NCN: [2023] EWHC 3377 (Ch)

Claim No: BL-2022-001854

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

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

Wednesday, 20 December 2023

BEFORE:

MR JUSTICE MILES

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BETWEEN:

INSTITUTO DE SALUD PARA EL BIENESTAR

Claimant

- and -

(1) VIVA ENTERPRISES LIMITED
(2) ROBERT GEORGE DANGOOR

Defendants

- and -

SERVICIOS DE SALUD DEL INSTITUTO MEXICANO DEL SEGURO SOCIAL PARA EL BIENESTAR

Proposed Substituted Claimant

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Zoe O'Sullivan KC and Andrew Gurr (Instructed by **Peters & Peters Solicitors LLP**) appeared on behalf of the Claimant/Proposed Substituted Claimant

Stephen Auld KC, Professor Mark Engleman and Kyle Lecuona (Instructed by **Altermans Solicitors)** appeared on behalf of the Defendants

Hearing dates: 19 and 20 December 2023

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APPROVED JUDGMENT

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Mr Justice Miles:

Introduction

1. This is an application by the defendants to strike out the claims and for summary judgment.

2. The application was made on 7 July 2023, supported by witness statements of Mr Robert Dangoor, who is the second defendant, Mr Joseph Dangoor, who is his son, Mr Hector Garza who, as I shall explain, is the CEO of a company called Encore, and a solicitor's witness statement of Mr Jamie Lester. In response to the application, the claimant relies on the witness statement of a solicitor, Mr Tickner. He refers to and relied on an earlier affidavit sworn by him on 26 October 2022 in support of an application for asset protection relief, and the exhibits to it.

3. The claimant is an agency of the Mexican State which was concerned with procuring medical equipment for the Mexican State during the Covid-19 pandemic. It has separate legal personality. Its functions and property, including legal claims, have recently been transferred, or are in the course of being transferred, to another state entity. The questions arising from that transfer, including an application for substitution of the claimant, are to be addressed separately (although they did form part of the application to strike out or for summary judgment) and for the time being I shall refer to the existing claimant as "the claimant".

4. The first defendant is a UK company which has a long track record as a supplier of electrical goods. It is a substantial company with a turnover at the relevant time of well over £10 million. Robert Dangoor is the major shareholder and is a director of the first defendant. His son, Joseph Dangoor. is not a director or employee of the company, but the evidence shows that from time to time he has assisted his father in relation to it. He practises as a medical general practitioner.

5. Counsel for the defendants has emphasised that neither Robert nor Joseph Dangoor have previously been involved in court proceedings, and certainly never been accused of fraud.

6. The claims may be summarised by reference to the particulars of claim as follows.

7. In April 2020 the Mexican Government, like many governments, was urgently seeking large supplies of ventilators to treat victims of the Covid-19 pandemic. On 11-12 April 2020 the first defendant made an offer to the claimant to supply 1,000 ventilators of a specific type. The ventilators were manufactured by a Chinese manufacturer.

8. The claimant's case is that the offer documentation contained representations to the effect that the defendant could supply 200 ventilators immediately and the remainder of the 1,000 within 21 days. This offer was transmitted to the claimant early on Sunday 12 April. It stated that payment had to be made by 10.00 am on 13 April 2020 to preserve the products available.

9. The claimant alleges that in making these representations, the first defendant also made implied representations that it had an honest and/or reasonable belief in the

truth of the representations; that Robert Dangoor, the second defendant, made both representations in his personal capacity; and that in reliance on the representations the claimant entered into the contract and made a payment of some US$59 million to the defendant on 13 April 2020.

10. In the event, none of the ventilators were delivered within 21 days. The claimant alleges that it then rescinded the contract by giving notice to the defendant on 21 May 2020 and that it asked for a refund.

11. The defendant made a partial refund of some $18 million in June 2020 (representing the cost of 300 ventilators). It is also common ground that it delivered 50 ventilators in early July 2020. That was during a period when there were without prejudice negotiations taking place between the parties, and the claimants' case is that the acceptance of those ventilators took place extra-contractually. It accepts that it must give credit for their market value.

12. The claimant contends that otherwise its prepayment has been lost. It makes proprietary claims to trace the prepayment and its proceeds; damages for deceit; damages for breach of contract; alternatively, restitution on the basis that the defendant was unjustly enriched.

13. The defendants vigorously deny these claims. In their pleadings and evidence, the defendants take the following broad points. There were no representations. Anything that was stated in the offer documents became part of the contracts and, in any case, no pre-contractual statements were made. This, the defendants say, is simply a case of breach of contract and the question is whether there was a breach and whether the claimant has suffered any loss. The defendants say that it is a contrivance to treat the case as one of misrepresentation and fraud. They say that in any case D2 did not make any representations himself because he was not the author of the relevant documents.

14. To the extent that any representations were made, the defendants contend that the defendants honestly and reasonably believed them to be true because they had an agreement with a broker in Hong Kong (known as American Venture) to obtain the relevant ventilators from the factory in Beijing, and they had had adequate assurances from American Venture.

15. The defendants also say that there were terms within the contractual documentation which showed that there might be variations in the delivery dates. They argue, first, that this enabled them as a matter of contract to vary the delivery dates and, second, that when reading the contractual documents as a whole, nobody in the position of the claimant could reasonably have spelt out a representation that ventilators had to be provided strictly within the time schedules set out in that documentation.

16. The defendants also deny that there was any rescission or repudiation of the contract and that, subject to the agreed variation and refund in respect of the 300 units, the contract constituted in early April 2020 continued.

17. The defendants also contend that the first defendant in fact delivered 700 ventilators during 2020 and this was in accordance with the contract.

18. As already mentioned, it is common ground that 50 ventilators were supplied in July 2020, and there is no dispute about those. The defendants say that they also arranged for a third party (known as Encore) to deliver a further 465 ventilators to the claimant between May and August 2020. The defendants contend that the claimant accepted those ventilators as deliveries from the first defendant. The defendants contend finally that from September 2020 onwards the first defendant tendered 185 more ventilators which had recently been ordered from Beijing, but which the claimant rejected.

19. The claimant takes issue with these aspects of the defendants' case.

20. In relation to the pre-contractual position, certain initial disclosure has been provided by the defendants in relation to the communications between the defendants and American Venture. The claimant in its Reply has identified a number of those communications in support of its case that the defendants were reckless, as to the truth of the representations which the claimants allege were made in the offer documents.

21. As for the delivery of the 700 ventilators, in response to the defendants' case the claimant has pleaded in its reply what it calls "the cover up scheme". It alleges (in brief summary) that once the defendants realised that the claimant had rescinded the contract and was seeking the return of the contract price, it engaged in a dishonest arrangement with Encore to treat some of Encore's own deliveries to the claimant under a separate contract between the claimant and Encore as if they had been delivered on behalf of the first defendant.

22. The claimant says that it had its own separate contract with Encore to supply 1,000 ventilators at a much lower unit price than the contract with the first defendant and that the 465 units which the defendants say were delivered on its behalf by Encore were in fact delivered by Encore to the claimant under its own contract with Encore (which was at a materially lower unit price).

23. The claimant's allegation is that the defendant and Encore essentially agreed to pass off the 465 ventilators delivered to the claimant by Encore as deliveries by the first defendant. The claimant alleges that this all took place without the first or second defendants informing the claimant of the intention that those 465 ventilators would be treated as being provided or supplied by the first defendant. The claimant says that it was only on 1 September 2020, when Joseph Dangoor provided a list of the serial numbers of the units which the first defendant claimed to have delivered, that the claimant began to understand that the first defendant was seeking to claim credit for the Encore deliveries.

24. Mr Tickner's affidavit provided a schedule or spreadsheet which set out the details of the case of cover-up advanced by the claimant.

25. As for the other 185 units, the claimant's case is that these were not even ordered by the first defendant from the manufacturer until after the claimant had rescinded the contract.

26. The main factual issues at the trial are therefore likely to include the following. First, what arrangements the first defendant had in place for supplying ventilators to the

claimant when it sent the offer documents to the claimant, and, more particularly, what it understood about the ability of American Venture to supply units to it. Second, the state of mind of the defendants in relation to the statements made in the offer documents including what steps were taken to analyse information provided by American Venture and others. Third, what the parties understood about the events from the date when the claimant gave notice of rescission in May 2020. This will go to questions of loss and to questions of waiver and affirmation. Fourth, the dealings between Encore and the defendants from August 2020 onwards, and what steps the defendants took to bring those arrangements with Encore to the claimant's attention. In relation to that last point, it appears that there is a substantial dispute between the parties as to the delivery of units to the claimant and the parties' understandings as to the basis on which those units were being delivered. As I have already explained, the claimant contends in relation to the 465 contentious ventilators that it always understood the ventilators were being supplied under its contract with Encore, whereas the defendant says that in fact those units were supplied by Encore on its behalf. There is on the pleadings a clear dispute about the extent to which those arrangements were known to the claimant and were honest.

Legal principles

27. The application to strike out and for summary judgment is made under CPR 3.4(2)(b), and CRP 24. There is no application to strike out under Rule 3.4(2)(a), but nothing turns on that given the way the matter was argued.

28. The main argument proceeded under Pt. 24. The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that that claimant has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial. The principles are well-known. They are accurately set out in note 24.2.3 of Volume 1 of the White Book, which recites the summary given by Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15].

29. Counsel for the defendants emphasised points (vi) and (vii) of that summary. Counsel for the claimant emphasised points (iii) and (v). Both parties accepted that the court must take into account all of the guidance in the passage.

30. Counsel for the defendants also drew my attention to a number of cases where the court has been prepared to give summary judgment in a case alleging fraud, summarised in *King v Stiefel* [2021] EWHC 1045 (Comm).

31. Counsel for the defendants also took me to a number of well-known decisions on the rules concerning pleading of fraud. These are helpfully summarised in the recent case of *Gerko v Seal* [2023] EWHC 63 (KB) at [24], [27], [28] and [32] to [35]. The claimant did not take issue with those statements of principle.

Parties' submissions and the main evidence relied on by them

32. In this section I shall summarise the principal submissions of the parties and the main parts of the evidence they emphasised.

33. Counsel for the defendants made certain overarching submissions before turning to the detail. He said that the pleadings contained very serious allegations against a company and an individual who had never been involved with any allegations of serious or indeed any wrongdoing. He submitted that the first defendant was a company of long standing with a successful business and that it would be very surprising if a party of that kind or its director decided to turn its mind to dishonesty.

34. He emphasised that this was not a case where it could be said that the first defendant had run off with the claimant's money. The evidence shows that the defendants made efforts to meet the supply agreement and the overall profit was about $3.5 million. He also said, as a general point, that while some aspects of the case would no doubt have to go to trial in any event, if the court concluded that the fraud claims were without substance there would be very good reasons for giving summary judgment at this stage. The case would be hugely simplified; very serious allegations of fraud would be removed from the case; and the scope of the dispute and the disclosure required would be reduced. He also observed that where serious fraud is alleged it often operates as an obstacle to settlement.

35. Turning to the allegations of fraud, he submitted that this was a very unusual case in which the alleged representations were said to be made in the contractual documents themselves. There were no negotiations of those documents, and they were offered and accepted over a very short timetable. He said that this made it a difficult starting point for any case of fraud.

36. He said that the case was contrived; this was properly to be regarded as a case of breach of contract which centered on the timing of deliveries against the schedule contained in the offer documents which then became the contract. The contractual terms themselves showed that there might be variations in the date of delivery. Moreover, the context was the worldwide pandemic where supply chains were disrupted and there were many customers clamoring for medical equipment of this kind, so there could hardly have been a worst time for a seller seeking to meet delivery deadlines. It was accepted that the contract which was entirely drafted by the defendants themselves included a tight delivery schedule: indeed, it said time was of the essence. It was very improbable that they would have drafted a contract with such tight deadlines if they knew or were reckless as to the ability of the defendants to meet them.

37. Counsel relied on the witness statement evidence of the defendants that they genuinely believed that they would be able to supply the goods to the claimant if their own supplier, American Venture, provided the goods to the first defendant.

38. Counsel contended that the contractual documentation did not in fact contain any representations of existing fact. To the extent that there were promises about the delivery schedule, these were (like other contractual matters) contractual warranties. The statement in the invoice document that 200 ventilators were immediately available was not a statement that the first defendant had possession or control of those goods. In context, it too was to be seen as part of an overall promise about delivery and was subject to the terms about possible changes to delivery dates.

39. Counsel explained that American Venture had been introduced to the defendants indirectly by somebody at the Chinese Embassy. The first defendant was itself

relying on an Austrian entity called Schlager which was acting for it as an introducer or intermediary.

40. Counsel for the defendant stated that the discussions that took place between the defendants and American Venture explained the statements made in the documents (which in any case were no more than contractual warranties); that the defendants would not have made those statements or promises unless they were sufficiently confident about delivery times, based on the discussions with American Venture; and that the statements or warranties were entirely honest. The reason for the non-supply was that American Venture unfortunately failed to live up to its promises to supply the goods to the defendants.

41. When assessing the allegations of dishonesty, the court should take account of what then happened. Between May and September 2020, the defendants made strenuous efforts to seek to meet the contractual obligations to supply the goods to the claimant.

42. Counsel contended that the pleading of knowledge in the particulars of claim at paragraph 23 was inadequate. It relied on the fact of non-supply, and on statements made in correspondence by the defendants about their supply chain problems and customs' difficulties in China. Those statements were not only true but were in any case consistent with honesty.

43. Counsel relied on a detailed chronology prepared by his team running to 11 pages, based on emails, texts and WhatsApp (and similar) messages passing between the second defendant and a representative of American Ventures.

44. Counsel emphasized that the defendants had previously had suppliers in China. It had already done one PPE transaction via Schlager with another Mexican state agency. The defendants also relied at paragraph 4.7 of the Defence on a document which counsel said showed that American Ventures had a sales allocation, or at least authority, regarding some 3,500 of the relevant ventilators for April and May 2020. (Counsel properly clarified in submissions that that document only came into the possession of the defendants the offer was made to the claimant.)

45. Summing up in relation to the communications with American Venture, counsel said the evidence showed that American Venture represented that it could supply 1,000 ventilators within two weeks and that it could supply 100 of these within a day or two. Based on those discussions the defendants entered the contract with the claimant for the supply of 1,000 ventilators. Counsel said that by the time the contract was signed between the defendant and the claimant, American Venture had stated that some 200 ventilators would be available on 15 April 2020, and that it could supply the rest of the 1,000 ventilators within 14 days. In summary, the terms of the contract between the claimant and the defendant simply reflected what the defendants had been told by American Venture.

46. As to the allegations that the defendants did not have an honest belief in any statements made in relation to the supply of the ventilators, the defendants have put forward clear evidence that they believed that they had a guaranteed supply from American Venture.

47. The pleading of the case of fraud is insufficient and it is not good enough simply to make an allegation of fraud. One has to do more than that and plead facts which tip the balance in favour of fraud.

48. As to the allegations of the cover up scheme, counsel for the defendants argued that these were improperly pleaded in the Reply. He said that they should, if they were to be advanced at all, be in the particulars of claim. But more importantly from the Defendants' point of view, he said that the allegations were wholly fanciful and should be dismissed.

49. Counsel relied on the evidence, in particular from Mr Joseph Dangoor and Mr Garza, to contend that it was clear that some 465 of the ventilators supplied or delivered by Encore to the claimant were in fact delivered by them on behalf of the first defendant. This was pursuant to a contract between Encore and the first defendant dated 25 May 2020. Although the claimant complained about the existence of the consultancy fee in that contract, the fee was openly disclosed in an invoice which is a public document in Mexico. The claimant also relies on a success fee, but that was paid because the work carried out by Encore was so much to the advantage of the first defendant and took place at the suggestion of Schlager.

50. The defendants contended that the evidence showed that some 2,000 ventilators were in fact supplied, either (a) directly by the manufacturer to the claimant, or (b) under the contract between the claimant and the first defendant, or (c) under the contract between the claimant and Encore. They provided a schedule with serial numbers for some 2,000 ventilators. They say that there is evidence that many of these were shipped and many were indeed installed at hospitals throughout Mexico and are being used.

51. I pause to note at this stage that the evidence of Mr Garza, the CEO of Encore, explains some of these numbers, but, as I shall explain below, it was not to my mind clear whether he was saying that a full 2,000 had been supplied, or 1,300, being the total supplied via Encore, or how this tallies with 50 supplied through HBK, and another 300 supplied by Aeon med (the manufacturer) itself. I also note that the schedule of 2,000 ventilators referred to by Joseph Dangoor has many boxes which say that the relevant information, such as shipping or installation, is unknown. I will come back to that point when I come to my conclusions.

52. Counsel for the defendants said that it was entirely clear on the evidence that the entire 465 ventilators which the defendants say were supplied on their behalf, and the 50 which it is common ground were supplied, had been installed and are in use. The only disputed part, he says, is the 185 ventilators which the defendants later tendered for delivery. If the claimant decided not to take delivery that was a matter for it.

53. The overarching submission in relation to this part of the case was that, whatever the rights and wrongs of the dispute about the precise numbers delivered by the first defendant, this was not a case of fraudulent conspiracy or cover up. The defendant had simply entered into a separate contract with Encore to supply goods when it became clear that it would not be able to get them through other sources, and that is what has happened in relation to the 465 ventilators.

54. The defendants relied upon certain letters written by the Foreign Affairs Secretariat

of the Mexican Foreign Ministry, in particular a letter of 5 August 2020, where the author concluded that many of the ventilators supplied by Encore were in fact supplied on behalf of the first defendant. The defendant said that that constituted clear supporting evidence from an independent arm of the Mexican Government as to the facts. Similarly, in another letter, dated 20 September 2021, about a year later, the Foreign Affairs Ministry reached a similar conclusion, including based on letters from the manufacturers. Again counsel said that that was clear supporting evidence for the defendants' case.

55. Counsel submitted that the entirety of this part of the claim should be dismissed as fanciful. This is not a matter of nuance or sensitivity to the facts. He said that the case was simply hopeless.

56. Counsel for the claimant contended that no part of the summary judgment application should be acceded to. She emphasised that this is a case where there has not yet been disclosure, at least full disclosure of documents, and that at trial the claimant would be able to cross-examine the witnesses for the defendants.

57. As regards the pre-contractual fraud claim, counsel for the claimant took me in some detail, through both the contractual documents and the contemporaneous communications between the defendants and American Venture. As to the contractual documents, she said that they contained clear statements of fact. The defendants said that 200 units were immediately available and impliedly represented that they honestly and/or reasonably believed that the other 800 units could be supplied within 21 days at the outside. The claimant has pleaded the representations and has also pleaded inducement. The fact that the representations may have been incorporated in the contract is irrelevant (see section 1 of the Misrepresentation Act 1967).

58. Counsel contended that the real question under this head was whether the defendants knew or were reckless as to the representations that were made. She pointed out that the communications between the defendants and American Venture had been extensively pleaded in the Reply so that the particulars of knowledge and dishonesty were not restricted only to the matters pleaded in the particulars of claim. She went through some of the communications in detail. I will not set them out in this judgment, but counsel drew some general conclusions from them.

59. The first was that there was no real evidence about American Venture, or what it is, or of any due diligence undertaken in respect of it by the defendants. There was nothing to show that it had any real substance. Indeed, it appeared that all that had happened was that an introduction had been made.

60. The second conclusion the claimant sought to draw from the evidence was that the first defendant had not concluded a contract with American Venture by the time of the deal with the claimant.

61. The third was that the first defendant had not by that time received an answer to a key question it had posed in messages i.e. whether American Venture could immediately supply 200 units rather than 100 units.

62. Fourth, American Venture had not at that stage when the first defendant entered the

contract with the claimant even provided a delivery schedule to the defendants.

63. Counsel says that it is against that background that the representations made to the claimant about the existing 200 units and the 800 further units fall to be considered, and submitted that the defendants had no proper basis for believing the statements they made in the offer documents to be true.

64. As to the brochure document referred to in paragraph 4.7 of the Defence, that does not say that the manufacturer had allocated any number of units to American Venture. It simply set out a sales quota for American Venture to act as its overseas representative. In any case it came after the offer was made.

65. Counsel submitted that before the contract was actually signed and returned by the claimant, American Venture had sent the defendants a message saying just how difficult it was to obtain products given the pressure of many parties seeking this kind of equipment in light of the pandemic. Counsel says that at that stage the defendants should have corrected the representations made the day before but this did not happen.

66. Counsel submitted that in the light of even that (necessarily incomplete) survey of the documents there was a realistic case for saying that what had happened was not honest.

67. She then turned to the post-contractual conduct. She went to documents which she said suggested that by 15 April 2020 the defendants knew that American Venture was not in a position to supply the defendants with ventilators - and indeed American Venture refunded a deposit that had been paid by the first defendant on 22 April 2020.

68. At that point the defendants could and should, so counsel submitted, have explained the position to the claimant and returned the money. Instead, on 25 April 2020 Robert Dangoor sent a letter to the claimant saying that there were problems with the manufacturer's supply chain, but said nothing about any back-to-back arrangement with American Venture or the failure of that arrangement. Counsel contended that by that stage there had already been substantial non-performance as some 600 units should have been delivered. Further letters were written on 26 April and 30 April 2020 making similar points about the manufacturer running behind schedule.

69. Counsel for the claimant contended that those statements were not honest because the failure of the defendant to supply the goods in accordance with the delivery schedule had nothing to do with the manufacturer's own supply problems. It had rather to do with the fact that the first defendant had not secured the supply of any goods, whether directly or indirectly, from the manufacturer.

70. Counsel then observed that the claimant took steps to rescind the contract and ask for its money back. It sent communications on 13 and 21 May 2020 to that effect. The immediate response of the defendants in an email from Mr Joseph Dangoor on 27 May 2020 was to say that the first defendant understood that the claimant wanted to cancel and get the money back, and the money would be returned to the extent that the first defendant was not committed to contracts of supply of goods to it from other parties. Counsel for the claimants explained that this was an important document as,

on the defendants' case, it had already entered a contract with Encore to buy 1,000 ventilators from Encore. The email of 27 May 2020 did not say anything about that. Counsel for the claimant also pointed out that the defendants' case is that it delivered over 100 units the next day via Encore, but again the email did not say anything about that.

71. Thereafter the defendants stated in a communication of 9 June 2020 that there had been no breach of contract by the defendant and that the contract remained on foot. Again counsel observed that letter did not say anything about a contract between the first defendant and Encore and that that was evidence that what was going on between the first defendant and Encore was a dishonest cover up.

72. Counsel submitted that in the next phase there was then certain without prejudice correspondence, which is not in the bundles, but was part of that process that the price of 300 units was returned. It was also during that period that some 50 units were supplied - the claimant says, extra-contractually, the defendant says pursuant to the contract.

73. Counsel for the claimant took me to certain documents from June 2020, including an invoice which related to a supply of some 15 of the ventilators. This was an invoice produced by the manufacturer. It referred to those 15 units being supplied from Encore as part of a deal for 1,000 units and referred to $18,750, the unit price that had been agreed as between Encore and the claimant. The serial numbers for these units then appeared on the list provided by Joseph Dangoor on 1 September 2020 and the claimant says that it was at that stage that it began to appreciate for the first time that the defendants were contending that units supplied by Encore were being supplied on behalf of the first defendant and not by Encore pursuant to its own agreement with the claimant. Counsel contended that the secrecy surrounding that arrangement was a mark of dishonesty. She pointed out that there is no suggestion that the claimant consented to these arrangements; and that that mattered a great deal because the claimant would never have agreed to it, given that the price under its own contract with Encore was much lower than that of the deal with the first defendant.

74. Counsel said that the claimant certainly does not accept that 2,000 units in total have been supplied pursuant to contracts with the claimant. Many of the entries in the defendants' schedule state that delivery details and shipping details are not known. Counsel for the claimant said that Mr Tickner had in his exhibit to his affidavit set out a massive spreadsheet showing how the first defendant had passed off the 465 ventilators as its own deliveries without the knowledge and consent of the claimant.

75. As to the letters from the Ministry of Foreign Affairs, counsel referred to another letter of 26 October 2020 from the claimant in response to the first letter from the Ministry of Foreign Affairs which took issue with its conclusions and also observed in the subsequent letter in September 2021 the MFA accepted that they did not have direct knowledge of the events.

76. In relation to the 185 ventilators, counsel pointed out that while Joseph Dangoor said that the MFA's letter confirmed that these had already been supplied to the claimant. In fact, the evidence shows that those had not even been purchased by the first defendant until 18 September 2020.

77. Counsel's overarching submission in relation to the alleged cover-up scheme was that this is relevant both to a rebuttal of the defence to the contract claim but also is evidence of dishonesty after the event. It has been fully pleaded in the reply and the defendants can, if they choose, respond to it in the rejoinder. They have not done so.

78. Finally, counsel for the claimant took me to the case of *AXA Sunlife Services plc v Cambell Martin Limited* [2011] EWCA 133 at [77], [78], [80] and [95], in support of her contention that clause 35 of the contract does not exclude liability for misrepresentation. She submitted that the clause does not refer to claims for misrepresentation; it refers to statements and representations but in context those are references to statements made in the contract itself: the purpose of the clause was to say that the contract was an entire one and that it was to exclude allegations of collateral warranty. It does not, even on its face, seek to exclude liability for misrepresentation.

79. Counsel for the claimant argued in conclusion that the claimants have a realistic prospect of success; that there are serious issues for the defendants to answer; and that the case is highly complex and fact-sensitive and is not suitable for summary judgment. The evidence that will reasonably be expected to be available at trial (but is not available yet) includes disclosure and oral evidence.

80. In his submissions in reply, counsel for the defendant said that the case is a straightforward one and that the court should grasp the nettle. The claimant has not filed rebuttal evidence answering the witness statements of the defendants. In particular, it has not answered the evidence about the supply of the ventilators or the details set out in the table to Joseph Dangoor's evidence, nor has there been a detailed, or indeed any, response to the evidence of Mr Garza. The evidence about the invoice from June 2020 has been explained by Mr Garza as an administrative error - it related in any case only to 15 of the ventilators and does not affect the others. The defendants have put in clear and detailed evidence that the case advanced by the claimant is simply fanciful. Moreover, counsel submitted that the claimant cannot simply cast aside the documents from the Mexican Foreign Ministry, which are powerful evidence. He described the case concerning the cover up as tenuous.

Conclusions

81. The question is whether the claimant has no real prospect of succeeding on the claim or issue as the case law shows a realistic claim is one that carries some degree of conviction; in other words, a claim that is more than merely arguable.

82. I turn to my conclusions. First, I emphasise that this is an application for summary judgment. It is not a mini-trial and the court should not conduct a process akin to a trial. So the court should not be drawn into an evaluation of the weight of various strands or items of evidence, without having the advantage of the full processes of the court at trial, including disclosure and the cross-examination of witnesses. The court should not seek to reach preliminary findings based on competing inferences to be drawn from the existing material.

83. In my judgment the defendants' approach amounts to an invitation to conduct a quasi-trial. The defendants have, quite understandably, emphasised their standing, reputation and track record and have made various powerful submissions about the

probability or otherwise of their engaging in dishonest conduct. All of that goes to the underlying probabilities. But those are points to be made at trial in light of all the evidence, where their weight will be assessed by the trial judge.

84. Specifically in relying on their 11 page chronology of key communications between the defendants and American Venture, it seemed to me that they were essentially inviting the court to reach conclusions (in the nature of factual findings) in their favour even though the evidence is incomplete and the inferences to be drawn from it are contested. The same may be said about the letters from the Mexican Foreign Ministry, where I was invited to conclude that they amounted to very powerful evidence that the case is contrived. The court should not on a hearing of this kind seek to weigh and evaluate different strands of evidence in the way that the defendants proposed.

85. Given the nature of this case and the allegations made in it, it seems to me that the evidence of witnesses and cross-examination are likely to be highly significant. The courts have repeatedly emphasised that under our procedural law all the evidence, including that arising from the cross-examination of witnesses, is an important means of the fact-finding exercise. The many points powerfully made by counsel for the defendants about the inherent probabilities may very well carry force at a trial, but that is not the exercise now before me.

86. Secondly, and this is a related point, at any trial there may well be considerable overlap or cross-influence between different aspects of the case. I accept the submission of counsel for the claimant that the conduct of the defendants after it became clear that American Venture would not be able to perform may well be relevant and material to the court's assessment of the fraud case in relation to the pre-contractual phase. It seems to me that a court at trial is likely to wish to consider all of the evidence in the round; that is how courts approach fact-finding.

87. Thirdly, although the defendants emphasised point (vii) in the list given in the *Easyair* case, they were unable to identify a short (or indeed any) point of law raised by their application. Instead, counsel emphasised that the court is able to reach a conclusion even on a case involving contested facts where it is sufficiently clear. I do not think in the present case that the defendants have come anywhere near showing that this is a clear case where the allegations of fraud are fanciful.

88. Fourth, I emphasise again that there has not been full disclosure of documents. I was taken to a small selection. This may well be a case where there will be third party disclosure, and the reasonable likelihood is that there will be a much fuller evidential picture at trial.

89. Fifth, the parties took me in some detail through strands or items of the evidence to bolster their rival positions, the defendants saying that this case had no real prospect, the claimant saying that it did. I have summarised the principal points above. In the light of the evidence currently available, I am satisfied in relation to the pre-contract phase that there is a case with a real prospect of succeeding, that the representations alleged by the claimant were made by the defendants, and the allegations of knowledge and state of mind against the defendants are more than fanciful. I have already summarised the points emphasised by counsel for the claimant in this regard. It seems to me clear that there is a case which meets the summary judgment

standard. The various communications between American Venture the defendants have been pleaded in the Reply, and it seems to me that that is a sufficient pleading of fraud.

90. As to the events shortly after it became clear that American Venture could not perform, I agree with the submissions of counsel for the claimant that the correspondence between the defendants and the claimant again gives rise to realistic questions about the honesty of what was said. I emphasise that I am only applying the summary judgment standard and I am not expressing any view at all about the overall or ultimate merits. The standard is a relatively low one at this stage of whether the claim carries some degree of conviction and is not fanciful. I also agree that the court at trial will wish to consider the state of minds of the defendants and their witnesses in the round.

91. As to the allegations about the alleged cover up, I do not accept the contention that this is so improbable and far-fetched that it should be dismissed. The evidence concerning the alleged delivery of 2000 units is incomplete and is likely to develop in the light of further investigations. Many of the entries in the defendants' schedule refer to the location being unknown, and the defendants accept that that is indeed the current position. Moreover, the claimant has set out its position in relation to the 465 units in the spreadsheet to Mr Tickner's affidavit. It also seems to me that this part of the case has to be considered not only by reference to the delivery of units on the ground but also by reference to the evidence about what was being said or perhaps, just as importantly, what was not being said, by the defendants to the claimant at the relevant times. I have already summarised the submissions of the claimant in relation to the email of 27 May 2020 and the point that this was only a couple of days after the defendant says that it had already reached a contract with Encore to buy 1000 ventilators. I also agree with the submissions of counsel for the claimant that it is at least reasonably arguable that the failure of the defendants at that stage to refer to their arrangement with Encore raises questions about the honesty of the arrangement. I accept her submission that there is at least a reasonable question as to why, in the correspondence at about that time, the defendants did not disclose their arrangements with Encore.

92. In that regard I have taken into account the defendants' contention that the arrangement, on the claimant's case, seems a surprising one, because if Encore did not perform, it would itself be in breach of contract. But it seems to me that (to the summary judgment standard) the claimant has answered that by pointing out the material price differential under the two contracts.

93. I have reached the clear conclusion that this case is one with real prospects of success on both of the two challenged aspects of the case. I do not consider that it would be right to go further and make detailed observations on particular documents or facts. The courts have wisely said in cases going back to (at least) the litigation concerning Bank of Credit and Commerce International to the effect that once the summary judgment threshold has been crossed, it is not appropriate for the court to make more detailed observations on the merits. To do so would risk embarrassing the trial judge. It would be inimical to the idea of concluding that the case should go to trial if the court were then to express even preliminary views about which side's case will turn out to be the stronger one.

94. Sixth, I also agree with the perceptive observation of Mummery LJ in the *Doncaster* case referred to in point (vi) of the *Easyair* checklist, that there are many cases where it is fairer for all the parties for the court to address the allegations with the additional time and capacity to hear full submissions from the parties as well as the fuller evidence that is available at trial. It seems to me that for this reason too this is a case which should be determined at trial.

95. Seventh, I accept the submissions of the defendants that there may be cases where fraud is alleged where it is appropriate for the allegations, nonetheless, to be dismissed under Part 24. That is so where the case has no rational basis and carries no conviction. But I do not think that is this case. I also accept that cases involving serious allegations of this kind are burdensome and create anxiety for individuals and may be damaging to the business of companies and I have taken into account the evidence in that regard. However, that cannot, to my mind, be a reason for dismissing a viable claim.

96. Eighth, as to the question whether the case has been properly pleaded in accordance with the principles concerning the pleading of fraud, I am satisfied that that there is a proper pleading here. The pleadings have to be read as a whole - the Reply as well as the particulars of claim - and I consider that the matters pleaded do include facts which take the allegations from those of innocent or negligent breach into the realm of fraud.

97. Ninth, in relation to the clause 35 of the contract, I am not satisfied that it is sufficiently clear that misrepresentation claims are excluded to think that this is a proper case for summary judgment in favour of the defendants. There is force in the submissions of the claimant that the clause is concerned with contractual promises and is an entire agreement clause properly so described, and does not exclude liability for misrepresentation. However, I do not go further than that and decide the point of interpretation.

98. Finally, there is the subsidiary pleading point as to whether the cover up allegation should be in the particulars of claim rather than in the Reply. I accept the submissions of the claimant in this regard that the allegations are essentially advanced by way of rebuttal of the case advanced by the defendants. The claimant does not rely on them as giving rise to a separate cause of action or any separate remedy. The defendants have had the opportunity to plead to those allegations in the rejoinder and it seems to me that the right course, if they wish to plead to them, is for them to do it in an amended rejoinder.

Disposal

99. The application is dismissed (except the adjourned parts).