you and for you to re-credit us in full for these masks. We also need to compensate UK Packaging and Local Boy'z for their loss of profit. I am undertaking this calculation and will advise you of the figure as soon as I am able to do so.
>
> The only customer that we have for the masks is UK Packaging. They have completely lost confidence in the product supplied by yourself and as you know they are refusing to take any more masks. On the additional masks that you are holding could you please send us all the documentation that supports that they are suitable for selling in the United Kingdom and that there will be no problems with HSE/Trading Standards in the United Kingdom."

61. Mr Van Craen responded by email the same day explaining that he disagreed both with Mr Mucklow and with the HSE. In relation to the latter, he reiterated that the documents and the KN95 masks had been physically checked by the Belgian authorities and that:

> "It cannot be that in the EU goods are released by an authority of a member state and stopped by an authority of another member state".

62. There were further exchanges between Mr Mucklow and Mr Van Craen on 7 October 2020 in one of which Mr Mucklow observed that:

> "For your information, whilst the masks and their certification are governed by EU legislation each member state can and does adopt a stance in relation to how they apply for their country."

63. Mr Van Craen then decided to approach the HSE directly. In an email he sent to the HSE on 7 October 2020, responding to the HSE's 29 September 2020 letter, Mr Van Craen explained:

> "My (Belgian) company Malu NV, imported KN95 masks, supplied it to Local Boyz Ltd who supplied it to UK Packaging.
>
> Yesterday, we were notified by Local Boyz about the letter in annex which you sent to Hamilton Wolfe UK. Since at this stage it is not clear that the masks to which you refer are the same as the ones which we delivered to Local Boyz Ltd I contact you directly.
>
> …
>
> For us it is a surprise to take note of the content of your letter since both Belgian customs and a safety inspector physically inspected all goods and documents during the import in Belgium against the EC regulations and they released the goods accordingly.

However, we do understand that your services are having additional questions.

First of all, in order to identify the goods to which you refer we need to know if these goods were really delivered by Malu and I therefore request you:

1. Could you send me the batch number which you found in the goods involved (each packaging is containing a batch number);

2. Local Boyz Ltd indicated me that you have tested the masks in an external accredited labo. Could you send me a copy of this report which should also mention the batch number?

As we understand that there are still some unclear findings in your assessment we want to inform you and provide you some additional information.

We are in direct contact with [Zhiwei] who will provide us all further required documents if needed and in case the information provided in this email is not sufficient.

Concerning your assessment we have following questions as a remedy to request a release of the goods on the UK market by your services:

1. 4 digit Number of Notified Body: Could you agree if we add a sticker of the NB – digit number on the packaging of the masks?

2. We requested the production conformity assessment certificate Module C2 and you find it in an annex.

3. It is not clear where to find the requirement that facial dimensions must be provided for the Total Inward Leakage Test. Could you please specify in which regulation it is specifically required?

4. To solve the ear loop concern, we suggest to add a plastic loop with the delivery of the masks. This plastic loop makes it very easy to make the fit perfectly as required. Please have a look at the picture in the annex.

If this information is still not convincing your services we request if you could accept an additional test of the masks according to [the EN149 Standard] requirements to be performed in a German accredited lab to proof you that the masks meet the EHSR requirements in accordance of [the PPE Regulation].

…

As we delivered considerable big volumes to other EC member states (Germany) we are confident that our delivered goods meet the UK safety requirements and hope you can re-assess your decision with the additional information provided.

…

We admit that the provided documentation might not have been complete and sorry for this. The EU and national regulations on the import of masks have also changed

a lot between member states after the outbreak of the pandemic. We hope in your assessment to consider the situation and circumstances during last months."

64. Attached to Mr Van Craen's email was a Conformity to Type Certificate Based on Internal Production Control Plus Supervised Product Checks at Random Intervals (Module C2) issued by PRS on 10 July 2020 no. CW/PPER/61/07/2020. The certificate stated that:

i) It covered the period 10 July 2020 to 9 July 2021;

ii) The product was a particle filtering half mask type ZW9501 class FFP 2;

iii) The EU Type-Examination Certificate was no. CW/PPER/16/06/2020 and the harmonised standard applied was the EN 149 Standard.

The certificate referred to a test report produced by Jiangsu dated 8 July 2020 number STFWT202015452.

65. Mr Van Craen sent two further emails to the HSE on 8 and 9 October 2020, the second of which acknowledged that the EN149 Standard did require the test report to include the facial dimensions of the individuals on whom the total inward leakage test had been performed and attached a further test report from Jiangsu (an amended version of the original report issued on 7 May 2020) including these dimensions.

66. On 9 October 2020 Mr Van Craen forwarded his emails to the HSE to Mr Mucklow, asking Mr Mucklow to forward them on to UK Packaging. Mr Van Craen said that he had tried to speak to the HSE on the telephone, but without success. He said, however, that, according to his lawyer, there should be no further opposition from the HSE to the selling of the KN95 masks.

67. In the event, Mr Van Craen was to be disappointed. In its email response of 12 October 2020 the HSE noted that Mr Van Craen had questioned whether the masks the HSE had been considering were items that had been supplied by Malu. It said that, since it could only discuss matters with those in the supply chain, it needed Malu to confirm that it had supplied the masks to Local Boy'z first.

68. By this stage, it appears that an issue had arisen in relation to the Type IIR masks. In early October 2020, according to paragraph 68.5 of Mr Priestley's second witness statement, samples of Type IIR masks had been sent by UK Packaging to EasyJet, a potential customer, and rejected on the grounds, inter alia, that they did not match the test report provided and were obviously of a sub-standard manufacturing quality.

69. On 28 October 2020, Mr Mucklow sent an email to Mr Van Craen dealing with both types of masks:

"I write further in relation to the PPE supplied by Malu to Local Boy'z.

**KN95/FFP 2 Face Mask**

It is absolutely clear that the goods which HSE are complaining about are the goods which Malu delivered to Local Boy'z. HSE's letter dated 29 September 2020 clearly states 'that the ZHI WHI brand, ZW-01 Spec 22.5 x 17 cm model of KN95

mask manufactured by Changxing Zhiwei Clothing Materials Co Ltd should not be placed on the UK market as PPE …'.

You have engaged in detailed correspondence with HSE about these masks, and provided documents (including witness statements) to HSE in relation to these masks. To now suggest that it's not clear what goods are being referred to by HSE is completely incorrect and disingenuous.

Even if HSE does not have samples of the Zhiwei masks supplied by you (which is extremely unlikely), HSE's determination that the masks are not compliant with [the PPE Regulation] includes reasons solely based on the documentation that you have supplied them.

HSE's letter (dated 29 September) includes (amongst other things):

1. examples of non-compliance with the PPE Regulation based on your documentation, including the lack of conformity assessment, a deficient Total Inward Leakage Test and a low fit test pass rate due to the ear loop design; and

2. a categoric statement that HSE have banned the masks from sale in the UK.

Since receiving a copy of HSE's letter, we have also undertaken investigations and have discovered additional reasons why the Zhiwei masks that you supplied do not comply with the PPE Regulation. By way of non-limiting example, the masks and packaging do not comply with the marking requirements set out in [the EN 149 Standard] in several regards.

**Type IIR**

You have delivered Type IIR masks that do not match the test certificates that you say apply to them (test reports No 721653434 and No 20R0011789MO respectively.

Twice you have tried to deal with these issues and in both instances you have been unable to provide any proof that the masks supplied correlate to the test reports.

In relation to the 750,000 masks that you delivered which you said were tested under test report No 721653434, the batch of samples that you sent did not match the masks tested in the report.

In relation to the masks that you are holding (which you say test No 20R0011789MO applies to) you have also sent us a batch of samples. These clearly are not the masks which are shown in the test report which you led us to believe we were buying. They are obviously a poorly manufactured imitation and we cannot sell the stock that we have as the test certificate clearly doesn't relate to these masks.

For example, in the goods shipped, the ear loops are attached facing inwards (not outwards as in the test report), the bonding on the sides of the mask are a couple of dots wide (instead of 4 dots wide as in the test report), the finish of the mask is

terrible with excess material which has not been trimmed to size (they are neat and tidy in the test report).

Obviously I'm not going to be taking the rest of the order of these defective masks and will require cancellation of, and a credit note for, your invoice number FA20-1352.

**Next steps**

Consequently, my customer (UK Packaging) cannot sell the KN95 masks or Type IIR masks delivered and is now insisting that they are returned and refunded. To do this, I first need to return the masks to Malu for a refund. My proposal to achieve this is:

…

There are other matters that we will need to discuss and agree upon (such as compensation for my lost profits and costs incurred) but I suggest that we deal with these aspects separately – the immediate priority is the return and refund.

For your information, I have taken legal advice which confirms that the masks don't conform to the specifications provided and aren't fit for purpose and that I have the right to send them back to you and receive my money back plus compensation for my lost sales to UK Packaging."

70. There were subsequent exchanges between Malu and Local Boy'z on 29 October, 5 November, 6 November and 11 November 2020 in which Local Boy'z insisted on being entitled to return the masks and to a refund of the amounts paid, both of which Malu refused. On 6 November 2020, Mr Van Craen summarised Malu's position in relation to the two types of mask as follows (the underlining is in the original):

"**Regarding the type IIR masks:**

The masks delivered correspond to the test reports. After delivery of the masks you failed to reply within 8 days after receipt, as stated in §6 of our Terms and Conditions (attached). Since the alleged non-conformity (which we contest) would be clearly visible, the failure to respond in due time and the fact that you even sold the items yourself, leads us to conclude that Local Boy'z accepted the goods and payment is due in full.

As for the goods not delivered yet, they correspond to the test reports and we strongly contest the unproven claim that they don't. I notice that you don't provide any test report regarding the samples sent so there's no objective proof whatsoever that there would be any non-conformity.

For the sake of completion I refer to the attached declaration of conformity regarding the masks in question.

I point out (and this applies to the KN95 masks as well) that our earlier communication (among others through whatsapp) shows the actual reason for your contestation: clearly you ordered more masks than you (or UK Packaging) could

find customers for and now you see no other option than to try to pass your problem on to us, which I deeply regret.

**Regarding the KN95 masks:**

The delivered KN95 masks fully comply with the EU Recommendations which were in effect at the time they were ordered and at the time of delivery.

To who and when Local Boyz sold the goods is not Malu's concern.

HSE never corresponded directly with us and you. We came to know that they corresponded with UK Packaging after they imposed in June new rules on the UK market on the distribution of KN95 masks. We, however, delivered the masks to you in April/May and you accepted the shipments without complaint (let alone complaint within the 8 days term of our T&C), which also applies to legal conformity.

We repeatedly requested you all communication between Local Boyz, UK Packaging and HSE which you refuse to share.

We have test reports which we sent to you earlier. An updated report, based on the comments of HSE was sent to HSE and you received a copy of this test report. I'm sending you that same report in attachment (even though you already received it) and it applies to all batches delivered to Local Boyz.

As we want to verify our files we requested you repeatedly the batch numbers of all goods which you are having in stock. We need the batch numbers to verify that the goods concerned are actually goods delivered by Malu which you haven't sold yet, and to link the batch numbers to the test reports. There is no need to open all 700 cartons to do this. You keep on finding excuses to do so. If you want we can send people to your warehouse to do it. It can be finished in a few hours' time.

We have reasons to believe that your intentions are not honest; this is proven by all emails, whatsapp messages and recent witness statements which we received.

Concerning your questions on the markings:

a. At the time of delivery all CE markings on the masks were correct. This is confirmed by your own lawyer who drafted a reply to HSE (his email of 23 July 2020).

b. The requirement NOW is that the Notified Body number should be put on the masks or its packaging. Although it was not mandatory at the time of delivery it can easily be done. (see also the explanation in my email to you of 29 October 2020).

c. The marking of our company name is missing on the export cartons. This was explicitly requested by you to remove it from the export cartons as you informed you would put your own marking for commercial reasons.

> I must conclude that – as stated above – there's no reason whatsoever why there should be a return of unsold goods, neither a repayment, let alone a claim for damages from your side."

71. In December 2020, as described by Mr Priestley in paragraph 37 of his first witness statement, Hampshire County Council, one of UK Packaging's customers, engaged SGS to carry out independent testing on the KN95 masks supplied to it. The SGS test report no. 166801 dated 7 December 2020 concluded that the masks did not meet the FFP2 standard but only the (lower) FFP 1 standard.

72. Local Boy'z itself commissioned two independent test reports in relation to the Type IIR masks, the first from SGS and the second from Centexbel:

    i) The SGS report, no. 166907 dated 14 December 2020, said that the masks failed the requirements for Type IIR masks in two respects: bacterial filtration efficiency and microbial cleanliness. It also indicated that the masks failed the marking, labelling and packing requirements of the Medical Devices Directive;

    ii) The Centexbel report. no. 21.02284.01 dated 2 June 2021, indicated that the sample masks inspected passed the bacterial filtration efficiency and microbial cleanliness tests, but failed the splash test requirements for Type IIR masks.

73. The testing evidence does not, however, all point in the same direction.

74. As Mr Van Craen explains in paragraph 43 of his witness statement, Malu has had samples from the last batch of KN95 masks supplied to Local Boy'z tested by Precise Testing & Certification (Guangdong) Co., Ltd ("PTC"), a laboratory accredited by the China National Accreditation Service for Conformity Assessment ("CNAS"), although not a Notified Body.

75. PTC issued a report no. PTC21031003201C-EN01 dated 17 March 2021 which said that the masks passed the Total Inward Leakage test at FFP 2 standard, thus contradicting the findings of the SGS report (compliance with the markings requirements of the PPE Regulation and EN 149 Standard, I note, were described as "not tested").

76. As for the Type IIR masks, Mr Van Craen explained in paragraphs 50 and 51 of his witness statement that Malu has had samples from the stock of Type IIR masks in its warehouse (from the same batch that was supplied to Local Boy'z) tested by two institutions:

    i) SGS-CSTC Standards Technical Services (Shanghai) Co., Ltd Testing Centre ("SGS-CSTC"), another CNAS accredited laboratory. Its report, no. SL52105242963501TX dated 9 March 2021 indicated that the mask passed both the bacterial filtration efficiency and microbial cleanliness test; and

    ii) Centexbel (the same body used by Local Boy'z to test the Type IIR masks). It issued two reports, an Analysis Report no. 21.01473.01 dated 2 April 2021, which stated that the masks passed both the bacterial filtration efficiency and microbial cleanliness test, and a Certification Report dated 15 April 2021, which concluded that the masks tested met the requirements of Type IIR masks.

77. I described in paragraphs 63 to 65 above how, in October 2020, Mr Van Craen had had direct communications with the HSE. He has had further such direct communications with the HSE since the commencement of these proceedings.

78. On 3 February 2021 Mr Van Craen sent an email to the HSE, referring to the claim made by Local Boy'z against Malu and asking for information about the product samples, information and documents that had formed the basis for the HSE's assessment, for the batch numbers of the KN95 masks assessed by the HSE, and for copies of correspondence between the HSE and Local Boy'z and UK Packaging.

79. The HSE responded by email on 12 February 2021. It said that:

> "While our position remains as advised previously that until you have established you supplied this product, you are not party to this case and we cannot disclose details of our findings or communications, I will however, share those details I can disclose:
>
> - The UK currently have a safety alert in place for the KN95 mask under which approval must be obtained from HSE (the UK Market Surveillance Authority for PPE for use at work) before KN95 masks may be used as PPE at work.
>
> - The approval process involves a technical assessment of the associated technical documentation for the mask in question.
>
> - Our assessment is not of the masks themselves and we will not have details on the batch numbers or samples of masks in our possession.
>
> - Between June and October 2020 we carried out two technical assessments of the associated documents for the Zhi Wei masks provided by the supplier which included:
>
>  1. A test report by WSZFHL No. W0086 from [Jiangsu]
>
>  2. A module B cert CW/PPER/16/06/2020 from [PRS]
>
>  3. A declaration of Conformity from [Zhi Wei].
>
>  4. Witness statements from representatives of the above (1-3).
>
> - Our assessments determined that these products were non-compliant and we have followed the supply chain and informed the UK suppliers of our findings and required them to act and withdraw these masks from supply.
>
> While I understand your need/wish to establish whether these masks were indeed from a batch supplied by you, this is a matter between you and the party making the allegation and until you have established your role as a supplier of these items, we cannot provide any further detail."

80. Mr Van Craen sent a further email on 17 February 2021 asking the HSE an additional question:

> "Is it correct that until the safety warning on KN95 masks was launched in June 2020 by HSE, there was no obligation from the importer/distributor to inform HSE on the import of KN95/CE marked masks in the UK? If it was the case, where can we find this obligation or instruction and if so was it an obligation by the Distributor to be done before the safety warning was issued?
>
> According to me Local Boyz who was buying the Zhiwei Masks from my company. My company imported the KN95/CE in the EU and delivered to Local Boyz who invoiced the goods to UK Packaging. Could you confirm that from June onwards Local Boyz had the obligation, after HSE issued its safety warning on KN95, to contact immediately HSE as an importer/distributor and requesting HSE permission on the distribution of the masks since this, as far as I can read on your website, is required after HSE issued this safety warning."

81. The HSE replied by email on 26 February 2021 as follows:

> "In answer to your questions, following the HSE Safety Alert, Local Boyz shouldn't have placed KN95 masks on the market without HSE approval. However, any product placed on the UK market would in any case, need to be in conformity with the applicable legislation."

The HSE's position, as plain from its 26 February 2021 email, was that, regardless of any specific requirement post-June 2020 for HSE approval for KN95 masks, the documents it inspected were not in compliance with the applicable legislation.

## The Proceedings

82. The present proceedings were commenced by Claim Form served on Malu on 24 November 2020. Particulars of Claim were served by Local Boy'z on 4 January 2021.

83. The present application was made by Application Notice dated 19 February 2021, which was issued before Malu had served its Defence. In the event, a Defence and Counterclaim was served by Malu on 1 March 2021 and a Reply and Defence to Counterclaim by Local Boy'z on 26 April 2021.

84. On 17 May 2021 HHJ Pelling QC made an order by consent granting Local Boy'z permission to amend its Claim Form and Particulars of Claim and setting a timetable for service of consequentially amended pleadings. An Amended Defence and Counterclaim and Amended Reply and Defence to Counterclaim were served on 21 May 2021 and 4 June 2021 respectively.

### (i) Local Boy'z's claim

85. The claim made by Local Boy'z in its Amended Particulars of Claim is for restitution of the sums paid for particular quantities of the KN95 and Type IIR masks and for associated declaratory relief. Specifically, taking each type of mask in turn:

i) *KN95 masks*: Local Boy'z seeks restitution of the sums already paid under five invoices, nos. FA20-0483, 0484, 0485, 0522 and 0523, and a declaration that no sums are due and owing under two further invoices, nos. FA20-0663 and 0664;

ii) *Type IIR masks*: Local Boy'z seeks restitution of the sum paid (in partial payment) under one invoice no. FA20-0591, and a declaration that no further sums are due and owing under that invoice or under two further invoices, nos. FA20-1352 and 1376.

86. As apparent from Schedules 1 and 3 to the Amended Defence and Counterclaim, Local Boy'z does not seek restitution of the sums it has paid under all the invoices rendered by Malu for KN95 and Type IIR masks. As explained in Ms Kagan's skeleton argument, this is because, unlike the masks in relation to which restitution is sought, these other masks have been sold to sub-buyers who have not themselves rejected them.

87. The legal basis upon which Local Boy'z seeks restitution and declarations is the alleged breach by Malu of terms (and conditions) implied into the contracts for the KN95 and Type IIR masks under sections 13 and 14 of the Sale of Goods Act 1979 ("the SGA"), viz., that:

i) The masks would correspond with the description given of them in accordance with sections 13(1) and (1A);

ii) The masks would be of satisfactory quality in accordance with sections 14(2) and (6); and

iii) The masks would be reasonably fit for the purpose of use in the UK in accordance with sections 14(3) and (6).

88. Although the alleged implied terms were the same, the focus of Local Boy'z's complaints was different in relation to the two types of mask.

89. In the case of the KN95 masks, Local Boy'z alleged that, either as part of their description, or because it was implicit in the requirements that the masks should be of satisfactory quality and fit for the purpose of use in the UK, it was a condition of the contracts that the masks would:

> "… comply with the requirements of the PPE Regulation and/or the PPE Recommendation and/or that they would be FFP2 face masks under [the EN149 Standard]".[3]

Local Boy'z relied upon the determination made by the HSE and on the report prepared by SGS at the instigation of Hampshire County Council (see paragraph 71 above) as evidence of non-compliance.

90. Similar allegations were made in relation to the Type IIR masks in the sense that it was alleged by Local Boy'z that the masks were required to conform with the Medical

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[3] See paragraph 8(b) of the Amended Particulars of Claim containing the allegation that the masks should be of satisfactory quality. In paragraph 8(a) (which referred back to paragraph 5) and in paragraph 8(c) the phrase "as interpreted and applied by the HSE" was added, *i.e.*, the allegation was that the masks had to comply with the PPE Regulation and/or the PPE Recommendation "as interpreted and applied by the HSE". As to the significance of this, see paragraphs 99 and 100 below.

Devices Directive and the EN14683 Standard. It was alleged that the masks failed to conform with the directive and the standard in three respects:

i) The masks did not comply with the requirements of the EN14683 Standard, in particular in relation to bacterial filtration efficiency and microbial cleanliness;

ii) The information supplied with the masks did not satisfy the requirements of clause 13 of Annex I of the Medical Devices Directive

(see, in relation to both, the SGS and Centexbel reports referred to at paragraph 72 above); and

iii) No valid Declaration of Conformity (which was necessary to place the masks on the market) applicable to the Type IIR masks had been supplied by Malu, from which it was to be inferred that no such Declaration of Conformity existed.

91. Local Boy'z also alleged, however, that the Type IIR masks had been described by reference to a report dated 16 April 2020 prepared by TUV SUD Products Testing (Shanghai) Co. Ltd ("TUV SUD"), provided to Local Boy'z before the contracts of sale had been entered into, and that the masks supplied (and those still held by Malu for Local Boy'z) were obviously different (and inferior) masks.

**(ii) Malu's defence**

92. Malu's defence comprised a number of strands. The principal points were the following.

93. First, in paragraph 4.7 (in the case of the KN95 masks) and in paragraph 17.6 (in the case of the Type IIR masks) of its Amended Defence and Counterclaim Malu said that there was no agreement between the parties as to the system of law governing the contracts of sale and it did not admit that they were governed by English law.

94. As I observed during the hearing, however, this non-admission goes nowhere. As Ms Kagan correctly submitted, in the absence of a positive allegation by Malu that some foreign system of law applied, and in the absence of any plea by Malu of the (different) content of that foreign law, the court will apply English law: see Dicey, Morris & Collins on The Conflict of Laws (15th ed), paragraph 9R-001.

95. Secondly, Malu alleged that there was a single "framework" contract for each type of mask: thus, there was one contract for the KN95 masks and one contract for the Type IIR masks. I commented on this in paragraphs 10 to 12 above. As explained below, this point was at the heart of Ms Swaffield's submission that, as Local Boy'z claim did not extend to all of the KN95 and Type IIR masks supplied under all of the invoices, there had been no total failure of consideration entitling it to restitution.

96. Thirdly, and of particular importance in the context of the KN95 masks, Malu alleged (see paragraph 4.6 of the Amended Defence and Counterclaim) that it was an express term of the contracts of sale, made orally in a conversation between Mr Mucklow and Mr Van Craen on or around 27 March 2020 and evidenced in subsequent emails (alternatively it was an implied term given the meaning of the conversations), that:

> "a. As an importer of the products situated in Belgium, [Malu] would comply with the law applicable to the EU as interpreted by Belgian national authorities. [Malu] was not responsible for compliance with the law applicable in the UK.
>
> b. As a distributor of the products within the UK, [Local Boy'z] would comply with the law applicable in the UK (including EU law) for the period during which the products would be in use and assumed responsibility for all dealings with its customers, including any liability thereto."

97. Consistent with this, in responding to Local Boy'z's pleaded case as to the description given of the KN95 masks to Local Boy'z pleaded case of breach, Malu pleaded that:

> "5.2 At all times, and in order to achieve customs clearance, and approval by Belgium central government inspectors, [Malu] complied with the law applicable to the EU and Belgium. The Defendant was an importer under Article 10 of [the PPE Regulation] as interpreted by the Belgian national authorities.
>
> 5.3 The products were such as to attract the application of the PPE Regulation, [the PPE Recommendation] as interpreted by the Belgium national authorities and as an FFP2 face mask, were subject to [the EN149 Standard].
>
> …
>
> 8.3 It is averred that the product complied with the requirements of EU law as interpreted by Belgian national authorities."

98. In circumstances where the relevant legislation and standards applicable to the KN95 masks were EU legislation (the PPE Regulation and the PPE Recommendation) and harmonised EU standards (the EN149 Standard), the thrust of these pleas was not immediately easy to understand: ostensibly at least, the same legislation and standards fell to be applied by both the English and Belgian authorities.

99. In part, this plea may have simply been a response to Local Boy'z plea – see footnote 3 above – that the KN95 masks were required to comply with the PPE Regulation and/or the PPE Recommendation "as interpreted and implied by the HSE". As expanded upon in Mr Van Craen's witness statement and in argument, however, what I understood to be suggested were two things:

i) First, that Malu was not liable simply because the HSE had determined that the KN95 masks did not comply with the PPE Regulation and/or the PPE Recommendation. Mr Van Craen's case was, effectively, that the HSE's determination was wrong (he suggested in paragraph 65 of his witness statement that the HSE had been provided with incomplete information);

ii) Secondly, that although the underlying regulation (the PPE Regulation) may have been the same, EU member states were entitled to, and did, make their own decisions and issue their own national guidelines as to the extent to which they would avail themselves of and/or apply the relaxations permitted by the PPE Recommendation in the context of the Covid-19 pandemic.

100. So, in relation to this second point, Malu's case as I understood it was this: the HSE might have been entitled to act in the way it did in the UK, but, in terms of legislative compliance, it was agreed that Malu's responsibility would end at the Belgian border, the Belgian authorities giving effect to the PPE Recommendation in a different way. See, for example, paragraph 21 of Mr Van Craen's witness statement where he said:

> "I was very clear with Mr Mucklow that Malu would be able to import the products into Belgium where they would pass through a technical check by the federal authorities enforcing EU legislation. After that it would be a matter for him to resolve any issues that he had as the distributor of both products into the UK".[4]

101. Mr Van Craen referred, as corroboration of his discussion with Mr Mucklow on this topic, to his email of 30 April 2020 in which he said, in the context of a question from Mr Mucklow as to whether KN95 masks could be supplied into the UK if they had been tested by an approved Chinese laboratory (see the Belgian regulations referred to in paragraphs 27 and 28 above):

> "Please find below our reply and in annex the directives from the FAGG, our Federal Public Service. These we apply and since there is free movement of goods in EU, there is no problem.
>
> You remember that I asked you initially if there were limitations for UK and you waved it away with a big smile!"

102. I note, in addition, the plea added by Malu (by amendment) in paragraph 8.6(c) of its Amended Defence and Counterclaim that, if it was a term of the KN95 contracts that the masks would comply with the PPE Regulation and/or the PPE Recommendation "as interpreted and applied by the HSE", the masks did so comply at the time the parties concluded the contracts and/or at the time of delivery or acceptance.

103. Fourthly, Malu denied that either the KN95 or the Type IIR masks failed to comply with the description given of them or with the other SGA implied conditions. I have touched on Malu's case on this topic, including its disagreement with the determinations made by the HSE already, however, in addition:

i) Malu relied in relation to the absence of full CE marking on the KN95 masks (i.e., the application of a CE mark with the number of the Notified Body) on the relaxations embodied in the PPE Recommendation;

ii) Malu pointed to the results of the PTC report (see paragraph 75 above) and to the SGS-CSTC and Centexbel reports (see paragraph 76 above) as indicating that the KN95 and Type IIR masks did, in fact, meet the requirements of the applicable standards;

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[4] Malu also pleaded that Local Boy'z was in breach of its own regulatory obligations as a distributor under the PPE Regulation and/or the EU Regulation 2017/745. These pleas appeared to me to add little of relevance, not least because EU Regulation 2017/745 was not, and is not, in force in England.

iii) In relation to the allegation that the Type IIR masks supplied were different from those shown in the TUV SUD report, Malu pleaded (paragraph 25.4 of the Amended Defence and Counterclaim) that:

> "… any alleged divergences from the TUV SUD report [were] de minimis and have been accounted for by slight variances in the batches manufactured."

iv) Malu also relied upon a further 16 June 2020 report prepared by Guangzhou Inspection Testing and Certification Group Co., Ltd ("GTTC") in relation to the Type IIR masks which were the subject of invoice FA20-1352 which had not yet been delivered.

104. Fifthly, Malu said that Local Boy'z had accepted, or was deemed under section 35 of the SGA to have accepted, the KN95 and Type IIR masks, and was thus precluded from rejecting them and from seeking restitution of the sums paid. Reliance was placed on the sub-sale and delivery of both types of mask to UK Packaging and on the period of time that elapsed before Local Boy'z purported to reject them.

105. Sixthly, Malu denied that there had been a total failure of consideration entitling Local Boy'z to restitution of the sums paid.

106. Malu's counterclaim was for sums allegedly unpaid in respect of the two types of mask: $403,200.00 in the case of the KN95 masks under invoice nos. FA20-0663 and 0664 and $1,088,859.30 in the case of the Type IIR masks under invoice nos. FA20-0591, 1352 and 1376.

## Principles

107. The principles applicable to applications for summary judgment are well known. They were formulated by Lewison J (as he then was) in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] in terms that were subsequently approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd & Ors* [2010] Lloyd's Rep IR 301 at [24].

108. As set out in *Easyair* (and omitting internal references to other authorities), the principles are as follows:

> "(i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success;
>
> (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable;
>
> (iii) In reaching its conclusion the court must not conduct a 'mini-trial';
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

(vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

109. The principles were expressed in *Easyair* in the context of an application for summary judgment made by a defendant, but they apply equally, but with obvious modification, to applications for summary judgment made by a claimant: the question in that context is whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success in relation to its defence.

110. Ms Kagan reminded me in the context of the sixth and seventh principles in *Easyair* that complexity - or at least alleged complexity - is not a bar to summary judgment. She referred me what Mummery LJ said in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661 at [10], but the surrounding paragraphs [9], [11] and [12] are also pertinent:

"9. I also wish to say a few words about the litigation expectations and tactics of claimants and defendants. Claimants start civil proceedings (including intellectual property actions) in the expectation that they will win and often in the belief that the defendant has no real prospect of success. So the defence put forward may be seen as a misconceived, costly and time-wasting ploy designed to dodge an inevitable judgment for as long as possible. There is also a natural inclination on the part of optimistic claimants to go for a quick

judgment, if possible, thereby avoiding the trouble, expense and delay involved in preparing for and having a trial.

10. Everyone would agree that the summary disposal of rubbishy defences is in the interests of justice. The court has to be alert to the defendant, who seeks to avoid summary judgment by making a case look more complicated or difficult than it really is.

11. The court also has to guard against the cocky claimant, who, having decided to go for summary judgment, confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be 'efficient' ie produce a rapid result in the claimant's favour.

12. In handling all applications for summary judgment the court's duty is to keep considerations of procedural justice in proper perspective. Appropriate procedures must be used for the disposal of cases. Otherwise, there is a serious risk of injustice."

111. As Ms Kagan pointed out by reference to *JSC BTA Bank v Ablyazov* [2013] EWHC 3691 (Ch) (Henderson J), summary judgment can be granted even in the very largest cases if the court is satisfied that enough is known about the matters in issue before it for it to reach a view. Each case, of course, depends upon its own facts.

**The Parties' Submissions**

112. Ms Kagan divided her written and oral submissions by reference to the two different types of mask.

113. So far as the KN95 masks are concerned, the first of the relevant contracts (the contract embodied in order confirmation no. V020-0421, which was the subject of invoice nos. FA20-0483, 0484 and 0485) was concluded on 21 April 2020. In support of Local Boy'z case as to the manner in which these goods were described, Ms Kagan took me to the documents sent by Mr Van Craen to Mr Mucklow by email on the preceding day.

114. These were:

i) An EC Declaration of Conformity signed by Zhiwei on 13 March 2000, which referred to KN95 masks and declared that they were in conformity with the PPE Regulation and had been tested under test no. YJ202005524;

ii) An EC Declaration of Conformity signed by Zhiwei on 3 April 2020, which referred to KN95 masks and declared that they had been assessed by the application of the EN 149 Standard (another copy of this was sent by Mr Van Craen on 23 April 2020 saying that this was "the latest EC Declaration of Conformity which was used for last week delivery); and

iii) A Test Report issued by Zhejiang Light Industrial Products Inspection and Research Institute ("Zhejiang") no. YJ202005524 on 3 April 2020, which referred to rating requirement of GB 2626-2006, the Chinese KN95 rating standard and which included a photograph of a sample mask.

115. The order confirmation no. VO20-0421 identified the "specification/details" by reference to a page of packing details, which contained a number of photographs of FFP 2/KN95 masks and their packaging, described the "product specifications/quality" as "All as per test report", and said that the testing requirements were "According to the KN95 test reports, CE Report, EC report of conformity, English test report".

116. The photographs contained on the page of packing details showed that the masks and packaging both bore a CE marking (without, I note, the inclusion of the four digit Notified Body identifier) and that the packaging was marked both with FFP 2 and EN149:2001+A1: 2009.

117. So, Ms Kagan said, in relation to both this order and the subsequent orders, the KN95 masks had been sold by a description which included that the masks would comply with the PPE Regulation and the EN149 Standard and that they would be FFP2 masks.

118. The CE notation on the masks, Ms Kagan submitted, led Local Boy'z to believe that it was buying masks in *full* compliance with the PPE Regulation. By that, Ms Kagan explained, after the issuance of the PPE Recommendation, a manufacturer of PPE had two choices:

    i) Full compliance with the PPE Regulation, which would include testing by a Notified Body to ensure that the masks complied with the essential requirements (see Article 19 set out in paragraph 17 above) following which a CE mark would be applied; or

    ii) The procedure set out in the PPE Recommendation (see paragraph 22 and the OPSS Guidance set out in paragraph 24 above), which allowed products to be placed on the market so long as a conformity assessment by a Notified Body was *in process* but before it was completed, in which case, Ms Kagan said, there would be no CE mark.

    The fact that the KN95 masks were described as compliant with the PPE Regulation and shown with a CE mark (even without the Notified Body number), Ms Kagan submitted, made clear that the first route was being taken.

119. So far as breach was concerned, in the case of the KN95 masks Ms Kagan relied upon the determination made by the HSE. She submitted that Mr Van Craen had a full opportunity to be involved, and that the documentation provided by him had failed to satisfy the HSE. She also relied upon the findings of the SGS report referred to in paragraph 71 above. PTC, she said, was not a Notified Body.

120. Ms Kagan then dealt with a number of the points raised by Mr Van Craen in his witness statement and/or by Malu in its Amended Defence and Counterclaim. Briefly:

    i) Ms Kagan was dismissive of Mr Van Craen's suggestion that there was an express term that Local Boy'z would be responsible for UK regulatory compliance (see paragraphs 96 to 101 above), referring to Mr Van Craen's 3 August 2020 witness statement;

    ii) She said that the KN95 masks had been sold as fully compliant with the PPE Regulation, but that, even if Malu was entitled to rely upon the PPE

Recommendation, the evidence did not support the case that conformity assessment procedures had been started by 15 April 2020, as was suggested in paragraph 40 of Mr Van Craen's witness statement;

iii) She submitted that Mr Van Craen had a full opportunity to get involved with the HSE, and the idea that he had further relevant information or that there was incomplete data was implausible. She noted that the only document Mr Van Craen said was missing – the production conformity certificate – was a document Mr Van Craen had sent to the HSE himself (see paragraph 64 above);

iv) The suggestion that the masks that the HSE had considered might not have been masks supplied by Malu, Ms Kagan said (rightly) was not a point pressed with any vigour. The documentation sent to the HSE was the documentation provided by Malu which clearly related to the KN95 masks it had supplied. The HSE's determination, in any event, applied to all Zhiwei KN95 masks;

v) As for Malu's case that Local Boy'z had accepted, or was deemed to have accepted, the KN95 masks:

    a) Ms Kagan relied upon section 35(6)(b) of the SGA for the proposition that Local Boy'z was not deemed to have accepted the masks simply because they had been delivered to UK Packaging;

    b) As to whether Local Boy'z had had a reasonable opportunity to examine the masks for the purposes of section 35(2)(a) of the SGA, or whether a reasonable time had elapsed for the purposes of sections 35(4) and (5) of the SGA, Ms Kagan submitted that:

        i) The masks had been delivered to UK Packaging and so (reasonably) were not inspected immediately (she referred me to *Manifatture Tessile Laniera Wooltex v JB Ashley Ltd* [1979] 2 Lloyd's Rep 28 in this context);

        ii) From 18 June 2020 Malu was aware of the HSE's initial determination and was seeking to persuade the HSE to change course. Ms Kagan submitted that an analogy could be drawn with cases where a buyer was held not to lose its right to reject if it was requesting or awaiting repairs, or seeking further information: see *Clegg v Anderson* [2003] EWCA Civ 320, [2003] 1 All ER (Comm) 721 at [58] (Sir Andrew Morritt VC);

vi) Ms Kagan submitted that it was not necessary for me to decide whether there was one "framework" contract or multiple contracts, because Malu's case, that, as some of the KN95 masks sold were not being rejected there could not be a total failure of consideration, was simply wrong as a matter of law. She said that, even if there was a single contract (which she submitted there was not):

    a) The contract was divisible (see *Chitty on Contracts* (33rd ed.), paragraph 29-066 and *Benjamin's Sale of Goods* (11th ed.), paragraphs 8-062 and 17-091); and

b) Section 35A of the SGA, in any event, afforded a right of partial rejection (see *Benjamin's Sale of Goods* (11th ed.), paragraph 12-062).

121. Turning to the Type IIR masks, Ms Kagan drew my attention to the documents sent by Mr Van Craen to Mr Mucklow under cover of his email dated 29 April 2020 prior to the single order which was placed on 10 May 2020. Those documents included:

i) A Declaration of Conformity issued by Shaoxing Fuqing Health Products Co., Ltd ("Shaoxing") dated 2 April 2020, which declared that the masks met the requirements of the Medical Devices Directive and identified TUV SUD Product Service GmbH ("TUV SUD") as the Notified Body; and

ii) A Test Report issued by TUV SUD no. 721653434 dated 16 April 2020 which contained a photograph of a sample mask and which confirmed that the masks examined met the EN 14683 Standard.

122. Ms Kagan submitted that the effect of those documents was to describe the masks being sold as masks manufactured by Shaoxing, as Type IIR masks conforming to the EN 14683 Standard, and as masks as depicted in the photograph contained in the TUV SUD report.

123. So far as breach of the SGA implied conditions is concerned, Ms Kagan made three points.

124. The first, and the point on which Ms Kagan placed most emphasis, was that the Type IIR masks supplied (and those held by Malu and not yet delivered) were obviously different to the masks shown in the TUV SUD report. There was, thus, a clear-cut failure to supply masks that complied with the contractual description quite apart from the requirements of the Medical Devices Directive and the EN14683 Standard.

125. So far as that is concerned, I was shown photographs of samples of the Type IIR masks delivered and those still held by Malu, and I was invited to compare them with the photograph of the mask in the TUV SUD report. I was also provided in advance of the hearing with a physical sample of one of the masks supplied. My attention was drawn by Ms Kagan to a number of differences:

i) The ear loops were of a different thickness, and were attached to the white side rather than to the blue side of the mask;

ii) There were two perforations along the shorter edge of the masks supplied rather than four perforations in the mask shown in the TUV SUD report that was tested;

iii) The bonding on the masks supplied did not match the bonding on the masks shown in the report; and

iv) The edges on the mask shown in the TUV SUD report had been trimmed, whereas those on the masks supplied had not been (the suggestion being that they had been not properly finished).

126. Secondly, although Ms Kagan said in her oral submissions that, given the point just made I need not decide the issue, as a result of the investigations carried out in China described in paragraph 54 of Mr Priestley's second witness statement, there was reason

to believe that the Type IIR masks had not, in fact, been manufactured by Shaoxing but by a different Chinese company, Heze RuiFuKang Pharmaceutical Products Co. Ltd.

127. Thirdly, Ms Kagan submitted that both SGS and Centexbel (see paragraph 72 above) had confirmed that the masks did not conform with the requirements of the EN14683 Standard in various respects.

128. Addressing points raised by Mr Van Craen in his witness statement and by Malu in its Amended Defence and Counterclaim, Ms Kagan submitted that:

i) Malu had not denied that the masks it had supplied did not match those pictured in the TUV SUD report;

ii) Its pleaded response, that any differences were:

> "de minimis and have been accounted for by slight variances in the batches manufactured"

was no answer, because contractual conditions, including as to description, had to be complied with strictly (as to which Ms Kagan referred me to *Chitty on Contracts* (33rd ed.), paragraph 44-089 and to *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470, 479). The differences were, in any event, obviously material because they had caused EasyJet to reject the masks;

iii) Local Boy'z had not accepted, nor was it deemed to have accepted, the Type IIR masks that had been delivered (plainly, it had not accepted those that were still held by Malu). Ms Kagan made similar points to those made in relation to the KN95 masks described in paragraph 120(v) above:

a) The Type IIR masks had been delivered directly to UK Packaging;

b) The defects in the Type IIR masks only became known to Local Boy'z when the masks were rejected by EasyJet, in early October 2020, following which Local Boy'z (promptly) rejected them on 28 October 2020;

c) In response to Mr Van Craen's reliance on a so-called AQL report sent to Mr Mucklow on 17 May 2020 (after the contract had been concluded), which Mr Van Craen said gave Local Boy'z an opportunity to reject the Type IIR masks, Ms Kagan pointed out that Mr Van Craen had sent a further email a few hours later saying that

> > "You are mixing up everything!
> >
> > The documents required are the ones which I now add in annex."

attaching another copy of the TUV SUD report;

iv) Ms Kagan dealt with the conflicting reports Malu had obtained from SGS-CSTC and Centexbel (see paragraph 76 above) by saying that these reports did not cure the basic failure of the masks to comply with their description, and that the most

they established was that, whilst some of the masks did comply with the EN14683 standard, an unknown quantity of the masks did not.

129. Ms Kagan addressed, finally, a number of points raised by Ms Swaffield in support of her submission that, as a result of a refusal by Local Boy'z to respond to requests for disclosure, there were issues that required fuller investigation at trial. Some of these, for example, the issue of whether Local Boy'z had sufficiently mitigated its loss, Ms Kagan submitted were simply irrelevant in light of the fact that the claim was a claim in restitution not a claim for damages.

130. Ms Swaffield's written and oral submissions focussed upon what she said were three triable issues in relation to each of which, she submitted, Malu had a realistic prospect of success. As summarised in paragraph 6 of her skeleton argument, these three issues were as follows:

> "Issue One: The Claimant will not succeed in showing that there has been a total failure of consideration.
>
> Issue Two: The construction and interpretation of the terms of the Contracts, make provision for the Claimant's liability for issues arising in the UK.
>
> Issue Three: There is a significant amount owed by the Claimant for its purported rejection of KN95 masks and refusal to accept delivery of Type IIR masks. The Defendant claims a set-off against the Claim by the amount owing under the Counterclaim."

131. So far as Issue One is concerned, Ms Swaffield's basic submission was that, in order for Local Boy'z claim to succeed in its restitutionary claim, the failure of consideration had to be total. That, she submitted, could not occur if Malu had performed its contractual duties "to a sufficient extent", which she said it had done by delivering the goods (and passing title in them) to Local Boy'z.

132. Ms Swaffield referred me in this context to *Chitty on Contracts* (13th ed.), paragraph 29-047 and to the following passage in Lord Goff's speech in *Stocznia Gdanska SA v Latvian Shipping Co.* [1998] 1 WLR 574, 588B-G:

> "I find myself to be in agreement with Mr. Cordara's submission on this point. I start from the position that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract like, for example, the property in the ships being built under contracts 1 and 2 in the present case. Indeed, if that were so, in cases in which the promisor undertakes to do work or render services which confer no direct benefit on the promisee, for example where he undertakes to paint the promisee's daughter's house, no consideration would ever be furnished for the promisee's payment. In truth, the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due. The present case cannot, therefore, be approached by asking the simple question whether the property in the vessel or any part of it has passed to the buyers. That test would be apposite if the contract in question was a contract for the sale of goods (or indeed a contract for the sale of land) simpliciter, under which the consideration for the price would be the passing of the property in the

> goods (or land). However before that test can be regarded as appropriate, the anterior question has to be asked: is the contract in question simply a contract for the sale of a ship? or is it rather a contract under which the design and construction of the vessel formed part of the yard's contractual duties, as well as the duty to transfer the finished object to the buyers? If it is the latter, the design and construction of the vessel form part of the consideration for which the price is to be paid, and the fact that the contract has been brought to an end before the property in the vessel or any part of it has passed to the buyers does not prevent the yard from asserting that there has been no total failure of consideration in respect of an instalment of the price which has been paid before the contract was terminated, or that an instalment which has then accrued due could not, if paid, be recoverable on that ground."

133. Relying upon the argument that there was a single framework contract for each type of mask, Ms Swaffield submitted that, if some goods had been delivered and paid for and were not the subject of any claim, any failure of consideration could not be said to have been total.

134. In her skeleton argument Ms Swaffield advanced eight arguments in support of this basic submission, although some of those seemed to me to be directed not so much at the question of whether there had been a total failure of consideration but at whether Malu had a realistic defence that it had not breached its contractual obligations at all. Briefly, however, these were:

i) First, that (save for those Type IIR masks whose delivery had been refused), all the KN95 and Type IIR masks had been delivered to Local Boy'z and sold on to UK Packaging;

ii) Secondly, that a significant quantity of the masks of both types was not the subject of a claim for a refund: thus, Ms Swaffield submitted, there had not been a total failure of consideration under the framework contracts;

iii) Thirdly, Ms Swaffield submitted that:

> "All of the relevant facts about the conformity assessment evidence were set out by Malu before the Claimant selected the products for the UK jurisdiction."

Ms Swaffield referred in this context to the photograph of the KN95 masks with a CE marking but without the Notified Body number (see paragraph 116 above);

iv) Ms Swaffield's fourth point was lengthy and addressed a number of issues. including:

a) The oral exchanges between Mr Mucklow and Mr Van Craen, and the suggested express term dealing with division of regulatory responsibility (see paragraphs 96 to 101 above);

b) The documentation provided by Malu in relation to the two types of mask, and whether Malu was in breach of the implied conditions alleged.

In relation to the Type IIR masks, she said that any minor differences in the product had been accounted for by the manufacturer.

Ms Swaffield submitted that the court was not in a position on a summary judgment application to resolve the conflict of evidence as to what had been said between Mr Mucklow and Mr Van Craen,[5] and that the inconsistent testing reports obtained by each party raised issues for trial;

v) Fifthly, Ms Swaffield said that the findings of the HSE (in relation to the KN95 masks) were not determinative: the thrust of this point appeared to be that Local Boy'z and UK Packaging should have challenged the HSE's determination, but that they had no incentive to do so because the resale price of the KN95 masks had dropped;

vi) Sixthly, Ms Swaffield submitted that the reason for the problems experienced was that Local Boy'z had not complied with its own obligations, both under the express term agreed with Malu (see paragraphs 96 to 101) and as a distributor under the PPE Regulation and under EU Regulation 2017/745 (although, as I indicated in footnote 4, it appears this regulation was never in force in England);

vii) Seventhly, Ms Swaffield submitted that "the operation of basic principles of title, risk and acceptance provide Malu with a realistic prospect of success". Reliance was placed in this context on section 35 of the SGA, as to which it was said that the time taken by Local Boy'z to reject the masks was unreasonable, or at least there was an arguable point in that regard;

viii) Lastly, it was said that, even if Local Boy'z was able to show a breach of "the implied warranty" – which I take to mean a breach of one of the section 13 or 14 SGA implied conditions – Local Boy'z had failed to approach Malu for alternative products to replace those that had been supplied.

135. In relation to Issue Two, the essential point made by Ms Swaffield was that Malu's case, that oral terms had been agreed between Mr Mucklow and Mr Van Craen on the telephone about responsibility for UK regulatory compliance, which was said to be important in the context of the KN95 contracts, was not a matter which the court could safely resolve on a summary judgment application.

136. Ms Swaffield reminded me in that context of a number of cases in which courts had warned of the inappropriateness on a summary judgment application of seeking to resolve conflicts of evidence, including the decision of the Court of Appeal in *Allied Fort Insurance Services Limited v Creation Consumer Finance Limited* [2015] EWCA Civ 841 at [79]-[80] (Sir Terence Etherton C).

137. Ms Swaffield's Issue Three concerned the counterclaim for the unpaid sums, for the most part in relation to the undelivered Type IIR masks, which Malu said that it was entitled to set-off against the sums claimed. Ms Swaffield suggested that Malu would

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5 Ms Swaffield was critical of the absence of a witness statement from Mr Mucklow and of the fact that Local Boy'z evidence was presented in the form of a statement from Mr Priestley, Local Boy'z's solicitor.

be able to show at trial that the goods were as described, that they complied with the applicable EU legislation and were thereby fit for their purpose.

138. As I observed at the hearing, however, insofar as the issues that arose were the same, a decision that Local Boy'z was entitled to summary judgment on its claim was likely to mean that Malu's counterclaim in relation to the same type of masks was no longer viable. Local Boy'z application for summary judgment embraced its claim for declarations that it was not liable to pay Malu the unpaid sums that Malu claimed.

## Decision

139. I have carefully considered all the submissions made, which the paragraphs above seek only to summarise.

140. My decision, having done so, is that, subject to the point made in the next paragraph, Local Boy'z is entitled to summary judgment on its claim in relation to the Type IIR masks, but that its application for summary judgment on its claim in relation to the KN95 masks should be dismissed.

141. Given that Malu has a pleaded claim of set off for the unpaid amount of $403,200 in respect of the KN95 masks, however, there may be an issue as to whether, in addition to the declaratory relief Local Boy's seeks and to which I consider it is entitled in relation to the Type IIR masks, Local Boy'z is also entitled to a monetary judgment at this stage. I will hear from the parties in relation to that issue.

142. So far as the reasons for my decision are concerned, I will deal with the position in relation to the Type IIR masks first.

### (i) Type IIR masks

143. As set out above, Local Boy'z claim in relation to the Type IIR masks is based upon Malu's alleged breach of three SGA implied conditions: that the Type IIR masks would comply with their description; that they would be of satisfactory quality; and that they would be reasonably fit for purpose, the alleged purpose being for use in the UK.

144. So far as the first of these implied conditions is concerned, on the evidence before me in my judgment Malu has no realistic prospect of defending the claim for the simple reason that the masks supplied (including those still held by Malu) were patently not the same as the masks shown in the photograph provided to Local Boy'z at the time the contract for the Type IIR masks was concluded.

145. Specifically:

i) There is no dispute that on 29 April 2020, prior to the Type IIR order being placed, Malu provided Local Boy'z with the TUV SUD report of 16 April 2020 which contained a photograph of the masks;

ii) Malu's own pleaded case – see paragraphs 18.1 and 21.1 of its Amended Defence and Counterclaim – is that that the TUV SUD report was part of the documentation by which the masks being sold were described. There is no reason, of course, why goods cannot be described by means of a photographic representation;

iii) It is obvious, both by comparison between the photograph in the TUV SUD report and the photographs of the masks supplied, and also by comparison between the photograph in the TUV SUD report and the sample mask that was provided to me, that the Type IIR masks supplied by Malu are not the same as those shown in the TUV SUD report. The differences are those summarised in paragraph 125 above.

146. So far as the law is concerned, the passage in Lord Atkin's speech in *Arcos Ltd v EA Ronaasen & Son* cited to me by Ms Kagan supports the proposition that, in general, compliance with the implied condition of description is strict, although I note that Lord Atkin observed (in terms that are repeated in *Benjamin's Sale of Goods* (11th ed.), paragraph 11-018) that:

> "No doubt there may be microscopic deviations which businessmen and therefore lawyers will ignore"

147. But, even if it were right that truly negligible differences might be ignored, there is no evidence to suggest that the differences between the masks shown in the TUV SUD report and those delivered could sensibly be regarded as "negligible", as "microscopic deviations" or as differences that businessmen would regard as irrelevant. Nor do I think that there is a credible argument to that effect. As I have explained, EasyJet rejected the Type IIR masks supplied on the grounds that the masks did not match the report in various ways, and that the finish of the masks was terrible.[6]

148. Given my view on this point, it is immaterial whether, as claimed by Local Boy'z, the Type IIR masks also did not comply with their description (or were not of satisfactory quality or reasonably fit for purpose) because:

i) They were manufactured not by Shaoxing, but by another Chinese company, or because

ii) They failed to comply with the Medical Devices Directive or the EN14683 Standard

neither of which issues, given the conflicting evidence, could have been determined on a summary judgment application. Local Boy'z has established a breach of condition.

149. That being so, Malu is left with essentially two arguments: first, that Local Boy'z has accepted, or is deemed to have accepted, the Type IIR masks that have been delivered and has lost its right to reject them; and secondly, that, because Local Boy'z has retained some of the Type IIR masks delivered, there has been no total failure of consideration. I do not regard either point as seriously arguable.

150. So far as the first is concerned, there is no evidence of an express intimation by Local Boy'z that it had accepted the Type IIR masks, and section 35(b)(b) of the SGA makes

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6 No reliance was placed by Malu on section 15A of the SGA, but even if it had been I would have held that this was not a case where the breach was so slight that it would be unreasonable for Local Boy'z to reject the Type II masks.

clear that Local Boy'z is not deemed to have accepted them simply because, at its direction, they were delivered by Malu to UK Packaging, its sub-buyer.

151. The real question is whether a reasonable time had elapsed for the purposes of section 35(4) of the SGA before Local Boy'z rejected the Type IIR masks, which it did on 28 October 2020. So far as that is concerned:

    i) Section 59 of the SGA provides that the question of what is a reasonable time is a question of fact;

    ii) Section 35(5) explains that the matters that are material in determining for the purposes of section 35(4) whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods to ascertain whether they are in conformity with the contract.

152. The primary facts in the present case do not appear to be in dispute:

    i) The Type IIR masks were delivered on 20/21 May 2020;

    ii) They were delivered by Malu directly to UK Packaging, and they were not inspected (and it is not suggested that they should have been inspected) by Local Boy'z at that time;

    iii) In early October 2020, samples were sent by UK Packaging to EasyJet, a potential customer, which rejected the masks on the ground that they did not match the report provided and were obviously substandard. It was only at this stage that the defects, and the fact that the masks supplied were different from those shown in the TUV SUD report, came to Local Boy'z attention;

    iv) Local Boy'z then sought samples of the masks from Mr Van Craen on 9 October 2020 and compared them with the report provided. Having done so, it rejected the masks on 28 October 2020.

153. In circumstances where there are no relevant contested facts, nor any indication that further material facts might emerge if this matter proceeds, and where both parties have had a sufficient opportunity to address the point in argument, it seems to me that Ms Kagan was right to submit that the court should grasp the nettle. In my judgment, a reasonable period of time to reject the Type II masks had not elapsed, and Malu has no realistic prospect of establishing otherwise.

154. This leaves Ms Swaffield's argument that, because Local Boy'z had not rejected and was not seeking to claim in respect of all the Type IIR masks that had been sold to it by Malu (there was no claim in respect of the masks the subject of invoice no. FA20-0590), then there had not been a total failure of consideration. That point is, in my judgment, hopeless for a number of reasons.

155. First, the premise is that there was a single contract of sale – a single "framework" contract. As I said in paragraph 11 above, speaking in relation to the contracts for both types of mask, this seems unlikely. However, whilst the position is likely different in

the case of the KN95 masks, in relation to the Type IIR masks there does appear to have been only one relevant order placed on 10 May 2020 and only one contract.[7]

156. This single contract was, however, performed by delivery of the masks in instalments, with a number of instalments of masks delivered over a period of two days, each instalment subject to its own invoice. As the editors of *Benjamin's Sale of Goods* (11th ed.) say at paragraph 8-062:

> "Contracts for the delivery of goods by instalments will more often be construed as severable (or divisible) contracts than as entire."

The editors continue in paragraph 12-062 saying:

> "It seems clear that in the case of an instalment contract, i.e. one involving severable deliveries, the acceptance rules apply to each instalment separately"

and in paragraph 17-091 (quoting from the decision in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 77 (Lord Porter):

> "If a divisible part of a contract has wholly failed, and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered."

157. So, there is no reason why, having accepted one instalment of Type IIR masks, Local Boy'z cannot reject another instalment and claim a refund on the basis that there had been a total failure of consideration in relation to that other instalment. (Insofar as property in the masks had passed to Local Boy'z, it would revest in Malu on rejection on ordinary principles.)

158. Secondly, quite apart from whether the contract was divisible, section 35A of the SGA provides that:

> "(1) If the buyer
>
> (a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but
>
> (b) accepts some of the goods, including, where there are any goods unaffected by the breach all such goods
>
> he does not by accepting them lose his right to reject the rest.
>
> (2) In the case of a buyer having the right to reject an instalment of goods, subsection (1) applies as if references to the goods were references to the goods comprised in the instalment."

The section, thus, expressly provides for a right of partial rejection.

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[7] Schedule 3 to the Amended Defence and Counterclaim refers to a further order placed on 9 October 2020 for 50 masks at a total cost of $22.50. This appears to be in response to Mr Mucklow's request for samples. Given the tiny number of masks ordered, the minute amount involved and the reason the order was made, I have ignored this.

159. Thirdly, insofar as, by her reference to Lord Goff's judgment in *Stocznia* (see paragraph 132 above), Ms Swaffield was intending to suggest that the contracts between the parties were not ordinary contracts of sale under which the consideration for the price was the passing of property in the masks, I reject that submission. The contract in issue in *Stocznia*, a contract to design and construct a ship, was quite different.

**(ii) The KN95 masks**

160. As I explained in paragraphs 88 to 91 above, while the claim made by Local Boy'z in relation to the KN95 masks relies upon the same three implied conditions as in the case of the Type IIR masks, the issues that arise in relation to the KN95 masks are rather different.

161. Some of the defences raised by Malu to the claim in relation to the KN95 masks are the same as those raised in response to the claim in relation to the Type IIR masks, and seem to me to have no realistic prospect of success for the reasons I have just given. I include within these:

i) The issue of whether Local Boy'z had lost its right to reject; Local Boy'z case in that regard is stronger in the case of the KN95 masks than it was in the case of the Type IIR masks because Malu was aware from 18 June 2020 of the HSE's position. See paragraph 120(v)(b) above;[8] and

ii) Malu's case that, because not all of the KN95 masks sold by Malu were rejected and subject to a claim by Local Boy'z, there was no total failure of consideration. I regard that case as hopeless for the reasons set out in paragraphs 155 to 159 above.

It also seems to me that there can be no real dispute that the KN95 masks – or rather the documents relating to the KN95 masks – that the HSE considered were masks supplied by Malu.

162. The key issue, however, in the case of the KN95 masks is not whether the masks were the same masks as shown and described in the photographs provided to Local Boy'z at the time the contracts were made, but regulatory compliance, an issue which requires answers to the following questions:

i) What was agreed between the parties as to which of them would be responsible for regulatory compliance, in particular in the UK?

ii) Were the masks required to comply with the PPE Regulation (including the full conformity assessment process), or was it enough that they satisfied the PPE Recommendation?

iii) Were there, as is suggested by Malu, different rules or guidance in place in Belgium and in the UK for PPE following the issuance of the PPE Recommendation?

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[8] I note that in paragraph 13 of the Amended Defence and Counterclaim Malu alleged that Local Boy'z purported to reject the KN95 masks as at 18th June 2020.

iv) If there were different rules or guidance in place in Belgium, did the KN95 masks comply with those rules, and what is the significance of that in terms of Malu's sale of the masks to Local Boy'z in the UK?

v) Bearing in mind the answers to these questions, and generally, did the KN95 masks, in terms of their documentation and the masks themselves, comply with the PPE Regulation and/or the PPE Recommendation and/or the EN149 Standard?

163. On this issue, and in relation to these questions, I am unable to conclude that Malu has no realistic prospect of success. I do not, furthermore, having regard to principle (vi) in *Easyair*, and also to the remarks made by Mummery LJ in the *Doncaster Pharmaceuticals* case at [11] and [12], consider that this issue can properly, fairly and appropriately be dealt with on an application for summary judgment.

164. There are a number of reasons for this.

165. First, whilst I have seen the email exchanges and the documentary material sent to Local Boy'z prior to the conclusion of the contracts for the KN95 masks, there is an outstanding issue as to whether there was an oral agreement between Mr Mucklow and Mr Van Craen in relation to the division of regulatory responsibility between the two companies.

166. So far as that is concerned, I have a witness statement from Mr Van Craen who says that there was such an agreement, and that, whilst Malu was responsible for importing the masks into Belgium and for satisfying the Belgian authorities that it had complied with the relevant EU legislation, it was agreed that it was a matter for Mr Mucklow to resolve issues in the UK (if there were any, notwithstanding freedom of movement).

167. I do not have a witness statement from Mr Mucklow in response. However:

i) Mr Priestley says in paragraph 7 of his second witness statement that Mr Mucklow denies that there was any such conversation;

ii) Ms Kagan also points to Mr Van Craen's 3 August 2020 witness statement in which Mr Van Craen said that it was an express term of the contract between Malu and Local Boy'z that the KN95 masks should comply with "UK" standards.

168. Notwithstanding these points, the email of 30 April 2020 that Mr Van Craen refers to in paragraph 21 of his witness statement, and indeed his earlier email of 18 April 2020 where he discussed the legal requirements in Belgium, provide some support for Mr Van Craen's evidence that the topic of regulatory compliance was discussed between them. Which of Mr Mucklow or Mr Van Craen is correct is not something that I can resolve on an application for summary judgment.

169. Secondly, Ms Kagan refers to the references in the documentation to the KN95 masks complying with the PPE Regulation, which she says meant that Malu agreed that the masks would comply with the full requirements of the PPE Regulation and not the (relaxed) requirements of the PPE Recommendation, which allowed goods to be placed on the market before the full conformity process had been completed.

170. But I do not think it is so obvious as to go without saying that a description of goods as compliant with the PPE Regulation is incapable of meaning compliance with the PPE Regulation as relaxed by the PPE Recommendation. I note, furthermore, that Local Boy'z own pleaded case (see paragraph 5 of the Amended Particulars of Claim) is that the KN95 masks were described as:

> "Face masks … conforming with the Essential Health and Safety Requirements ('**EHSR'**) of the EU PPE Regulation 2016/425 (the '**PPE Regulation**') and/*or* the EU Commission Recommendation 2020/403 (the '**PPE Recommendation**') (*emphasis added*)

Nor do I think I can resolve the issue as to when the process of conformity assessment started for the purposes of the PPE Recommendation and the OPSS Guidance.

171. There is also an issue between the parties in relation to CE marking. As KN95 masks are a Category III PPE product, the ordinary requirements of the PPE Regulation would require the application of the CE mark followed by the Notified Body number. Where the PPE Recommendation was used, and where a full conformity assessment procedure had not been completed, masks could be placed on the market without a CE mark.

172. What appears to have happened as a matter of fact was that the KN95 masks were manufactured and delivered with a CE marking, but without the application of the Notified Body number. Ms Kagan's submission, as I understood it, was that this was a defective application of the ordinary PPE Regulation requirements, and not something permitted by the PPE Recommendation. I do not feel able to reach that conclusion at the moment.

173. Thirdly, and relatedly, any decision in relation to the questions I identified in paragraph 162 above requires a proper understanding of a number of EU legislative instruments and guidance (not necessarily limited to those specific to PPE – see Regulation (EC) No 765/2008 referred to in Article 16 of the PPE Regulation), and their application in the UK and in Belgium and to the facts of this case in the obviously fluid circumstances of the Covid-19 pandemic.

174. I make no criticism of the presentation made by either counsel; Ms Kagan, in particular, took me to a number of the relevant provisions in the course of her written and oral submissions. There is, however, a limit as to what realistically can be done in the context of a comparatively short summary judgment application, and notwithstanding my probing, I was left at the end of the hearing with a sense of unease (which has not dissipated as a result of further consideration) as to whether I had a complete picture of the relevant material and how it would apply to the facts.

175. Simply by way of example:

i) On the face of the material I was shown, there were differences in the way in which the UK and Belgian authorities had approached the relaxations permitted by the PPE Recommendation. These were largely unexplored;

ii) I also had little information as to the checks that had been carried out on the KN95 masks by the Belgian authorities, or indeed the basis on which the KN95 masks are on sale elsewhere in the EU (if they are). Ms Kagan submitted that

there was no corroborating evidence as to what had been done by the Belgian authorities, but this is an issue on which further relevant evidence may exist;

iii) There was also the question of how, if the KN95 masks had indeed met the requirements of the Belgian directive implementing the PPE Recommendation and had been imported into the EU on that basis, this affected the position in the UK, another Member State at the time. I received only limited submissions on that question.

176. Ms Kagan, with skill and for understandable forensic reasons, submitted that the present case involved a simple dispute to which there was a clear answer. It may turn out to be so at trial, but at the moment I am not so sure. This is, in my judgment, one of those cases where, consistent with *Easyair* principle (vi), a fuller investigation is appropriate, and where I should resist the temptation to decide the matter now on the basis of what may be incomplete material and limited submissions.

177. Fourthly, so far as compliance with the EN149 Standard is concerned, there is conflicting testing evidence: see paragraphs 71 and 75 above. The HSE's investigation was confined to the documents and does not bear on this at all.

## Conclusion

178. For the reasons set out above:

i) I grant summary judgment on Local Boy'z's claims in relation to the Type IIR masks to the extent indicated in paragraph 141 above;

ii) I dismiss the application for summary judgment on Local Boy'z's claims in relation to the KN95 masks.

179. So far as the Type IIR masks are concerned, in light of my judgment Local Boy'z is plainly entitled to the declarations sought in paragraphs 4, 5 and 6 to the prayer to the Amended Particulars of Claim.

180. Local Boy'z is also entitled, in principle, to restitution of the sums paid in respect of invoice no. FA20-0591. Malu has, however, pleaded that it is entitled to set off against any liability to Local Boy'z in relation to the Type IIR masks the sums claimed to be outstanding in relation to the KN95 masks, a claim which will now have to be determined at trial.

181. The parties did not address me on the question of whether Malu was entitled to set off sums claimed in relation to one type of mask in relation to sums owing in relation to another. The answer may not be in dispute – I would be surprised if it were - but I am reluctant to decide the issue without giving the parties an opportunity to make submissions if it is in issue.

182. I invite the parties to agree an order reflecting my judgment. If there is disagreement on the point I have just identified, I will deal with it at the same time as any other disputed consequential matters.

183. It seems to me that what remains of this case is suitable to be dealt with in the London Circuit Commercial Court. If the parties think otherwise, they should write to the Judge

in Charge of the Commercial Court within 7 days of my order explaining why they consider the case should remain in the Commercial Court.