Neutral Citation Number: [2019] EWHC 3462 (QB)

Case No: QB-2019-000347

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2019

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

Perkier Foods Limited

Claimant/Applicant

- and -

Halo Foods Limited

Defendant

- and -

Mr John Patrick Tague

Respondent

- -
- -

Daniel Saoul QC (instructed by **Fieldfisher LLP**) for the **Claimant**
Mohammed Zaman QC and Shakil Najib (instructed by **Hillyer McKeown LLP**) for the **Defendant and Respondent**

Hearing dates: 4 - 7 and 13 November 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 There are two applications before me. The first is the application of the Claimant ('Perkier'), issued on 6 June 2019, to commit the Respondent ('Mr Tague') for contempt and/or to sequestrate the assets of the Defendant ('Halo') for breach of an order of HHJ Blair QC, sitting as a High Court Judge, made on 21 February 2019 ('the Order'). The second is Halo's application, issued on 19 July 2019, for discharge of the Order. Mr Tague is Halo's Managing Director and, he accepts, its controlling mind for all purposes relevant to the present applications.

2 The circumstances in which the Order was granted, and the reasons for it, are set out in full in a judgment handed down on 21 February 2019: [2019] EWHC 292 (QB). For present purposes, the following summary is sufficient. Perkier designs and creates recipes and specifications for food snack products, which it markets as 'healthy' and supplies to retailers. It has two relevant products: Perkier Bars ('Bars') and Perkier Bites ('Bites'). Bites are spherical, bite-sized snacks. Perkier entered into two agreements with Halo: a Manufacturing Agreement ('MA') dated 5 July 2017, relating to Bars, and a Memorandum of Understanding ('MOU') signed by Perkier on 5 July 2017 and by Halo on 10 July 2017, relating to the development of the (then) new Bites product. One of the terms of the MOU was that Halo would purchase a machine from a German company, Kruger und Salecker GmbH & Co. KG ('Kruger'), which could produce moulded cereal products. It was at the time the only machine of its kind in the UK. After an initial period during which recipes were trialled, Perkier placed two orders worth just over £20,000 and just over £30,000 in November and December 2018 respectively. Everyone agrees that these conformed to the contractual specification. On 14 January 2019, however, Mr Tague telephoned Dr Turner (Perkier's Managing Director), to say that Halo would no longer produce the Bites. He then imposed a credit limit of £20,000 on Perkier and finally purported to terminate the MA. Perkier applied for an order requiring Halo to comply with the MA and MOU.

3 HHJ Blair QC considered the purported termination at [20]-[34] and concluded that there was at least an arguable case that the MA had not been effectively terminated. At [35]-[37], he held that Perkier's argument that Halo had no right to impose a credit limit gave rise '*at the very leas*t' to a serious issue to be tried. At [38]-[40], he expressed a '*substantial degree of assurance*' that Perkier would at trial establish its right to a mandatory injunction requiring Halo to manufacture Bites. At [41]-[42], he considered the question whether damages would be an adequate remedy as follows:

> '41. If the interim injunctions as sought by the Applicant (prohibiting the imposition of a credit limit and mandating the Respondent to manufacture Bites under the Manufacturing Agreement) are not granted then it will be hugely damaging to the Applicant and, contrary to the submissions made to me by the Respondent, will in my view be extraordinarily difficult to assess in an award of damages. There is no other Kruger machine in the UK and so the Applicant cannot simply find an alternative manufacturer in the marketplace. The Applicant's future funding round is dependent upon their continued growth in a volatile and competitive market. The Applicant will suffer irremediable damage which will be extremely difficult to quantify.

> 42. On the other hand the losses which the Respondent suggested to me it would sustain if it were reluctantly obliged to manufacture the Bites in accordance with the contract and without a credit limit were in my view exaggerated. The figures put forward of several £100k were not credible. Doing my best to assess them I am prepared to accept on current information it is possible that they might reach £90k per annum. If the Applicant was to be unsuccessful at trial it would, in my view, be capable of meeting the Respondent's losses under the necessary cross-undertaking which they are obliged to offer and have offered. I am not persuaded that a cross-undertaking would be meaningless and unenforceable. Whilst the Respondent identified its concern about the Applicant having made a small trading loss of £10,000 in the 7 months to October 2018 this does not lead to the conclusion that the cross-undertaking in damages is inadequate.'

4 At [43]-[44], HHJ Blair QC concluded that this was one of the relatively rare cases where a mandatory injunction was appropriate in a commercial context. At [45], he said this:

> 'It is suggested that the court will have to endlessly supervise the compliance of the contract and the Respondent will be at constant risk of expensive litigation to resolve any alleged contempt of court for breaching the injunctions. I do not believe that to be the case. This is a relatively straightforward contract which has provision within it to resolve most issues.'

In retrospect, it may be observed that the suggestion made on behalf of Halo to HHJ Blair, and rejected by him, was prescient.

5 The Order, which contained a penal notice, provided in relevant part as follows:

> '1. The Defendant shall, pending final judgment or earlier settlement, comply in full with the Manufacturing Agreement between the parties dated 5 July 2017 and the Memorandum of Understanding between the parties signed on 5 July 2017 by the Claimant and on 10 July 2017 by the Defendant, including by doing the following:
>
> (a) Manufacturing the food product Perkier Bars according to the Finished Product Specifications set out at Schedule A, at the prices set out in Schedule B (unless and until such prices are changed in accordance with the terms of the Manufacturing Agreement), in such quantities as the Claimant shall order (subject to the +/- 10% variation permitted to the Defendant), and deliver the same to the Claimant in accordance with the delivery dates stipulated by the Claimant (the Claimant to give the Defendant not less than 10 working days' notice of any required delivery date).
>
> (b) Manufacturing the food product Perkier Bites according to the Finished Product Specifications set out at Schedule C, at the prices set out in Schedule D (unless and until such prices are changed in accordance with the terms of the Manufacturing Agreement), in such quantities as the Claimant shall order (subject to the +/- 10% variation permitted to the Defendant), and deliver the same to the Claimant in accordance with the delivery dates stipulated by the Claimant (the Claimant to give the

> Defendant not less than 10 working days' notice of any required delivery date);
>
> (c) refraining from imposing any credit limit upon the Claimant with respect to the value of the food products ordered by the Claimant;
>
> (d) Taking all steps required to adhere to the plan for the launch of new Perkier Bars in Cacao & Orange and Cacao Salted Caramel flavours, as set out in Schedule E;
>
> (e) cooperating with the Claimant to launch new products which benefit both parties, and using its best endeavours in relation to the same, as required by paragraph 12, sub-paragraph 7, of the Manufacturing Agreement.'

Annexed to the Order were 49 pages of documents comprising the various documents referred to.

6 HHJ Blair QC refused Halo's application for permission to appeal. Halo did not renew that application to the Court of Appeal. It is common ground that Halo complied with its contractual obligations (and therefore with the Order) so far as concerns Bars. It is also common ground that Halo did not comply with paragraph 1(b) of the Order, which relates to Bites. In response to an order placed by Perkier in February 2019, it supplied the quantity ordered, albeit late, but a substantial proportion of the product was of such poor quality that it was unsaleable. Nothing at all was supplied in response to orders placed by Perkier in March and May 2019.

7 In those circumstances, Mr Daniel Saoul QC, for Perkier, says that the failures to comply with the Order amount to contempts of court and seeks to commit Mr Tague to prison and/or to sequester Halo's assets. For their part, Mr Mohammed Zaman QC and Mr Shakil Najib, for Halo and Mr Tague, say that a failure to comply with an order does not amount to a contempt of court if compliance is impossible. They submit that compliance *was* impossible here, because the recipes set out the specification annexed to the Order were either too abrasive or too sticky for the machine they had purchased. These recipes, they say, caused the fingers on the machine's rollers to degrade, shedding plastic into the food mix, which might have made the food produced unsafe.

The law

Contempt of court

8 In *Masri v Consolidated Contractors Ltd* [2011] EWHC 1024 (Comm), Christopher Clarke J considered the *mens rea* required to establish contempt of court arising from the breach of an order. Having reviewed the authorities, he concluded as follows at [150]:

> 'In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach…'

At [154]-[155], he held that it was not necessary to show any direct intention to disobey the order and noted that there were good reasons of public policy why this should be so. This decision has been consistently applied since: see e.g. *McCann v Bennett* [2013] EWHC 283 (QB), [127] (Tugendhat J); *Taylor v Van Dutch Marine Holding Ltd* [2016] EWHC 2201 (Ch), [56] (Warren J).

9 Each of the three elements identified by Christopher Clarke J must be proved to the criminal standard: *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411, [2013] 1 WLR 1331, [51]-[53] (Rix LJ, with whom on this issue Toulson and Maurice Kay LJJ agreed).

10 In *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch), the respondent said that it was impossible to comply with an undertaking given to the court. Briggs J said this at [32]-[33]:

> '32. …I accept the thrust of Mr Grant's second submission that failure to perform an impossible undertaking is not a contempt. The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order: see *Adam Phones v. Goldschmidt* [1999] 4 All ER 486 at 492j to 494j.
>
> 33. Nonetheless, even a mental element of that modest quality assumes that the alleged contemnor had some choice whether to commit the relevant act or omission. An omission to do that which is in truth impossible involves no choice at all. Failure to comply with an order to do something, where the doing of it is impossible, may therefore be a breach of the order, but not, in my judgment, a contempt of court.'

11 In *Westminster City Council v Addbins Ltd* [2012] EWHC 3716 (QB), Males J set out this passage and went on to consider at [48] '*whether this principle of impossibility should be extended to a case where compliance with the order is not impossible but is difficult or inconvenient*'. At [75], he said this:

> 'The question then arises whether it would have been possible to comply with the order within the deadline if a determined effort had been made to do so. However, defendants who in fact made no serious attempt to ensure compliance with the deadline are not in a strong position to persuade the court that such compliance would have been impossible. As it is, I do not accept that substantial compliance would have been physically impossible. It would have been a substantial task and would have required the commitment of much greater resources… However, the defendants had numerous employees who could have been employed on this task…'

At [76], Males J concluded:

> 'It may be that they did not positively intend to breach the order, but they knew that this was the probable (indeed on their own case, inevitable) consequence of the failure to ensure a more determined effort to comply.'

At [77], he referred to the passage quoted above from Briggs J's judgment in *Sectorguard* and noted:

> 'The reason why a failure to perform the impossible does not constitute contempt is because it involves no element of choice. A defendant who is ordered to do something impossible will inevitably fail, however hard he may try.'

On the facts of the case, Males J held that the impossibility principle did not avail the defendants.

12 The authorities to which I was referred do not in terms decide who bears the burden of proof on the question of impossibility. Mr Saoul submitted that impossibility is in the nature of a defence and should be proved by a defendant to the civil standard. He draws attention to the language used by Males J in the *Addbins* case ('defendants… are not in a strong position to persuade the court'), which he says is consistent with the burden of proof being on the defendant. He refers in addition to *Reynolds v Long* [2018] EWHC 3535 (Ch), in which Rose J at [50]-[55] examined the evidence put forward by a defendant alleged to be in contempt before rejecting the suggestion that compliance was impossible.

13 Mr Zaman, for his part, submits that, as a matter of principle, the fact that it is possible to comply with the order should be regarded as an essential ingredient of contempt. That being so, the position is similar to that which applies in criminal law: the respondent bears an evidential burden; but once this is satisfied the burden of proving that compliance was possible passes to the applicant and the standard of proof is the criminal standard: see by analogy *Phipson on Evidence* (19th ed.), §§6-09 and 6-16, setting out the general rule in criminal law. One of the cases mentioned there is *R v Bennett* (1979) 68 Cr App R 168, where the Court of Appeal applied the general rule to impossibility in cases of common law conspiracy.

14 In my judgment, Mr Zaman is correct on this point. Contempt of court, whether criminal or civil, was at common law a misdemeanour: see *Dean v Dean* [1987] 1 FLR 517, per Neill LJ, cited in *Arlidge, Eady & Smith on Contempt* (5th ed.), §12-51. That, together with the fact that its potential consequences include imprisonment and other penal sanctions, is why its elements must be proved to the criminal standard. In *Sectorguard*, Briggs J reasoned that a person who has no choice, because compliance with the order is impossible, does not have even the modest *mens rea* required for contempt. It is for the applicant to prove to the criminal standard that the respondent had the necessary *mens rea*. In a case where the respondent says that compliance was impossible, and there is *some* evidence to that effect, *mens rea* is in issue and it should be for the applicant to prove to the criminal standard that compliance was possible, in the sense that the respondent had a choice about what to do. That result is consistent with the general rule in criminal law.

15 In the vast majority of cases, it will not be difficult for the applicant to prove that compliance is possible. In general, an injunction will not be granted if it would be impossible to comply with it. Furthermore, as the above cases show, it is not necessary to show that compliance would have been easy or convenient or inexpensive. Court orders must be complied with even if compliance is burdensome, inconvenient and expensive. What has to be proved on a committal application, in a case where the respondent has adduced evidence that compliance would be impossible (and so has discharged the evidential burden), is simply that compliance was possible. I would prefer not to qualify the word 'possible' with any adverb such as 'physically', because it seems

to me that there might be other kinds of impossibility – such as legal impossibility, for example – that might result in a person having no choice, in the relevant sense, about how to act.

16 There is, in my judgment, nothing in the authorities to which Mr Saoul referred that is inconsistent with this conclusion, if the reasoning in those authorities is considered as a whole. In *Addbins*, the passage quoted above from [76] of the judgment shows that breach of the order was, on the respondent's own case, the '*inevitable'* consequence of their failure to make a more determined effort to comply. That being so, the allocation of the burden of proof did not matter and so was not directly addressed. In *Reynolds v Long*, Rose J's reasons make clear that she regarded the case as a clear one. Again, there is nothing in what she says to suggest that the allocation of the burden of proof would have made any difference to the outcome.

Applications to vary or discharge injunctions

17 It is important to bear in mind that many of the matters the subject of submissions before me were also in issue before HHJ Blair QC. This is not an appeal from his decision. In considering whether to vary or discharge the Order, I must therefore start from the assumption that the Order was justified when made, for the reasons given by HHJ Blair. As was pointed out by Buckley LJ (with whom Shaw and Oliver LJJ agreed) in *Chanel v FN Woolworth & Co Ltd* [1981] 1 WLR 485, 492-3:

> 'Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter.'

18 What counts as a significant change of circumstances is, of course, fact-specific. In principle a change of circumstances could, if significant, relate to any of the elements material to the grant of an interlocutory injunction: the assessment whether there is a serious issue to be tried, the balance of convenience or any other factor relevant to the exercise of the discretion to grant the remedy (including the conduct of the parties).

The contempts alleged

19 The contempts alleged in Perkier's Application Notice are as follows:

> '1. Breach of paragraph 1b of the Order in failing to manufacture and deliver to the Claimant the food product Perkier Bites according to the Finished Product Specifications set out at Schedule C to the Order in the quantities ordered by way of Purchase Order PO 1164 dated 1 February 2019, either promptly or at all.
>
> 2. Breach of paragraph 1b of the Order in refusing, on 14 March 2019, to produce any further Perkier Bites until 25 March 2019.
>
> 3. Breach of paragraph 1b of the Order in failing to manufacture and deliver to the claimant the food products Perkier Bites according to the Finished Product Specifications set out at Schedule C to the Order in the quantities

> ordered by way of Purchase Order PO 1177 dated 8 March 2019, either promptly or at all.
>
> 4. 'Breach of paragraph 1b of the Order in failing to manufacture and deliver to the Claimant the food product Perkier Bites according to the Finished Product Specifications set out at Schedule C to the order in the quantities ordered by way of the Claimant's solicitors letter dated 9 May 2019 (sent 10 May 2019) either promptly or at all.'

The evidence

Overview

20 Perkier's evidence of fact was given by Dr Steven Turner and Miss Ann Perkins, its founders and directors. Halo's evidence of fact was given by Mr Tague, its Managing Director. Expert evidence was given by Dr Duncan Campbell for Perkier and Mr Sterling Crew for Halo and Mr Tague. There was a series of videos referred to in the evidence and in submissions, which were given to me on memory sticks and which I viewed.

21 Where there has been a conflict of oral evidence about what was said or done on particular occasions, I have applied the approach of Leggatt J in *Gestmin SGPS SA v Credit Suisse Securities (Europe) Ltd* [2013] EWHC 3560 (Comm) at [15]-[21] and summarised at [22] as follows:

> '…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'

These observations have been relied upon by other judges and endorsed in the academic literature: *Blue v Ashley* [2017] EWHC 1928 (Comm), at [68].

22 There was a great deal of documentary evidence. I refer only to what I consider to be the documents of greatest importance evidentially. Likewise, I have referred only to those parts of the oral evidence which I consider particularly significant.

23 I now consider the key evidence as it relates to each of the alleged contempts and record my factual findings in relation to that evidence.

Alleged contempt 1: failing to satisfy the February PO promptly or at all

24 It is not necessary to rehearse the history of these proceedings prior to the hearing on 6 February 2019 before HHJ Blair QC. He circulated a draft judgment on Friday, 8 February 2019. On the following Monday, 11 February 2019, Dr Turner emailed Mr Tague. In relation to Bites, he said this:

> 'Bites; We are out of stock and need to get back into supply ASAP with in-spec product. Purchase Order 1164 for Perkier Bites (re-attached for convenience) is due for delivery on 15/02/19. As we are OOS [out of stock] on all flavours our priority is to get back in-stock ASAP so we can recommence supply to our customers. To assist with this, please arrange to produce 2 pallets (616 cases) of each flavour this week. The balance of the PO [purchase order] is needed for collection as early as possible next week. Please advise.'

The reference to Purchase Order 1164 was a reference to an order placed on 1 February 2019 for Bites to the value of £36,610 excluding VAT ('the February PO').

25 Mr Tague responded by email on 12 February 2019 indicating that he had a certain amount of stock on the premises and offering to supply that. He also noted that the forecast had doubled, that it would be necessary to employ people to work the line and that the earliest date by which further Bites could be produced was 4 March 2019. In oral evidence, Mr Tague gave another reason for not starting production at this stage: the draft judgment was under embargo, so he ought not to not do anything that might reveal the outcome.

26 The Order bears the date of 15 February 2019, but both parties agree that it was not in fact pronounced until 21 February 2019, the date when the judgment was formally handed down and the Order sealed. (The date for hand-down appears to have been delayed by the judge.)

27 Mr Saoul accepts that conduct prior to the making of the Order cannot constitute contempt, but is nonetheless critical of Mr Tague's inaction following Dr Turner's email of 11 February 2019. There was, Mr Saoul submits, nothing to stop Mr Tague from instructing his team to start production without informing them of the contents of the judgment. For my part, I do not think it would be fair to draw inferences about Mr Tague's attitude to compliance from his inaction at this stage. No doubt it would have been possible to give instructions to his team without breaching the embargo, but he was not obliged to do anything until the Order was pronounced. Moreover, although the explanation was not advanced in Mr Tague's written evidence, I accept his oral evidence that his inaction at this stage was attributable to an honest belief that, because of the terms of the embargo, he should do nothing at all that might reveal the outcome before the judgment was formally handed down.

28 As to what happened next, the salient points are uncontroversial. Halo delivered three pallets to Perkier on 27 February 2019. Dr Turner tested two cases from the top, middle and bottom of each pallet and found that they did not conform to the specification. He emailed Mr Tague that day rejecting the goods. There was further correspondence in which the parties disputed whether the Bites did or did not conform to the specification and about whether the specification formed part of the contract. There was a further

production run and a consignment of Bites was supplied in the week commencing 4 March 2019. Dr Turner and Miss Perkins spent two and a half days that week in the warehouse they used, sampling and evaluating what has been supplied. They concluded that 40% of the stock was out of specification in that many of the Bites were crumbly and misshapen.

29 Mr Tague initially suggested that they might have been damaged in transit. This was based on something he had been told by Vicky Colton, Perkier's Supply Chain and Finance Executive, who worked for the transporter. But he accepted in cross-examination that this could not account for as high a proportion as 40% of the Bites being out of specification. It followed, he accepted, that what Halo had produced was of inadequate quality. This was never remedied. So, Halo and Mr Tague accept that there was a breach of the Order. The real question is whether Perkier have proved to the criminal standard that compliance with the order was possible at this stage. I shall come to that later.

Alleged contempt 2: refusing on 14 March 2019 to produce any further Bites until 25 March 2019

30 Perkier placed a further purchase order on 8 March 2019 ('the March PO'). It is common ground that Halo did not start producing Bites for this order until 25 March 2019. In his Affidavit, Mr Tague said this was because Perkier had unilaterally changed the packaging without giving Halo sufficient notice. There is email correspondence about the packaging. On 18 February 2019, Halo were advised by Perkier's printers (Clifton) that Perkier was changing the artwork on its packaging. On 19 February 2019, Dr Turner emailed Halo attaching some alterations to the design of the packaging and making clear that the film on which these designs were to be printed was also to change. Mr Tague responded on 26 February 2019 expressing concerns that '*we are not aligned on the process regarding this change*' and asking a number of questions about logistics. He emailed Dr Turner again on 27 February 2019 chasing an answer, which Dr Turner gave later that day. There was further correspondence including an email from Mr Tague on 12 March 2019 expressing concern that Perkier was expecting Halo to complete an order of 5,850 cases to be delivered by 29 March when the new film had not been trialled on the relevant machine and Perkier had not confirmed when it would arrive. Later that day (12 March 2019), after a further exchange, Dr Turner made clear that he wanted Halo to trial and approve the new film that week, but if they could not, he would simply use the old film. He said that he did not understand why the packaging had an impact on the production schedule for Bites. The correspondence continued on 13 March 2019, when Mr Tague said that the delivery date (29 March 2019) was '*totally unrealistic*' because of the unavailability of film stocks. Dr Turner replied on the same day, saying this:

> 'As far as we are concerned, there is a shortfall in our previous order because a lot of the product is poorly made that it is unsaleable. We'd urge you to start production asap using the film you have on-hand and insuring [sic] the production process is properly controlled so that the product is made and bagged to the standards defined in the QAS which are part of the product specifications, the same quality standard as was achieved in the production of 78,000 bags in November and December.'

There was then a further exchange, in which Mr Tague said that the production run was being put at risk because of Perkier's decision to change packaging said that Dr Turner

replied that this was not so, because Perkier would not change the packaging without Halo's agreement.

31 In cross-examination, it was put to Mr Tague that he had enough packaging film to produce more than half of the peanut Bites and slightly less than half of the salted caramel Bites, but he said that it would have been very difficult to do this, given the need to book the labour needed for a production cycle 3 weeks in advance. When it was put to him that it would have been '*difficult but not impossible*' to begin production earlier than 25 March 2019, Mr Tague answered, '*Maybe*.' He accepted that starting production on 25 March 2019 made it inevitable that Halo would be unable to supply the product on 29 March 2019, as required. He was aware that this would '*in theory*' put Halo in breach of the Order.

32 I find on the basis of Mr Tague's evidence that Halo could have attempted to begin production of Bites sooner than it did. It would have been inconvenient to do so because it would have been necessary to divert labour from orders for other customers, but he could have done it. However, that is not to say that, if Halo had in fact attempted to begin production earlier, it would have been successful. To understand what would have happened if Halo had begun production before 25 March 2019, it is necessary to consider what happened when it did begin production on that date.

Alleged contempt 3: failing thereafter to satisfy the March PO

33 There was a production run of the salted caramel Bites at Halo's premises on 25 March 2019. Dr Turner attended. In his Affidavit, Mr Tague described the outcome as follows:

> '33… Halo was unable to produce any bites which were acceptable either to Mr Turner or indeed to us. The balls were not forming correctly, and those that did were crumbling and brittle. Mr Turner checked all production records, process settings and even went through the raw materials (he wrongly accused halo of changing the syrup, as he believed it looked different). He accused Halo of substituting ingredients to deliberately sabotage the trial. This was not true, and an extraordinary thing to say…
>
> 34. He then checked all further process parameters, but they too were found to matches expectations. Eventually, after 10 hours of attempted production on 25th March 2019, and having caused huge disruption to Halo's operation, Mr Turner agreed that production attempts should stop for the day as we were going around in circles. No acceptable bites had been produced. The attempts made on that day when recorded and there is a video which it would assist the court to watch. This shows the efforts that Halo made, and the results. Different temperatures for the mix initially inserted into the machine were tried, at the request of Mr Turner, but none produced bites of a quality which was satisfactory. The cohesion of the mixture and the effect on the machine are obvious on this video as they were to those present.'

34 On 27 March 2019, Richard Cox, Halo's Commercial Director, emailed Miss Perkins and Dr Turner.

> 'Following on from the salted caramel bites production run on Monday, it was agreed that although the bites form a ball at circa 30 degrees the bite was

> not acceptable as it could turn to crumb quite easily. We (Perkier and Halo Foods) agreed that the bites were inconsistent and not acceptable to Perkier as saleable product. After numerous trials at different temperatures circa 33 to 42 degrees, the bites were not forming so we both agreed to stop production and look at re-developing the recipe.
>
> …
>
> So as we both agreed there are two fundamental points that have to be adhered to if we are to produce on an industrial scale, the three Bite products:
>
> 1. The product has to run through/on the Kruger ball machine – we discussed an efficiency target of minimum 70%
>
> 2. We (Perkier and Halo foods) will need to change (re-develop) the current bite recipes and come to an agreement on the mouth feel of chewiness and crispiness. We agree this he is a usp of the initiative.'

35 On 28 March, Mr Cox emailed Miss Perkins and Dr Turner, saying this:

> 'We have stopped production of the Cacao & Orange Bites as the product has not passed Halo's internal QA inspections, as you know we undertake hourly line inspections at the bagger plus we also check the quality of the product coming of the trays and we are finding that some bites are turning to crumb quite easily. We have taken the decision to scrap 200 kgs of finished bites.'

36 On 29 March 2019, Dr Turner sent an email to Mr Cox headed 'Without Prejudice' (but which all parties agreed I could consider). He said this:

> 'In our meeting, we agreed to work with Halo on a without prejudice basis to modify the recipes and as we've pointed out, the process will need reviewing too. The objective is for Bites that are easier to produce to a consistent standard at scale. Based on what we understand, temperature control of the mix plays an important role in how well it runs through the machine.'

37 Later the same day, Dr Turner sent another email to Mr Cox asking how production of the cacao & peanut Bites had gone and noting that the immediate priority was the salted caramel Bites.

38 On 1 April 2019, Emma Davies of Halo emailed Dr Turner in the following terms:

> 'I'm just out of the factory with the team as we have been working on the Caramel bites.
>
> Today has been exhausting and frustrating as we have had no success with recipe V5A, despite numerous variation and iterations, which we agreed should be the starting point for the redevelopment work. We have tried reducing boil temperatures
>
> And testing different level of dates but the work had either been very wet and balls not formed or formed balls which as soon as you apply any pressure shatter into little pieces. I think we have exhausted options around the V5A

> unless we can look at different ingredient percentages or changing the ingredients. Do you have any thoughts around this? Is there anything you would like us to try?
>
> We have Wolfgang from Kruger coming over on Wednesday to see if he can help us on the equipment and if there is anything that can be improved from that perspective.'

39 Wolfgang Sander, an application engineer from Kruger, came to Halo's premises on 3 April 2019. There is some controversy about was said by him. In my judgment, the best evidence of what Mr Sander said is to be found in his summary report, which he sent by email on 5 April 2019, shortly after his visit. The report is illustrated with photographs and is obviously written by Mr Sander himself in perfectly intelligible but less than perfect English. It does not appear to have had input from anyone else. Mr Sander said this:

> 'Halo has no flow of production in the GFT, because the binder is too stable and sticky. When some stuff is moved through the system, it sticks into the cavities and will build a second or third time "overpressure". That force eats our fingers/rollers fast.'

There were then some photographs of the machine's rollers, and in particular the fingers on them, which had been substantially worn away. Mr Sander continued:

> 'That is the recipe, but even the machine still works with to [sic] little airflow… this incorrect installation exists since my last visit.'

Mr Sander made clear that the installation of the stamps was also wrong and that Halo would need a new roller to feed the machine. He continued:

> 'A free-falling, crumble mix is the main recipe/material design to feed the GFT perfectly.'

40 On 23 April 2019, Emma Davies of Halo emailed Klaus Scheel and Wolfgang Sander at Kruger. She said this:

> 'Following on from the communication with James and Wolfgang's visit you have probably realised we have some disagreement with our customer Perkier.
>
> Perkier just won't except that the recipe will not work in the GFT and are inferring that there is an issue with the equipment. We don't believe this to be the case, we think it has been very clear from the start what will and won't work in the GFT.
>
> We want to make this clear to Perkier and need your help, I have attached a slightly more forceful report which we have taken from the recent communications, would you be able to transfer to Kruger headed paper and resend to us a report from Wolfgang's visit.'

41 Kruger agreed most of the changes made, with some amendments. The final report included the addition of several statements not found in Mr Sander's summary – in particular, the following:

> 'The rollers in the GFT 0401 are designed to run for a minimum 8,000 hours and should be changed annually. The rollers seen have only been used for 450 hours showing that there has been significant damage to the fingers with the abrasive nature of the recipe causing erosion.
>
> K&S wish it noted that this issue is serious due to the fact that it could be an indicator for **foreign body contamination**. The fingers are shown below measuring less than 10 mm illustrating just how much foreign body contamination must have occurred.
>
> …
>
> The recipes developed for the machine are simply not what the machine was designed for. The dense nature of the mix, high levels of big fruit particles and abrasive nature of nuts are all contrary to producing a free-flowing mix which is essential for this machine to process the mix properly and consistently.
>
> Recommendations:
>
> 1. A new binder should be developed with a lower BRIX target to enable the homogenous mix to be more free-flowing and not become too stable in the hopper…
>
> 2. Future recipes need to be developed using similar size particulates (especially smaller fruit chunks) and less abrasive materials i.e. soft and nuts (cashews) or soft fruits.
>
> 3. New feeding rollers will have to be purchased due to the erosion of the rollers on the GFT caused by the recipe not filling the cavities and friction building up in the hopper. For food safety reasons, continuing within an erosive recipe causing this much damage to the fingers is not acceptable…' (Emphasis in original.)

42 It is clear from this that Halo was trying to make the final report more 'forceful' so as to bolster its position in its dispute with Perkier. But I reject the suggestion, put to Mr Tague in cross-examination, that Halo were trying to get Kruger to say things they did not believe. Mr Sander had said in his first summary report that he thought there was a problem with the recipe. Much of what is in the final version is simply an elaboration of that. Insofar as new elements were introduced, Emma Davies's email indicates that her suggestions were based on communications between Halo and Kruger and a comparison of the version she sent him and the version he sent back (particularly as regards the food safety issue) shows that he had considered carefully what he thought it was fair and accurate to say.

43 It is common ground that Halo's Kruger machine had been capable of producing Bites in November and December 2018 (when there had been no problems with the quality of the

finished product). It had been capable of producing *some* Bites in early 2019 (when 60% of the product was saleable). But by 25 March 2019, it is common ground – and is in any event clear from the evidence – that, the Kruger machine was not capable of producing Bites at all. This progression from good to poor performance is what would be expected if, as Mr Sander said in his original summary report, the fingers on the distribution rollers were being gradually '*eaten*' by the force of the mixture being fed through the machine.

44 It was put to Mr Tague that the state of the Kruger machine as at 25 March 2019 could be explained by Halo's failure properly to maintain it. This was relevant, Mr Saoul submitted, because a party cannot rely on his inability to comply with an order if that inability is caused by his own default. It is not obvious to me that this proposition is correct, at least in a case where the default occurs before the order is made. There may be situations where, because of something the defendant has done (but should not have done) or not done (but should have done) prior to the making of the order, by the time the order is made, it is not possible for him to comply with it. I am far from convinced that, in such situations, failure to comply with the order would amount to a contempt. But I do not need to decide the point because in my judgment the evidence does not establish any relevant default on the part of Halo with respect to the maintenance of the Kruger machine.

45 The contrary suggestion, which was put to Mr Tague in cross-examination, was that Halo was at fault for not inspecting the fingers on the distribution rollers and for not replacing them when it was obvious that they were wearing down. As to that, the operating manual for the Kruger machine provided, in the 'Maintenance/Inspection' section, as follows:

> 'In cases of wear and tear, particularly of wearing parts, it is necessary to decide whether the part will remain fully functional until the next inspection date. Even if there is only some doubt about the continued use of components, it must undergo proper repair or replacement immediately.
>
> …
>
> Components made of rubber or plastic must be examined exactly and must be replaced if they show any dimensional deviations due to material swelling or shrinking, if there [sic] any changes in hardness or damage to the surface (e.g. cracks or porosity).'

46 If that stood alone, it might suggest that there was an obligation to check every component made of plastic and replace it if worn. But it does not stand alone. Immediately following these passages, there is another heading, 'Service intervals for single-shift operation', under which the following appears:

> 'The operating safety and service life of the machine depends to a crucial extent on the required inspection and service intervals being observed and the necessary work being carried out properly.'

There are then tables showing which items have to be inspected daily, which every 2 months, which every 6 months and which every 12 months. The fingers on the distribution rollers do not appear on this schedule. Thus, it was Mr Tague's evidence that Halo's engineers did not understand that the fingers on the distribution rollers were a

'*wearing part*'; and they did not know until Mr Sander visited on 3 April 2019 that the fingers were worn down.

47 Reliance was also placed on a document entitled 'Global Standard Food Safety' from an entity called BRC Global Standards, which produces detailed food safety standards for food manufacturers and audits manufacturers to ensure that they are meeting these standards. Under the heading 'Maintenance', this it said this:

> 'In addition to any planned maintenance program, whether there is a risk of product contamination by foreign bodies arising from equipment damage, the equipment shall be inspected at predetermined intervals, the inspection results documented and appropriate action taken.'

As I have said, however, neither Mr Tague nor Halo's engineers understood that the fingers on the distribution rollers gave rise to any risk of product contamination by foreign bodies until Mr Sander's visit on 3 April 2019.

48 In my judgment, Halo cannot fairly be criticised for failing to inspect the fingers on the distribution rollers in circumstances where the operating manual did not list them as an item that required regular inspection and Halo did not know that they were a '*wearing part*' or (therefore) that they gave rise to a risk of contamination. Accordingly, it would not be fair to say that Halo had by its own default disabled itself from complying with the Order.

49 Following Mr Sander's visit on 3 April 2019, Halo received replacement rollers from Kruger on 19 April 2019, but it is common ground that it did not then fit them to the machine and did not then produce Bites to satisfy the March PO. Mr Tague said that this was because he understood from Mr Sander that it was the recipes that were causing the fingers on the distribution rollers to degrade. Instead, Halo instructed Mr Crew, a food safety expert, to advise.

50 In the meantime, Perkier had been in touch with Kruger. In his first affidavit, Dr Turner explained that he had had meetings with Kruger on 7 and 23 May 2019 in order to investigate the conclusions expressed in Mr Sander's report. (Perkier did not proactively disclose any of the emails passing between it and Kruger. Halo had to obtain them by threatening an application for third party disclosure against Kruger.) They show that one of Perkier's purposes in the discussions with Kruger was to obtain a machine for itself. They also show discussions about changes to the recipe. The first email in which Perkier expressed an interest in procuring a new machine was on 10 April 2019. There were also emails between Perkier and another manufacturer, Wholebake, to which Perkier was considering moving some or all of its Bites and Bars business. (Again, these emails were not disclosed by Perkier. Halo had to obtain them by seeking third party disclosure against Wholebake.) Emails from Perkier to Kruger on 9 May 2019 and from Perkier to Wholebake on 19 May 2019 show that scenarios were being considered in which Perkier or Wholebake would rent or buy a new machine from Kruger. Further emails in May and June 2019 make clear that this remained under consideration, but it was subject to trials of new recipes at Wholebake.

51 At the same time as these discussions were taking place, Kruger prepared and issued a '*clarification*' to its earlier report. This was necessary, it was said, '*because [Kruger] is not content with some phrasing of the report as it might be interpreted falsely*'. The

evidence makes clear that the clarification report followed discussions between Kruger and Perkier. The '*clarification*' report said this, under the heading '*Recommendation*':

> 'Our main concern of the original report here is at point 3, concerning the wear of the fingers, as our understanding at this point is that not just the recipe caused the high amount of abrasion to the rollers but mainly the wrong handling of it.
>
> As the preparation of the mix includes the heating of the binding agent, which in turn leads to lower viscosity, our strong suspicion is that an increased batch size compared to what was tested is the main problem.
>
> When starting production, the batch may still be warm and runny. Over time though, the parts of the batches that are used later will already have cooled down and set, which leads to less flow inside of the machine which, in turn, highly increases the abrasiveness of the mix and the wear of the rollers.
>
> This means, in our opinion the preparation process is something that must be considered as a factor that influences efficiency and wear and adaption [sic] will lead to improvement.'

Under the heading '*Note concerning the wear of machine parts*', it added this:

> 'As far as the wear of machine parts is concerned: The wear of the fingers is inevitable and its form was a consideration throughout the design process of the machine. All parts that have contact with the product throughout the production process within the machine are FDA certified and food save. Consumption of eroded particles does not cause any danger to human health. Especially when it comes to the rollers, tiny particles that may be eroded will not be digested by the human body.
>
> Also, in the unlikely event of bigger chunks getting into the product, those would be metal detectable.
>
> The machine was designed to produce food, making it a priority for us to ensure that there are no safety issues.'

Under the heading '*Further recommendations*', the report continued as follows:

> 'K&S is optimistic that minor modifications to both recipe composition as well as preparation process will help improve the material flow inside of the machine,
>
> Decreased wear of the machine parts and increase production efficiency. Therefore, K&S would be happy to help in the near future by visiting the production sight [sic] again to provide advice on the machine parameters and preparation process to increase efficiency and decrease wear.
>
> Our strong wish is to get together with all parties involved in order to find a mutually satisfying solution for the current issues.'

52 Mr Crew came to Halo's premises on 13 May 2019. His first expert report, dated 19 July 2019, sets out what he found. In summary, he noted that the fingers on the distribution rollers were '*badly worn and abraded, to such an extent as to pose a significant risk of foreign body contamination*'. He noted that he had himself removed two loose pieces of plastic using '*a firm touch*'. These, he said, would certainly have come loose in a vigorous mixing process. He continued:

> 'It is my opinion that the recipe, manufacturing process and equipment are contributing to excessive wear of the plastic mixing fingers resulting in a significant risk of contamination of plastic into the cereal balls. It is noted that the Perkier Foods product is made up of a combination of a densely abrasive mix of fruit and nuts. This combination in my opinion poses a significant risk of contamination to the product as pieces of plastic could make their way into the finished product.'

53 There was then a discussion of the requirements of EU Regulation 854/2004 and the Hazard Analysis and Critical Control Point ('HACCP') principles. Mr Crew was not convinced that the metal detector would be sufficient to detect plastic contamination unless the plastic was dosed with metal. He went on to advise that two studies be undertaken: a '*full root cause analysis of the potential contamination of plastic*' and a capability study to assess what modification to the recipe, equipment and/or process was required. In answer to questions, Mr Crew explained that it would have been possible to do the capability study within a day. The capability study was not in fact undertaken.

54 As I have said, it was not possible for Halo to comply with the March PO until the fingers on the distribution rollers had been changed. The evidence shows that the new rollers were received by Halo from Kruger by 19 April 2019. After that date, however, there was no attempt to fit them and, therefore, no attempt to comply with the March PO. Mr Saoul points out that, so far as the period between 19 April and 13 May 2019 is concerned, Halo cannot point to Mr Crew's conclusions as providing even a subjective explanation for not producing Bites, because Mr Crew did not attend until 13 May 2019. I do not agree. Mr Tague said in evidence that he believed, on the basis of what he had been told by Mr Sander, that there was a problem with the recipe. The exchanges between Halo and Kruger certainly show an attempt to bolster Mr Sander's original report, but – as I have found – not a bad faith attempt to cause Kruger to say things it did not believe. I find as a fact that Mr Tague and therefore Halo believed that the recipes were causing the fingers on the distribution rollers to degrade and was concerned that this might be leading to contamination. That is why he instructed Mr Crew; and it is also one reason why it did not immediately try to fulfil the March PO.

55 The foregoing findings deal with Mr Tague's subjective beliefs in the period leading up to Mr Crew's visit. They do not, however, address the question whether compliance with the Order was, objectively speaking, possible – or (more precisely) whether Perkier has proved to the criminal standard that it was possible. I shall turn to that shortly.

Alleged contempt 4: failure to fulfil the May PO

56 The May PO was placed by Perkier's solicitor's letter of 9 May 2019. It is common ground that it was never satisfied. Mr Saoul submits that the evidence shows that Halo never fitted the replacement rollers it had received from Kruger. Nor did it explore the possibility of fitting the stainless steel rollers which Mr Crew had suggested as an

alternative and which Kruger has since confirmed are available. Mr Saoul points out that, even when on 10 May 2019 it received from Kruger the 'clarification' report, which suggested among other things using a smaller batch size, it made no attempt to resume manufacture or to seek further advice from Mr Sander, which had been offered. Even after receiving Mr Crew's report on 19 July 2019, Halo did not instruct Mr Crew to carry out the root cause analysis or capability study, which in cross-examination he said could have been concluded in a matter of hours. Mr Tague did not instruct his team to resume production using smaller batch sizes. In fact, Mr Saoul submits, there was no attempt to explore alternative production methods until September – and even then, the attempts were in truth directed at undermining Perkier's evidence for this application, rather than at complying in good faith with the Order.

57 Again, it is not disputed that Halo failed to meet the May PO. It is Halo's and Mr Tague's case that this was because the recipes did not work. Although new rollers had been supplied, Halo and Mr Tague believed that if they fitted these rollers and started production using the original recipes, the problem would recur and the fingers on the rollers would become abraded again, with the risk that the product would become contaminated.

58 In the light of the oral and documentary evidence as a whole, I find the following facts:

(a) Mr Tague honestly believed, on the basis of what he had been told by Mr Sander and Mr Crew, that the original recipes were unsuitable for the Kruger machine because they would cause the plastic fingers on the rollers to become abraded and that this could give rise to a risk of contamination.

(b) He did not, however, take any steps either to carry out the root cause and capability assessments recommended by Mr Crew or to attempt production by fitting metal rollers. So, whilst the failure to fulfil the May PO was initially attributable to an honest belief that the recipes were not suitable, Mr Tague made no strenuous attempts to find a way of complying with the Order. This was because Halo was by this time in dispute with Perkier, the parties' respective positions were becoming entrenched and Mr Tague was focussed on bolstering his position in the dispute rather than finding ways to comply with the Order.

Perkier's dealings with Kruger and Wholebake

59 Redacted emails passing between Perkier and Wholebake and between Perkier and Kruger were disclosed at a late stage in the preparation for this hearing as a result of the threat of third-party disclosure applications by Halo. Unredacted versions of these emails were later disclosed by Perkier. Mr Zaman placed considerable reliance on these documents. He submitted that, taken as a whole, they show that: (a) Perkier planned to acquire a Kruger GFT machine from at least 10 April 2019 in order that Perkier could transfer the production of Bites and Bars from Halo to Wholebake; (b) Dr Turner devised and executed a plan to 'rent to buy' a Kruger GFT machine involving Wholebake; (c) Dr Turner and Kruger developed new '*workable*' recipes for each of the three flavours of Bites that would be manufactured by Wholebake, whilst at the same time maintaining a pretence that the Court Order recipes worked; (d) Wholebake carried out manufacturing trials of Bars and Bites at its premises; (e) Perkier has entered into an arrangement under which it can have long-term access to the Kruger machine; (f) Wholebake have continued to manufacture Bites to the '*new*' recipe to Perkier's satisfaction and can also

manufacture Bars to Perkier's satisfaction; (g) Perkier's purchase of the Kruger machine has been deliberately deferred until after the conclusion of these applications in order to give the pretence that the arrangement with Wholebake is temporary only.

60 Before considering whether the evidence justifies these findings, it is necessary to say something about their relevance to the issues arising in these applications. Mr Zaman used the third-party disclosure to mount what may be fairly described as a full-frontal attack on the honesty and motives of Dr Turner and Miss Perkins and, therefore, of Perkier. That attack included vigorous criticism of Dr Turner and Ms Perkins for failing to disclose the correspondence with Wholebake and Kruger. Mr Zaman submitted that these points were relevant in three principal ways. First, the documents were relevant to the main issue on the committal application – whether compliance with the Order was possible – because they showed that Wholebake was also having difficulties with the original recipe and that Perkier accepted that changes were needed. Secondly, they showed that the injunction was no longer required, because – by contrast with the position when the Order was made – Perkier now had available an alternative machine on which it could produce Bites (and Bars). Thirdly, if, as Mr Zaman submitted, there was bad faith on the part of Perkier, that was a powerful factor relevant to the exercise of discretion, which should tell in favour of discharge of the Order.

61 Insofar as the newly disclosed documents discuss changes to the recipe, they are obviously relevant to the central question on the committal application – whether the original recipes were viable. Insofar as they bear on the availability of an alternative machine, they are also obviously relevant. Even though the stage of standard disclosure has not yet been reached, I consider that these documents should have been disclosed by Perkier together with the evidence it filed supporting the committal application. But I am not convinced by Mr Zaman's general attack on Dr Turner's and Miss Perkins's honesty. Having considered the correspondence as a whole, and having heard them both give evidence, I find that both of them gave essentially truthful accounts, albeit – as was also the case for Mr Tague – the importance to them of what was at stake in the dispute between Perkier and Halo led to their adopting perspectives that were sometimes less than objective.

62 In the light of these conclusions, it would be disproportionate to set out the correspondence *in extenso*. I summarise instead the key documents and the conclusions I draw from them. Emails between Perkier and Kruger beginning on 10 April 2019 and continuing in April, May and June 2019 show that Perkier was seeking to procure from Kruger a GFT machine. Initially this was by way of rental, but with an option to purchase. At the same time, emails between Perkier and Wholebake show that there were discussions about Perkier and Wholebake jointly acquiring the machine. It is plain that there were discussions from as early as 18 April 2019 with a view to Perkier working with Wholebake as a '*strategic partner*'. An email exchange on 31 May 2019 makes clear that both sides wished to secure an agreement by which Wholebake would produce Bars. It is clear from the terms of this exchange that the plan was for Wholebake to become the exclusive producer of Bars (see the reference in Ms Perkins's email of 31 May 2019 to Wholebake as '*our key supplier*' and in Mr Gould's email to Miss Perkins of the same date to the prospect of Perkins being '*happy to move the bars to us*'). Production trials for Bars took place at the end of July or beginning of August 2019 and an email on 8 August 2019 indicates that Perkier was pleased with these.

63 The Kruger machine was delivered to Wholebake's premises at the end of July 2019. The rental was paid jointly by Perkier and Wholebake. Extensions to the rental period were agreed. On 30 September 2019, Dr Turner wrote to Klaus Scheel of Kruger in these terms:

> 'We also want to purchase the machine and hope to be in a position to place an order very soon. We had expected everything to be settled by the end of this week but it seems it will take 1-2 weeks longer.'

Negotiations continued in October 2019. On 24 October 2019, Klaus Scheel emailed Dr Turner and Miss Perkins as follows:

> 'For us, there are currently only 2 scenarios:
>
> (1) The machine stays until at least the end of this year (be it through long-term rental agreement or purchase)
>
> (2) The machine is picked up and returned to Germany on Monday, October 28…
>
> Our rental agreement to end of December can be offered for 3000/week for nine weeks or until the end of January for 2850/week for 14 weeks.
>
> Please let me know your decision soon, as we have to inform the forwarder regarding the pick-up on Monday.'

Ms Perkins replied on 25 October 2019. The reply included this:

> 'Our understanding of our agreement with Joerg is that we will rent the GFT until Thursday 31st October when we will know the outcome of the negotiation and then either
>
> (1) Purchase the GFT in Corwen and potentially trade in the Halo GFT if it becomes Perkier property
>
> (2) Come to a longer-term rental agreement for the GFT to give Perkier and Wholebake security of supply/production for Perkier bites until our dispute is resolved with Halo. We anticipate a longer term rental to run to end 2020.'

Later that morning, Ms Perkins emailed Richard Shaw in the following terms:

> 'Perkier will underwrite the extension of the GFT for this week and next week at 3000 euro p/week. We are negotiating with Halo a settlement next week and we hope this will be successful – if we are not negotiating a longer term rental with K&S till the end of 2020 to give security of production and Perkier security of supply.'

64 Mr Zaman said that these emails, some of which were only disclosed during the trial, show beyond doubt that Perkier had the ability to secure a Kruger machine up to the end of 2020. This, he said, marked a fundamental and significant change of circumstances from the position when the Order was made. Miss Perkins was cross-examined on these

emails. She said that the reference to '*end 2020*' was a typographical mistake. She had meant to refer to the end of 2019, not the end of 2020. When asked how such an error could have been made twice, she suggested that it might have been the result of cutting and pasting, but she eventually accepted that that was an unlikely explanation, given the different terms of the two emails.

65 In my judgment, and contrary to Mr Zaman's suggestion, neither this passage of cross-examination nor the late disclosure of these emails demonstrates that Miss Perkins was being untruthful in her oral evidence. The emails on 25 October 2019 referred back to a conversation with Joerg Maskow of Kruger on 23 October 2019, which Miss Perkins described in an email to Mark Gould of Wholebake on the same day in these terms:

> 'We had a good discussion with Jorge this morning… Jorge will be making a new offer next week for a longer-term rental agreement (hopefully) offset against the cost of the machine, to end 2019 or end Jan 2020.'

In my judgment, this email – rather than the later ones – contains an accurate record of the true arrangement between Perkier and Kruger. The wording '*end 2019 or end Jan 2020*' is too specific to have been a mistake; and it makes sense that this period was being referred to as '*longer-term*' given previous emails in which Kruger had made clear that the rental of the machine was being extended week by week.

66 Nor do I accept that Dr Turner's written evidence was deliberately misleading on this point. It is true that, in his affidavit, he said that it had been in May 2019 (rather than April 2019) that Perkier had started to explore the possibility of renting (rather than buying) a Kruger machine. But the discrepancy in dates was not significant; and the precise details of the arrangement were not critical: the fact of the arrangement being explored with Kruger was deposed to, so Halo could (and did) seek further disclosure about it. When disclosure was sought, Perkier's solicitors replied on 3 October 2019 that '*correspondence leading up to the rental was between Kruger and Wholebake and our client does not have copies of the same*'. This was not accurate, because it omitted to mention the emails passing between Perkier and Kruger. But I accept that it was an error, not a deliberate attempt to mislead.

67 Considering the evidence as a whole, I accept Perkier's evidence that the arrangement they had with Kruger would allow them to continue to rent the GFT machine only until the end of 2019 or the end of January 2020 at the latest. It also is also plain, however, that Perkier was exploring the possibility of transferring its Bars business to Wholebake. As I have said, the correspondence should have been disclosed because it was relevant to the question whether there remained a need for the injunction to be continued. But although relevant to that question, it was not determinative of it. Perkier were entitled to explore alternative options in the hope or anticipation that the dispute with Halo might be settled on terms that included a release of Perkier from its obligations under the MA and MOU; and there is nothing in the correspondence which indicates that negotiations with Wholebake had progressed so far that it was possible to say that Wholebake was in a position to produce either Bites or Bars at the required scale.

68 The correspondence between Perkier and Wholebake and between Perkier and Kruger was also relevant insofar as it included discussion about changes to the recipes. On 15 April 2019, Klaus Scheel of Kruger emailed Dr Turner noting that '*the bigger date pieces could cause issues, especially concerning their high percentage in the recipes. Otherwise*

recipes seem good from what I can tell by just looking at the recipes'. On 16 April 2019, Klaus Scheel emailed again saying that '*the smaller date paste would definitely help to reach a consistent material flow and production process*'. There were then trials at Kruger's premises in Germany on 23 April 2019, following which Klaus Scheel emailed on 24 April 2019 in the following terms:

> 'You will see that the balls with bigger dates did not turn out well, whereas the balls that look good tend to have smaller date pieces inside. In the hopper view video, you will see how the mix sticks on the distribution rollers that are supposed to sprinkle the mix into the cavities. The cavities in turn were not or only rarely completed (see compression video).'

69 On 25 April 2019, Dr Turner emailed Klaus Scheel in these terms:

> 'Please confirm you will conduct small batch trials on 29th/30th April with smaller dates pieces and potentially adapting the binder to have less crystallised sugar and trial agave if this appears to help.'

70 On 26 April 2019, Dr Turner emailed Klaus Scheel again, asking whether Kruger was still doing small batch trials early next week as planned '*so we can understand if changing the date size and reducing the coconut sugar in the binder helps*' and suggesting use of agave in place of rice syrup. There was further correspondence about changes to the recipes – and in particular to the binding agents – on 30 April 2019.

71 There were further trials at Kruger's premises on 7 and 8 May 2019 and again on 23 and 24 May 2019 and in June and July. On 30 July 2019, Richard Shaw of Wholebake wrote to Florian Tampe of Kruger saying this:

> 'The biggest disappointment to me is Perkier! They are still modifying the recipes and process! These have been changing every day since we started! I was under the impression that the bites were a production product, have been in production at Halo and so on, but it seems they are still developing the products…
>
> Hopefully, they will eventually settle on a set of recipes and process.'

72 Mr Zaman submits that the fact that there had been 3-4 months of trials, with '*recipes changing every day*', is a strong indicator that the original recipes were unviable. Dr Turner's response to this, in cross-examination, was that the changes were minor and in any event were necessary because Wholebake's production process was different from Halo's in that Wholebake did not have packaging facilities on site, so the product had to be capable of being transported to a separate packaging facility. Mr Zaman has prepared tables showing the difference between the original recipes and the new recipes disclosed by Perkier in October 2019. There can be no doubt that the changes are more than minor. The significance or otherwise of these changes, however, is a matter that cannot be assessed without reference to the expert evidence.

The expert evidence

73 Mr Crew for Halo and Mr Tague was asked to prepare a report regarding potential food safety issues in relation to the manufacture of Bites by Halo. He had attended Halo's factory on 13 May 2019. His summarised his conclusions as follows:

> 37. The inspection of the equipment and review of documentation confirmed that, in my professional opinion, it would not be safe or legal for Halo to manufacture Bites without significant modification of the combination of the existing recipe, manufacturing process and/or equipment. The recipe is unsuitable for the machine in its current configuration and method of manufacture. It is possible that modifying the recipe along with modifications to the manufacturing process and equipment might reduce the potential risk of plastic contamination. This would involve conducting a root cause analysis and restarting the product development process and carrying out a capability study with new variables to the recipe and/or process and/or equipment. For this to be effective I would advise the involvement of the customer and the equipment manufacturer. This could be time-consuming.
>
> 38. It is my opinion that the plastic distribution fingers must not be used in their current condition as they present a significant risk of contaminating the product.
>
> 39. I believe contamination of the Bites by the blue plastic could result in a food safety issue and breach of the legislation under the Regulations [EU Regulation 178/2002] and Act [Food Safety Act 1990] as detailed. Sale of the Bites from Halo to Perkier, and Perkier onwards could result in the possible serving of prohibition notice, prosecution and withdrawal/public recall of the product. This would also risk damaging the brand and reputation of both businesses. In the circumstances, I have advised Halo to now prepare to initiate potential procedures under Article 19 of the Regulation, including notifying Perkier of the food safety issue, and seeking guidance from the local authority.'

74 Dr Campbell for Perkier was asked to consider whether Bites could be commercially manufactured in a way that would be expected to produce a food compliant with relevant food safety legislation. He had not visited Halo's premises but instead had visited Wholebake on 29 August 2019 and produced a report dated 6 September. He summarised his conclusions as follows:

> '22. My visit to Wholebake established to my professional satisfaction that Cacao & Orange Bites can be commercially manufactured in a way that produces a food that, in relation to possible contamination with pieces of plastic from the Kruger machine, is compliant with the food safety obligations to which food manufacturers are subject. It is also my view that the other flavours of Bites manufactured in the same way would be similarly compliant. The recipes for Bites manufactured at Wholebake differ to varying degrees to those at Halo. In my opinion these differences in isolation do not make a significant difference to the abrasiveness of the mixtures.
>
> 23. The Kruger & Salecker GFT 0400 BBT machine installed at Wholebake differs in some respects from that installed at Halo. The Halo machine was installed with distribution rollers with one finger per segment, the one at

> Wholebake with two. The moulding mechanisms are identical. The manufacturer has stated that the Halo machine is suitable for the production of bites. The Wholebake machine has been in use for production of bites for 112 hours at the time of my visit and the fingers on the distribution rollers showed no sign of wear, with the fine lines left by the machining process during manufacture still visible. This contrasts with the fingers on the Halo machine which after 450 hours of production were reduced to little more than a third of the original length.
>
> 24. A feature of the manufacturing process at Wholebake is the short time between the final mixing of ingredients and the moulding of the Bites which is at most eight minutes. This means that the mix is still warm (above 34° C) and does not have time to cure. When produced the bites are very delicate and require a 40 minute curing time to become sufficiently robust to be handled. This contrasts with my understanding of the process employed at Halo prior to the cessation of production work, due to the larger batch size, parts of the mix would be partly cooled and partly cured prior to moulding. In my opinion this is the key difference between production at the two sites and it is clearly shown in the videos referred to [in] Mr Tague's Affidavit dated 19 July 2019 and Dr Turner's Affidavit dated 16 August 2019.
>
> 25. Material worn from the fingers of the Halo machine during production will have been present in the Bites produced at Halo. Erosion by abrasion by its nature produces tiny particles which, in my opinion, would not result in the Bites being unsafe. All commercially manufactured foods which come into contact with moving plastic components of the production machinery will contain such particles to a greater or lesser degree. It [sic] the unlikely event of larger piece is becoming detached these would be picked up by inspection or metal detection.
>
> 26. Bites containing pieces of plastic from the finger is large enough to cause injury could be considered unsafe and those containing smaller pieces could be considered unacceptable for human consumption for reasons of contamination. No evidence has been produced to show that either has occurred.'

75 After the experts' meeting, the experts produced a joint statement on 30 September 2019. There were '*no substantive areas of disagreement*'. However, it was noted that Dr Campbell's comments (for Perkier) were based on observations of a process different from that observed by Mr Crew (for Halo and Mr Tague). Mr Crew saw a Kruger GTF 0401 machine which had been used for 450 hours to produce Bites. It was agreed that the Bites produced were '*not necessarily unfit for human consumption and that there was no evidence that any had been manufactured which were contaminated with visible pieces of plastic*'. This did not mean, however, that contamination had not occurred. If plastic visible to the naked eye were present, it was agreed that this would give rise to a contravention of s. 14 of the Food Safety Act 1990. It was noted that the manufacturer of the machine had claimed that the fingers are made of a plastic dosed with metal detectable material. It was also agreed that, if the plastic of the mixing fingers were metal detectable, this would '*go some way to mitigating the potential risk of any potential plastic foreign body contamination*', but this required '*further validation in manufacturing conditions*'.

76 The experts compared and contrasted the operations at Halo (observed by Mr Crew) and Wholebake (observed by Dr Campbell). It was agreed that the recipes differed across the two operations and that the condition of the blue plastic mixing fingers was '*markedly different*' in that excessive damage could be seen after 450 hours' production at Halo but there was no observable damage or scoring after 112 hours' production at Wholebake. When the videos of the differing manufacturing processes were reviewed, they demonstrated that the rheology (flow) and mixing characteristics of the product were very different. The Wholebake method was free flowing, whereas the Halo method showed clogging and bridging. This, it was said, could result in stress being placed on the manufacturing equipment.

77 The experts agreed as follows:

> 'The recipe is used are different and this could account for the different flow characteristics of the mix, as could the time elapsed between the mixing of the syrup with the dry ingredients and its passage through the machine. As far as the Cacao and Orange Bites are concerned, reducing the percentage of peanuts and the size of the date pieces would result in a mix that was, in the absence of binder, marginally less abrasive and could have a better flow characteristic.
>
> The mixing fingers of the Wholebake machine in a different configuration. At Halo they are set in pairs in Wholebake they are set in fours. This may also contribute to a better mixing performance at Wholebake and possibly less stress being placed on the plastic mixing fingers.
>
> It was jointly agreed that the combination of a modified recipe, processing method and slightly different equipment could result in a safer method of manufacture. This would need to be validated if this was to be piloted at the Halo operation.'

78 The two experts then visited Halo's premises on 22 October 2019 and saw production of Salted Caramel Bites using Wholebake's recipe. Dr Campbell produced an additional report on 31 October 2019. He noted that the recipe used was '*essentially identical*' with that used by Wholebake, but there were differences in the production processes. Whereas Wholebake had used a batch size of 10kg, Halo had used a batch size of 41kg. Whereas Wholebake used a roller speed of 60-70% of the maximum, Halo set the rollers to their maximum speed. Whereas Wholebake used a saucepan to heat the syrup, Halo used a large steam jacked mixing bowl. Wholebake's batch processing time was 8 minutes; Halo's was 35 minutes. Dr Campbell said this:

> '12. I understand that the new distribution rollers had been in use at Halo for between 40 and 50 hours. Photographs of the rollers are shown in figures A19 to A22. Mr Crew agreed with me that these rollers showed more signs of wear after between 40 and 50 hours use than the equivalent rollers that had been in use at Wholebake for 112 hours (Figures 8.2 to 9 of my original report) making bites to the modified recipes. Wear is caused by abrasion between the mix and the fingers on the rollers. The rollers at Halo are rotating at a higher speed than at Wholebake. The larger batch size results in the later parts of each batch being cooler and having more time for the setting process to advance then at Wholebake.'

Dr Campbell also explained that he and Mr Crew had cut small pieces of plastic from the rollers to see if they were metal detectable. They were.

79 Mr Crew also produced an additional report on 31 October 2019. He noted that the process used on 22 October 2019 was the same as for the previous court-ordered recipe run, but made the point that he had not observed the production at Wholebake so could not compare what he had seen at Halo with that. He said that the recipe used for production of Salted Caramel Bites differed from the court-ordered recipe and that this '*could contribute to the improvement in the mixing characteristics and setting up and stability of the cereal Bites*'. He noted the details of the differences between the recipes and in conclusion said this:

> 'It is my opinion that the new Salted Caramel Bites used in conjunction with the process and equipment observed means that the product can be manufactured safely and satisfactorily by Halo to the new recipe.
>
> The substantive reason for this improvement appears to be the changes made to the recipe from the court ordered recipes to the new recipes used at Wholebake. The new recipe appears to have altered the mixing characteristics, rheology, set up and final stability of the product.
>
> There may also be a contributory factor due to the changes made in the method of processing and the modification of the blue mixing fingers.'

80 Dr Campbell gave oral evidence about the differences between the original recipe and the Wholebake recipe for Cacao and Orange Bites, a matter he had addressed in an appendix to his original report. Although he stood by his conclusion that there had been a '*significant*' changes in the percentages of some ingredients, he did not think that the changes to the recipes were significant overall. They were minor. Dr Campbell referred to photographs showing that, after only 40-50 hours of use, the new rollers on Halo's Kruger machine were already rounded and dull due to abrasion. The rollers on the Wholebake machine, by contrast, were not abraded at all. Yet the recipe was the same. His conclusion was that the process at Halo, using larger batches which took much longer to go through the machine, allowed more time for the recipe to set and harden and therefore resulted in greater abrasion to the rollers. The rheology of the product (i.e. the way it flows) depended, he said, not only on the recipe but also the time since the mix was made.

81 In oral evidence, Mr Crew accepted that the plastic was metal detectable. He said that it was possible that the greater wear seen on Halo's rollers was attributable to the larger batch size used there, but he could not say for sure having not seen the production method at Wholebake. He remained of the view that recipe was a significant factor causing the original abrasion of the rollers at Halo.

Has Perkier proved to the criminal standard that it was possible for Halo to comply with the Order?

82 This question must be posed, and answered, for each of the time periods during which it is alleged that Halo and Mr Tague were in contempt of court.

Alleged contempt 1: 21 February to 14 March 2019

83 Mr Saoul submits that it was possible for Halo to fulfil the February PO to the contractually required standard. He makes three principal points. First, he points out that – as HHJ Blair QC said – Halo had had no problem producing Bites to an acceptable standard in November and December 2018. This shows, Mr Saoul submits, that it was possible to manufacture Bites using the recipe specified in the Order and the Kruger machine.

84 Second, Mr Saoul notes that 60% of the Bites manufactured by Halo and delivered pursuant to the February PO were of adequate quality. He draws attention to what Mr Tague had said this at paragraph 66 of his Affidavit in response to the committal application:

> 'Because the Bites are produced in a batch process, the syrup will be in a different stage of hardening at any given time and coats the inside of the equipment. This means in any production cycle (i.e. batch) they will be well formed balls at the start of production, which deteriorates to crumbs the longer the production run as the clogging in the machine builds over time as syrup sets.'

This, Mr Saoul submits, shows that, even in February 2019, it was possible to make Bites of adequate quality using the Kruger machine. What was required was a smaller batch size, which in turn would mean a shorter production run. It may well be that this would prove uneconomic over time, a point made by Mr Tague at paragraph 67 of his Affidavit, but that is not the question.

85 Third, Mr Saoul submits that – even looking just at that part of the stock which Halo agrees was of inadequate quality – the photographic evidence shows that there were *some* properly formed Bites together with other misshapen ones and crumbs. Halo could have separated the properly formed Bites from the other material – a process which takes place anyway – and packaged only the former. This too may have been uneconomic, because it would have resulted in considerable waste, but it would have been possible.

86 In my judgment these points fail to take adequate account of the position as observed on 25 March 2019. Perkier does not (and, in the light of the contemporaneous documents, could not) dispute that, by that stage, the condition of the distribution rollers had degraded to such an extent that it was not possible to manufacture Bites. I have found that the condition of the machine cannot be attributed to any default on the part of Halo. On and after 25 March 2019, the evidence shows strenuous but unsuccessful efforts over several days to manufacture Bites. The position by that time was that Halo would '*inevitably fail, however hard [it] may try*' (to echo the words used by Males J in *Addbins* at [77]). What is unknown is the precise date on which the distribution rollers had degraded to the point that manufacture was no longer possible. It is certainly *conceivable* that manufacture would still have been possible at the end of February/beginning of March, but – given that the degradation of the rollers was a gradual process – it is more likely than not that, by the beginning of March 2019, the distribution rollers had already degraded to the point where manufacture was not possible and the 60% adequate product delivered in the week of 4 March 2019 was the last the machine could produce before the rollers were changed. In any event, I cannot be sure that compliance with the February PO Order was possible in the period 21 February to 14 March 2019. The first alleged contempt is therefore not proved.

Alleged contempt 2: refusal on 14 March 2019 to attempt production until 25 March 2019

87 The above analysis applies also to the refusal on 14 March 2019 to produce Bites until 25 March 2019. As I have found, Halo could have attempted to begin production sooner than it did. But if it had done, its attempts are more likely than not to have been unsuccessful, as they were when it did in fact attempt production, on 25 March 2019. In any event, I cannot be sure that on 14 March 2019 it was possible for Halo to comply with the Order. The second alleged contempt is therefore not proved.

Alleged contempt 3: Failure to satisfy the March PO thereafter

88 As I have said, Halo made considerable and unsuccessful efforts to manufacture Bites on and immediately after 25 March 2019. It is clear, and admitted, that production was not possible at least until Halo received the replacement rollers on 19 April 2019. I have rejected the submission that Halo was at fault for not properly maintaining the machine. So, compliance with the Order was not possible until 19 April 2019.

89 Thereafter, I have found that Mr Tague honestly believed that compliance with the Order was not possible because the recipes were unsuitable for the machine and because there was a risk of plastic contamination. Whether he was right about that is, as I have emphasised, a separate question to which I must now turn.

90 I draw the following conclusions from the expert evidence. First, the most direct way of establishing whether compliance with the Order was possible would have been for Halo to fit the replacement plastic rollers, or the alternative metal rollers suggested by Mr Crew, to the Kruger machine and to undertake a production run using the original recipes, but with smaller batch sizes. Halo could easily have done that. For whatever reason, it chose not to. It also chose not to undertake the '*root cause*' or capability assessments recommended by Mr Crew. The consequence is that it is necessary to consider more indirect sources of evidence.

91 Second, what was observed by Dr Campbell on 22 October 2019 was significant. Although a different recipe (the Wholebake recipe) was being used, the fingers on the distribution rollers were already rounded and dull due to abrasion, after only 40-50 hours of use. This contrasted with the rollers on the Wholebake machine, which were not abraded at all, despite being used for 112 hours. I accept Dr Campbell's view that this is good evidence to show that the abrasion was in large part attributable to the process, not the recipe. Dr Campbell was a careful and balanced witness. He explained, convincingly in my view, why it was that the process used at Wholebake (which involved a smaller batch size and a correspondingly shorter time for the ingredients to cool and set as they pass through the machine) would be expected to generate a more free-flowing mix. Mr Crew, who was careful not to opine on matters on which he had no direct knowledge, pointed out that he had not seen the production method at Wholebake (though he had seen a video of it), so his ability to comment on it was limited. He accepted in cross-examination that it was possible that the larger batch size used at Halo was causing additional wear on the rollers. In my judgment, that inference is irresistible. It is also tellingly consistent with the description given by Mr Tague himself at paragraph 66 of his First Affidavit (see paragraph 84 above).

92 Third, looking at the evidence as a whole, there is no basis to conclude that the original recipes give rise to any real risk of plastic contamination. The experts agreed at their

meeting that contamination by plastic visible to the naked eye would violate relevant food safety legislation, but there was no evidence that any of the product had been contaminated in that way. Mr Crew agreed that, if the plastic had been dosed with metal and was metal detectable, that would go some way to mitigating the risk. He agreed in cross-examination that the plastic was metal detectable. On 22 October 2019, the experts undertook a test and found that visible pieces of plastic were indeed detectable by the metal detector. I note Mr Crew's view that the fragments tested might have been larger than the smallest visible fragments, but the test showed that the process was in principle effective.

93 Fourth, it is significant that Halo had been able to produce Bites using the original recipe and to the contractually agreed standard in November and December 2018 and that 60% of the Bites delivered in the week of 4 March 2019 were also of an adequate standard. There is no evidence that any of these Bites was contaminated with plastic. Production became impossible when the abrasion of the fingers on the distribution rollers had reached the point that they were no longer able to perform their function. It is safe to infer that, once new plastic or metal rollers had been fitted, it would have been possible to produce the Bites again, without an unacceptable risk of plastic contamination.

94 Fifth, the correspondence with Wholebake indicates that there were a number of changes to the recipes (and that some of the staff at Wholebake were beginning to become frustrated by this). The tables prepared by Halo show that the quantities of some ingredients were changed significantly. But, having considered the correspondence in its entirety, I do not consider that it advances Halo's case that the original recipes were unviable. Perkier was entitled to make efforts to improve its product. Wholebake's needs were also different because it did not package on-site, so required recipes that would be stable enough to be transported before being packaged.

95 In the light of these matters, taken together, I am satisfied so that I am sure that – contrary to Mr Tague's belief – it was from 19 April 2019 onwards possible for Halo to use the Kruger machine to produce Bites using the original recipes without running an unacceptable risk that the product would be contaminated by plastic so as to contravene applicable food safety legislation. Because it is common ground that Halo did not fulfil the March PO, and its controlling mind Mr Tague knew that and knew of the terms of the Order, it follows that in failing to fulfil the March PO after 19 April 2019, both Halo and Mr Tague committed contempts of court.

Alleged contempt 4: Failure to fulfil the May PO

96 The above analysis applies also to the fourth alleged contempt. It is common ground that the May PO was not fulfilled and that Mr Tague knew that and knew of the terms of the Order. It was possible for Halo to fulfil the Order. So, in failing to fulfil the May PO, both Halo and Mr Tague committed contempts of court.

Sentence

97 It was agreed between the parties that, in the event I found any of the alleged contempts proved, it would be appropriate to hear further submissions by way of mitigation before determining the sentence. That will, of course, reflect among other things the factual findings I have made as to Halo's and Mr Tague's state of mind at the relevant times.

The application to discharge the Order

98 Insofar as Mr Zaman's case for discharging the Order depends on the proposition that the court-ordered recipes are unviable, it fails for the reasons I have given. But Mr Zaman also made a separate point. He noted that the Order had been based on the premise that '*[t]here is no other Kruger machine in the UK and so the Applicant cannot simply find an alternative manufacturer in the marketplace*' (see HHJ Blair QC's judgment at [41]). But correspondence between Perkier and Kruger and between Perkier and Wholebake (which post-dated the Order) shows that there *is* now a viable alternative supplier of both Bites and Bars. The correspondence also shows that Wholebake have successfully manufactured Bites at scale using their new recipe. The correspondence between Halo and Kruger shows that the latter is willing in principle to provide a machine. Mr Zaman invites me to reject Dr Turner's evidence that Perkier could not now afford to purchase one. He points, among other things, to the costs schedule served by Perkier, which demonstrates that it has had no difficulty incurring costs of over £250,000 in respect of these applications; even if Perkier were to buy a machine outright, it would cost less than this. The stark position described by HHJ Blair QC, in which absent an injunction there would inevitably be a damaging hiatus in production of Bites, no longer obtains. Mr Zaman made clear in his submissions that his application was to discharge the Order in its entirety – i.e. not only those parts of it relating to Bites, but the parts relating to Bars as well, because the Wholebake correspondence indicates that it is keen and able to supply Bars. If the Order is not discharged, Mr Zaman submits that – at the very least – it should be varied to permit Halo to use the new Bites recipes, which have been tried and clearly work.

99 Mr Saoul says that Mr Zaman's submissions misrepresent the position in which Perkier now finds itself. The true position which emerges from the documents and the oral evidence is that Wholebake would like to manufacture Bites for Perkier, but it cannot do so without clarity as to the long-term position. Perkier cannot provide such clarity because it does not have access either to a Kruger machine on a long-term basis or to the funds necessary to acquire one. Its only option as matters stand is a rental agreement. The documents show that the rental agreement currently on offer is to the end of December 2019 or, at the latest, the end of January 2020. Without the Order, Perkier has no long-term security of supply, risks defaulting on orders and will struggle to secure or commit to further business. The Bites project would become unviable. This would cause significant damage, including reputational damage, to Perkier's business, because 60% of its customers now purchase Bites. If the Order remains in force, Mr Saoul says that it should not be varied to permit Halo to use the new recipes. The original recipes have completed all the necessary trial and testing for microbiology, shelf-life and absence of key allergens. The new recipes have not, because Halo has refused to allow Dr Turner or Miss Perkins access to its factory to observe the production process and has not supplied product specifications, trial records or samples for testing. If the Order were to be varied, it would be necessary to set out new product specifications and details of the curing and testing processes to be followed. Mr Saoul describes the application to discharge the Order as it relates to Bars as '*an unattractive attempt to torpedo the Bars business*', which accounts for '*a very significant proportion of [Perkier's] turnover*'. There is, he submits, no evidence that Wholebake is in a position to supply Bars to the required standard or scale, no evidence of a commercial offer to produce Bars and no evidence that Perkier has placed even a single order with Wholebake for Bars.

100 I approach Halo's application to discharge the Order assuming (not deciding) that it was properly granted for the reasons given by HHJ Blair. On that assumption, it is for Halo to show that there has been a '*significant change of circumstances*' on a matter relevant to the exercise of the discretion to grant the Order. Only if there has been such a change would it be appropriate to discharge it.

101 Having considered the evidence as a whole, I am not satisfied that there has been a significant change of circumstances sufficient to warrant discharging the Order. I have reached that conclusion for three reasons.

102 First, although it is no longer true to say that '*there is no other Kruger machine in the UK*', the correspondence (taken as a whole) shows that the Kruger machine currently at Wholebake's premises is only likely to be available for a short period unless Perkier and/or Wholebake is prepared to enter into an arrangement to purchase it. I have seen nothing to gainsay Perkier's evidence that it is not currently in a position to purchase the machine, so that the result if the Order is discharged is that it will have no way of satisfying orders for Bites. The precariousness of Perkier's position is evident from the correspondence with Kruger, which indicates that the machine is rented on a week-to-week basis. The fact that Perkier has incurred considerable legal costs in relation to these applications does not undermine this conclusion because legal costs are not incurred in one go. Dr Turner and Miss Perkins could not have predicted when it began these proceedings how expensive they would become. The fact that Perkier now has a substantial costs liability (subject to any order that may be made in these proceedings) makes it more difficult, not less, for it to purchase the Kruger machine.

103 Second, the reason why HHJ Blair granted the Order is that, on the facts, damages would not be an adequate remedy for Perkier. In the light of my conclusion that Perkier does not have the means to secure access to an alternative Kruger machine, that remains the case. If the Order is discharged, it remains likely that Perkier will have to abandon Bites as a product just at the point where it is beginning to achieve some commercial success. In those circumstances, Perkier could no doubt try to quantify the losses it would make. Mr Zaman makes the point that it has attempted to do so by instructing a forensic accountant. But in the light of my finding that there has been no significant change from the position before HHJ Blair QC, any assessment of loss would just be as speculative as it would have been when he made the Order. The task of working out how successful Bites would have been will involve just as much guess work as it would then have done. So, there has been no sufficiently significant change in the facts relevant to the question whether damages would be an adequate remedy for Perkier.

104 Third, I have considered carefully whether Perkier's failure to disclosure the correspondence with Wholebake and Kruger should lead, in the exercise of my discretion, to the discharge of the Order. I have decided that it should not. Although the documents should have been disclosed, I do not find that the non-disclosure was the result of dishonesty on the part of Dr Turner or Miss Perkins (or, therefore, Perkier). If it can be shown that the disclosure failures generated extra cost (a matter on which I have not heard submissions), that can be reflected in any costs order. It would be disproportionate to go further and discharge the Order in circumstances where there has been no sufficiently significant change in the factual position relevant to the discretion to grant relief since the Order was made.

105 Having decided that the Order should not be discharged, I must go on to consider whether it should be varied to permit Halo to use the new recipes, which it accepts are viable. I conclude that it should not, essentially for the reasons given by Mr Saoul. The Order incorporates complex specifications set out in its annexes. These specifications were agreed between the parties. The new recipes have not been tested and new specifications are not available. The drafting of new specifications would be a time-consuming process and could not be done immediately. The issue of a mandatory Order requiring performance of a contract which (at least for a period) had been performed is one thing. The issue of a mandatory Order requiring compliance with new, unagreed and untested specifications is another. Such a course would be almost certain to lead to further disputes and further need for intervention by the court. I note that paragraph 2 of the Order already provides that '*[a]cts which would otherwise be a breach of this Order shall be permitted if done with the prior written consent of the Claimant's solicitors*'. I hope that Perkier will be prepared to consent under this provision to variation of the recipes if and when the new recipes have been tested, properly documented and agreed. But the formulation of new detailed specifications is an inherently unsuitable matter for judicial resolution.

Conclusions

106 For these reasons, I conclude that:

(a) Halo and Mr Tague are guilty of contempt of court in:

(i) not fulfilling the March 2019 purchase order after 19 April 2019;

(ii) not fulfilling the May 2019 purchase order.

(b) There has not been a sufficiently significant change of circumstances to warrant discharge of the Order made by HHJ Blair on 21 February 2019.

Postscript

107 These applications were made at what is still an early stage in this litigation. Standard disclosure has not taken place. I am told that a trial is not likely until the end of next year. Despite that, there has already been a 1-day hearing before HHJ Blair and, now, a 5-day hearing before me of these applications. A great deal of time and money has been spent. Perkier's costs schedule apparently indicates that it has incurred costs that exceed the sum necessary to purchase a new machine from Kruger. In retrospect, it seems a pity that Perkier's resources have been diverted from that. (No doubt Halo has also spent a great deal on legal costs that it could have spent developing its business.) Where there are allegations that court orders have been breached, it is important not only to the parties but also in the public interest that the allegations are investigated. Given the potentially serious consequences of findings of contempt, it was important not to curtail the parties' time for cross-examination and submissions. But it should be borne in mind by courts considering applications for mandatory injunctive relief to enforce the performance of complex commercial contracts that policing such injunctions may turn out to be a very resource-intensive exercise for all parties and for the court itself. As noted in *Gee on Commercial Injunctions* (6th ed.) at §2-034, this factor can and should be taken into account, alongside other discretionary factors, in the exercise of the court's discretion whether to grant interim mandatory injunctive relief.