Neutral Citation Number: [2022] EWHC 2258 (Comm)

Case No: CC-2021-MAN-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)

Date: 31 August 2022

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

- -

Between :

RSW International Limited **Claimant**

- and –

Purple Surgical Manufacturing Limited **Defendant**

- -
- -

Richard Chapman QC and **David Uff** (instructed by **Ozon Solicitors**) for the **Claimant**
Thomas Ogden and **William Harman** (instructed by **Armstrong Teasdale Limited**) for the **Defendant**

Hearing dates: 10, 11, 12, 13 January, 22 February 2022

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives website. The date and time for hand down is deemed to be 31 August 2022 at 9.45 am.

HHJ Halliwell:

(1) Introduction

1. This is my judgment following the trial of proceedings relating to a disputed transaction ("**the Disputed Transaction**") for the supply of surgical face masks ("**the Face Masks**"). The parties to the Disputed Transaction were RSW International Limited ("**RSW**") and Purple Surgical Manufacturing Limited ("**Purple**"). They are also the parties to these proceedings. The main issue is whether there was a binding contract for the sale of the Face Masks.

2. On the footing that there was a binding contract and, in anticipatory breach, Purple have renounced the contract, RSW sues for damages.

3. Before me, Messrs Richard Chapman QC and David Uff, of counsel, appeared on behalf of RSW and Messrs Thomas Ogden and William Harman, each of counsel, appeared on behalf of Purple. They presented their respective cases with considerable skill.

(2) Background

4. The dispute originates from the COVID-19 pandemic ("**the Pandemic**"). Purple is part of a group of companies concerned in the manufacture and supply of medical and surgical instruments and devices. At an early stage of the Pandemic, it sought to enter into transactions for the purchase and supply of personal protective equipment, PPE, to the National Health Service and the Department of Health and Social Care ("**the DHSC**"). At all material times, Mr Robert Sharpe ("**Mr Sharpe**") was sole director of Purple and majority shareholder of its parent company.

5. RSW is and was historically in the business of importing and distributing home and leisure consumer products. Mr Mark Rubens ("**Mr Rubens**") is managing director. By the time of the Pandemic, he was already acquainted closely with Mr Nicholas Samuels ("**Mr Samuels**"), a businessman experienced in importing toys from China. Mr Samuels had recently been introduced to a Chinese supplier, Mr James Wan, of the JHT Group ("**JHT**"). Having visited at least one of JHT's factories, Mr Samuels was impressed with their operation which included the manufacture of textiles, machinery and equipment. Mindful of the demands for PPE unleashed by the Pandemic, Mr Samuels believed JHT would be well placed to supply such equipment for the UK market. He approached Mr

Rubens with a proposal for RSW to be deployed as a corporate vehicle for the acquisition and supply of PPE in the UK. Mr Rubens was willing to proceed on this basis and engaged Mr Samuels to act on RSW's behalf.

6. Suppliers, purchasers and intermediaries were then forming "daisy chains" to meet the surge in demand for PPE equipment. One such intermediary was Mr Adam Bailey ("**Mr Bailey**") of Myse&Vast Group Limited, a company originally incorporated to provide services in connection with healthcare recruitment. In April 2020, Mr Bailey was introduced separately to Mr Sharpe and Mr Samuels. Mr Sharpe was interested in acquiring PPE stock, including face masks, and Mr Samuels had a connection with factories capable of manufacturing such stock in Wuxi, China. Mr Sharpe advised Mr Bailey that the PPE stock was required by the DHSC and, if it was to be sourced and supplied by Mr Bailey, Purple would need to acquire it on terms accommodating the DHSC's requirements. Mr Bailey did not put Messrs Sharpe and Samuels in touch with one another at this stage; it would have been contrary to his interests to do so. However, Mr Samuels was aware that the stock was ultimately to be supplied to a public body.

7. During late April and early May 2020, Mr Bailey was invited to submit offers for the sale of PPE stock to Purple and, in turn, Mr Bailey approached Mr Samuels. Offers were submitted at a purchase price adjusted to provide Mr Bailey with a cut. It appears from the contemporaneous exchanges of WhatsApp messages between Messrs Bailey and Samuels they were aware "approval from cabinet office" was required and it is common ground that the transactions never proceeded to fruition.

8. Mr Sharpe was aware the DHSC was anxious to acquire face masks on a substantial scale. On 7 May, he was advised that the DHSC intended to purchase as many Type IIR face masks as could be guaranteed within a time scale of 90 days. By an email message timed later that day, at 4:56 pm, Mr Sharpe advised Mr Bailey that the DHSC had requested him to "continue to supply them with Type IIRs" and asked him to re-submit all documents for forward transmission and "confirm the volumes that can be guaranteed to be available ex-works China within 90 days or receipt of a p.o & part-payment" with "a long-stop date" of 15 August. He also asked Mr Bailey to "confirm the price for the volume that can be supplied". Having contacted Mr Samuels, on

WhatsApp, Mr Bailey provided Mr Sharpe with a production schedule. He did so by an email timed at 5:38pm the same day. There was no immediate response. When Mr Samuels chased Mr Bailey for further progress on WhatsApp, he was advised they were "always at mercy of cabinet".

9. The DHSC had already been advised of the Face Masks specification. On their behalf, the Defence Equipment and Support section of the Ministry of Defence had seconded Ms Janet Glenn to deal with orders for PPE. By an email message timed at 11:14 am on 18 May, Ms Janet Glenn advised Mr Sharpe that "the Wuxi Yashu type II face masks" had technical approval. With a view to progressing an order, she forwarded Mr Sharpe a Supplier Product Information Form.

10. Later that day, Ms Glenn emailed Mr Sharpe to ascertain how many Wuxi masks he could supply and request a proposed form of invoice. By an email timed at 3:28pm, Mr Sharpe advised her that 110 million masks could be supplied by 14 August 2020. He also provided her with a form of pro forma invoice for 110 million masks at a total price of £61,600,000.

11. As the parties sought to close in on a deal, Mr Bailey repeatedly communicated with Messrs Sharpe and Samuels to provide them with the information they required and move the transaction forward. He did so on the understanding he would be remunerated – as indeed would RSW - from a share of the margin between the price payable to JHT Group and the amount ultimately payable on behalf of DHSC. This is reflected in an email timed at 7:53 pm from Mr Bailey to Mr Samuels confirming that "as mentioned I think you may have sold yourself a little low on the kick back from the factory, so I am happy to take a $2c introduction brokerage fee on each unit instant of the full $. At present that is 110* ($2,200,000) for this initial 110m deal".

12. Mr Samuels was alive to the need to ensure JHT retained capacity to meet the transaction. On this basis, he asked Mr Bailey to do what he could to obtain a purchase order which could be shown to them to confirm the transaction was going ahead. However, it is Purple's case that it could not be expected to enter into contractual commitments with RSW until Government approval and the payment of a deposit by Purple to RSW.

13. By an email at 4:32 pm on 19 May, Mr Sharpe advised Mr Bailey that he had "agreed the deal in principal (sic) & taken the £0.06p hit so I must ask your supplier/manufacturer to reduce our cost by (a very reasonable) $0.02 per unit because I've got another CO approved supplier who can do this volume that is only costing me $0.33. Please confirm & we will issue the p/o immediately". In his reply at 4:49pm, Mr Bailey stated "as discussed, they've agreed a $0.01 reduction to a total price of $0.3975 per unit. 110 million units starting from June 1st through to August 15th. As agreed, if you could please get Jeff to raise the PO, I'll send it across for them to raise the invoice tomorrow". Mr Sharpe then emailed Mr Jeffrey Land, of Purple, to request him to "raise a p/o for 110,000,000 Type IIR Masks @$0.3975 each".

14. At 6:44 am the following day (20 May), Mr Bailey emailed Mr Land to request a copy of the draft purchase order "first thing this morning" warning him that "securing the lower price was somewhat contingent on getting PO to them last night so they could block the factory space out". Mr Land then emailed a draft purchase order to Mr Bailey copying in Mr Sharpe. Mr Bailey responded with some suggested amendments.

15. Mr Bailey then emailed Messrs Rubens and Samuels to confirm he had received a copy of the draft purchase order. In doing so, he provided them with a copy of M&V's 'Standard Introduction Agreement' ("**the SIA**") for them "to sign and return" confirming that, for introducing RSW to Purple and facilitating the deal for the sale of 110,000,000 Type IIR Surgical Masks at a "FOB price Shanghai of $0.3975 per unit", "the introduction fee applicable [would] equate to $1.5 cents per unit delivered".

16. At 10:17 am, Mr Land sent an amended purchase order to Mr Bailey ("**the Purchase Order**") and, by an email timed at 10:30am ("**the 10.30 am Email**"), Mr Bailey forwarded the Purchase Order to Messrs Rubens and Samuels with a schedule of delivery dates ending on 16 August 2020.

17. The 10.30 am Email incorporated a schedule of delivery dates ending on 16 August 2020 and provided for an initial payment, due retrospectively on 19 May of $13,117,500 with 11 deliveries of 10,000,000 items of stock. The initial payment of $13,117,500 was denoted in the schedule as a "cost". Seven further items of "cost", in the sum of $3,975,000 were allocated to the first seven deliveries and a final item of $2,782,500 was allocated to the eighth delivery on 20 July.

18. In addition to providing a schedule of delivery dates, the 10.30 am Email was in the following terms.

> "Hi Gents,
>
> Please find the PO for the order.
>
> Can you please raise an invoice with the following schedule; (particulars will be driven from your invoice)
>
> FOB rate to Shanghai for the 110m IIR Masks

Unit Price	$0.3975
Total Units	110,000,000
Total Price	$43,725,000

> Delivery will be Interserve Shanghai.
>
> If you can please raise the invoice. I'll send to my guy and sort deposit ASAP.
>
> Thanks, Adam".

19. The Purchase Order was addressed to RSW and incorporated some 22 items based on the 11 delivery dates identified in the 10.30 am Email. A value of $3,975,000 was allocated to each delivery of 10,000,000 units and, on that basis; in aggregate, "the amount due" was $43,725,000. In the Purchase Order, RSW was asked – in standard terms - to "please confirm receipt of order and advise expected".

20. However, at about the same time, Ms Glenn emailed Mr Sharpe to advise him that the transaction would "not go through" that day since it would have to be approved by Triage which only meet at 6pm each work day. Shortly afterwards, Mr Sharpe replied in the following terms. "Oh dear. I thought there were two triages a day, with one around midday. Please do what you can to push these through because we now have a very significant financial exposure".

21. Having obtained and forwarded the Purchase Order, Mr Bailey turned his attention to RSW. By a WhatsApp message at 11:21am to Mr Samuels, he stated: "I can't get these guys to pay the deposit until RSW raise the invoice…can't believe I'm now chasing you!"

22. At 2:47 pm, Mr Rubens returned a signed copy of the SIA to Mr Bailey and, at 3:10 pm, he emailed him a document ***("the Pro Forma Invoice")*** conspicuously headed "Pro-Forma Invoice" with 11 items of $3,975,000, in respect of "Face Mask Type IIR Single Use", in the aggregate sum of $43,725,000. It was recorded on the Pro Forma Invoice that the "deposit required [was] $13,117,500". However, it made no provision for VAT

and it contained a notice providing that it was "not a TAX invoice". The main body of the Pro Forma Invoice did not contain delivery dates or dates for payment but there was an appended document with a scheme for delivery and payment based on the Purchase Order but substituting 20 May for 19 May as the date for initial payment or deposit of $13,117,500.

23. RSW contends that Mr Bailey was authorised to act as Purple's agent for the purpose of communicating with RSW in connection with the transaction, including the delivery and acceptance of contractual offers. It contends that, by sending the 10.30 am Email and the Purchase Order, Purple offered to purchase 110 million Type II Face Masks from RSW at a purchase price of $43,725,000 and, by emailing Mr Bailey the Pro Forma Invoice, Mr Rubens accepted Purple's contractual offer. At that point, RSW contend that the parties entered into a binding contract for the sale of the Face Masks.

24. By a short email timed at 3:27 pm, Mr Bailey forwarded the Pro Forma Invoice to Mr Land, copying in Mr Sharpe.

25. Later that day, Mr Samuels repeatedly asked Mr Bailey whether Purple had paid the deposit. In a WhatsApp message timed at 4:54 pm, he asked "have they transferred the money, so important we get it to the factory"? At 5:28 pm, he asked "have PS sent the deposit"? However, the DHSC had not yet provided its approval. Following an email at 5:47 pm, in which Mr Sharpe gave Ms Glenn details about JHT Wuxi, Ms Glenn advised him that the cut off time for approval had already passed that day. At 6:47 pm, Mr Bailey advised Mr Samuels that "Cabinet now need to sign RSW and JHT OFF" and, after four short messages including a comment from Mr Bailey that "you will get signed off", Mr Samuels' reply was "WTF so now not a done deal".

26. Next day, Mr Samuels contacted Mr Bailey, at 7:17 am stating "please…the factory was expecting the deposit yesterday and they are chasing right now for it". After stating that "the only thing we're waiting for now is the cabinet…", he stated in a message, at 7:32 am that "the moment [Mr Sharpe] gets the OK he will get finance to press send". At one point, Mr Bailey advised Mr Samuels that "…purple surgival (sic) are taking liability already". When, in response, Mr Samuels asked Mr Bailey whether Mr Sharpe was "confident…of cabinet signing it off", Mr Bailey replied "yeah".

27. However, this optimism proved to be misplaced. By an email at 11:47 am on 22 May, Ms Glenn advised Mr Sharpe that she had been asked to try and negotiate the price and deposit down". Eventually, by an email dated 26 May the DHSC advised Mr Sharpe that they did not intend to proceed with the transaction stating that "the pricing of masks was higher than most other deals as indeed was the % deposit required" and that "the Department also needs to minimise its exposure to financial risk". Next day, Mr Bailey emailed Mr Samuels to advise him that "the cabinet have pulled the plug on the IIR's" on the basis that they were now being offered a lower price from elsewhere.

28. However, RSW did not intimate a claim against Purple until their solicitors' letter of claim dated 25 November 2020 ("**RSW's Letter of Claim**"), some six months after Mr Bailey confirmed that the Disputed Transaction would not proceed. In RSW's Letter of Claim, Ozon Solicitors contended that, by virtue of the exchange of emails on 20 May incorporating the Purchase Order and the Pro Forma Invoice, the parties had entered into a binding contract for the supply of the Face Masks at a price of $43,725,000 and Purple had repudiated the contract by wrongfully refusing to accept the goods. On that basis, they contended that RSW sought specific performance of the contract and "invite[d]" Purple to pay "the deposit in the agreed sum of $13,117,500". It also sought confirmation that Purple would "take delivery of the goods at the intervals and in the quantities set out in the Purchase Order".

29. As it happens, once notified that the DHSC had decided not to proceed with the Disputed Transaction or, as Mr Bailey had put it, "the cabinet [had] pulled the plug", RSW took no further action to implement the transaction itself whether by performing or purporting to perform its own contractual obligations or, more specifically, obtaining and delivering the Face Masks. Contrary to the impression given in RSW's Letter of Claim, RSW did not put itself into a position to deliver the goods on the dates listed in the 10.30 am Email or the Purchase Order nor, indeed, on 25 November 2020, the date of RSW's Letter of Claim.

30. By letter dated 2 December 2020, Purple's then solicitors, Kerman & Co, took issue with RSW's prospective claim denying *inter alia* that the parties ever entered into a contract and pointing out that the RSW had never purported to deliver stock. In response, Ozon

Solicitors stated, by letter dated 6 December 2020, that it would pursue its claim by seeking damages.

31. When RSW issued proceedings, its claim was simply for damages for repudiatory breach of contract. It sought damages in the sum of $10,958,750 based on the agreed price for the goods, $43,725,000 "less the direct cost to [RSW] of performing the contract in accordance with its terms – (1) the cost to [RSW] of supplying the Face Masks $31,075,000 and (2) the commission which would have become payable by [RSW] to Adam Bailey/Myse $1,691,250".

(3) Witnesses

32. Five witnesses were called to give oral evidence. There was a substantial amount of contemporaneous electronic documentation in which significant parts of the negotiations were comprehensively recorded. However, where plausible, the oral testimony of the witnesses was of value at least to the extent it was explanatory in the overall commercial context.

33. On behalf of RSW, three witnesses were called to give oral evidence, namely Mr Samuels, Mr Rubens and Mr James Wan ("Mr Wan").

34. Mr Samuels was not and is not an officer or employee of RSW. In Paragraph 9 of his witness statement, he suggested he was appointed to the role of "consultant" but, in cross examination, confirmed that he was essentially working with RSW on a "joint venture…to do particular deals". He also confirmed it was agreed between them that he would be entitled to 50% of the profits made by RSW on any PPE deal and that, if the current claim succeeds, he would thus expect to receive 50% of the damages awarded.

35. Mr Samuels was introduced to Mr Bailey on 24 April 2020. At the outset, he was led to understand "Mr Bailey had a network of arrangements and relationships with access to supplying the NHS and care home groups". With this in mind, he provided Mr Bailey with a presentation about the JHT Group Virafree products and attended a Zoom meeting with Mr Bailey and his business partner, Mr Philips. Mr Bailey advised Mr Samuels that he was working with "a really big company" to provide large quantities of PPE to the UK Government but was not prepared to identify the company. Mr Bailey and Mr Samuels later discussed a number of opportunities, including a potential

transaction for the sale of gowns to an NHS Trust in Birmingham and a separate transaction for the sale of gowns to an NHS Trust in York.

36. Mr Samuels played a critical role in the negotiations with Mr Bailey for the Disputed Transaction. These were largely conducted by email and messages on WhatsApp. He was a party to the 10.30 am Email and Mr Rubens copied him in on his email timed at 3:10 pm, on 20 May 2020, attaching the Pro Forma Invoice.

37. In his closing submissions for Purple, Mr Ogden described Mr Samuels as an unsatisfactory witness on the basis his evidence was coloured by his financial interest in the litigation. In places, his oral testimony was inconsistent with his witness statement. It is also true that he was not an independent witness and, where his testimony was inconsistent with the contemporaneous written evidence, I have treated it with caution. In view of the extent of the contemporaneous documentary evidence – in particular the WhatsApp and email communications – I have also treated with caution his general observations where not supported by specific documentary evidence. However, Mr Samuels was willing to make substantial concessions in cross examination. His oral testimony was not without some evidential value.

38. Mr Wan is the managing director of JHT. Unlike the other witnesses, he gave his evidence remotely through CVP and was interposed before Mr Rubens. It is not RSW's case that it entered into binding contractual commitments to JHT or companies associated with it. However, in his initial witness statement, Mr Wan confirmed RSW agreed to pay $31,075,000 for the Face Masks. In the absence of evidence to the contrary, I took this to be a reference to the amount RSW agreed to pay or for which it was to be accountable in the event the Disputed Transaction went ahead. It was not suggested RSW entered into an unconditional agreement to pay for the Face Masks regardless of whether this happened.

39. Mr Wan's evidence was primarily directed to RSW's ability to perform in the event that the Disputed Transaction had proceeded. Having initially stated, in his witness statement dated 3 December 2021 that the Face Masks would have been produced by BM Medical Technology Co Limited with JHT responsible for export, he appeared to endorse RSW's new case – advanced for the first time shortly before trial – that the goods would in fact have been exported by a different company, Wuxi Jtex Co Limited.

Mr Ogden no longer challenges this part of RSW's case. However, in view of the way in which it has evolved, I have treated Mr Wan's evidence with caution.

40. On behalf of RSW, Mr Samuels handled most of the negotiations and discussions with Mr Bailey in relation to the Disputed Transaction. However, Mr Rubens was party to the 10.30 am Email and, by an email timed at 3.10 pm on 20 May, he sent Mr Bailey the Pro Forma Invoice which Mr Bailey forwarded to Mr Land at 3.27pm that afternoon. On this basis, Mr Rubens took the opportunity to give specific evidence about the Purchase Order and the Pro Forma Invoice.

41. In Paragraph 8 of his witness statement dated 3 December 2021, Mr Rubens stated as follows.

> "I raised the [Pro Forma Invoice] in response to [the 10.30 am Email] and at a time when all terms (including deposit) had been negotiated and agreed. I considered that the raising of the [Purchase Order] meant that [Purple] was willing to enter into a legal binding agreement based on the terms that had been negotiated between the parties. I was not in any doubt that a PO is a legally binding document. In fact, and for that reason, RSW itself would never raise a PO unless it was willing to abide by the terms of the PO".

42. In Paragraph 9 of his witness statement, Mr Rubens made the following observations.

> "It is not unusual for RSW to express its invoices as 'pro-forma'. This, however, is only relevant to RSW's liability to account for VAT and has no bearing whatsoever over the binding effect of any transaction agreed between RSW and a counterparty such as Purple Surgical. This practice is necessary where the credit risk for RSW is significant and breach of contract by the counterparty may impact on RSW's cashflow. This is illustrated by the circumstances in the present dispute. The transaction value was considerable and the deliveries were to occur between 7 June 2020 and 16 August as set out in the PO. Payments were due from [Purple] in 7 weekly instalments of $3.9m followed by a final instalment of $2.7m. [Purple] could have breached its obligations at any time in the course of the transaction after taking part delivery. This means that, even if a deposit has been paid, RSW could have been left with a serious 'bad debt' but would have had to pay the gross VAT nonetheless unless a pro-forma invoice was raised".

43. When asked to clarify the point in time at which the parties entered into a binding contract, Mr Rubens' evidence was not free from ambiguity. His answer was that it was the time of "…receipt of the purchase order and then our confirmation of that order…". He did not state it was achieved at the point of delivery of the Pro Forma Invoice. Whilst it might have been suggested that delivery of the Pro Forma Invoice amounted to confirmation of receipt, Mr Rubens did not put it in this way. As it happens, Mr Samuels

first confirmed receipt of the Purchase Order when, at 10:40 am on 20 May, he responded on WhatsApp to Mr Bailey's message "sent!!" by confirming that "Mark will call u shortly to go through it to understand it properly".

44. It also emerged from Mr Rubens's evidence in cross examination that his evidence was misleading in relation to the use of the Pro Forma Invoice to avoid liability for VAT. At the time of the Dispute Transaction, PPE was zero rated for VAT purposes. When this was put to him, he appeared to accept that this was so and, rather more troublingly, confirm he was aware of this at the time. Mindful that he needed an alternative explanation for the delivery of the Invoice on a pro forma basis, he stated that "…our systems and most companies systems do not allow them to raise a full invoice until the goods are handed over and that's the way our - - all our trade is done in this way when we transact in this way. We raise a proforma invoice to - - when we are asking for payment, pre-payment before the goods are handed over. And then as soon as the goods are handed over, we raise our full invoice". Mr Rubens declined to accept that pro forma invoices are used as a device for offering to enter into contractual commitments that cannot take effect until payment.

45. I have treated Mr Rubens' evidence with caution.

46. On behalf of Purple, Mr Ogden called two witnesses to give oral evidence, namely Mr Sharpe and Mr Bailey. With the agreement of both counsel, Mr Jeff Land's witness statement dated 3 December 2021 was also admitted into evidence albeit without any admission of accuracy.

47. Mr Sharpe gave evidence about the methods of procurement of companies within the Purple Group and the use of purchase orders and pro forma invoices when prepayment is treated as a condition for the supply of the invoiced goods. He stated that the Group did a substantial amount of business with the DHSC during the early part of the Pandemic and was well acquainted with the DHSC's triage process by the time of the Disputed Transaction. Most of his submissions "failed to get through the DHSC's procurement process". Mindful of this, he stated that "my rule was that unless and until the DHSC had issued its final purchase order, we had no deal with the DHSC; and I would not commit to 'go live' with suppliers until the DHSC was committed through its final purchase order. Given that suppliers were dealing with us on pro forma terms, this

meant that I would not pay any supplier unless and until the DHSC had committed to the deal via its issued purchase order".

48. On 23 April 2020 or thereabouts, Mr Sharpe was introduced to Mr Bailey as a potential source of PPE supplies. The introduction was effected remotely. During late April and early May 2020, Mr Sharpe was alerted to at least three opportunities for the acquisition and disposal of face masks to the DHSC for which Mr Bailey identified potential supply chains. These culminated in the opportunity which gave rise to the Disputed Transaction.

49. Mr Sharpe stated that Mr Bailey was never more than an intermediary with no authority to agree deals with suppliers. Turning to the Disputed Transaction itself, he confirmed he will have told Mr Bailey the Group would issue a purchase order for the limited purpose of helping the supplier to manage its manufacturer and persuade it to hold factory capacity pending the formation of a contract. He assumed that the supplier would issue a pro-forma invoice only – as indeed it did – since it required a 30 % pre-payment for the contract to proceed. When Mr Bailey emailed the Pro Forma Invoice to Mr Land, copying in Mr Sharpe himself, Mr Bailey was aware from their discussions that the prospective deal with DHSC had not been approved. Mindful of this, Mr Bailey didn't ask Purple to pay the Pro-Forma Invoice. In the days that followed, Mr Sharpe chased the DHSC without a response but was eventually advised that the DHSC had rejected the opportunity.

50. Mr Sharpe contends that Purple and RSW never entered into a binding contract for the purchase of the Face Masks and his contemporaneous exchanges of correspondence with Mr Bailey were and are generally consistent with his written and oral testimony to the Court. However, his testimony is inconsistent with the impression that he sought to give to Ms Glenn when seeking to persuade the DHSC to proceed with the transaction. At 8.57 am on 20 May, he emailed her to state that he was in receipt of two completed Type IIR contracts and asked her "…to push these through for payment this morning as I've raised our p/o to the manufacturer & we wired the required deposit to complete the contract formalities at their end to secure the production capacity". In another email at 10.00am, he stated that "…we now have a very significant exposure".

51. In cross examination, Mr Sharpe candidly stated that the first of these emails was untrue and he regretted sending it. He said that "the entire purpose of that email was for me to somehow leverage my relationship with Janet Glenn, which I'd built up over time - - I never met her, spoken and emailed - - in the hope that she would realise the importance of our offer to the triage team to get it over the line". In cross examination, he was unable to confirm whether the second email was sent at 10.00 or 11.00 am. It bears 10am as the time sent but may not have been recorded to British Summer Time. However, he again confirmed that, in referring to Purple's "very significant exposure", he was seeking to create a misleading impression about Purple's financial commitment.

52. If Mr Sharpe's testimony is correct, he deliberately set out to mislead Ms Glenn. On behalf of RSW, Mr Chapman submitted that this demonstrates, on the part of Mr Sharpe, a propensity to be untruthful which I should take into consideration when assessing his evidence. It was open to him to do so and I have taken Mr Chapman's submissions into account when considering Mr Sharpe's evidence as a whole, in particular his testimony in court. Having done so, however, I am satisfied that his oral evidence was and is consistent with the critical exchanges, on 20 May 2020, between Mr Bailey and the parties. It is also the most plausible explanatory evidence. His initial email to Ms Glenn stating that "I've raised our p/o to the manufacturer & we wired the required deposit to complete the contract formalities…" was plainly incorrect. At this stage, the Purchase Order had not been delivered. At no stage, did Purple pay or purport to pay a deposit. The obvious explanation is that Mr Sharpe was seeking to persuade the DHSC to proceed with the transaction. More generally, I am satisfied Mr Sharpe's oral evidence as a whole generally provides a reliable account of the factual background to the Disputed Transaction and the exchanges of correspondence on 20 May.

53. Mr Bailey is a director of Myse&Vast Group Limited ("Myse&Vast") a company which provides recruitment services for the healthcare sector. He confirmed that he was first introduced to Mr Sharpe at a remote meeting on 23 April 2020. He followed this up with an email message exploring the ways in which they might work together. This included brokering Purple's stock and assisting in the sourcing of stock for outstanding orders. In his witness statement, Mr Bailey described his role for Purple as "an independent

consultant…communicating with suppliers and bringing in opportunities but with no independent right to sign on [Purple's] behalf or to conclude any transaction." Initially, it was agreed that they would negotiate commission on a case by case basis. However, there were then discussions with a view to putting their relationship onto a more formal footing. On 28 May 2020, he finally signed a written consultancy agreement but only did so after the Disputed Transaction had been aborted.

54. Mr Bailey was introduced to Mr Samuels at about the same time as Mr Sharpe, in April 2020. His main point of contact was Mr Samuels although he did speak to Mr Rubens on some occasions.

55. Mr Bailey initially explored with Mr Samuels a number of potential deals for the supply of PPE prior to the Disputed Transaction. However, none of these came to fruition. Had these culminated in a contract, at least two transactions would have involved Purple although Mr Bailey did not identify Purple as a contracting party at this stage.

56. The Disputed Transaction evolved from an email message on 7 May 2020 in which Mr Sharpe advised Mr Bailey that the DHSC was interested in acquiring a substantial number of face masks from China and had sought confirmation of the amounts that could be supplied with a long stop date on 15 August. Mr Bailey advised Mr Samuels of the opportunity that had arisen without, at this stage, identifying Purple as a contracting party. Once Mr Samuels had advised Mr Bailey that BM Medical Technology was earmarked as manufacturer, Mr Samuels sought to impress upon him the importance of blocking out production capacity at the factory to ensure the supply deadline could be met. In one subsequent message, he advised Mr Bailey that he would need something to wave in front of the Chinese to show them they were serious and thus retain capacity.

57. Mindful of this, in a WhatsApp message at 7:25pm on 18 May, Mr Bailey advised Mr Samuels that "once we confirm payment terms we can get them to raise a PO first thing in the morning". Shortly afterwards, Mr Bailey advised Mr Samuels that "this deal is done now (as long as we can confirm payment terms and as long as we have the necessary arrangements in the background)". However, in evidence, Mr Bailey emphasised that he was referring to an agreement in principle. In his witness statement, he confirmed that "…no deals were ever done unless and until the DHSC placed a purchase order, and until deposits were paid, as Nikki knew".

58. When, in cross examination, it was put to Mr Bailey that he was working for Purple, not RSW, Mr Bailey stated that he "wasn't working for anyone. I was working between two parties in this instance, the same way that I had worked between multiple parties before that, including RSW." By this, I took him to mean that he wasn't simply working for one of the parties only. The relationship he described with each party was as an intermediary, relaying views or messages, providing them with information and doing what he could to achieve a deal on terms from which he would benefit personally through the payment of commission.

59. At least initially, Mr Bailey looked to RSW rather Purple for remuneration from the Disputed Transaction. In their initial discussions, Mr Bailey and Mr Samuels had envisaged Mr Bailey would take a cut out of the margin on the amount payable by RSW to its supplier. However, by an exchange of emails between them on 18 May, it was agreed RSW would pay Mr Bailey a "brokerage fee of $0.02 per mask" and, on 20 May 2020, Mr Bailey sent Mr Samuels the SIA providing for him to be remunerated at a reduced rate of $0.015. This was Mr Bailey's agreed rate of commission at the time of the Disputed Transaction. Purple was under no obligation to pay him commission.

60. When the Purchase Order was provided to RSW, this was to provide it with something to wave in front of the Chinese. Mr Bailey pressed RSW for the Pro Forma Invoice because he "wanted to push things along" mindful that payment of the deposit was fundamental to the deal. At one point in cross examination, he stated that "it's all linked. We had to have the PO across to RSW. RSW had to have the PI across back to Purple. The Cabinet had to have the PO across to Purple, and then the deposit had to go across to RSW…"

61. Mr Bailey's view was that "under no circumstances could anyone possibly have thought that the exchange of [the Purchase Order and the Pro Forma Invoice] was the end of the line and that the deal was live. No-one ever suggested that at the time. The DHSC had not yet placed an order so the daisy chain was not complete. And it was my clear understanding (and, as far as I could tell, everyone else's clear understanding) that the relationship between [Purple] and RSW was never going to go live until cash moved to pay the deposit. Absent cash moving, nothing was going to happen between RSW and its factory supplier either".

62. It emerged during cross examination that, in his communications with Mr Samuels on WhatsApp on 2 May 2021, Mr Bailey had sought to encourage business by over-stating his own role in the market. He stated that "we" - presumably Myse&Vast - had an "exclusive consultancy deal with the big buyer to use as a vehicle to his deals and NHS" and "just filled the 5m FF3 order with them". In cross examination, he confirmed that neither of these comments was correct and, in making them, he could thus be said to have bent the truth. Obviously, this does not reflect well on Mr Bailey's business propriety. However, unlike the other witnesses who had an obvious financial interest in giving evidence on behalf of one party on whose behalf they were called, the same could not be said of Mr Bailey. Mr Bailey would only be entitled to a financial return from the Disputed Transaction if it was a binding commercial contract. Mr Bailey's testimony was generally consistent with the contemporaneous documentation. It was also plausible. Having assessed his evidence in its commercial context, I am satisfied that his factual account was generally reliable and that he provided an accurate account of his perceptions at the time.

63. Mr Land was Purple's purchasing and procurement manager. He was only peripherally involved in the Disputed Transaction. In his witness statement, he gave general evidence about the treatment of purchase orders and pro forma invoices, and more specific evidence about the preparation of the Purchase Order itself. Since he was not cross examined, his evidence was of no more than limited value.

(4) Mr Bailey's role as an intermediary

64. At all times, Mr Bailey was a director of Myse&Vast and it was at least implicit in his evidence that he acted as managing director of Myse&Vast and not in his personal capacity. This is reflected in the fact that, when on 20 May, he entered into the Standard Fee Agreement with RSW, he did so on behalf of Myse&Vast.

65. However, there is are issues between the parties as to the nature of Mr Bailey's role in the Disputed Transaction, whether he is to be regarded as a "pure intermediary" or an agent and, if he was an agent, the identity of his principal or principals and the scope of the agency itself. These issues have a bearing on Mr Bailey's duties to the parties themselves and the imputation of his knowledge.

66. The core definition of agency, in *Bowstead and Reynolds on Agency (22nd edn)(2021) Para 1-001*, is as follows.

> "Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation".

67. It is obviously a critical part of this definition that the putative agent is authorised to act in such a way as to affect the principal's relations with third parties. This would certainly encompass cases in which the agent is authorised to enter into a contract on behalf of the principal. However, at *Para 1-020*, the editors observe that it is also capable of encompassing some agents who are authorised to negotiate on the principal's behalf but not enter into a binding contract. Consistently with this, they state that "the evidenced intentions of such [agents] may, for instance, be relevant to the rectification of a written contract should it not accord with the informal consensus that had been reached". Conceivably, such agents might also be authorised to make representations falling short of an immediate contractual warranty.

68. The editors observe that some putative agents "may be the main go-between in negotiations on behalf of one of the parties and…trusted by that party to pursue that party's interests." Such agents "will usually in doing so have authority to receive and communicate information on their principal's behalf, and thereby have the capacity to alter their principals' legal position. In that respect, such persons fit within the core definition of agency, since without that authority to make and communicate information, the principal may not secure a deal".

69. In any event, the editors of *Bowstead* state, in *Paragraph 1-001* (supra) that, "a person may have the same fiduciary relationship with a principal [as an agent satisfying their core definition] where that person acts on behalf of that principal but has no authority to affect the principal's relations with third parties". Since there is a fiduciary relationship, the editors observe that "such a person may also be called an agent".

70. In the present case it is common ground that, if Mr Bailey was not an agent and is not to be treated as such, he must have fallen into a residual class designated as "pure intermediaries" by Mance J in *Hanjin Shipping Co Ltd v Zenith Chartering Corporation*

(the Mercedes Envoy) [1995] 2 Lloyd's Law Rep 559, 560. In that case, the parties acted through two separate firms of brokers. However, at least some of their communications were transmitted through a third firm, HH. The issue arose as to whether the parties had conferred authority on HH to receive communications on their behalf. Having concluded that HH were pure intermediaries, Mance J stated that their "only actual authority was to transmit accurately actual messages which they had received" and there was no basis "for treating them as having, or having been held out as having, any other or wider authority".

71. Applying these principles, I am satisfied Mr Bailey is to be regarded as a dual agent, not a "pure intermediary", nor a sole agent for one of the parties only. This is on the basis that Mr Bailey's relationship with each party, RSW and Purple, satisfies the core definition. If not, there could be no issue that, with each party, his relationship was of a fiduciary nature.

72. I have reached this conclusion for the following reasons based, in particular, on the evidence, following cross examination, of Mr Bailey, Mr Sharpe and Mr Samuels together with the contemporaneous documentary evidence.

73. Firstly, whilst the parties did not authorise Mr Bailey, at any stage of the negotiations, to enter into binding contractual commitments, they each authorised him to identify, as the case might be, a purchaser and supplier and, having done so, authorised Mr Bailey to receive and communicate documents and information, provide advice and negotiate on their behalf. He was thus authorised to negotiate the fundamental terms, including the price and delivery schedule, and reach agreement in principle on the parties' behalf. On this basis, the parties can each be taken to have authorised Mr Bailey to act on their behalf so as to affect their legal relationship with one another. Moreover, given the ambit of his relationship with each party, including his advisory role, there can be no room for doubt that RSW and Purple were entitled to repose trust and confidence in Mr Bailey as a fiduciary. This is underlined by the fact that, on 20 May, RSW entered into a written agreement with Myse&Vast for the payment of commission, characterised as an introduction fee in respect of the Disputed Transaction, and Purple were in negotiations with Mr Bailey for a consultancy agreement, ultimately signed on 28 May 2020.

74. Secondly, it matters not that, by acting as a dual agent in this way, Mr Bailey potentially exposed himself to a conflict of duty or, indeed, that he was acting for unidentified principals until a late stage of the negotiations. An agent is not precluded from acting concurrently for both parties to a transaction, *Bowstead Para 2-102*. Moreover, RSW and Purple were aware from the outset that Mr Bailey was acting for unidentified third parties. To the extent it is relevant, there is thus no room for any suggestion that he was acting for an undisclosed principal.

75. Notwithstanding that Mr Bailey was expressly authorised to negotiate on their behalf, I am not satisfied that either party allowed the impression to be created that Mr Bailey had their authority to enter into binding contractual commitments so as to clothe him with apparent authority to do so. Given the scale of the transaction, the extent of the parties' potential liabilities and, indeed, Mr Bailey's own level of business experience, they could not reasonably have expected Mr Bailey to have such authority and the parties did not do anything themselves, whether in correspondence or otherwise, to suggest otherwise.

76. As principals, RSW and Purple would generally be imputed with Mr Bailey's knowledge relating to the subject matter of the agency at least to the extent Mr Bailey acquired such knowledge whilst acting for them, *Bowstead Para 8-208*, *El Ajou v Dollar Land Holdings [1994] 1 BCLC 464*, *479-481*, *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmBH [2014] EWHC 3615 at [762]*. Mr Bailey's knowledge of the factual context and the contractual requirements of other parties in the relevant chain of transactions pertained to the subject matter of each agency and was plainly material information for his principals. This includes the DHSC's contractual procedures and requirements. Mr Bailey was thus under a duty to provide RSW with this information and RSW is imputed with his knowledge about it.

(5) Did the parties enter into a binding contract for the sale of the Face Masks?

77. As pleaded, RSW's case is founded on the following propositions.

    77.1. Mr Bailey acted as an intermediary for both parties "in negotiating and concluding [an] agreement" for the sale of the Face Masks. ("**Proposition 1**").

77.2. Mr Bailey was also authorised to act as Purple's agent "in communicating [its] offer to purchase…" ("**Proposition 2").**

77.3. By the 10.30 am Email and the Purchase Order, Mr Bailey made an offer to purchase the Face Masks on behalf of Purple ("**Proposition 3**").

77.4. By his 3.10 pm email to Mr Bailey with the Pro Forma Invoice attached, Mr Rubens accepted Mr Bailey's offer ("**Proposition 4**").

78. Proposition 1 is partly correct. Both parties authorised Mr Bailey to act as their intermediary. I am satisfied, on the evidence, that this encompassed all stages of the negotiations prior to the formation of a binding contract. During that period, Mr Bailey was also authorised to act as the parties' agent, to receive and communicate information and negotiate on their behalf. However, he did not have authority to conclude a binding contract on behalf of either party without first obtaining their express agreement.

79. Proposition 2 conflates Mr Bailey's authority with the question of whether Purple made a contractual offer. However, in the hypothetical event Purple made a contractual offer, he was plainly authorised to communicate it to RSW.

80. Propositions 3 and 4 raise issues that are central to the case. However, relying on observations from Lloyd LJ in *Pagnan SpA v Feed Products Ltd [1987] 2 Lloyds Rep 601*, Mr Ogden submits that the operative test is whether Mr Bailey, as intermediary, obtained the agreement of both parties to the contract. At *616*, Lloyd LJ stated as follows.

> "I do not myself find it helpful to think in terms of authority and ratification, or even offer and counter-offer, when considering a contract negotiated through a single intermediary. The only question in such a case is whether there comes a point in time when the intermediary has obtained the agreement of both parties to the same terms".

81. In the *Pagnan* case, it was not suggested that the intermediary was authorised to commit the parties to a binding contract without first obtaining their agreement. However, if and once they had signified their assent, it was axiomatic that the parties had authorised the intermediary to enter into the agreement on their behalf. No doubt it was for this reason that Lloyd LJ considered it unhelpful to think in terms of authority.

The issue of ratification arose in relation to contractual terms allegedly introduced after the initial formation of the putative contract. There is no such issue in the present case.

82. Whilst the preliminary part of Lloyd LJ's above observations was apparently intended as guidance only ("I do not myself find it helpful…"), he formulated the relevant test without qualification and applied it when dismissing the appeal. His conclusion was based on a determination – consistent with the findings of the judge – that the intermediary had obtained the consent of the parties to the relevant terms. Since Stocker and O'Conner LJJ were in full agreement with Lloyd LJ, his test can be taken to authoritatively state the law in cases such as the present where the intermediary did not have authority to commit the parties to a binding contract without their express agreement.

83. In any event, regardless of the way in which the operative test is formulated, I am satisfied that the parties did not enter into a binding contract for the sale and purchase of the Face Masks. The same answer is achieved by asking whether Mr Bailey obtained the agreement of each party to the agreement or applying the familiar test of offer and acceptance.

84. I have reached this conclusion for the following reasons based on the commercial context of the negotiations, the contemporaneous documentation and the testimony of the witnesses bearing in mind that the parties' intentions are to be assessed objectively in the light of what they said and did rather than what they claim to have intended.

85. Firstly, whilst Purple's identity was not disclosed to RSW until shortly before the parties are alleged to have contracted, they were each aware at the outset that the Face Masks were ultimately required for a public body, in all likelihood the NHS or the DHSC. In view of the scale of the Disputed Transaction and its commercial value, Purple was not prepared to assume the risk of purchasing the Face Masks until the transaction was formally approved by the DHSC. It would also have been obvious to RSW that no intermediate purchaser would willingly expose itself to such a risk. In any event, Mr Bailey advised Mr Samuels that Cabinet approval would be required before the Disputed Transaction could go ahead and, in cross examination, Mr Samuels confirmed that this was his understanding at the time.

86. It is true that, in his communications with Ms Glenn on 20 May 2020, Mr Sharpe sought to apply pressure or, as he put it, "leverage his relationship" with the DHSC in order to secure a deal by suggesting Purple was by then under significant pressure. In doing so, he sought to create a misleading impression about Purple's financial commitments, suggesting, in particular, that Purple had entered into contractual commitments to its supplier when it had not done so. However, the most plausible explanation for him having done so is the one given by Mr Sharpe himself, namely that he was seeking to persuade DHSC to approve the transaction. Purple had not entered into any binding contractual commitments at this stage even on the case now advanced by RSW. Without DHSC approval, it never did so.

87. Secondly, as Mr Bailey confirmed when giving his evidence, a practice had developed by the time of the Disputed Transaction in which suppliers disposed of PPE equipment in "daisy chains" initiated at the point when the first purchaser paid a deposit. The market operated in this way owing to the scale of demand, the extent of the market itself and the number of demands that were being placed on manufacturers. Suppliers were not prepared to enter into contractual commitments until they had received a substantial deposit. Consistently with this, Mr Bailey was made aware Purple would not enter into any contractual commitments prior to payment of the deposit. When giving his evidence, Mr Samuels himself confirmed that RSW required a deposit before the deal went ahead. It is apparent from the contemporaneous communications between Mr Bailey and Mr Samuels on WhatsApp that, for this reason, they were alive to the importance of the payment of a deposit.

88. In the absence of a deposit, no parties in the so-called daisy chain other than RSW have ever sought to advance a claim on the footing there was a binding contract. RSW itself did not assert such a claim until RSW's Letter of Claim, some six months after it was advised that the Disputed Transaction was not going ahead.

89. Thirdly, the 10.30 am Email and the Purchase Order were not in the nature of a contractual offer. They were sent and could be seen to have been sent with a view to moving the prospective transaction forward so as to provide RSW with a template for its pro forma invoice and documentation that could be "waved before the Chinese" to persuade them to block capacity in their factory. On their face, they were not apt to

amount to a contractual offer but, in the unlikely event that they could be construed in this way, it would have been obvious to Mr Rubens and Mr Samuels that Purple did not have the requisite intention, *Chitty Vol 1 Para 4-004*.

90. Fourthly, on the hypothesis that the 10.30 am Email and the Purchase Order could somehow be characterised as a contractual offer, it cannot reasonably be suggested that Mr Rubens accepted or purport to accept the offer by sending Mr Bailey his 3.10 pm email accompanied by the Pro Forma Invoice. In addition to attaching the Pro Forma Invoice, the 3.10 pm email merely provided some information about the contents of the Pro Forma and stated that he would prefer to give account information verbally with a view to the payment of the deposit.

91. Acceptance of a contractual offer is a final and unqualified expression of assent to the terms of an offer and the test is objective, *Chitty Vol 1 Para 4-031*. Viewed objectively, the 3.10 pm email and the Pro Forma Invoice could not reasonably be interpreted in this way.

92. Suppliers sometimes use pro forma invoices to offer goods or services to potential customers on the basis neither party is under a contractual commitment unless the customer elects to make a payment, HMRC's VAT Guide Para 17.3. Relying on *Carlos Soto SAU v AP Moller-Maersk AS [2015] EWHC 458 (Comm)* at *[8]*, Mr Chapman submitted that the use of the words "pro forma" does not preclude the incorporation of such an invoice in contractual documentation. However, it was not suggested in Eder J's judgment that, by issuing the pro forma invoice, the relevant party – a shipper – had accepted a contractual offer. Conversely, Mr Chapman also referred me to *Behnke v Bede Shipping Co Limited [1927]1 KB 649*, in which Wright J adjudged that a party had made a contractual offer by sending a pro forma contract to the other. It is conceivable that there could also be circumstances in which a contractual offer is accepted through the delivery of a pro forma invoice, unlikely as that might seem. However, in my judgment there is no room for this in the present case. The Pro Forma Invoice was delivered at Mr Bailey's request to accommodate or facilitate payment of the deposit. There is nothing in the contemporaneous documentation to suggest that, by sending the Pro Forma Invoice, Mr Rubens thought that he might somehow have entered into a binding contract to sell the Face Masks to Purple in advance of payment.

93. Mr Rubens's evidence on this issue was itself confused. In his witness statement, he did not specifically state that he sent the 3.10 pm email or the Pro Forma Invoice with the intention of accepting a contractual offer rather he stated that the expression "pro forma" was "only relevant to RSW's liability to account for VAT and [had] no bearing whatsoever over the binding effect of any transaction agreed between RSW and a counterparty such as Purple Surgical". When it was put to him that VAT was not payable on PPE at the time, he appeared to concede this was so but failed to provide a convincing explanation for the use of the label.

94. In any event, I am satisfied that, in the hypothetical event that the 3.10 pm email and the Pro Forma Invoice were sent to Mr Bailey with the intention of accepting a contractual offer for the purchase of the Face Masks, Mr Bailey did not construe them as such and there was no substantial basis on which he (or, indeed, anyone else) could objectively have done so.

95. Having determined that the parties have not entered into a binding contract for the sale of the Face Masks, the question is entirely hypothetical whether such a contract would have been subject to conditions precedent or subsequent that the DHSC approved the Disputed Transaction or Purple paid RSW a deposit. It is unnecessary for me to deal with this aspect of the case and I shall decline to do so.

96. The Claim is dismissed. I shall hear submissions from counsel in relation to costs and all other consequential issues.