Neutral Citation Number: [2026] EWHC 561 (TCC)

Case No: HT-2024-000438

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 March 2026

Before:

MR JUSTICE CONSTABLE

- -

Between:

UK GLOBAL HEALTHCARE LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**

- -
- -

Philip Moser KC and Tom Ogg (instructed by Kleyman & Co Solicitors L) for the Claimant
Andrew Sutcliffe KC and Emmanuel Shepherd (instructed by Simmons and Simmons) for the Defendant

Hearing dates: 25 February 2026

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CONSTABLE

Mr Justice Constable:

A. Introduction

1. The Defendant ('DHSC') applies for summary judgment in respect of its counterclaim for £15,350,000 (plus interest) and to strike out the claim brought by the Claimant ('UKGH') ('the Application').

2. DHSC was the ministerial department responsible for acquiring medical equipment throughout the COVID-19 pandemic.

3. UKGH is a medical company with a specialty in providing healthcare facilities and equipment on an international level. The sole director and Chief Executive Officer of UKGH, Dr Ajay Gupta, has 35 years' experience working in healthcare, including having worked for the National Health Service for 20 years as an Orthopaedic Surgeon. The Claimant along with its Indian subsidiary, Indo UK Healthcare Private Limited run the Indo UK Institute of Health ('IUIH') Medicity Programme which was announced in 2015 as a Joint Statement between the Governments of Republic of India and the United Kingdom.

4. The dispute arises out of two contracts ('the Contracts') entered into in May and June 2020 for the supply of 320 million medical gloves during the Covid-19 pandemic. Time was of the essence as stipulated in both contracts, with contractual deadlines of 30 June and 31 July 2020. In accordance with the payment terms, DHSC made a cumulative upfront payment of £15,350,000. In the circumstances more fully described below, no gloves have been delivered at all, although it is UKGH's position that it remains, and has generally remained, ready, willing and able to supply the gloves. DHSC's case is that the contract was lawfully terminated by letter dated 28 October 2020. It accepts that the grounds then given were not valid, but maintains that the termination was lawful because other valid grounds existed at the time. It also claims that, in any event, the Contracts expired on 26 May 2021 and 7 December 2020. As a result of either the termination or the expiry, DHSC claims, summarily on this Application, the return of the £15,350,000 advance payment. UKGH resists the application on the basis that there is at least a triable issue that DHSC, in breach of contract, prevented delivery occurring in accordance with the contractual delivery dates, by insisting on testing to which it had no contractual right, by wrongfully rejecting the goods and by failing to cooperate with UKGH as contractually required; further and alternatively that DHSC waived compliance with the delivery dates, and/or is now estopped from relying on either the delivery dates or the expiry dates; and that as a result the purported termination was unlawful.

5. DHSC relies upon the witness evidence of Mr Mick Corti, Director of Partners Procurement Services for Whittington Health NHS Trust, an NHS hosted procurement service. At the relevant time, DHSC had established a network of NHS Trust leads responsible for identifying providers of medical equipment and connecting these providers with DHSC's central assurance and contract teams. Mr Corti served as a Procurement Lead, focussing specifically on the procurement of gloves. UKGH relies upon the witness evidence of Dr Gupta. No evidence was served by DHSC in reply to the statement of Dr Gupta.

B. The Contracts

6. The first Contract was dated 27 May 2020 ('the First Contract'). The second contract was dated 8 June 2020 ('the Second Contract'). The terms of both Contracts were broadly similar. They contained an Order Form and four Schedules: Schedule 1 "Key Provisions"; Schedule 2 "General Terms and Conditions"; Schedule 3 "Definitions and Interpretations" and Schedule 4 "Additional Special Conditions". Throughout the Contracts, DHSC was referred to as the Authority and UKGH as the Supplier.

7. The Order Form in relation to the First Contract included:

(1) Clause 6 "Deliverables", which provided:

(a) "Non-sterile powder free nitrile Examination gloves"

(b) the Date of Delivery as:

"60,000,000 units to be delivered by the 30/06/2020"

(2) Clause 7 "Specification", which provided:

"Device Type

Non-sterile powder free nitrile Examination gloves"

(3) Clause 8 "Term", which provided:

"The Term shall commence on

27th May 2020

And the Expiry Date shall be 26th May 2021, unless it is otherwise extended or terminated in accordance with the terms and conditions of the contract

The Buyer may extend the Contract for a period of up to 6 months by giving not less than 5 Business days' notice in writing to the supplier prior to the Expiry Date. The terms and conditions of the Contract shall apply throughout any such extended period."

(4) Clause 10 "Payment", which provided:

"(A) The Supplier may issue an invoice:

Immediately following dispatch of the Goods.

(B) The Supplier's invoice shall be paid by the Authority:

> 50% on the official order, day of receipt of a valid invoice on signing of the contract (and the payment term in clause 6.6 of Schedule 2 shall be adjusted accordingly)
>
> 50% on confirmation of delivery
>
> …
>
> The Supplier acknowledges and agrees that any advance payment of Charges as set out in this Order Form may be recovered by the Authority in accordance with the terms and conditions (including (without limitation) in the event that the Goods are delivered late or are rejected or otherwise in the event of the expiry or early termination of this Contract prior to the acceptance of any such Goods by the Authority)."

8. The Order Form in relation to the Second Contract included:

(1) Clause 6 "Deliverables", which provided:

(a) "Non-sterile Powder free nitrile Examination gloves to ASTM D6319 standard"

(b) the Date(s) of Delivery as:

> "Phase 1:
>
> 60m pieces – Inspection concluded. Shipment to air or sea port by 30th June 2020.
>
> Phase 2:
>
> 100m pieces – Inspection date: June 8th 2020. Shipment to air or sea port by 31st July 2020.
>
> Phase 3:
>
> 100m pieces – Inspection date: June 20th 2020. Shipment to air or sea port by 31st July 2020"

(2) Clause 7 "Specification", which provided:

> "Device Type
>
> Non-sterile powder free nitrile Examination gloves"

(3) Clause 8 "Term", which provided:

> "The Term shall commence on
>
> 8th June 2020
>
> And the Expiry Date shall be 7th December, unless it is otherwise extended or terminated in accordance with the terms and conditions of the contract
>
> The Buyer may extend the Contract for a period of up to 6 months by giving not less than 5 Business days' notice in writing to the supplier prior to the Expiry Date. The terms and conditions of the Contract shall apply throughout any such extended period."

(4) Clause 10 "Payment", which provided:

> "The payments will be made in 3 phases.
>
> For each phase:
>
> (A) The Supplier may issue an invoice and shall be paid by the Authority:
>
> 50% on the completion of local inspection.
>
> 50% on confirmation of delivery to the UK.
>
> …
>
> The Supplier acknowledges and agrees that any advance payment of Charges as set out in this Order Form may be recovered by the Authority in accordance with the terms and conditions (including (without limitation) in the event that the Goods are delivered late or are rejected or otherwise in the event of the expiry or early termination of this Contract prior to the acceptance of any such Goods by the Authority)."

9. The relevant terms of Schedule 1 (Key Provisions) to each Contract were as follows:

(1) Clause 3 Quality assurance standards

> "3.1 The following quality assurance standards shall apply, as appropriate, to the manufacture, supply, and/or installation of the Goods: ATM D6319"

(2) Clause 5 Time of the essence

> "Time is of the essence as to any delivery dates under this Contract and if the Supplier fails to meet any delivery date this

shall be deemed to be a breach incapable of remedy for the purposes of Clause 12.4 (i) of Schedule 2."

(3) Clause 12 Supply of PPE Goods

"…

12.2 The Supplier shall supply the PPE Goods to Authority in accordance with the terms of this Contract and in accordance with the relevant requirements of applicable laws and regulations applicable to the supply of PPE, including, as applicable, the EU PPE Regulation 2016/425, the Personal Protective Equipment (Enforcement) Regulations 2018 and the Medical Device Regulations 2002 (together the "PPE Laws")."

10. The relevant terms of Schedule 2 (General Terms and Conditions) to each Contract were as follows:

(1) Clause 4 Inspection, rejection, return and recall

"4.1 As relevant and proportionate to the Goods in question and subject to reasonable written notice, the Supplier shall permit any person authorised by the Authority, to inspect work being undertaken in relation to the Goods and/or the storage facilities used in the storage of the Goods at all reasonable times at the Supplier's premises or at the premises of any Sub-contractor or agent of the Supplier in order to confirm that the Goods are being manufactured and/or stored in accordance with Good Industry Practice and in compliance with the requirements of this Contract and/or that stock holding and quality assurance processes are in accordance with the requirements of this Contract.

4.2 Without prejudice to the provisions of Clause 4.6 of this Schedule 2 and subject to Clause 4.7 of this Schedule 2, the Authority shall visually inspect the Goods within a reasonable time following delivery (or such other period as may be set out in the Key Provisions, if any) and may by written notice reject any Goods found to be damaged, or delivered late, or otherwise not in accordance with the requirements of this Contract ("Rejected Goods"). The whole of any delivery may be rejected if a reasonable sample of the Goods taken indiscriminately from that delivery is found not to conform in all material respects to the requirements of the Contract."

(2) Clause 12 Term and Termination

"12.4 Either Party may terminate this Contract by issuing a Termination Notice to the other Party if such other Party

commits a material breach of any of the terms of this Contract which is:

(i) not capable of remedy; or

(ii) in the case of a breach capable of remedy, which is not remedied in accordance with a Remedial Proposal."

(3) Clause 13 Consequences of expiry or early termination of this Contract

"13.1 Upon expiry or earlier termination of this Contract, the Authority agrees to pay the Supplier for the Goods which have been supplied by the Supplier and not rejected by the Authority in accordance with this Contract prior to expiry or earlier termination of this Contract. The Supplier shall within thirty (30) days of the expiry or early termination of this Contract, reimburse the Authority for any Charges paid in connection with Goods (including without limitation any pre-payment or advance payments) not delivered at the date of expiry or earlier termination of this Contract.

13.2 The expiry or earlier termination of this Contract for whatever reason shall not affect any rights or obligations of either Party which accrued prior to such expiry or earlier termination."

(4) Clause 17 Change Management

"17.2 Any change to the Goods or other variation to this Contract shall only be binding once it has been agreed in writing and signed by an authorised representative of both Parties."

(5) Clause 26 General

"26.3 Failure or delay by either Party to exercise an option or right conferred by this Contract shall not of itself constitute a waiver of such option or right.

26. 4 The delay or failure by either Party to insist upon the strict performance of any provision, term or condition of this Contract or to exercise any right or remedy consequent upon such breach shall not constitute a waiver of any such breach or any subsequent breach of such provision, term or condition."

C. The Law

C1. Summary Judgment

11. Unsurprisingly, there was no dispute between Mr Sutcliffe KC, for DHSC, and Mr Moser KC, for UKGH, about the legal framework in which I should approach the Application.

12. Under CPR r24.3, the court may grant summary judgment if it considers that (a) the respondent has no real prospect of succeeding on the claim or defence and (b) there is no other compelling reason why the issue or case should be disposed of at a trial.

13. Under CPR r3.4(2), the court may strike out a statement of case if it appears to the court—(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim. The test for striking out a claim under CPR r3.4 is materially the same.

14. The principles applicable to applications for summary judgment were formulated by Lewison J (as he then was) in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. L.R. 301. This summary was restated more recently by Nicklin J in Amersi v Leslie [2023] EWHC 1368 (KB) at [142(1)-(7)], drawing on other relevant authorities:

> *"(1) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain -v- Hillman [2001] 1 All ER 91. The criterion is not one of probability; it is absence of reality: Three Rivers DC -v- Bank of England (No.3) [2003] 2 AC 1 [158] per Lord Hobhouse.*
>
> *(2) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products -v- Patel [2003] EWCA Civ 472 [8]*
>
> *(3) In reaching its conclusion the court must not conduct a 'mini-trial': Swain -v- Hillman. 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: ED & F Man Liquid Products -v- Patel [10]; Optaglio -v- Tethal [2015] EWCA Civ 1002 [31] per Floyd LJ.*
>
> *(4) 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: Royal Brompton Hospital NHS Trust -v- Hammond (No.5) [2001] EWCA Civ 550; Doncaster Pharmaceuticals Group Ltd -v- Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63.*

> *(5) Nevertheless, to satisfy the requirement that further evidence 'can reasonably be expected' to be available at trial, there needs to be some reason for expecting that evidence in support of the relevant case will, or at least reasonably might, be available at trial. It is not enough simply to argue that the case should be allowed to go to trial because something may 'turn up'. A party resisting an application for summary judgment must put forward sufficient evidence to satisfy the court that s/he has a real prospect of succeeding at trial (especially if that evidence is, or can be expected to be, already within his/her possession). If the party wishes to rely on the likelihood that further evidence will be available at that stage, s/he must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up: ICI Chemicals & Polymers Ltd -v- TTE Training Ltd [2007] EWCA Civ 725 [14] per Moore-Bick LJ; Korea National Insurance Corporation -v- Allianz Global Corporate & Speciality AG [2008] Lloyd's Rep IR 413 [14] per Moore-Bick LJ; and Ashraf -v- Lester Dominic Solicitors & Ors [2023] EWCA Civ 4 [40] per Nugee LJ. Fundamentally, the question is whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success: Okpabi -v- Royal Dutch Shell Plc [2021] 1 WLR 1294 [128] per Lord Hamblen.*
>
> *(6) Lord Briggs explained the nature of the dilemma in Lungowe -v- Vedanta Resources plc [2020] AC 1045 [45]:*
>
> *'... On the one hand, the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue…'*
>
> *(7)The Court may, after taking into account the possibility of further evidence being available at trial, and without conducting a 'mini-trial', still evaluate the evidence before it and, in an appropriate case, conclude that it should 'draw a line' and bring an end to the action: King -v- Stiefel [2021] EWHC 1045 (Comm) [21] per Cockerill J."*

15. Mr Sutcliffe KC placed particular emphasis, in the context of this case, upon sub-paragraph (5) above, and the requirement for the Court to consider whether there are

reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success. He also sought to underline paragraph 7. The fuller guidance from Cockerill J (as she then was) from which the summary was drawn is as follows:

> *"The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial."*

C2. Waiver/Estoppel

16. Where one party voluntarily accedes to a request by the other that they should forbear to insist on the mode of performance stipulated by the contract, the court may hold that they have waived their right to require that the contract be performed in that particular manner. Waiver (by estoppel) may also be held to have occurred if, without any request, one party represents to the other that they will forebear to enforce or rely on a term of the contract to be performed and the other party acts in reliance on that representation (see generally *Chitty on Contracts* 36th Edn at 26-043).

17. A waiver may be oral or written or inferred from conduct (subject to any clause of the contract requiring otherwise, as considered further below).

18. The similar concept of equitable promissory estoppel relies, in the context of an existing legal relationship giving rise to rights and duties between the parties, on a promise or a representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship, an intention on the part of the former that the latter will rely on the representation, and such reliance by the latter. The doctrine may be excluded if it is not inequitable for the first party to go back on their promise.

19. The promise or representation must be 'clear' or 'unequivocal' or 'precise and unambiguous', even if it is implied, whether by words or conduct. Mere inactivity will not normally suffice. As for reliance, the promise or representation must in some way have influenced the conduct of the party to whom it was made. It is not necessary for the promisee to have done something they were not bound to do which causes them to suffer loss. It is enough if the promisee has altered their position in reliance on the promise so that it would be inequitable to allow the promisor to act inconsistently with it. See generally *Chitty on Contracts* 36th Edn at 7-040-7-044).

C.3 'No Oral Modification' Clauses

20. Clause 17.2 stated that "[a]ny change to the Goods or other variation to this Contract shall only be binding once it has been agreed in writing and signed by an authorised

representative of both Parties". It is undisputed that no such written and signed variation was ever executed.

21. UKGH do not contend that, as a matter of construction, Clause 17.2 is incapable of defeating its argument that there was in fact an agreement to vary the delivery dates in circumstances where that agreement was not signed by an authorised representative of both Parties. However, it pleads by way of Reply that DHSC is estopped from relying upon the clause.

22. The leading case on clauses of this nature is MWB Business Exchange v Rock Advertising [2019] AC 119. At [16], Lord Sumption, in his judgment which confirmed the enforceability of such clauses, made the following observations about the remaining role of estoppel:

> *"In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering In Gl En SpA [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker)."*

23. The reference to Actionstrength, a case relating to a purported oral guarantee and the operation of section 4 of the Statute of Frauds 1677, assists in identifying what Lord Sumption intended by the phrase 'something more'. At paragraph 9, Lord Bingham stated:

> *"It is implicit in the assumed facts that Actionstrength believed itself to be the beneficiary of an effective guarantee. Its difficulty, in my view insuperable, arises with the second question. For in seeking to show inducement or encouragement Actionstrength can rely on nothing beyond the oral agreement of St-Gobain which, in the absence of writing, is rendered unenforceable by section 4. There was no representation by St-Gobain that it would honour the agreement despite the absence of writing, or that it was not a contract of guarantee, or that it would confirm the agreement in writing."*

24. The rationale at paragraph 53 of Lord Walker's analysis is also illuminating:

> *"To treat the very same facts as creating as an unenforceable oral contract and as amounting to a representation (enforceable as soon as relied on) that the contract would be enforceable, despite section 4—and to do so while disavowing any reliance on the doctrine of part performance—would be to subvert the whole force of the section as it remains in operation, by Parliament's considered choice, in relation to contracts of guarantee."*

Thus, in order for a party to be estopped from reliance on a No Oral Modifications clause, there must be some representation that goes beyond the mere agreement of the 'modification' itself. A representation that the clause would not be relied upon or that it would confirm the modification in writing may constitute that 'something more'.

C4. No Waiver Clauses

25. Clauses 26.3 and 26.4 provide that 'the failure or delay' by either party to exercise an option or right, or to insist on the strict performance of any provision, term or condition, or to exercise any right or remedy consequent upon such breach, shall not constitute a waiver.

26. Mr Sutcliffe KC draws attention to those authorities that provide that 'no waiver' clauses are enforceable by analogy with Rock Advertising: in particular, Sumitomo Mistui Banking Corp Eurpoe Ltd v Euler Hermes Europe SA (NV) [2019] EWHC 2250), in which Butcher J held:

> *"An analogy may be drawn which what was said by Lord Sumption JSC in Rock Advertising about estoppels at paragraph 16. Applying that reasoning and language to an alleged waiver, it appears to me that if it is said that waiver prevents reliance on a no waiver clause there would have to be something which indicated that the waiver was effective notwithstanding its noncompliance with the non-waiver clause and something more would be required for this purpose than what might otherwise simply constitute a waiver of the original right itself."*

27. Mr Sutcliffe KC also drew to the Court's attention the passage in *Chitty* (at 26-048) which drew on Sumitomo but then pointed out that, on the other hand, there was authority for the proposition that a no-waiver clause can itself be waived and that it gives rise to little more than an evidential requirement to establish that there truly has been a waiver in the case in question so that (quoting from Foxton J, as he then was, in A v B [2020] EWHC 2790 (Comm)) such clauses "*raise the bar for establishing the elements of a waiver plea, but they do not forestall the application of the doctrine altogether".*

28. Mr Moser KC argues that these clauses do not, on their face, engage with situations where the conduct relied upon is not a 'failure or delay' to take a particular point, but a positive representation that the point will not be taken. Mr Moser KC did not draw a

particular authority to the Court's attention to support this distinction. I note that the 'no waiver' clause in the Performance Bond in Sumitomo was a 'No failure or delay…' clause; and the alleged waiver relied upon was a positive act (in that case, the provision of a Notice of Assignment).

C4. Termination

29. As set out by Lloyd LJ at [51] in Reinwood v L Brown & Sons [2008] 2 C.L.C. 422, there is a general principle of contract law that if a party refuses to perform a contract, giving a reason which is wrong or inadequate, or giving no reason at all, or terminates a contract under a contractual provision to that effect, the refusal or termination may nevertheless be justified if there were at the time facts in existence which would have provided a good reason for the refusal. That principle is often used in relation to facts unknown to the party refusing at the time of its refusal, but there is no reason why it should not be used in relation to facts which were known to that party at that time. Waiver can apply to qualify that principle, but only in cases of, in effect, estoppel. See also *Chitty on Contracts* (36th Edn) at 28-067.

C5. Prevention Principle of Interpretation

30. In relation to the proper construction of clause 13.1, Mr Moser KC relies upon what he refers to as the 'prevention principle of interpretation'. As explained by Edwin Johnson J sitting in the Upper Tribunal in Carlton Vale v Gapper [2023] UKUT 141 (LC) (by reference to Lewison, The Interpretation of Contracts (7th Edn) at 7.108), there is a principle of construction that a contract should be interpreted, so far as possible, in such a manner as not to permit one party to take advantage of their own breach of that contract. Mr Sutcliffe KC draws attention to the two points then noted by the Court: (1) the principle applies where a causal connection can be shown between the wrong of the relevant party and the contractual right which that party seeks to rely upon; and (2) the principle is not an absolute rule. It may be displaced by express contractual provision or by the intentions of the parties as made apparent by the express terms of the relevant contract.

C6. The Prevention Principle

31. Although not put in terms of the 'prevention principle', Mr Moser KC's written submissions introduced an unpleaded argument that DHSC's actions, in demanding extra-contractual testing and/or rejecting the gloves on grounds not permitted by the Contracts, placed time for compliance with the agreed delivery dates 'at large'.

32. The prevention principle can be summarised as follows:

> *"It is well settled that in building contracts – and in other contracts too –when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it*

> *impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."* See Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, HL at p 607, approving a statement of principle by Lord Denning in the CA; see also Hamblen J as he then was in Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 at [11].

33. The essence of the prevention principle is, therefore, that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing. It is well established that actions by the promisee which are perfectly legitimate under a contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date. Acts of prevention do not set time at large, if the contract provides for extension of time in respect of those events (see *Multiplex v Honeywell* [2007] Bus LR Digest D109 at [56]). There is no suggestion that the Contracts contained an express provision by which the delivery dates could be extended as a result of any acts of prevention on the part of DHSC.

D. Documentary and Witness Evidence

34. The Application rests, as it must, on the basis that the Court can determine the issues before it on the basis of a review of the relevant contemporaneous communications between the parties, and without either witness (or any other witness) being tested in cross-examination.

35. It is therefore necessary to set out in some detail the chronology. Much of the correspondence is between DHSC and IUIH, the subsidiary of UKGH that, in relation to these transactions, UKGH traded as. For the sake of clarity, however, I refer throughout to UKGH.

36. A Letter of Intent was provided to UKGH by DHSC on 21 May 2020 in respect of what became the First Contract. On 26 May 2020, UKGH wrote to DHSC, acknowledging the Letter of Intent and attaching 3 agreements between UKGH and Khai Hoan JSC, Vietnam, confirming the ready stock of 260m gloves. The following day, the day of the First Contract, Mr Corti asked by email whether it was possible for a company called SGS 'to carry out local and immediate inspection of this ready stock – to confirm availability and provenance', because of concerns about counterfeit product offers. Mr Gupta responded:

> "We accept your concerns on quality of the gloves and especially the possibility of counterfeit gloves. As a result, we have legally contracted with all distributors to get an SGS report. The 3 stockholders will be instructing SGS to carry out the local and an immediate inspection of their stocks to confirm availability and provenance."

37. The First Contract was signed on 27 May 2020 and countersigned on 29 May 2020. Mr Sutcliffe KC accepted that it included no reference to 'Inspection' on the Order Form because any relevant inspections had been carried out.

38. A Letter of Intent was provided to UKGH by DHSC on 3 June 2020 in respect of what became the Second Contract. This included the following:

> "Payment Terms: 50% on confirmation of satisfactory local inspection and 50% on delivery. 3 shipments as follows:
>
> 60m – Local inspection concluded
>
> 100m – Local inspection due 8th June 2020
>
> 100m – Local inspection due 20th June 2020."

39. On 8 June 2020, immediately prior to the Second Contract, as the parties were negotiating delivery dates, Evan Williams of DHSC wrote to Tharounnia Nadarajan of UKGH :

> "Following conversation with Ajay I have made the amendments to:
>
> ….
>
> 3. I have changed the expiry date of the contract to 7th December as this makes it under a 6 month contract duration and makes sign off easier. Hope this is ok."

40. The Second Contract was signed on 8 June 2020 and countersigned on 11 June 2020. It makes no reference to 'Inspection' for Phase 1, no doubt in light of the fact that, as stated in the relevant Letter of Intent, 'Local Inspection' was 'concluded'. It provided for 'Inspection' in relation to Phases 2 and 3 under Delivery Date(s) as well as in the section on Payment. On 11 June 2020, DHSC made an advance payment to UKGH of £12,350,000 in respect of the Second Contract, which payments were predicated on the completion of local inspections.

41. Dr Gupta's detailed evidence, by reference to underlying documents, was that by this time, in late May and early June 2020, UKGH had locked-in vessels, containers, charter aircraft, inspection services, suppliers, routes, and delivery dates, and was operationally ready to deliver all 320m contracted gloves. The logistics arrangements were binding, cost-incurring, and fully executable. At least for the purposes of this Application, this evidence was not disputed.

42. On 12 June 2020 Dr Gupta provided Mr Corti with an SGS test report in relation to a sample of gloves due to be delivered as part of Phase 1 of the Second Contract (the "SGS report"). Mr Corti's witness evidence is that the SGS report had been commissioned given the requirement for local inspection of the gloves in paragraph 6 of the Order Form for the Second Contract; and that the local inspection constituted a 'visual inspection', carried out to provide comfort, both to UKGH and DHSC, that the gloves destined for the UK conformed to the type expected by DHSC and were not counterfeit.

43. Mr Corti responded to receipt of the report on the same day, saying:

> "Thanks for this. But it is a bit worrying to be honest. I was expecting to see inspection to the recognisable standards. Either ASTM6319 (with the relevant sub-tests) or EN455-1, -2,-3 and -4. A key test in both being Freedom from Holes, which is conspicuous in its absence from the report. There is also nothing in the report that confirms the sample set was taken from the shipment of 60m pieces to be despatched to the UK. It's good that the product met the tests, apart from one, but we will need to think about the above certainly before the 260m pieces are collected. I'll have to take advice on the failure area to assess importance."

44. Mr Corti repeated in his witness evidence the substance of these concerns. However, these observations even if well founded had no contractual relevance. 'Inspections' were completely irrelevant, contractually, for both the First Contract and the First Phase of the Second Contract. Insofar as they were an impending contractual stipulation in respect of the Second and Third Phases of the Second Contract, there was no further definition of 'Inspection'. Although it is not necessary to decide summarily, it seems likely that the phrase was being used to mean an inspection for provenance and availability. The SGS Report specifically addressed provenance (in respect of the sample), and was irrelevant to availability. Mr Sutcliffe KC accepted, and indeed averred, that the SGS Report did not give rise to any right to reject the gloves under the Contracts.

45. UKGH did not respond by telling Mr Corti that he was not contractually entitled to what he said he was expecting to see. In his witness evidence, Mr Gupta characterised Mr Corti's statement of what he was expecting to see as a 'demand'. Irrespective of the characterisation (to which I will return), the response from Dr Gupta was to seek to meet the stated expectations.

46. Dr Gupta's unchallenged evidence was that, as a result of Mr Corti's email, the SGS team were promptly contacted and a request was submitted to undertake the Freedom from holes, ASTM and EN455 testing. SGS's response was forwarded to DHSC the same day under cover of an email from UKGH stating:

> "Following your email on Friday, we have put all the Gloves orders on hold till we have clarity on ASTM test , EN 455 test and the advice on the failure area in SGS report to assess importance.
>
> I and my team have been in touch with SGS Vietnam directly (see email trail below) which confirms that Vietnam SGS team do not routinely perform ASTM or EN 455 in Vietnam. They would have to send samples to Shanghai to get ASTM and EN455 tests which are not done in Vietnam. The gloves from Khao Hoan factory are already accredited for ASTM standards (tests already sent to you).

> However, if we want these done again, SGS Vietnam can send samples to SGS Shanghai and will take 2 weeks for ASTM and 3 weeks for EN 455."

47. Dr Gupta's evidence was the result of carrying out this testing was that it would be impossible to meet the original delivery schedules. This is – arithmetically – plainly true for deliveries required by 30 June 2020. His evidence was that as a result of the email, the second shipment of 60,000,000 Gloves which was scheduled to leave Ho Chin Minh port on the 15 June 2020 had to be cancelled. This is consistent with the first sentence of the above email. Dr Gupta's evidence was that:

> "It was self-evident to all that the additional testing requirements imposed by the Defendant would delay delivery of the Gloves. Indeed, the Defendant's own representative acknowledged the delaying effect testing would have on shipment, with no purported allegation of breach at the time, indeed quite the opposite: the parties continued to a new timetable."

48. The chronology continues with Mr Corti emailing Dr Gupta on 15 June 2020 regarding the SGS report:

> "The test result that SGS applied to the gloves, where there was a marginal fail is a test more associated with gloves used in the handling of foodstuffs and therefore not directly relevant to use in a healthcare setting. Indeed immersion in Vinegar (Acetic Acid) for 30 mins would be highly unusual. I think the SGS inspection can be a lot simpler entailing just a visual and manual examination for criteria such as:
>
> - Quantity available (confirm full shipment is available) –
>
> - Assortment
>
> - Colour
>
> - Packaging and packing (with supporting photos to show relevant EN455/ASTM6319 standards on the box)
>
> - Shipping mark
>
> - Size / dimension
>
> - Style
>
> - Workmanship
>
> ...
>
> Do you think this is possible for remaining shipment of the 260m?"

49. In response, Dr Gupta said the same day he would instruct SGS to perform an inspection of all 320 million gloves (i.e. all gloves to be supplied under the First and Second Contracts) and to provide Mr Corti with the SGS reports as soon as possible.

50. Two days later, on 17 June 2020 there was a call between Dr Gupta and Mr Corti. There is a telephone note of the call produced by UKGH. This sets out the following:

> "Mr Corti was informed that today IUIH has sent email to Gary Cobbing (UGroup) and Nick Parkes (DHSC) that this week, IUIH have received instructions from DHSC once again on new demands on what all is needed in a SGS report. IUIH has disseminated this information to our distributers and they all will be re-arranging new SGS inspections and reports this week. DHSC are still aiming for all 320 Million Gloves to be air lifted.
>
> However, Mr Corti during the call changed his mind and asked IUIH to cancel all contracts with their 3 wholesalers and cancel shipments/ flights to the United Kingdom till the SMTL Laboratory test results were completed (ie in 3 months).
>
> Mr Gupta raised concerns on phone to Mr Corti that this would result in millions of pounds lost which were paid to wholesaler and logistic company and 3rd party consultants.
>
> Mr Corti requested a sample of V Gloves- Goods for testing (the Sample) to EN455 standards at Surgical Materials Testing Laboratory (SMTL). Mr Gupta resisted another attempt to change course and demand different things by DHSC.
>
> Mr Gupta confirmed to Mr Corti that SMTL laboratory does not conduct ASTM D6319 testing and this testing was done at Intertek Laboratories in the UK, Quatest and in Eurofins Testing Laboratories in Spain. In addition, SMTL laboratory was not UKAS accredited for certain components of the EN455 Testing and thus their laboratory would not be suitable for testing Samples of gloves to be used in the NHS by DHSC.
>
> Mr Gupta made it clear that IUIH will not bear any of the losses due to change of plans by DHSC and that DHSC should let more SGS be done in Vietnam on stock of 3.2 million boxes in warehouse rather than bring the samples to the UK which may take 8-12 weeks of delivery/ testing and auditing time.
>
> However, Mr Corti insisted and said he will send a formal email.
>
> Mr Gupta informed Mr Corti that the team in Vietnam will arrange the V Gloves boxes to be couriered to the UK as soon

> as possible but DHSc needs to send an email to accept that the stock will be lost and financial losses / burden will be sole responsibility of DHSC."

51. This was followed, as foreshadowed, by an email from Mr Corti. He wrote:

> "I don't think we have any option but to try and maintain the position.
>
> The cabinet office technical lead for PPE, Dr Darren Mann, and the HSE/MHRA are not comfortable with what they have seen from Khai Hoan JSC.
>
> If we had QuaTest3 confirming testing to ASTM D6319 or EN 455-1,-2,-3,-4 (with the actual test results) then this would unstick it. Given the local distributors are in Vietnam and can converse easily with Quatest, then this may be the quickest route.
>
> Otherwise a box that is couriered then it will go straight in front of the MHRA and HSE.
>
> It can be couriered to me at address below and I will personally drive it to the NHRA/HSE team based in Daventry and bike some on to the test house.
>
> If the stock is lost, the stock is lost – while far from ideal that is better than bringing in millions of pieces that are not the right standard.
>
> As long as MHRA and HSE give the ok then we can arrange for collection by DHL in country with very little notice, even ahead of flights if necessary. So it will be a week or so, not 2/3 weeks.
>
> Far from ideal situation but I can two routes to success here (full certification and test results from Quatest3, or the samples to UK been given the ok).
>
> There would be another route. If Emergo were to be able to fully confirm CE certificate of conformance, which needs to include Modules C and D. Unfortunately when contacted, Emergo, had only vague records of Khai Hoan and this may simply be because the CE process was undertaken back in 2009. So I don't think this is a likely route to success."

52. Dr Gupta characterised this email as a further 'demand'; Mr Sutcliffe KC, in his submissions, described it as an expression of concern and a suggestion as to how those concerns might be allayed. Taken with the preceding telephone note, the accuracy of which is not, at least on this Application, challenged in any way, it is at the very least arguable that, on an objective reading of the documents, Mr Corti was making it clear that:

(1) the procurement process was 'stuck' because the cabinet office technical lead for PPE, Dr Darren Mann, and the HSE/MHRA were not comfortable;

(2) whilst the process remained 'stuck', UKGH should not transport the gloves to the UK for delivery. If this meant that, as a consequence, stock was lost, so be it;

(3) the only viable solutions to 'unsticking' the Contracts were QuaTest3 testing in Vietnam or by SMTL in the UK prior to delivery;

(4) none of the 'routes to success' involved (as DHSC now contend is what UKGH should have, and was entitled to have, insisted upon) simply delivering the product, leaving DHSC to test in accordance with clause 4.2 of Schedule 2 to the Contract.

53. Following this exchange, on 23 June 2020, Dr Gupta provided a video taken that day of the gloves ready in the warehouse to be couriered. He added:

> "As soon as we get the QuaTest3 testing to ASTM D6319 or EN 455-1,-2,-3,-4 and when you authorise us to release the product, these can be brought to London by DHL in next 5-7 days (before 30th June).
>
> However, we want to seek extension of the deadline of the 30th June 2020 for the delivery of the gloves and so am attaching a letter for you to kindly review."

54. The accompanying letter set out the following:

> "With reference to the various discussions and recent email correspondence relating to deliveries under the above contracts, I believe it would be helpful if we formalised the position with regard to the changes in delivery arrangements.
>
> The date for delivery under the first contract and for Phase 1 of the second contract was originally intended to be 30 June 2020, although the contracts differ in terms of where delivery was to occur contractually. I believe we have now agreed in correspondence that the deliveries of all the gloves/units under both contracts should be co-ordinated and should be by air (exact delivery arrangements and dates for despatch/collection to be confirmed and agreed between Uniserve and us when you authorise us to release the product).
>
> Your email of 15 June 2020 15:07 indicates what the Authority is expecting to see from the reports of SGS (the independent inspectors) and I confirm these requirements have been passed on to SGS so that this can be implemented. As indicated previously SGS has a backlog of work and we are forced to wait on their availability to do the inspections & reports. In addition your email of 17 June 2020 16:23 requested further (additional) confirmation to be provided by QuaTest3 testing to

ASTM D6319 or EN 455-1,-2,-3,-4 which we did not have scheduled into our delivery plans originally. We have subsequently agreed to investigate and comply with this additional request where this can be achieved in practice.

The contracts did not have a requirement for QuaTest3 additional confirmations, and we have agreed to obtain these where possible as a matter of goodwill, in addition to the SGS inspections and reporting. Also the first contract contained no specific requirement for SGS inspections. The dates for independent inspections in the second contract are currently 8th June (Phase 2) & 20th June (Phase3). The inspection in respect of Phase 1 was noted as having already been "concluded" when the second contract was signed based on the paperwork we had already provided to the Authority. This is because the Authority was satisfied with the quality assurance paperwork we had already provided and wanted to proceed with the deliveries under the first contract (60million units) and Phase 1 of the second contract (60million units) without delays.

As indicated by email we are willing to commission fresh SGS reports on the basis outlined in your email of 15 June 20 with SGS using samples from all deliveries (not just Phases 2 & 3) sampling 100 per million units up to a maximum of 500 units. The shipment of first products we had already arranged to despatch in time for the 30th June delivery date has now been held up in Vietnam in order to implement your instructions on inspections and you have acknowledged by email that you are aware of this and the risk in relation to the product currently held in stock (which is in high demand).

I would like to assure you that we are doing everything within our power to get the SGS reports to you as soon as possible and to endeavour to fulfil the additional request for QuaTest3 to give further confirmations. In the meantime as a precaution under the contracts it is necessary to formalise the fact that the initial deliveries of product (60m + 60m units) are likely to be delayed beyond the 30th June delivery date as a result of these developments and to notify that this delivery date will need to be changed under both contracts. On behalf of the Supplier I am formally claiming an extension of time for deliveries to be made under both contracts, by way of this letter.

There is already some indication via email that it would be desirable for deliveries under both contracts to be made at the same time if this can be done by air and we will endeavour to co-ordinate this to best meet the Authority's requirements. (The Phase 2 & 3 deliveries are currently scheduled in the second contract for delivery by 31 July 2020). We can discuss this further and confirm specific dates and delivery arrangements once we have the SGS reports available.

> However, in terms of the initial delivery date of 30 June 2020 in both contracts, it is likely that this is no longer realistically achievable. It has already slipped due to the matters referred to in email correspondence, additional comfort requirements the Authority are seeking prior to authorising the release of the products for delivery.
>
> Given these circumstances UK Global Healthcare Ltd should not be held to its obligation as the Supplier to make the initial deliveries of 120m (60m +60m) product by the 30 June 2020 date in the contracts as an extension of time to perform the contract deliveries is needed. Please can you confirm that the 30 June 2020 delivery date has now been postponed under both contracts and please take this letter as notice of the Supplier's claim to an extension of time for inspection dates and deliveries under both contracts."

55. Thus, Dr Gupta was making clear that complying with the 'expectations' of DHSC with regard to pre-delivery testing would mean that the impending delivery date of 30 June 2020 would need to be changed, and that UKGH required that to be formalised. The letter said in terms that what was being asked for was extra-contractual. It also repeated an understanding that it was for DHSC to authorise release of the product in order for delivery to be effected.

56. Mr Corti replied the same day:

> "It makes total sense to vary the original dates in the contract to allow for both sides to get the absolute assurance over the standards to which the gloves are manufactured.
>
> We are not seeking to change anything about the gloves we are buying. Only to ensure they are indeed compliant with either ASTM D6319 or EN 455-1, -2, -3 and -4.
>
> Evan – can you work with IUIH to get the delivery dates amended as suggested."

57. Dr Gupta's evidence is that he understood this email to clearly indicate that there was no way the DHSC would require UKGH to comply with the delivery dates in the Contracts.

58. On 25 June 2020, there was an exchange in relation to a box of V-Glove samples from a Japanese company. From a photograph provided, Dr Gupta agreed that the boxes were fake, which was happening across the PPE industry, especially in gloves and masks. He then set out what they were doing to prevent the same thing happening in respect of the gloves UKGH were responsible for. He pointed out, however, that in order to provide verification of certification, the factory wanted a letter from DHSC to confirm that the NHS wanted the certificates, as they were concerned about wider distribution of these key certificates, which could result in production of counterfeit certificates. Such a letter was provided the following day.

59. On 26 June 2020, Mr Corti was asked whether the testing was only required if DHSC could not get the certificates and test results etc. quickly as per Mr Corti's e-mail of 17 June. Mr Corti replied that it was 'Belt and Braces', and that it was far better that 'we' do this before we have 60m in the UK.

60. On 29 June 2020, Dr Gupta provided by way of update confirmation that he had arranged for 4 boxes of the gloves to be couriered to the UK by DHL from Vietnam, and that they had given the team in Vietnam the letter regarding ASTM D6319 certification. He also indicated that UKGH had had to cancel 2 deals in Vietnam as they could not hold onto the stock or provide UKGH with the ASTM D6319 although they did provide UKGH with documents from factory to confirm that the V Gloves have been assessed and found suitable for use in the USA by FDA (which include reference to the ASTMD 6319).

61. On 30 June 2020, the very day delivery was required under the First Contract and part delivery required under the Second Contract, Mr Williams of DHSC confirmed to Ms Nadarajan that

> "We are following up with the contracts team at the moment regarding the amendments and will provide an update asap"

62. On or around 2 July 2020, Dr Gupta provided photographs of the four boxes sent for testing. The boxes contained markings suggesting that the gloves were CE-marked and met the EN455 and ASTM D3578 standards. The ASTM D3578 standard applied to rubber gloves, not nitrile gloves. Mr Corti accepted this could be a packaging error, and Dr Gupta pointed out that ASTM D3578 in latex was similar to ASTM D6319 in Nitrile. Either way, the laboratory testing would provide clarity.

63. The testing took around 3 weeks.

64. On 3 July 2020, in a telephone call between Dr Gupta and Mr Corti, and as recorded in a telephone note provided by UKGH, Dr Gupta indicated that "the delays due to DHSC testing of V Gloves is costing IUIH substantially". On 6 July 2020, Mr Williams forwarded an email from his team about work on the prospective contract amendments.

65. On 21 July 2020, the Technical Manager at SMTL sent an email to Mr Corti which stated that:

> "The DRAFT data suggests that the gloves have failed EN 455-1 perforations and also EN 455-3 residual powder. After reviewing the ASTM D6319-19 (Standard Specification for Nitrile Examination Gloves for Medical Application) I believe that the perforation and residual powder results would also fail the ASTM performance requirements (this is based on a Lot size 35,001 - 150,000 which is the minimum sample size that can be tested in EN 455)."

66. On the same day, Mr Corti informed UKGH that the test was "not looking good at all" and that "we aren't going to be in a position to accept the V-Gloves."

67. This position was formalised the following morning when Mr Corti informed Dr Gupta that on the basis of the testing, "the gloves are not going to be acceptable". He indicated that having multiple gloves which have come off different production batches "is a huge problem". He indicated that they needed to get to a point quickly where DHSC either have 60m pieces of acceptable standard gloves or the DHSC has the upfront payment returned by UKGH.

68. On 22 July 2020 there was a call between Mr Corti and Dr Gupta. UKGH's note of the call records that

> "[UKGH] noted their surprise that SGS and TUV studies for V Gloves from the same batch have passed all tests and are being used in the USA and Europe. They will await the final SMTL report to verify the facts.
>
> [UKGH] informed about the impending TUV report that has been organised by IUIH partners Cerepac Holdings in Vietnam"

69. On the same day, Ms Nadarajan (expressly on behalf of Dr Gupta) said:

> "I am glad we got the Lab Tests done for Vgloves before bringing them to the United Kingdom.
>
> I am disappointed that the Vgloves have failed the test and I agree that we should not use the V gloves for the NHS. It is however surprising that SGS and TUV Studies for V Gloves done from the same batch of gloves have passed all tests and are being used in the USA and Europe.
>
> Thank you for confirming in the past that INTCO has passed the laboratory test in the UK and are being used in the NHS.
>
> Over the past 6 weeks, we have been asked to provide the following gloves to USA, Italy, Germany and Middle East –
>
> 1) INTCO
>
> 2) Hartelega
>
> 3) Vgloves
>
> Whilst we wait for the laboratory results of Vgloves to be shared with us, I would suggest that we secure 3.2 Million INTCO Gloves or HARTELEGA Gloves for the NHS from our current stock of 15 million gloves which is being sent to the USA next week."

70. As for the testing itself, Dr Gupta raises the following points in his evidence:

(1) SMTL does not have UKAS accreditation to test to an ASTM D6319 standard (although it does have accreditation for the EN 455 standard);

(2) The size and selection of the sample was inadequate according to ISO standards;

(3) There was a lack of chain of custody for the samples;

(4) As result, the results were 'fundamentally flawed from a statistical and methodological standpoint' for assessing contractual compliance;

(5) SMTL destroyed the samples on 5 November 2020 (precluding verification), and withheld the results until July 2021;

(6) UKGH sought alternative laboratories to conduct testing on the same batch of Gloves tested by SMTL (Batch No N00320302) in 2020, and also on other batches of Gloves produced by VRG Khai Hoan (Batch No N03302030) and (Batch No N12220201). Each of 10 laboratories over a period between 29 July 2020 and April 2024 passed the gloves tested to either EN 455 or ASTM D6319. The same batch (N00320302) that was tested by the SMTL Laboratory subsequently passed six independent tests conducted 36, 37, 45, and 51 months later, indicating that there was an original sampling error or testing error.

71. On this Application, it is not suggested that there is not at least a triable issue that the testing carried out was flawed. DHSC says this is not relevant to its right to have terminated for delay and/or the effect of the expiry of the Contracts.

72. On 24 July 2020, Mr Corti emailed Dr Gupta and Ms Nadarajan to say that the technical assurance team was conducting a rapid assessment of the alternative gloves from Hartalega and Intco. UKGH had already provided information regarding the gloves manufactured by Hartalega and Intco, but Mr Corti asked for documents that did not relate to the specific products DHSC would be receiving to be removed. On 27 and 29 July 2020, Ms Nadarajan provided a number of documents relating to the Hartalega and Intco gloves, and on 30 July 2020, Mr Corti emailed Dr Gupta noting that UKGH was in breach for its failure to deliver the gloves as originally contracted but indicating a willingness to issue a contract variation for the First Contract, noting that the offer was "very much a good will offer, so all other outstanding items will also need to be satisfactorily resolved".

73. UKGH's record of a further call between Dr Gupta and Mr Corti on 4 August 2020 states:

> "EN455 certificates for HARTALEGA Gloves will be available once DHSC confirmed the contract variation and provided a letter to Hartalega CEO that the gloves were for consumption of NHS staff.
>
> Hartalega are not willing to provide original of these certificates till they have confirmation that gloves have been used for Government. This is because of multiple orders in Covid-19 Pandemic and the decision of Hartalega management to priortise delivery of gloves to government
>
> …
>
> Mick Corti confirmed that he would revert back in due course. The DHSC team was over burdened with lots of work and so

> there may be delay in Contract variation (already under process since 30th June 2020) and above letter is likely to take time."

74. If accurate, this was clear statement that the contractual variation previously discussed between the parties was "under process".

75. The record of the call also recorded the successful results of testing which had been received on 29 July 2020 in relation to the gloves:

> "Dr Gupta discussed about the V Gloves were tested - 17-28th July 2020, IUIH and its supply chain partners- Cerepac. The V gloves (test report no.7191240643 dated 29 July 2020) passed EN455 tests. Mr Corti once again refused to accept the results and stated that their team had decided not to accept V Gloves anymore (due to failure in SMTL lab) and would want to proceed ahead with either Hartalega or INTCO gloves."

76. The documentation appended to Dr Gupta's statement includes the successful test results.

77. On Dr Gupta's evidence, the parties continued their discussions regarding the required certificates and standards throughout August, September and October. The telephone notes provided by UKGH show Dr Gupta continuing to ask for a letter for Hartalega from DHSC in order to release original documents of certification. They also evidence Dr Gupta asking for a copy of the final SMTL report. This had been produced on 13 August 2020, but was not provided to UKGH until much later. The last communication of this type referenced by Dr Gupta in that part of his witness evidence is dated 2 December 2020.

78. These discussions therefore spanned the purported termination by DHSC of the Contracts. DHSC sent a letter (dated 28 October 2020) to UKGH on 30 October 2020, stating that the gloves were not manufactured using reasonable skill and care and were neither of satisfactory quality nor fit for purpose; that regarding the gloves from Intco and Hartalega, the manufacturers had been unable to provide the necessary documentation and, as such, no variation of the Contracts had been agreed; and that DHSC was terminating the Contracts for material breach which was incapable of remedy in accordance with clause 12.4 of Schedule 2 to the Contracts ('the Termination Notice').

79. There is no dispute that the parties held a mediation in July 2021 resulting in a Heads of Terms whereby the termination notice was withdrawn, and it was agreed that UKGH would supply nearly two hundred million gloves. The heads of terms were subject to contract, and it is not in dispute that no such contract was entered into.

E. Analysis

80. Mr Sutcliffe KC relies upon (1) breach of the time of the essence obligation, retrospectively justifying the termination and (2) expiry of the Contracts as the bases for DHSC's Counterclaim for the return of the advance payments.

Time of the Essence

81. UKGH denies the Counterclaim, pleading that DHSC breached the contract by rejecting the Gloves by email dated 21 July 2020 and again within the Termination Notice. Although in his written and oral submissions, Mr Moser KC argued that the requests, or even demands, to comply with extra-contractual testing were themselves also breaches, he was not able to identify what clauses the making of such requests or demands were a breach of.

82. It is not possible for the pleaded breaches (i.e. the rejections) to have caused the failure to have delivered pursuant to the First Contract, or Phase 1 of the Second Contract, given that they postdate 30 June 2020.

83. It is possible for the alleged breach to have caused the failure to have complied with the dates for Phases 2 and 3. However, it makes more sense to consider, chronologically, whether the events which preceded the 30 June 2020 deadline were capable of giving rise to a basis to argue that the delivery dates were no longer effective.

84. On the facts before the Court at this stage, subject to Mr Sutcliffe KC's arguments about whether such arguments are precluded by the terms of the Contracts, there is a reasonable prospect, or a more than fanciful one, that UKGH will establish at trial that DHSC agreed to extend the delivery dates or waived the requirement to comply with the agreed delivery dates and/or is estopped from relying upon them.

85. That is because:

    (1) There was, as Mr Sutcliffe KC accepted, no contractual basis upon which DHSC were entitled to the benefit of inspections or tests in relation to the products being supplied under the First Contract or the first phase of the Second Contract (i.e. with the delivery date of 30 June 2020);

    (2) It is arguable there was no contractual basis upon which DHSC were entitled to the benefit of inspection or testing in relation to the remaining Phases of the Second Contract which went beyond a visual inspection to ascertain provenance and availability.

    (3) As Mr Sutcliffe KC also accepted, the only contractual basis upon which DHSC could reject the goods following testing envisaged in the Contracts was the post-delivery testing envisaged by Clause 4.2 of Schedule 2 to the Contracts.

    (4) There is a real prospect of UKGH establishing at trial that DHSC made clear that it expected to receive the benefit of more intrusive inspections/testing than that allowed for in the Contracts and 'demanded' (according to Mr Moser KC) or 'requested' (according to Mr Sutcliffe KC) that the extra-contractual inspections and/or testing be undertaken prior to delivery. For the reasons set out below, the precise characterisation does not in fact matter analytically, but if it did, that characterisation is one a Court should determine having had the evidence tested at trial rather than summarily.

    (5) It is right, as Mr Sutcliffe KC submitted, that UKGH acquiesced in accommodating the requests or demands. It did not refuse them and simply deliver the gloves as DHSC contends in this litigation, many years later, it was

both entitled to, and indeed should, have done. Mr Sutcliffe KC is right that UKGH was probably entitled to do that.

(6) However, there is a reasonable prospect of UKGH establishing that its acquiescence was not unconditional. Instead, it did so making clear that (i) the requests were extra-contractual; (ii) compliance would have an impact on the ability to deliver the goods in accordance with the prescribed timetable and (iii) it required a formal variation reflecting any necessary extension of time.

(7) It may be said that, in the world of the hypothetical, as open as it was for UKGH to have refused DHSC's requests/demands and simply deliver the gloves, it was equally open to DHSC to reject the conditionality of the acquiescence and to refuse to countenance extending the delivery dates. It did not do so. Instead, in response, DHSC made clear that it made total sense to vary the original dates in the contract to allow for both sides to get the absolute assurance over the standards to which the gloves are manufactured prior to delivery.

(8) This may reflect the fact that this approach benefitted both parties. In any event, there is a real prosect that UKGH will establish at trial that Dr Gupta was objectively justified in understanding from these exchanges that there was, by late June 2020, no way the DHSC would require UKGH to comply with the delivery dates in the Contracts, and that new delivery dates would be formalised in writing as required by the Contracts;

(9) There is also a reasonable prospect that UKGH can establish at trial that it relied upon these, and continuing, exchanges (including those which represented that the process of formally amending the Contracts was in hand) by expending resources in an effort to achieve the supply of gloves which accorded with UKGH's (extra-contractual) levels of pre-delivery due diligence satisfied.

86. Were these facts to be established at trial, UKGH would have a reasonable argument the parties had in fact agreed (albeit not in compliance with clause 17.2) that the delivery dates would be extended by a reasonable time in order to accommodate the additional pre-delivery testing and/or that strict compliance with those dates had been waived and/or that DHSC is estopped from relying upon the delivery dates as a basis for termination. Moreover, I accept Mr Moser KC's argument that there is also a real prospect that UKGH would, in the scenario identified above, have established 'something more' as required by Rock Advertising in relation to no oral modifications and/or by analogy in relation to waiver. The 'something more' is the explicit recognition by both parties in the exchanges in late June, and in particular on 23 June 2020, not just that it was necessary to extend the dates in order to accommodate pre-delivery testing which had not previously been required by the Contracts but that it would be necessary to formalise that contractually.

87. There is a further analysis which has a real prospect for the purposes of the Application, pursuant to the prevention principle. The same facts, in the absence of any contractual method to extend time, arguably rendered time no longer of the essence and placed time for compliance with the delivery obligations at large. DHSC were entitled to request pre-delivery testing which had not been an entitlement under the original Contracts (whether pursuant, potentially, to clause 7.1.23 or otherwise) but if as a matter of fact compliance with those requests meant that it was no longer

possible to comply with the delivery deadlines, then that was, arguably, an act of prevention. If time was put at large, that is a complete answer to DHSC's reliance upon the failure to have complied with the original deadlines in order to justify termination of the contract. It is right (as Mr Moser KC conceded) that, in order to pursue this additional argument, that UKGH may need to amend its pleadings, but it would be proper to permit UKGH to do so rather than strike the claim out/give summary judgment on the Counterclaim on the basis of the delivery date claim.

Rejection

88. Even if I am wrong about this, there is on the evidence before the Court a real prospect of UKGH establishing at trial that (a) DHSC rejected the goods on 21 July 2020 when, on the basis of the SMTL testing, Mr Corti said in terms that "we aren't going to be in a position to accept the V-Gloves" and/or refused to reconsider when DHSC was presented with compliant test results; (b) the extra-contractual testing by SMTL upon which DHSC relied was flawed such that there was, in fact, no objective basis upon which to have refused to accept the V-Gloves; and/or (c) DHSC failed to co-operate in the provision of alternative gloves, in particular those from Hartelega, in breach of clause 5.4 of Schedule 2 by failing to provide relevant authorisation by which the certification DHSC sought could be provided.

89. Mr Sutcliffe KC's principal point is that UKGH agreed to or acquiesced in the non-supply of the original V-gloves following the statement by Mr Corti that DHSC was not in a position to accept the gloves. However, this is not (at least for the purposes of the Application) fatal to UKGH's claim if, as UKGH contend and in respect of which there is a triable issue, the testing obtained by DHSC was flawed. The context of UKGH's acquiescence or agreement was the (arguably flawed) testing. Moreover, UKGH's acquiescence or agreement was not unreserved, in that UKGH pressed, unsuccessfully for some considerable time, for the final SMTL report in order to interrogate it, and also provided the results of the (successful) testing UKGH had commissioned in an effort to persuade DHSC to change its mind.

Termination

90. If UKGH makes out its case either in respect of the delivery dates or rejection, it would follow that there is a real prospect that UKGH can establish that the termination was unlawful.

91. Mr Sutcliffe KC accepted that this would have been a repudiatory breach of contract. He contends, however, that the repudiation was not accepted. That is correct: indeed, UKGH's contention is that the contract is still on foot (because the expiry dates were also waived).

92. However, he fairly accepted that the wrongful termination would nevertheless amount to a breach which could sound in damages irrespective of the fact that the repudiatory element of that breach did not lead to bringing the contract to an end. That breach is (amongst others) said to have caused loss of profit, losses as a result of having to cancel contracts, and loss of profits on further supply contracts. No schedule of losses has been provided (nor pressed for) at this point, but the loss of profits alone is claimed at £11,300,000. It is not suggested that, if there is a triable issue in respect of breach, there is not a triable issue in respect of the various heads of loss claimed.

Expiry

93. DHSC relies upon an additional entitlement to the return of its advance payment, namely the expiry of the Contracts coupled with Clause 13.1.

94. In light of my findings above, there is a triable issue in respect of UKGH's claim for damages. Mr Sutcliffe KC contends that, notwithstanding, it is entitled to judgment in respect of repayment of the advance payments as a matter of contractual entitlement which can be summarily decided. Judgment should therefore be entered in respect of the Counterclaim and UKGH should be permitted to pursue its claim for damages.

95. There is a dispute on the pleadings as to what the relevant expiry date of the Second Contract was. Neither party suggested that anything turned on this for the purposes of this Application. It is not necessary for me to do so and where, in light of the views arrived at in this judgment, there will be a trial, I leave that matter to trial.

96. Mr Moser KC does not dispute that, irrespective of whichever are the contended for dates of expiry, those dates have passed in circumstances where no delivery of the gloves had taken place by the date of expiry.

97. Mr Sutcliffe KC contends that as a straightforward operation of clause 13.1, DHSC is entitled mechanistically to the reimbursement "for any Charges paid in connection with Goods (including without limitation any pre-payment or advance payments) not delivered at the date of expiry".

98. In response to this, Mr Moser KC contends that the clause cannot be construed so as to operate in circumstances where the *reason* for non-delivery prior to expiry was a wrongful refusal on the part of the Authority to take delivery of the Goods. He contends that this can be achieved as a matter of construction by construing the phrase 'not rejected' in the first sentence of clause 13.1 as meaning, 'not lawfully rejected'. It may also be necessary, in the present circumstances, to construe the word 'supplied' as meaning 'offered for supply' or similar. This would create an obligation on the part of DHSC to make payment for the gloves to the extent that they were offered for supply but unlawfully rejected. It would then be through this lens that one construes the word 'delivered' in the second sentence and the entitlement to a return of advance payment.

99. I consider that, for the purposes of this Application, UKGH have a reasonable prospect of arguing that, properly construed in accordance with the prevention principle of interpretation, clause 13.1 is not operative to require reimbursement in circumstances where the non-delivery of the goods has been caused by a breach on the part of DHSC. It would on the face of it be an exceptional construction which presumed, in circumstances where DHSC had been the cause of non-delivery of goods, that it nevertheless had a right to the repayment of advance sums which, as Dr Gupta's unchallenged evidence on this Application says was in fact the case, may well have been committed in the supply chain obtaining the wrongly rejected goods. Such a construction would need the clearest of words, which do not exist. Construing the clause as restricted in this way satisfies the requirement for causality referred to in the principles set out at paragraph 30 above; and nor does such a construction offend any other express clause.

100. Even if I am wrong about this, and (subject to waiver) DHSC were entitled to repayment of the advance payments, there is a triable issue on UKGH's claim for substantial damages which may equal or overtop DHSC's claim. The obvious question is whether there may be an equitable set-off between the claim and counterclaim in this regard. Mr Sutcliffe KC points out that set-off is not pleaded, and it was not the subject of submissions. The interconnection of claim and counterclaim may be relevant in other contexts (e.g. any claim for security for costs) and it would be wrong in these circumstances to go further.

101. It is not necessary in the present circumstances to determine whether there is a real prospect that UKGH's waiver case extends to a waiver of reliance upon the expiry clauses. Mr Sutcliffe KC's contention is that the case is deficient by way of pleading and, on these applications, evidentially. This contention has force. There is no suggestion in the documents that the parties put their minds to the expiry dates, in the same way that they did for delivery dates. Moreover, it does not follow that an act of prevention to a delivery date ought to impact a date within the contract that has a different purpose.

102. However, in circumstances where there is in any event to be a trial, I do not consider it appropriate to determine, notwithstanding my scepticism of this part of UKGH's case, that it has no prospect of success and should be struck out.

F. Conclusion

103. For the reasons given the Application is dismissed.