Neutral citation number: [2022] EWHC 23 (Comm)

IN THE HIGH COURT OF JUSTICE Claim No. CC-2020-LIV-000006

BUSINESS AND PROPERTY COURTS IN LIVERPOOL

CIRCUIT COMMERCIAL COURT (QBD)

Before HHJ Cadwallader sitting as a Judge of the High Court

B E T W E E N:-

PHARMAPAC (U.K.) LTD

Claimant

and

HBS HEALTHCARE LTD

Defendant

John de Waal QC (instructed by MSB Solicitors) for the Claimant
James Newman (instructed by Leathes Prior Solicitors) for the Defendant
Hearing Dates: 16, 17 and 18 November 2021 and 7 January 2022

JUDGMENT

Introduction

1. This is my reserved judgment following the trial of this matter for 3 days commencing on 16 November 2021. It is a dispute over an agreement for the sale and delivery of facemasks. The Claimant claims that by an agreement which was finalised in an email dated 10 March 2020 between the parties, following and supplanting an oral agreement made the previous day, the Defendant agreed to supply 5 million facemasks to the Claimant at 30p per mask, to be delivered in tranches of 500,000 per week for 10 weeks, for which the Claimant agreed to pay the Defendant £750,000 plus VAT to cover the first 2 ½ million masks, and a further £750,000 plus VAT once the initial 2 ½ million

masks had been delivered. It says that time was of the essence in relation to delivery. On 10 March 2020 the Claimant paid the Defendant £750,000 plus VAT, totalling £900,000 and the first tranche of 500,000 masks were supplied to the Claimant on 16 March 2020. However, it complains that the tranches due on 23 March, 30 March, 6 April and 13 April were not delivered, and that this amounted to a repudiatory breach of the contract. On 23 April 2020 the Defendant emailed the Claimant offering either to return the Claimant's monies which, the email said, the Defendant held on account, or to hold the monies until the stock arrived. On 3 June 2020 the Claimant accepted the repudiation and the offer of the return of the monies, amounting to £720,000, but the Defendant failed to pay them. Accordingly, the claim is for repayment of the £720,000 alternatively damages.

2. The Defendant did not accept that the email dated 10 March 2020 accurately reflected the terms agreed at the meeting the previous day, but accepted that it was content to contract on the terms of the email and did so. It disputed that time was of the essence, however. It averred that it had been prevented from supplying the remaining tranches of facemasks because the Government of India, where they were manufactured, had prohibited their export, but that the Claimant's representative had stated that the Claimant was prepared to wait until the stock arrived. On that basis, the Defendant's case was that there had been an oral variation of the agreement between the parties, such that the delivery dates were extended; alternatively, that the Claimant had elected to waive any repudiatory breach on the part of the Defendant, so that it was no longer entitled to treat the contract between them as discharged on the basis of the Defendant's failure to deliver at the stipulated time. Moreover, the Claimant was estopped from relying on the original dates because the Defendant had acted to its detriment in reliance on the statement that the Claimant was prepared to wait. The Defendant denied that its offer to return the purchase monies which it held on to account amounted to an offer to release the Claimant from the contract. Moreover, the masks actually arrived with the Defendant on or about 20 June 2020, but then the Claimant refused to take delivery of them, as a result of which the Defendant incurred, and continues to incur, storage costs. The Defendant therefore counterclaimed for payment of the sum of £750,000 plus VAT, in order that the Claimant must take delivery of the masks, and damages for the storage costs.

Issues

3. Although each Counsel produced a valuable list of issues, a simpler summary of the issues is more useful for present purposes.
   (1) As a matter of construction of the agreement, or of implication of the term into the agreement, was time for delivery of the essence of the contract?
   (2) If not, were the goods available within a reasonable time?
   (3) If there was a breach of contract, was the contract varied or affirmed?
   (4) If not, and if the Claimant is entitled to accept the breach as repudiatory, did it do so?
   (5) if not, what are the Defendant's remedies?

The Trial

4. The trial took place online. For the Claimant, I heard evidence from Matthew Banks-Crompton, John Pugh, Kevin Whitley, and Kelly Johnston (then Durney). Mr Banks-Crompton was unwell, but he and those acting for the Claimant assured me that he was well enough to proceed to give evidence, as indeed he appeared to be. The witness statement of Paul Garstang for the Claimant was agreed, and he did not give oral evidence. For the Defendant, I heard evidence from Salim Habib Patel, a director of the Defendant. I had the benefit of skeleton arguments and oral submissions from counsel for the Claimant and for the Defendant.

Time of the essence

5. The Claimant's case is that the Defendant's failure to deliver the instalments on 23 and 30 March and 6 and 30 April 2020 amounted to a repudiatory breach of the agreement, which entitled it to elect to treat the contract as discharged. The email agreement does not explicitly state that time is of the essence, or that delivery time is a condition of the agreement, or essential to it. There is no presumption of law that stipulations as to the time of delivery are of the essence of a contract: see *Chitty on Contracts* 34th ed., 46-246. It is said that commercial (mercantile) contracts are frequently so construed, but it remains a matter of construction: see also section 10(2) of the Sale of Goods Act 1979. It follows that the agreement in question has to be construed as a whole and against the relevant background factual matrix: *Spar Shipping AS v Grand China Logistics (Group) Co Ltd* [2016] EWCA Civ 982. Unless the contract makes it clear that a particular stipulation was a condition or only a warranty, it is to be treated as an innominate term. It is true that the courts should not be too ready to interpret contractual clauses as conditions: ibid., per Gross LJ at [52]. Certainty is, however. a consideration

of major importance when construing commercial contracts, both as a matter of legal principle and of commercial common sense, though it is a matter of striking the right balance: ibid. [58]-[59], [62]. So, for example, where the goods in question are perishable so that if late, they may be useless, or if the value of the goods is volatile, time is more likely to be found to be of the essence: see the discussion in *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1393 (CH). However, in *Bunge Corporation v Tradax Export SA* [1981] 1 W.L.R. 711, HL at 716 Lord Wilberforce said

> "*But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and indeed they should usually do so in the case of time clauses in mercantile contracts*."

6. In the present case the goods were not perishable, but against the background of the developing coronavirus pandemic there was plainly an urgent commercial need to acquire them with a view to selling them on. Mr Banks-Crompton, who was at the time the Claimant's Sales Director, said there was a shortage of PPE, and both the Claimant and the Defendant had recognised a gap in the market but were trying to fill it. I accept that. There was urgency. Moreover, the price was volatile, as appears from certain WhatsApp messages in the bundle concerning deliveries from China; and I infer the parties are likely to have known that it would be likely to be so, given the pandemic, the gap in the market, and the scramble for supply. The Claimant had a potential customer for 5 million masks, Impact Health Limited ("Impact"), although at the time of the agreement no order had been placed, no timescale agreed, and the Claimant was not aware of Impact's terms of business.

7. At the meeting on 9 March 2020 Mr Patel, a director of the Defendant, had explained to Mr Banks-Crompton that the Defendant was getting the masks from suppliers in India, where he had good contacts, and from where he was already supplying masks to other customers. Mr Patel's evidence was that there is always a risk when it comes to importing goods from abroad, and in this case, there was a degree of uncertainty about what would come through from India, and when. The fact that Customs clearance would have to be obtained meant that stock could not be guaranteed to arrive on a specific date and there was a question about getting the shipments of masks onto flights which, in the context of the pandemic, might be difficult. His evidence was that he made it clear that the Defendant could not guarantee the timing, and that this had been discussed with the Claimant in general terms in their meeting, but did not trouble Mr Banks-Crompton,

or Mr Garstang who was also there. Mr Banks-Crompton said that was not true. Mr Garstang's witness statement did not address the question.

8. I prefer Mr Banks-Crompton's evidence on this. He gave his evidence in a straightforward and clear way, and appeared to be attempting to assist the Court with his best recollection. Mr Patel's oral evidence, by contrast, gave the impression of either confusion or evasion, and on either basis appeared less reliable. Nonetheless, I accept that Mr Banks-Crompton will have been aware, as anyone would have been at the time, that the Defendant's ability to deliver stock on time was dependent on circumstances over which he had less than complete control. That is not unusual.
9. Against that background, I turn to the terms of the agreement itself as represented in the email dated 10 March 2020. So far as relevant, that email read as follows

> "As discussed, we agreed to the following:
>
> 5M masks at £0.30 per mask based on meeting the product specification and quality of the sample received.
>
> 1st 500K shipment will be available for inspection and collection on Monday 16th March.
>
> Followed by 9 further weekly shipments. Please can you ensure that we receive shipping documents 2/3 days before goods are due to arrive so we can then raise invoices with our customer?
>
> Payment terms:
>
> First 2.5M masks @£0.30 = £750K as deposit payment against securing the weekly 500K shipments and the 5M balance.
>
> Once we have reached 5th week completed shipment we will be due to pay the balance of the next 2.5M masks of £750K"

10. The first tranche has a specified date. That tranche was to be supplied from stock already in the country. The other tranches do not have a specified date. There are to be 9 further weekly shipments. Nothing is said about whether the shipments are all to be of 500,000 masks, or whether some may be more and some less, so long as the total amounts to 5 million masks. There is no particular reason in the background why the shipments should all have to be equal, but it seems to have been assumed that they would be.
11. The email contemplated a rapid start and short intervals for deliveries. Even so, specifying the time for the further deliveries as being 'weekly' has a certain vagueness. If it had been intended that each should be 7 days from the previous one, the dates might easily have been specified, or reference might have been made to the day of the week

(Monday) upon which they ought to be made available for collection. On the Claimant's primary case, time was of the essence for delivery every 7th day after the first delivery date. That is not a fair reading of the agreement, however. 'Weekly', against the background in this case, merely indicates each delivery must arrive during the following week, in my judgment. For what it is worth, Mr Banks-Crompton indicated in cross-examination that this was how he understood it too. It means that the obligation is to make each delivery at some point within a specified period of a week's duration. Within that period it did not matter when. But if delivery had not taken place by the end of each week, there would be a breach of contract at that point, though not before. To say that delivery is to be weekly entails that delivery must occur by, or before, the end of each weekly period. There is a definite deadline.

12. Admittedly the deadline was not spelled out in those terms, nor explicitly as a deadline. The language identifies the delivery time, but does not state that it is essential. Moreover, the consequences of failing to deliver weekly were not specified. And the parties knew the Defendant was not in complete control of its supply chain. But against the background of the rapid start and the short and repeated delivery intervals, the developing pandemic, the high demand and volatile market, I conclude that time was of the essence. The point was not just to get the masks as soon as possible, but to be able to cancel the contract if they had not arrived in time.

13. That is a matter of construction of the contract. The implication of a term to make time of the essence is therefore unnecessary. Had I rejected the argument on construction, I doubt a term would have fallen to be implied. The contract would have been effective without it, with the remedy being limited to damages for breach on the part of the seller; such a term would not have gone without saying, and would not have been a logical consequence of the express terms: see *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, see Lord Neuberger PSC at [18].

Reasonable time

14. The Claimant's alternative case was that by virtue of section 29 (3) Sale of Goods Act 1979, if no time is fixed for delivery, the seller must deliver the goods within a reasonable time. On that footing, the Claimant argued that when the Claimant says it accepted the Defendant's repudiatory breach of contract on 3 June 2020, a reasonable time had passed.

15. However, a time had been fixed for delivery, even if that time had not been of the essence. Section 23(3) of the 1979 Act adds nothing here. In particular, it does not make time of the essence, and Counsel for the Claimant made it clear that he was not arguing that it did. His point as I understood it was that, if it applied, the pandemic, the high demand and a volatile market were background features which made the obligation to deliver within a reasonable time a condition. But of section 29 (3) of the Act did not apply in the present case.

Termination under the offer of 23 April 2020

16. If time was not of the essence, so that the Claimant could not terminate the contract on that ground, the Claimant claimed alternatively that the email of 23 April 2020 entitled it do so anyway.

17. 20 April 2020 had been the date for the sixth tranche, on the Claimant's primary case. No tranches had been delivered after the first. On 21 April 2020 Mr Banks-Crompton had emailed Mr Patel, saying,

> "Please can we get an update on the Mask situation? As you are aware we have a significant amount of money in your account currently and this has been the case for a number of weeks. This Thursday we have a board meeting and this is a key item on the agenda so I would be grateful if you could respond with an update and make some proposals around what our options would be?"

On 22 April 2020 Mr Banks-Crompton sent a WhatsApp message to Mr Patel to chase a response to his email, and to remind him that he had a call with his board to discuss the deal the following day.

18. On 23 April 2020, Mr Patel responded in the following terms.

> "We have numerous times tried engaging with the Government and continue to see how this consignment can be imported. I have sent all communications to you.
> I can confirm we continue production and currently now hold circa 5 million masks in India awaiting shipment, we continue to produce as we feel that the requirement will continue.
> We can return your monies we hold on account to you or hold it till the stock arrives. Things are moving in India as the lockdown is slightly eased further.
> I'm sorry to have let you down in delivery but it's beyond our control."

Mr Banks-Crompton's evidence was that this left him in something of a dilemma, and he decided he needed more information from Mr Patel. Accordingly, on 24 April 2020 Mr Banks-Crompton sent a WhatsApp message to ask Mr Patel what his gut feeling was about getting the stock soon. Mr Patel responded, "I think high as I'm still ordering". Mr Banks-Crompton responded, "Ok thanks".

19. The Claimant's case is that this was, as Mr Banks-Crompton understood it (and I accept that he did understand it in this way), an offer to the Claimant of two choices: either the Claimant could request the return of the money and accept that the contract was at an end, or the money could be held until the stock arrived at the contract would continue. The Defendant's case, on the other hand, was that it was simply offering to return the money pending completion of the contract, and not by way of an agreed discharge of the contract.

20. In my view it has to be construed against the background that the Claimant had paid a substantial sum in advance and had not received all the masks for which the payment was made. Moreover the email of 23 April 2020 was a response to Mr Banks-Crompton's email of 21 April 2020, in which he asked for an update on the mask situation in the context of the fact that the Claimant had a significant amount of money in the Defendant's account, and had done for a number of weeks, and that this was a key item on the agenda for the board meeting to take place on the Thursday of that week. Objectively speaking, what Mr Banks-Crompton was expressing was, in other words, a concern that the Claimant had paid for the masks and had not got them, rather than a wish to terminate the contract get the money back. Mr Patel's response was intended, and should have been understood as, a reassurance that if the Claimant wanted the money back while it was waiting, it could have it. He was not giving the Claimant the option of terminating the contract, and a person in his position would have been unlikely on commercial grounds to do. Nor was his reference to holding the monies on account intended, and it should not have been understood as, an indication that the Claimant's purchase monies were held separately, or subject to a trust: that would have been completely uncommercial in the context of this transaction, and in any case the Claimant had never asked for the monies to be dealt with in that way. The monies had been received and retained on account of the Claimant's anticipated purchase. The grammar of the sentence "We can return your monies we hold on account to you or hold it till the stock arrives" is equally consistent with the phrase "till the stock arrives" qualifying just the time for which the monies are to be held, or both holding the monies or returning the money (that is, an equivalent amount of money). But the commercial sense of the email is not consistent with his having offered over some unspecified period during which further deliveries would fall due just to cancel the contract should the Claimant wish it, even if, as I accept, the Claimant took it that way.

21. Accordingly, this was not an offer to consensually terminate the contract which was capable of acceptance by the Claimant, whether on 3rd June 2020 or at any other time.

Waiver

22. However, even if the Claimant was entitled to elect to treat itself as discharged from further performance by reason of breach on the part of the Defendant, the Defendant's case was that the Claimant elected to waive its right to do so, or was estopped by conduct from doing so, such that the Defendant's only obligation was to deliver the masks within a reasonable time if so requested: see *PM Project Services Ltd v Dairy Crest Ltd* [2016] EWHC 1235 (TCC).

23. A helpful passage in *Chitty on Contracts* 34th ed., at 27-056 states as follows:

> "Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and terminate further performance of the contract, elects to treat the contract as continuing, he is usually said to have "affirmed" the contract. He will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. When deciding whether the innocent party has affirmed the contract, a court is not conducting a "mechanical exercise" but is exercising a judgment. The acceptance of the repudiation (as the decision to terminate is often termed) must be "real", that is to say, there must be a "conscious intention to bring the contract to an end, or the doing of something that is inconsistent with its continuation". Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as terminated. Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract. Equally a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time. Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation:
> "… the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation.
>
> But if the innocent party unreservedly continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract. Reliance upon a term of the contract (such as a term giving a party the right to claim a refund) will not be held to amount to an affirmation, at least in the case where the party who is alleged to have affirmed the contract has made it clear that it was treating the contract as discharged."

24. On the Claimant's primary case time was of the essence for delivery every 7th day after the first delivery date; alternatively at the end of every week. I have accepted the alternative case and rejected the primary one on this, but since the claimant seems to have regarded matters at the time in the light of its primary case, what follows refers to those dates for delivery in order to make sense of the narrative.

25. The course of events was as follows. The Claimant paid the Defendant £900,000, inclusive of VAT, on 10 March 2020. The first tranche of 500,000 masks was delivered on 16 March 2020, in accordance with the agreement. On 19 March 2020 the Government of India prohibited the export of such masks. On 23 March 2020, on the Claimant's primary case, the 2nd tranche of 500,000 masks fell due. Ms Johnstone, (then Durney), of the Claimants, called and emailed the Defendant seeking confirmation that the next 10 pallets of facemasks were ready to collect the following day. She did so again on 24 of March 2020. The same day, Mr Garstang emailed asking the Defendant to revert as soon as possible, saying "we had an agreement in place which you/we need to uphold. Silence, worries me!!!". Later that day, Rizwan (or Ridwan) Patel emailed back, copying in Mr Banks-Crompton and Mr Salim Patel, to say that an export ban had been imposed on 19 March 2020, a ban had been imposed the previous month and lifted after a week, and that as soon as it was lifted this time the Defendant would be able to send the Claimant the full quantity in one go. He asked the Claimant to bear with them. Mr Banks-Crompton's evidence was that since Mr Patel appeared to be reliable, he decided to wait and see what he could do to resolve what Mr Banks-Crompton thought would be a short-term problem: he had in mind that the Claimant had 9 weeks to deliver all the masks, and he was therefore prepared to wait to see what happened. He asked Ms Durney to chase an update on 30 March 2020, which was the date upon which, on the Claimant's case, the third tranche of 500,000 masks was due. In cross-examination he said that the Claimant could have determined the agreement at that stage, because of the failure to deliver the 2nd instalment, but chose not to, because of what it had been being told by Mr Patel. I accept this evidence of his mental process. It shows that he both knew of the breach, and his supposed right to terminate the contract because of it, so that from this point, acting on behalf of the Claimant, he was in a position to elect to affirm the contract notwithstanding the breach. It might suggest, too, that he had made a positive choice not to determine the contract, rather than merely postponing a decision whether to do so or not, but in context it is clear that he had just

decided to wait and see. In any case, Ms Durney's email of that date to Rizwan Patel asked simply "Any update on the ban please?" That was hardly an unequivocal indication that the Claimant had elected to treat the contract as continuing. It was a request for information upon the basis of which a decision might be made, but had not yet been made.

26. Impact emailed Mr Banks-Crompton asking for news on the facemasks too. Mr Banks-Crompton's reply was that the ban had still not been lifted, and he hoped to have an update the following day. He must have been in touch with the Defendant. On 6 April, and again on 13 April, further tranches of masks were due. Each of those represented a further opportunity for the Claimant to terminate the contract if it had not already done so.

27. On 15 April 2020 Mr Banks-Crompton emailed Dipak Patel of Impact to say that unfortunately the masks were still in stock in India, where there was a mountain of stock ready to be shipped once the ban was lifted. He said that the Defendant, whom Impact knew, had been lobbying the local MP to have the case considered and it had been passed right up to the Minister for International Trade for extra help. Hopefully, the Claimant could receive the goods soon. On 18 April 2020 Mr Banks-Crompton sent a WhatsApp message to Salim Patel for an update, saying his financial director was pushing for an update due to the cash the Claimant had tied up in the Defendant's account: this was a reference to the advance payment which the Claimant had made. Mr Patel responded the same day to say he had not got an update, and they themselves were pushing weekly, and as much as possible. I accept that is what they did. It seems to me that it was in their interests to do so, whether or not the contract with the Claimant continued which, for the moment, it did.

28. 20 April 2020 was the date for the sixth tranche, on the Claimant's primary case. On 21 April 2020 Mr Banks-Crompton emailed Mr Patel for an update in the terms discussed above; on 22 April 2020 Mr Banks-Crompton sent a WhatsApp message to Mr Patel to chase a response to his email, and to remind him that he had a call with his board to discuss the deal the following day; and on 23 April 2020, Mr Patel responded in the terms already considered above.

29. Mr Banks-Crompton's evidence was that having had the offer to return the monies, he felt he did not need to make any decision as he wanted to give Mr Patel a little more time to see if the masks arrived. He had in mind the time period for fulfilment of the 9 instalments, the last of which was due on or around 18 May 2020. He had thought

(mistakenly, as I find) that the offer to return the monies amounted to an offer to terminate the agreement if the Claimant wished. At this stage the Claimant did not indicate it was choosing either element of the offer, and, it appears, did not intend to make any choice at that stage. That is particularly apparent from the evidence of its chief executive officer, Mr Pugh, who said they felt justified in waiting further to make a decision. Mr Whitley agreed that no decision was taken at this stage. I accept their evidence. As long as by that time the Claimant had not unequivocally elected to affirm the contract, which it had not, the Claimant had a reasonable time from after the last breach to make up its mind whether to do so or not and act accordingly.

30. 27 April 2020 was the date for the seventh tranche, on the Claimant's primary case. On 28 April 2021 Mr Banks-Crompton texted again, asking if there had been any movement on the masks. There must have been a telephone conversation, although Mr Banks-Crompton's evidence was that there had not been one, because there was no reply by email or text. Evidently there had not been any movement.
31. 4 May 2020 was the date for the eighth tranche, on the Claimant's primary case. On 6 May 2020 Mr Banks-Crompton sent a WhatsApp message to Mr Patel to ask for news.
32. 11 May 2020 was the date for the ninth tranche, on the Claimant's primary case. On 13 May 2020 Mr Banks-Crompton sent a WhatsApp message to Mr Patel to ask again for news, and also whether the Defendant had another supplier it could share to release the stock, using the money held by the Defendant. On 14 May 2020 Mr Patel responded that the Defendant might have imports coming in soon from India, but Mr Banks-Crompton asked when and appears to have received no reply.
33. 18 May 2020 was the date for the tenth and final tranche, on the Claimant's primary case. I accept that on this day, as Mr Banks-Crompton says, he met with Mr Pugh, explained that the last instalment date had passed without any more deliveries, and that he did not think there would be any. Mr Banks-Crompton accepted that they knew their options were either to terminate the contract or continue. He and Mr Pugh decided to allow a further 14 days and then, if they had still not received any masks, to ask for their money back and terminate. They did not tell the Defendant this, but they believed they had the comfort of his offer of 23 April 2020, which had not been limited as to time.
34. On 19 and 26 May 2020 Mr Banks-Crompton again sought further updates but received no reply.

35. On 3 June 2020 Mr Banks-Crompton, Mr Pugh, and Mr Whitley met and decided that the Defendant was not going to be able to perform the contract and they could wait no longer. They decided to terminate it and accept the offer of a refund. Kevin Whitley, the Claimant's financial controller, emailed Mr Patel, copied to Mr Banks-Crompton, to say,

> "With no sign of the masks we paid for being released from India, and with the Pharmapac financial year end approaching, regrettably I would like to request a refund of all outstanding monies in relation to this deal."

He provided the bank details. Later that day Mr Patel responded that he hoped the mask situation would be relaxed very shortly, but the Defendant had committed to the stock, and hopefully very shortly should see it arriving into the UK. Mr Whitley responded the same day reiterating his request for the monies to be returned in accordance with the offer in Mr Patel's email of 23 April 2020, saying he felt the Claimant had given more than enough time for the order to be fulfilled, and because there was no clear date on which restrictions would be lifted, this was what the Claimant required. Received no response, Mr Whitley said a chasing email on 9 June 2020, with no result; and another email on 19 June 2020. It said,

> " Could you please provide an urgent update to Matt and I on the email trail below. We have received no information that stock is en route to PharmaPac, and further correspondence in our request for a refund of monies owed. The current situation, which we appreciate has been largely out of your control, is unacceptable and we would expect more regular updates from any supplier - but even more so considering the value of this agreement. Goods have not been delivered as originally agreed, and as such we request a full refund of all monies paid upfront."

Mr Patel replied the same day to say the stock had left India and was en route, and was expected to be delivered early to mid next week. But the Claimant no longer wanted to buy it.

36. In considering whether at any point the Claimant elected to affirm the contract, one must bear in mind that a person entitled to make an election has a period of time to make up his mind what he is going to do. If he does nothing for too long, he may end up being treated as if he has affirmed; but if he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if the repudiation is persisted in, he has not yet elected. *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051 is an example; and see the discussion at [112-113]. Moreover, waiver is based on encouraging the purchaser to think that he will be given time indefinitely and will not be cut off without further notice. Mere standing by is not

enough, at all events unless it continues for an unreasonably long time: see *Buckland and Others v Farmar & Moody* [1979] 1 W.L.R. 221.

37. The Defendant relied upon a number of communications as amounting to an affirmation of the contract.

    (1) Following receipt of the letter of 20 March 2020, Mr Patel spoke by telephone with Mr Banks-Crompton and informed him of the delay. According to the Defendant, Mr Banks-Crompton stated that he was willing to wait for the masks to arrive in the UK because the price to purchase masks from other sources had increased significantly from £0.30 to approximately £0.60 to £0.70. The Claimant's case was there had indeed been a conversation on that day in which Mr Patel had told him that the masks had not arrived from India and there would be a short delay of about 5 days; Mr Banks-Crompton's response had been that there was not much he could do about it and he would have to wait for the 5 days. Mr Patel's own evidence was that he said that the previous ban had been lifted quickly, and Mr Banks-Crompton seemed fairly happy to wait for delivery. In his oral evidence Mr Patel said that he had said that hopefully the ban would last 5 days, or be short; that Mr Banks-Crompton was neither happy nor upset; but he could not remember whether Mr Banks-Crompton said he was prepared to wait for 5 days. His evidence was hesitant and gave the impression that he was unsure. I prefer Mr Banks-Crompton's evidence. On that footing, I find that he did nothing to affirm the contract on that occasion.

    (2) The Defendant also alleges that in late April, a telephone call took place between Mr Banks-Crompton and Mr Patel in which Mr Banks-Crompton indicated, on behalf of the Claimant, that it was still willing to wait for the delivery to be made because the cost of sourcing alternative masks was prohibitive. The Claimant's case is that the Claimant was still holding off from making a decision, against the background of the offer dated 23 April 2020, and Mr Patel's continuing assurances that it would not be long. This telephone call did not feature in Mr Patel's witness statement and Mr Banks-Crompton denied it. Having seen him give evidence, and having had an opportunity to compare the witnesses, I prefer the evidence of Mr Banks-Crompton.

    (3) In or around May 2020, the Defendant's case is that Mr Patel spoke to Mr Banks-Crompton and informed him that the Defendant could import the masks from an alternative supplier in China, but the cost was higher. Again, the Defendant

indicated that it would wait for the stock to arrive from India. The Claimant's case, by contrast, was that there was indeed a conversation on 2 May 2020 during which Mr Patel told him he was sourcing masks from China at 78p per mask; but that Mr Banks-Crompton did not say he would wait. Mr Patel's evidence does not quite support the Defendant's allegation, and Mr Banks-Crompton's evidence, which I accept, was that he had not said that he would wait. I find that he did nothing to affirm the contract on that occasion either.

38. With my permission, given during the trial, the Defendant pleaded further particulars of affirmation as follows.

(1) The email of Ms Durney dated 24 March 2020 referred to above. This is not an affirmation, however, because the writer was merely trying to arrange collection, and was unaware of any breach.

(2) The email of Mr Garstang dated 24 March 2020 referred to above, which states, "Can you please revert ASAP, we had an agreement in place which you/we need to uphold." This is not an affirmation either, again because the writer was merely trying to arrange collection, and cannot at that stage have be aware of any breach.

(3) The email dated 30 March 2020 at 12.23 from Ms Durney asking if there was "Any updates on the ban please." However, that was a request for information upon the basis of which a decision might be made, but had not yet been made, about terminating the contract. It was not an affirmation.

(4) The WhatsApp message of 24 April 2020 from Mr Banks-Crompton to Mr Patel, asking about his gut feeling about getting the stock soon. This was after the offer of 23 April 2020. Again, this was a request for information upon the basis of which a decision might be made, but had not yet been made, about terminating the contract. Moreover, the Claimant was in my judgment entitled to time to consider the offer and, following it, any information it received in response to its enquiry. It was not an affirmation.

(5) The WhatsApp message from Mr Banks-Crompton to Mr Patel on 6 May 2020, asking, for an update on the masks. Again, this was a request for information upon the basis of which a decision might be made, but had not yet been made, about terminating the contract. Moreover, the Claimant was still entitled to time to consider the offer and, following it, any information it received in response to its enquiry. It was not an affirmation.

(6) The WhatsApp message of 26 May 2020, from Mr Banks-Crompton to Mr Patel, asking again for an update. Again, this was a request for information upon the basis of which a decision might be made, but had not yet been made, about terminating the contract

(7) The email of Mr Whitley dated 19 June 2020 mentioned above. On its face this is a surprising email to rely on as an affirmation, since it is consistent only with the acceptance of a repudiation, requiring as it does a full refund.

39. For the avoidance of doubt, given the hopes expressed by Mr Patel in particular, and his efforts to get the masks released, of which he informed the Claimant, I do not consider that the Claimant took too long to make its election either, so as to be treated as if it had affirmed. Accordingly, I conclude that the Claimant did not affirm the contract.

Variation

40. Nor did any of those alleged communications, so far as they occurred, amount to a variation of the contract to vary the delivery dates. Quite part from the fact that the evidence does not support there having been any agreement to that effect, no consideration for any such variation is alleged or evidenced.

Estoppel

41. Nor did any of the communications to which I have referred amount, in my judgment, to representations capable of founding an estoppel. The Claimant's stance was to wait and see. Nor do I accept that if they had been representations, the Defendant placed any reliance or acted to its detriment upon them. Nor yet that there was any evidence upon which the Court could conclude that it would be inequitable for that or any other reason to allow the Claimant to rely on its strict legal rights. This allegation is hopeless, in my view. I should just add, however, that it was argued on behalf of the Claimant that one of the reasons why it would not be inequitable was that the Defendant, by Mr Patel, had effectively strung the Claimant along with its repeated assurances that the masks would be delivered before too long. It was made clear to me that it was no part of the Claimant's case Mr Patel had deliberately misled it, and my own conclusion is merely that in good faith he expressed more hope than subsequent events quite justified. I would not accept that this had any relevant bearing upon inequity.

Acceptance of repudiation

42. It is clear, in my judgment, that the Claimant terminated the contract for repudiatory breach by the email dated 3 June 2020, as it was entitled to. The email refers to there

being no sign that the masks for which the Claimant had paid were being released, and to the end of the financial year, at which it is commonly commercially desirable to closeout transactions. This is sufficient for the request for the return of the money not just to be a request to have it back until the masks arrived and had to be paid for (and in fact the Claimant did not consider itself to be making such a request, as I accept). The Claimant no longer expected the masks to arrive. While I accept that Mr Whitley's primary concern may have been the return of the money, that being his area of responsibility, the email is not equivocal. The fact that he, like other employees of the Claimant, may have misunderstood the offer of 23 April 2020 made by the Defendant to be an offer of consensual termination does not, in my judgment, affect the position at all. Nor does the superficial similarity between that offer and what was sought by the email dated 3 June 2020: the terms of the emails are different, as is their context.

Conclusion and consequences

43. It follows that the Claimant is entitled to repayment of the sum of £720,000 and statutory interest , and that the Defendant is not entitled to specific performance of the agreement or damages. I have not been addressed on interest. If an order is not agreed, I will receive written or oral submissions as may seem best at the time.