

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**

The Rolls Building  
7 Rolls Buildings  
London EC4A 1NL

Date: 25 May 2023

**Before :**

**David Mohyuddin KC sitting as a Judge of the High Court**

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**Between :**

**DNANudge Limited**

**Claimant/  
Applicant**

**- and -**

**Jabil, Inc.**

**Defendant/  
Respondent**

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**Mr Thomas Braithwaite** (instructed by **Lewis Nedas Law**) for the **Claimant**  
**Ms Michelle Menashy** (instructed by **Clarke Willmott LLP**) for the **Defendant**

Hearing date: 3 May 2023  
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**Approved Judgment**

This judgment was handed down by the Judge remotely by circulation to the parties or their representatives by e-mail and by release to the National Archives.  
The date and time for hand-down is deemed to be 10.30am on 25 May 2023.

## **DAVID MOHYUDDIN KC SITTING AS A JUDGE OF THE HIGH COURT:**

### Introduction

1. The Claimant, DNANudge Limited (**'DNA'**) is a bio-tech start up company which says that it has developed a product which allows DNA/RNA testing to take place outside of a laboratory by the use of a disposable cartridge which could conduct various tests, for COVID-19 or for other infections or skin conditions. The Defendant, Jabil, Inc. (**'Jabil'**) is a United States corporation providing manufacturing and supply chain services from sites including one in Bray in the Republic of Ireland.
2. On 28 May 2020, DNA and Jabil entered into a written Manufacturing Agreement (**'Agreement'**), pursuant to which (put shortly) Jabil was to manufacture cartridges to DNA's requirements (**'Products'**), which DNA would then purchase from it, using equipment either provided by DNA or acquired by Jabil but ultimately paid for by DNA (**'Equipment'**). The component parts to be used in the cartridges (**'Components'**) were to be acquired or acquired and altered by Jabil.
3. The parties are agreed that the Agreement has been terminated. There is a dispute as to which of them effectively terminated it, but that does not matter for present purposes.
4. By Application Notice dated 23 March 2023, DNA applies for an interim order that, the Agreement having been terminated, certain of the Equipment (**'Requested Equipment'**) and certain of the Components (**'Requested Components'**) be delivered up to it. Jabil resists the application. For the reasons that follow, I dismiss the application.

### Representation

5. At the hearing before me, DNA was represented by Mr Thomas Braithwaite of Counsel and Jabil by Ms Michelle Menashy of Counsel. I am grateful to them both for their helpful skeleton arguments and oral submissions.

### Factual background

6. The Agreement was entered into on 28 May 2020. It is a lengthy document, signed on behalf of DNA by Professor Christofer Toumazou and on behalf of Jabil by Mr David Panneton. So far as is relevant to the Delivery Up Application, it includes the following clauses: 1 (which provides definitions); 2.1; 4.4; 4.5; 5.1; 5.2; 5.4; 6.1; 6.5; 6.6; 6.7; 8.1; 9.1.1; 9.1.2; 10.3; 12.1; 12.3; 12.4; 18.1.3(b); 18.3; 18.4; 19.4; 30.3; 48 and 50. I have considered the wording of these clauses and, given the submissions that were made to me, in particular clauses 4.6 and 6.7.
7. Following their entry into the Agreement, Jabil manufactured Products for which Jabil paid; the parties' relationship was a successful one.

8. However, on 17 June 2022, DNA told Jabil that its requirement for Products would reduce to zero and asked for manufacture to stop as soon as possible.
9. There was then email correspondence between the parties, the most relevant of which are the following:
  - i) 21 June 2022 from Cheryl Goodwin (Jabil) to David West and James Gilmour (both DNA);
  - ii) Mr West's reply of 22 June 2022;
  - iii) Professor Toumazou's (DNA) email to David Panneton (Jabil) of 19 August 2022;
  - iv) Mr Panneton's reply of 23 August 2022;
  - v) Professor Toumazou's reply of 24 August 2022;
  - vi) Mr Panneton's reply of 24 August 2022;
  - vii) 25 August 2022 from David Anderson (DNA's Finance Director) to Mr Panneton;
  - viii) Mr Panneton's reply of 26 August 2022.
10. At the end of August 2022 and as foreshadowed in the email correspondence, DNA paid to Jabil €1.3m. There is a dispute as to the effect of that payment having been made and accepted.
11. There was then a further exchange of emails starting with that from Mr Panneton to Professor Toumazou on 22 September 2022.
12. By email dated 26 October 2022, Mr Panneton demanded payment of a further €1.3m by the end of October 2022 and a plan for paying the balance said to be due to Jabil.
13. There was then a meeting between the parties on 2 November 2022 at which, as recorded in the minutes, a commercial discussion took place but resolution was not reached.
14. Mr Panneton followed up from that meeting by email dated 15 November 2022. Mr Peter Linscott from DNA visited the Bray facility at the end of November 2022. Mr Panneton followed up again in an email on 1 December 2022.
15. On 2 December 2022, Ms Foley emailed Mr Panneton attaching a list of equipment which DNA required to be returned to it.
16. There are a number of other emails to which I was not taken. It appears that negotiations that might have led to a resurrection of the parties' trading relationship were unsuccessful.

17. By letter dated 13 December 2022, Jabil gave DNA notice of material breach and that it would submit the parties' dispute to mediation in accordance with the procedure set out in the Agreement.
18. By letter also dated 13 December 2022 from its solicitors, Lewis Nedas Law, DNA demanded immediate delivery up of all its goods and possessions, which were said to be detailed in schedules enclosed with the letter. It was said that Jabil's failure to do so was "causing severe loss of business, financial, reputational damage, and failure to finalise important product development, as well as the urgent supply of Test Cartridges to our customers, in particular hospitals requiring urgent products." The letter went on to say that the failure to deliver up the equipment and components was "holding [DNA] to unreasonable ransom, and is putting [DNA] at risk of survival, in that it is unable to supply test cartridges, its main product, to its customers and develop important products that it has urgent orders for." DNA then asserted that Jabil was in material breach of the Agreement and entitled to terminate it. It said that even after the delivery up of the equipment and components requested, Jabil would "still hold more than over Euro 10 million of paid for equipment and components, belonging to [DNA], for an unjustified claim of around Euro 6 million, until the dispute is resolved." A deadline of 3 January 2023 was set, with the threat of an urgent application to Court.
19. Jabil replied by letter, written in quite strong language, dated 22 December 2022, rejecting DNA's demand for delivery up. It also expressly referred to clause 4.6 in the context of DNA's termination of the Agreement. Whilst Jabil denied that DNA was entitled to terminate, it said:

"...this termination triggers section 4.6 which requires DnaNudge to pay all amounts due and owing prior to return of any equipment."

20. On 6 March 2023, DNA gave notice of termination of the Agreement.

#### Procedural background

21. I am told, although I was not shown it, that on 16 December 2022 Jabil made a request for mediation to the LCIA.
22. By a without notice application notice dated 18 January 2023, DNA asked for:
  - i) permission to serve out of the jurisdiction pursuant to CPR 6.37;
  - ii) permission to serve by alternative methods (email) pursuant to CPR 6.15; and
  - iii) the listing of DNA's "Application for an Injunction for Delivery Up on short notice with a half day time estimate".
23. That application was supported by a witness statement dated 18 January 2023 made by Mr Ian David Coupland, DNA's solicitor, a partner in and head of the commercial and litigation department at Lewis Nedas Law. The statement

recites in paragraph 12 that exhibited to it is DNA's application for an injunction for delivery up, a draft order and the witness statements of Keeley Foley, Mohammadreza Sohbati and Rashmita Sahoo in support. Each of those statements was dated 18 January 2023 and each was endorsed with a signed statement of truth. Mr Coupland asked that that application be listed on short notice.

24. On 20 January 2023, Master Clark made an order granting permission to serve out of the jurisdiction and dismissing DNA's application for permission to serve by an alternative method. Nothing was said in Master Clark's order about DNA's request for the urgent listing of its application for an injunction for delivery up.
25. On 24 January 2023, DNA issued the claim form in these proceedings. It gave brief details of its claim as follows: "This claim is only limited to the Claimant seeking Delivery Up of The **Requested Equipment, Requested Components & Requested Stock** from the Defendant" (emphasis original).
26. On 9 February 2023, Jabil filed its acknowledgement of service after which, on 14 February 2023, the parties agreed an extension of time for the service of Jabil's defence and counterclaim to 30 March 2023.
27. On 23 March 2023 the present application was filed and served.
28. Jabil's Defence and Counterclaim was filed and served on 30 March 2023.
29. DNA's Reply and Defence to Counterclaim was filed and served on 26 April 2023.
30. Jabil has yet to file and serve its Reply to Defence to Counterclaim. However, the shape of the dispute between the parties is already quite apparent.

#### The present application

31. The present application ('**Delivery Up Application**') states on its face that the order being sought is:

"An order for an interim injunction and/or and order under CPR 25.1(e) requiring delivery up of certain property from the Defendant to the Claimant."

#### Delivery Up Application: CPR 25.1.1(a) or (e)?

32. Mr Braithwaite submitted that it did not matter whether I approached the Delivery Up Application pursuant to CPR 25.1.1(a) – that being the part of the CPR which applies to an application for an interim injunction – or under CPR 25.1.1(e) – that being the part which applies to an application for an order under section 4 of the Torts (Interference with Goods) Act 1977 to deliver up goods. He said that the applicable principles were the same in either event.
33. Ms Menashy submitted that the application ought to be approached under CPR 25.1.1(a) because section 4 of the Torts (Interference with Goods) Act 1977

conferred a power on the Court which was limited to “any goods which are or may become the subject matter of subsequent proceedings in the court, or as to which any question may arise in proceedings.” She pointed out that “proceedings” means proceedings for wrongful interference, i.e. conversion, trespass, negligence or any other tort so far as it results in damage to goods or an interest in goods: see sections 1, 4(1) and (2) of the 1977 Act. She said that DNA’s current claim is not a claim for wrongful interference but, as is set out in the prayer in the Particulars of Claim endorsed on the Claim Form, is for “delivery up ... pursuant to the terms of the **Contract**” (emphasis original).

34. I agree with Ms Menashy’s analysis and have approached Delivery Up Application as an application for an interim injunction under CPR 25.1.1(a), reminding myself that Mr Braithwaite was content with that approach.

#### Delivery Up Application: evidence

35. DNA’s Delivery Up Application was supported by a witness statement dated 22 March 2023 made by Ms Foley with exhibits KJF1 and KJF2. Jabil relied on a witness statement dated 19 April 2023 made by Cheryl Goodwin with exhibit CG1. DNA relied on a further witness statement made by Ms Foley dated 26 April 2023 with exhibit KJF3.

#### Delivery Up Application: principles

36. The Delivery Up Application being an application for an interim injunction pursuant to CPR 25.1(1)(a), the guidance given by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408B-E as explained in *R v Secretary of State for Transport ex party Factortame (No. 2)* [1991] 1 AC 603 at 671E-672F applies.
37. An initial threshold question arises, namely whether there is a serious issue to be tried, i.e. that the claim is not frivolous or vexatious. If the answer to that question is ‘yes’ then two further related questions arise. They are, first, whether damages would be an adequate remedy, either to the party seeking the injunction or to the other party in the event that an injunction is granted against them. If damages are an adequate remedy for the party seeking the injunction then that will normally preclude the grant to them of an interim injunction. If not, then the second question arises, whether, if an injunction were granted, the party against whom the injunction was granted would be adequately compensated by the undertaking of the party seeking the injunction to pay damages. If damages recoverable under such an undertaking would be an adequate remedy and if the party seeking the injunction would be in a financial position to pay them, there would be no reason on this ground to refuse to grant an injunction.
38. If there is doubt as to the adequacy of either or both of the respective remedies in damages, then the next stage is to ask where the balance of convenience lies. The question in this case is not just one of convenience but rather one of seeking to predict whether granting or withholding the injunction sought is more or less likely to cause irreparable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld. The basic principle is that the court should take whichever course seems likely to cause the least

irremediable prejudice to one party or the other. It does not matter whether the application is for a prohibitory (or negative) injunction or a mandatory (or positive) injunction. See *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd (Practice Note)* [2009] UKPC 16 per Lord Hoffman at [19]-[20].

39. That said, I consider the Delivery Up Application to be an application for a mandatory injunction because the relief sought would do more than preserve the existing state of affairs; it would, as Mr Braithwaite accepted require Jabil, to the extent sought in the Claim Form (the relief sought in the claim being coterminous with the relief sought on the Delivery Up Application) to give up its possession of the Equipment and (if granted) will likely dispose of the proceedings as whole. As such, I have reminded myself of the principles set out in *Nottingham Building Society v Eurodynamics Systems* [1993] FSR 468 per Chadwick J at 474 as endorsed by the Court of Appeal in *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354 per Phillips LJ at 366:

“... First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be “wrong” in the sense described by Hoffmann J.

Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.

Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.

But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.”

40. I remind myself that I should not seek to resolve any of the factual disputes between the parties.

#### DNANudge’s case on the Delivery Up Application

41. As set out in the evidence of Ms Foley and explained by Mr Braithwaite in his written skeleton argument and oral submissions, DNA’s case is as follows.

42. What DNA seeks by the Delivery Up Application is an order which requires Jabil to facilitate the extraction of the Requested Equipment and Requested Components and is therefore not invasive. If the order is made, there would be a change in the existing state of affairs (i.e. given that Jabil might have a lien, see below, the change would be the reduction in the scope of that security) but Jabil would not wish to restore it because it does not want to retain the Equipment; rather it wants security.
43. The Delivery Up Application should be looked at in two parts, the first concerning the Requested Equipment and the second concerning the Requested Components.
44. The Requested Equipment is owned by DNA which is entitled to delivery up of it. Jabil's assertion that, pursuant to clause 4.6 of the Agreement, it is entitled to exercise a lien over the Requested Equipment is misconceived; the clause grants no rights of any kind to Jabil and rather imposes a positive obligation on Jabil to deliver up the Requested Equipment once both DNA and Jabil have discharged their obligations under the Agreement. Jabil's reading of clause 4.6 of the Agreement requires it (i) to treat clause 4.6 as though it is an exclusive provision dealing with the return of the Equipment, despite any indication to that effect and (ii) to treat the reference to payment by DNA as an implicit precondition to the return of the Equipment, whilst effectively ignoring the performance of the Manufacturer's own obligations.
45. There is nothing in the Agreement which prevents DNA from vindicating its title to the Equipment independently of clause 4.6. If the position were otherwise then, during the currency of the Agreement, Jabil could retain custody of any Equipment belonging to DNA for its security value alone (i.e. using it as security for the payment of sums due to Jabil by DNA), even if Jabil no longer required the Equipment for the purpose of manufacture. Such a provision cannot be implied from clause 4.6. If a lien had truly been intended, one would expect to see it referred to in clauses 30 and 31.
46. Clause 4.6 is to be looked at in three stages: (i) Jabil completes its manufacturing obligations; (ii) DNA pays what is due from it to Jabil; (iii) Jabil returns the Equipment. Clause 4.6 is a longstop provision imposing an obligation on Jabil to return the equipment in those eventualities. It does not mean that DNA cannot vindicate its property right in the Equipment at any point prior to that should it need to. The clause does not impose on the Equipment anything at all for Jabil's benefit.
47. Jabil has to say that clause 4.6 is exclusive, that once the Agreement terminates the only circumstances in which the Equipment can be returned are those set out in clause 4.6. But when one looks at the triggers in respect of Jabil's obligation to return the Equipment, it becomes absurd to say that Jabil can retain the Equipment if it has not completed its obligations which remain after termination.
48. Clause 4.6 is not sufficiently clear to allow the implication of a lien. Its meaning is not informed by how clause 30.1 operates but that clause is relevant because



if the Equipment is going to be subject to a lien, that would scupper the Exit Plan contemplated in clause 30.1.

49. There is a serious issue to be tried whether clause 4.6 entitles Jabil to assert a lien over the Equipment.
50. As for the Requested Components, these are to be divided into two categories. First, there are those acquired and owned by DNA which were provided to Jabil. There is no justification for Jabil's retention of those.
51. Second, there are those originally acquired by Jabil. In respect of these, DNA, in Mr Braithwaite's skeleton argument, put its case in two alternative ways: (i) an agreement was reached effectively selling such Components to DNA (and relies on the emails set out above and in particular that from Mr Panneton dated 26 August 2022 which, it says, on an objective reading amounts to an acceptance of terms Jabil was being asked to agree) for which DNA has paid such that title to them has transferred to DNA and they should be delivered up alternatively (ii) whether or not there was such an agreement, DNA appropriated the payment of €1.3m made to Jabil in August 2022 to the cost of certain Components that DNA would identify and Jabil accepted the payment on that basis; the Agreement has come to an end and the effect of that appropriation is to vest title in the Components in DNA. In oral submissions, Mr Braithwaite resiled from the assertion that an agreement had been reached, preferring to rely on his argument that there had been an appropriation. He submitted that there was no agreement because the bullet points set out in the email of 25 August 2022 were not "followed through" in Mr Panneton's response.
52. Accordingly, there is a serious issue to be tried that it is entitled to claim title to the Requested Components and that it is entitled to their delivery up.
53. DNA says that damages are not an adequate remedy for it and it needs both the Equipment and the Components in order to be able to carry on its business.
54. As for the Requested Equipment, whilst DNA has some existing production capacity at an alternative third-party facility run by TTP, it is not suited for the manufacture of Products for clinical use. Without the Requested Equipment, DNA will be unable to fulfil orders in a timely fashion or at all. DNA is a young company and its ultimate success depends upon achieving a sales momentum that it cannot achieve using TTP's facility. The retention of the Requested Equipment by Jabil is putting DNA's very survival at risk. The lack of capacity is interfering with existing retail pilots, the expansion of services to NHS hospitals and the ability to provide diabetic foot infection diagnostic tests in India. The Equipment is bespoke and it makes no sense for it to be duplicated as a temporary expedient pending trial; it is not easily or readily replaceable not least because of the cost and time involved in doing so.
55. As for the Requested Components, a significant proportion are bespoke and the parts are specialised; they are not generic ordinary articles of commerce and are not readily replaceable. Jabil argues that they have no resale value thus implicitly conceding that there is no ready market for the Requested

Components and that there is no certainty that DNA will be able to source them in a reasonable timeframe.

56. As for the balance of convenience, on which he said that the Delivery Up Application really turns, Mr Braithwaite accepted that, if Jabil is entitled to assert a lien upon the true meaning of clause 4.6, it will lose some of its security, even though Jabil is not using the Equipment or Components and has expressed its preference for them to be taken away. However, there needed to be a balancing act between the prejudice to DNA if it is not able to use its own Equipment and Components and the prejudice to Jabil if it had to give up the Requested Equipment, which formed only part of the Equipment as a whole which might be subject to a lien. Further, the Requested Components only formed part of the Components as a whole and the remainder would remain in Jabil's possession, even though they could not be the subject of a lien. The detriment to DNA if the delivery up order was not made would be profound and obvious but the detriment to Jabil if the order was made would be much less so.
57. DNA's case as to the value of the Equipment that would remain in Jabil's hands even if the Requested Equipment was delivered up to DNA was based on a valuation report prepared by European Valuations, the intended use for which was to assist with asset-based lending. In summary, as at 29 November 2022, a valuation of DNA's plant and equipment at Jabil's facility at Bray was £6,220,000 if removed from the site.
58. Further, Mr Braithwaite submitted, the lien asserted by Jabil needs to be approached with care for two reasons.
  - i) First, it is not likely that Jabil will succeed at trial in recovering all of the sums its claims it is owed and which underpin the lien. A full account will be needed, a large part of Jabil's claim not being susceptible to immediate proof. Jabil should not be allowed to use an alleged lien as an effective veto over DNA's property right simply by reason of having asserted, without any proof, a claim of a particular value.
  - ii) Second, a person in possession of goods cannot assert a lien without providing the owner of the goods sufficient particulars to allow the owner to establish that the right amount is being claimed: see *Albermarle Supply Co v Hind & Co* [1928] 1 KB 307 at 319. Not only are Jabil's claims disputed (DNA asserting a set off and saying that it owes Jabil nothing; its admission (which required formal amendment) in paragraph 17 of its Reply and Defence to Counterclaim having been intended as an admission only that payment had not been made and not that non-payment amounted to a breach of the Agreement), Jabil has refused to supply particulars of how its claim is calculated. Mr Braithwaite accepted that, of course, on the Delivery Up Application, I cannot reach a view as to whether DNA or Jabil owes the other any money and, if so, how much. He also submitted that DNA could not say that Jabil's pleaded claim was nonsense and that there might well be a sum owing between zero and something, but there would be little prejudice to Jabil if it was deprived of security for a small part of the sum owing where the bulk of the Equipment would remain in its possession.

59. Mr Braithwaite further submitted that it would be open to me to order DNA to provide further security as a condition of the order it seeks. It would not matter whether that was done by way of fortification of the cross-undertaking it offers or pursuant to the power under CPR 25.1(1)(m) which provides that the court may make an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if that party does so, the property shall be given up to it. Mr Braithwaite was unable to suggest how much any such payment into court should be. He submitted that DNA could only assess whether it could make the payment once it knew how much it should be and that I should take a real world view on the value of the lien asserted by Jabil. As asserted in Mr Braithwaite's skeleton argument, on Jabil's evidence as to DNA's financial standing, any order for the payment of any sum of any significant value will present difficulty to DNA; there is no evidence updating the position from that shown by DNA's filed accounts for the year ended 31 July 2021. But the retention of the remainder of the Equipment provided sufficient security for Jabil such that fortification was not required.

Jabil's case on the Delivery Up Application

60. As set out in the evidence of Dr Goodwin and explained by Ms Menashy in her written skeleton argument and oral submissions, Jabil's case is as follows.
61. By the Delivery Up Application, what DNA is seeking to do is to deny Jabil what to it is the most valuable element of the Agreement, i.e. the right to retain the Equipment until DNA has paid all that is due. That is exacerbated by the financial position in which DNA finds itself. The order sought is a mandatory injunction because it requires Jabil to take positive steps and alters the existing state of affairs: Jabil has security and if the order is made, some of that security will be taken away.
62. As to the questions arising on the Delivery Up Application, Ms Menashy's first submission was that the Delivery Up Application does not disclose a serious issue to be tried in respect of the Requested Equipment or the Requested Components.
63. As for the Requested Equipment, clause 4.6 entitles Jabil to exercise a lien over the Equipment. It is a clause which deals with the situation upon termination; this is a case where the Agreement has been terminated, not a case where the Agreement continues. It has a clear commercial purpose; Jabil has been exposed to significant financial risk and has paid costs to third parties and for which it required security, which it obtained by the retention of the Equipment. Jabil seeks to recover such costs; it does not advance a convoluted damages claim. It makes commercial sense for Jabil to have security by way of a contractual lien over the Equipment.
64. There is no need for the court to make a final determination on the true meaning of clause 4.6. The court should ask whether it feels a high degree of assurance that DNA's construction of clause 4.6 will prevail. The answer to that question is that the court should not feel a high degree of assurance because it does not make commercial sense for DNA to be able to recover the Equipment when it

has not paid Jabil and for Jabil to be obliged to return the Equipment once DNA has paid.

65. Jabil was owed money by DNA pursuant to clauses 6.6, 6.7 and 9.1.2 of the Agreement. The first indication that DNA wished to amend paragraph 17 of the Reply and Defence to Counterclaim was given at the hearing and, on the face of the statements of case, it was common ground that something was due and owing to Jabil from DNA. As for DNA's Defence to Jabil's Counterclaim, there will be a response which will be set out in the Reply to Defence to Counterclaim. Ms Menashy submitted that the claims to set off were opportunistic and that the process set out in the Agreement in respect of breach of warranty claims had not been followed. There is no serious question to be tried in respect of the Requested Agreement.
66. As for the Requested Components, there again is no serious issue to be tried because the complete answer is provided by clause 6.7 of the Agreement. It has not been complied with. DNA is not entitled to pick and choose what it wants. The payment of €1.3m is a red herring because of the complete answer provided by clause 6.7. DNA's assertion that the €1.3m was appropriated to particular components fails by reason of the effect of clause 6.7; because there was no agreement for appropriation; and because no particular components were identified at the time of the payment and only €850,000 worth have since been identified.
67. The second submission made on Jabil's behalf was that damages would be an adequate remedy for DNA, which had failed to show that any harm at all would be caused by the refusal of the order sought, let alone any irreparable harm. Where DNA suggested that it would lose business opportunities, the court should be cautious about DNA's evidence because its position had changed. Initially, in the evidence appended to the witness statement made in support of the application for permission to serve out of the jurisdiction, DNA's case was that the Requested Equipment was needed in order to fulfil existing orders. However, in the evidence in support of the Delivery Up Application, DNA said that the Requested Equipment was needed to grow its business; the evidence in support of the potential for growth is very thin indeed and lacking detail. The proper conclusion is that DNA is not in a position to grow its business and would suffer no loss if the injunction were refused because: (i) it is on the cusp of insolvency; (ii) it has lost its anchor contract with the Department for Health and Social Care ('DHSC'); (iii) it is locked in heavy litigation with its investor, Ventura which is making allegations (no findings have been made) of fraud against it and Professor Toumazou. In consequence, no serious commercial business partner or investor is likely to place any investment or substantial orders with DNA in its present state.
68. As for the Requested Components, Ms Menashy said that there is no suggestion that DNA needs those for the purpose of any attempt to grow its business.
69. The third part of Ms Menashy's submissions addressed the question whether damages would be an adequate remedy for Jabil. She said that damages cannot be an adequate remedy for losing a security interest. If specific performance will be granted in respect of a contract to grant security because damages are not an

adequate remedy for the absence of the security which the parties agreed would be given, damages cannot be an adequate remedy to Jabil, the respondent to the Delivery Up Application, which seeks to deprive it of its security (i.e. the contractual lien arising under clause 4.6 of the Agreement).

70. As for DNA's suggestion that Jabil would be adequately secured even if an order is made on the Delivery Up Application, Jabil did not accept that the Equipment and Components that would remain in its possession would have any more than scrap value and thus the value of Jabil's security would be lost. DNA wants the Requested Equipment and the Requested Components because it perceives them to be the most valuable. The valuation evidence relied upon by DNA is unhelpful because of the basis upon which the valuation was conducted. DNA's case that the value of what would remain after the Requested Equipment was returned should be calculated on a percentage basis ignored the point that DNA perceived the Requested Equipment to be the most valuable (at least to DNA); if the Requested Equipment were returned to DNA, the value of what was left would be well below Jabil's €7m claim.
71. As for Components, DNA's case that Jabil would retain some €3m worth of Components ignored the point that there is no ready market for them.
72. DNA's offered cross-undertaking in damages was worthless and there is no evidence from DNA that it would be able to meet the cross-undertaking if called upon to do so. If there was to be any order made on the Delivery Up Application, Jabil would seek fortification of the cross-undertaking. If the court was to consider making an order pursuant to CPR 25.1(1)(m) the appropriate amount to require DNA to pay into court would be the full amount of Jabil's €7m claim.
73. Fourthly, Ms Menashy addressed me on the balance of convenience. She submitted that there was a greater chance of injustice if the order sought was granted and turned out to be wrongly granted than if it was not granted. That was principally because if the order was made Jabil would, in practical reality, cease to be a secured creditor. That risk was high whereas the risk to DNA was low: it is unlikely to recover financially whether or not it receives the Requested Equipment. It was also relevant to note that DNA had delayed three months in making the Delivery Up Application which was telling and indicated that it did not need the Court's urgent attention. It would not be a just outcome to leave Jabil €7m out of pocket and enable DNA to commence production with another manufacturer. Insofar as the Requested Components were concerned, if no order was made in respect of the Requested Equipment, DNA could have no need of the Requested Components. Finally, it would set a dangerous precedent for creditors with security similar to Jabil's if debtors like DNA were able to defeat it by raising spurious claims by way of set off.

Serious issue to be tried

74. In my judgment, applying the principles set out above, there is a serious issue to be tried between the parties whether clause 4.6 has the meaning ascribed to it by Jabil (in respect of the Equipment). The position is not as clear cut as Jabil would have it.

75. There is also a serious issue to be tried whether DNA has title to the Requested Components and is entitled to their delivery up. Again, the position in respect of clause 6.7 is not as clear cut as Jabil suggested. As for DNA's particular argument, that the €1.3m payment was appropriated to goods to be identified by it, there is a serious question to be tried whether that is correct or whether Jabil's case (which was, essentially, that there was a failure to appropriate the payment to a specific debt or debts) is correct.

Damages an adequate remedy for DNA or Jabil

76. Having taken into account the competing submissions that were made to me on the question whether damages would be an adequate remedy for either party, I have reached the conclusion that they would not be.
77. As for DNA, if its business is lost then it will be very difficult to compensate it in damages.
78. As for Jabil, damages would not be an adequate remedy for the loss of its security right and DNA is not in a position to pay any damages. Its most recent filed accounts, for the year ended 31 July 2021 disclose a loss of over £45m. As for its balance sheet, its current liabilities exceeded its current assets by £26m. There is a material uncertainty which may cast significant doubt as to DNA's ability to continue as a going concern. There was no evidence updating the position or suggesting that DNA's fortunes had turned around.

Balance of convenience

79. I turn then to the balance of convenience. This is the determinative question on the Delivery Up Application and the balance between DNA and Jabil is a fine one.
80. I have considered the potential harm that will be suffered by DNA if the injunction sought is not granted and that which will be suffered by Jabil if it is granted. For DNA that is the prevention of it growing its business, the inability to do so being an existential threat. For Jabil that is the loss of the security it might enjoy pursuant to clause 4.6 of the Agreement.
81. In my judgment, the potential harm to Jabil outweighs the potential harm to DNA. I reach that conclusion for the following reasons:
- i) If the order DNA asks for is made, the existing state of affairs will be changed because Jabil will give up possession of the most valuable (at least to DNA) part of the Equipment;
  - ii) There is a real risk that the value of the Equipment which would remain in Jabil's possession if the Requested Equipment is delivered up to DNA will be insufficient to provide security to Jabil for its claim, even if it does not succeed in obtaining an order for the full amount that it claims it is owed by DNA. The valuation obtained by DNA might ultimately turn out to be accurate but at this stage it seems to suffer some serious difficulties in that it was prepared in respect of the Equipment as a whole

and does not disclose the residual value if the Requested Equipment was returned to DNA;

- iii) DNA is insolvent to a very marked degree. There is no evidence to suggest that its fortunes have improved. It is therefore unable to offer any meaningful cross-undertaking in damages or to fortify it or to satisfy any order that might be made pursuant to CPR 25.1(1)(m);
- iv) DNA does not rely on the evidence which was verified with a statement of truth and appended to its application for permission to serve out of the jurisdiction suggesting that it needed to “fulfil client orders and purchase orders” (see Ms Foley’s statement dated 18 January 2023 at paragraph 57). Rather, it wishes to fulfil orders and intends to tout for business (see Ms Foley’s statement dated 22 March 2023 at paragraph 40). Its anchor contract with the DHSC has ended. Its pilot with Holland and Barrett relates to a skincare product for the manufacture of which the Equipment could be used; there is an ongoing relationship with the Chelsea and Westminster NHS Trust but, it seems, no other hospital trust; a test for diabetic foot infection has been developed and is undergoing clinical and analytic testing. None of these are business opportunities on which DNA is missing out and it has confirmed that the capacity it has through its other manufacturing lines is sufficient to produce units for initial trials and the like (see Ms Foley’s statement dated 26 April 2023 at paragraph 16 and its sub-paragraphs);
- v) On the evidence, DNA has no immediate need for the Requested Equipment or the Requested Components it having waited for about three months to make this application.

Delivery Up Application: disposition

82. For these reasons, the Delivery Up Application is dismissed.