Neutral Citation Number: **[2025] EWCA Civ 1212**

Case No: CA-2024-001949 & CA-2024-001935

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Nicholas Thompsell (sitting as a Deputy High Court Judge)
[2024] EWHC 1725 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 02/10/2025

Before:
LORD JUSTICE MALES
LORD JUSTICE PHILLIPS
and
LORD JUSTICE SNOWDEN

- -

Between:

1) ADVANCED MULTI-TECHNOLOGY FOR MEDICAL INDUSTRY (trading as HITEX) **2) CARAMEL SALES LIMITED** **3) DAVID POPECK**	**Respondents/ Claimants**
- and -	
UNISERVE LIMITED	**Appellant/ Defendant**
-and-	
MAXITRAC LIMITED	**Third Party**
-and	
ANDREW STEAD	**Fourth Party**

- -
- -

Luke Parsons KC, David Walsh KC & Edward Mordaunt (instructed by **Holman Fenwick Willan LLP**) for the **Appellant**
David Lewis KC & Edward Knight (instructed by **Trowers & Hamlins LLP**) for the **Respondents**
Hearing dates: 22 & 23 July 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 2 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE MALES:

1. These appeals concern two contracts, a contract for the supply of 80 million face masks and a contract providing for commission to be paid on shipments made under the supply contract. The contracts, both dated 21st April 2020, were concluded at the height of the Covid 19 pandemic.

2. The seller had problems meeting the agreed delivery schedule in the supply contract, which eventually led to the buyer purporting to terminate that contract. The seller contended in this action that the buyer's purported termination was unlawful, with the consequence that the supply contract remained alive for performance. It claimed damages for the buyer's failure to accept and pay for the goods as and when deliveries fell due. The buyer defended the claim on the basis that it was entitled to terminate the contract; alternatively that it was entitled to rescind the contract for misrepresentation; and that in any event the seller was not in a position to perform the contract and therefore not entitled to damages.

3. The judge, Mr Nicholas Thompsell, sitting as a Deputy High Court Judge, held that the seller's claim succeeded, although on a basis for which the seller had not contended, and awarded damages of over US $16 million. The buyer appeals against that award. The seller accepts that the award of damages cannot be supported on the basis of the judge's reasoning, but contends by a respondent's notice that the same result should be reached by a different route.

4. I have concluded that the appeal under the supply contract must be allowed and that the seller's claim must be dismissed. In short, the seller was not in a position to perform and the buyer was entitled to terminate the contract.

5. The judge dismissed the claim under the commission contract, holding that commission had not been earned under the terms of that contract. The seller's agent appeals against that conclusion. However, in circumstances where commission has been paid on all the shipments made under the supply contract and where (contrary to the judge's view) the buyer was entitled to terminate that contract, no further commission will be payable regardless of the further issues arising in the commission appeal.

The parties

6. The seller, the first claimant in the court below and respondent to the supply contract appeal, is a Jordanian manufacturer of medical supplies called Advanced Multi-Technology for Medical Industry. It trades under the name of Hitex. Early in 2020 it began to manufacture medical masks.

7. The buyer, the defendant in the court below, is Uniserve Ltd, an English company whose business had consisted of providing logistical support in relation to the transport of goods. It was well connected with the UK Department of Health and Social Care and, at the start of the pandemic, saw an opportunity to profit by moving into the supply of Personal Protection Equipment ('PPE') for the NHS. Uniserve is the appellant in the supply contract appeal and respondent in the commission appeal.

8. The third claimant was Mr David Popeck, a businessman who operated principally within the fashion trade, acting as a middleman buying from manufacturers or

wholesalers and selling to retailers. He had no previous experience in supplying PPE, but he too was aware of the opportunity to profit caused by the soaring demand for PPE as a result of the pandemic. He was the sole shareholder and director of the second claimant, Caramel Sales Ltd, an English company. Mr Popeck and Caramel are the appellants in the commission appeal.

9. The third and fourth parties, Maxitrac Ltd and Mr Andrew Stead, played no part in the appeal. Maxitrac acted on behalf of Uniserve in arranging the supply contract and was later involved in the management of the contract. Mr Stead was Maxitrac's sole director and shareholder.

Background

10. It was Mr Popeck who introduced Uniserve to Hitex in or about April 2020. Initially he wanted Caramel to buy face masks from Hitex as a principal for resale to Uniserve, but he was reluctantly persuaded to accept the contractual structure which was adopted, namely a sale contract between Hitex and Uniserve, together with a Commission Contract with Uniserve under which he/Caramel would receive a commission rather than making a profit as a reseller.

11. On 9th April 2020 an email was sent by a Mr Andrew Waller to Mr Stead. Mr Waller was a conduit for information from Caramel and Hitex to Maxitrac. It was Uniserve's case, admitted by Hitex, that Mr Waller had authority to make the statements in the email on behalf of Hitex. The email, which was referred to at the trial as 'the Waller email' and which became the basis for Uniserve's misrepresentation case, stated that:

> '… there are 5 million available on 15th and 5 million on 22nd April. We can then produce 5 million a week from there on in.'

12. However, Uniserve carried out considerable further investigation of Hitex's production capability before the supply contract was concluded, including by a company called Majlan, Uniserve's shipping agent in Jordan, which visited Hitex's factory on 16th April and again on 23rd April 2020. That capability was largely dependent on the delivery from China of five new automated machines capable of producing up to 120 masks per minute. Although these machines were originally expected to be supplied in late March, there were delays in the machines being shipped. As matters turned out, deliveries were spread during April and were only completed on 29th April 2020.

13. Following its inspection on 16th April 2020, Majlan reported back to Uniserve that the current volume of production was 25,000 masks per day on Hitex's existing semi-automated machine and 80,000 masks per day on the first of the automated machines which by then had been delivered; and that production was expected to increase to approximately 180,000 masks per day (so 'maybe 1 million per week') once the remaining machines were delivered and in production.

14. Uniserve was concerned that this level of production, far below what had been described in the Waller email, would be insufficient for its needs. It instructed Majlan to visit again on 20th April 2020. This was subsequently changed to 23rd April 2020. After that visit Majlan reported back that the first automated machine was working, a second one was being tested, and the third machine was the original semi-automatic

machine, with three new automated machines still on their way; meanwhile there was at this point no cargo ready for delivery.

The Supply Contract

15. Although dated 21st April 2020, the Supply Contract was signed on behalf of Hitex on 23rd April and by Uniserve on 23rd or 24th April, only after Majlan had reported the results of its inspection on 23rd April. It provided for the supply of 80 million 'Type IIR Surgical Disposable Fluid Resistant Masks', in accordance with an attached specification, packed in cartons containing 50 boxes with each box containing 50 masks, for delivery ex works, to be collected from Hitex's factory in Jordan. The price was US $0.30 per mask.

16. The agreed delivery schedule was as follows:

Date	**Quantity of masks**
28th April	6 million
5th May	5 million
12th May	5 million
19th May	5 million
26th May	5 million
2nd June	7 million
9th June	7 million
16th June	7 million
23rd June	7 million
30th June	7 million
7th July	7 million

14th July	7 million
21st July	5 million

17. The contract provided that the dates for delivery were of the essence, meaning that Uniserve would be entitled to terminate the contract (and, if appropriate, claim damages) if any of the delivery dates were not met. However, while time was of the essence as regards Hitex's obligation to have the masks ready for delivery, it was not of the essence as regards Uniserve's obligation to collect the masks on the stated delivery dates.

18. The contract also contained an entire agreement clause excluding liability for non-fraudulent pre-contractual representations.

19. The contract was expressly governed by the law of England and Wales.

The Commission Contract

20. At the same time a Commission Contract was concluded between Uniserve and Mr Popeck/Caramel under which Uniserve agreed to pay a commission on each shipment of masks, calculated by reference to the date that each shipment arrived in the United Kingdom and was cleared by customs. The contract contained an acknowledgement by Mr Popeck/Caramel 'that this Agreement does not represent a commitment by Uniserve to purchase any Goods from the Supplier' (i.e. Hitex).

Performance of the contract

21. The first delivery, of 6 million masks, was due to take place on 28th April 2020. However, a problem arose because the masks produced by Hitex did not have a nose bridge, as required by the specification. The judge found that Hitex had not appreciated that nose bridges would be required, and that when this was pointed out a modification to the machines manufacturing the masks was necessary. This took some time. Moreover, it was found that after the modification was made, the production rate needed to be reduced in order to avoid an unacceptable number of sub-standard masks.

22. In the event Hitex failed to meet the deliveries due on the first four delivery dates set out in the table above, although 1 million masks were delivered, in two batches which were collected on 16th and 20th May 2020.

23. On 13th May 2020 Mr Stead, on behalf of Uniserve, produced a document setting out the expected production of each machine over the coming days and weeks. This led to further exchanges in which a revision of the contractual delivery dates was agreed.

24. On 22nd May 2020 Mr Stead set out the following revised schedule of deliveries (totalling 79 million masks to take account of the 1 million already delivered) and asked for confirmation that it was agreed:

Date	**Quantity of masks**
31st May	1 million
7th June	1 million
14th June	2 million
21st June	3 million
28th June	5 million
5th July	5 million
12th July	7 million
13th July	7 million
20th July	8 million
27th July	8 million
3rd August	8 million
10th August	8 million
17th August	8 million
24th August	8 million

25. Hitex confirmed in an email dated 26th May 2020 that this schedule was agreed.

26. There was an issue in the court below whether this exchange was effective to vary the contractual delivery schedule. Uniserve contended that it was not and pursued the point in this court. Ultimately, however, perhaps perceiving that his submissions were falling on stony ground, Mr Luke Parsons KC for Uniserve abandoned this ground of appeal.

27. Following the agreement of this revised schedule, the next deliveries, each of 1 million masks, were due on 31st May and 7th June 2020. These quantities were made available for delivery on the due dates but were only collected by Majlan on 10th June and 17th June. The judge found that by about this time Uniserve was keen to get out of the contract, partly because it was frustrated by Hitex's previous failures to supply on time and partly because it had concluded a contract with an alternative supplier of masks at a cheaper price.

28. No further deliveries took place under the contract and the parties were in dispute as to whether and in what quantities masks were made available for collection from Hitex's factory. The judge found that the most reliable evidence of the quantity of masks available for collection consisted of Hitex's Production Reports. These were reports, compiled manually, recording masks transferred from elsewhere in Hitex's premises into that part of the main warehouse from which deliveries were collected. On the basis of these reports, the judge found that on 14th June 2020 Hitex had available the 2 million masks due for delivery on that day and that it had complied with its obligations as set out in the revised schedule. However, Hitex did not notify Uniserve (or Majlan) that these masks were available and ready for collection and Majlan did not turn up to collect them.

29. Instead, on or about 17th June 2020, Mr Stead (on behalf of Uniserve) communicated to Mr Popeck (on behalf of Hitex) that the supply contract was over and Uniserve instructed Majlan to have no further dealings with Hitex. The judge found that Hitex would have concluded at this point that Uniserve had no intention of further performing the supply contract.

30. The judge found that because Hitex had at this stage complied with its delivery obligations under the revised schedule, Uniserve was not entitled to terminate the contract in this way and its purported termination was itself a repudiatory breach of the contract which would have entitled Hitex to bring the contract to an end and to claim damages for repudiation. However, Hitex did not do so. Instead, by an email dated 11th July 2020 Hitex complained that Uniserve had failed to collect the deliveries due on 21st and 28th June and on 5th July, and that it was running out of space to store masks on site and might need to hire space nearby. In response, Mr Stead made clear once again that the contract was finished.

31. The judge's findings about what happened thereafter are not easy to follow. At paras 392 to 394 he said that Hitex continued to produce masks as normal for a period, without informing Majlan that further shipments were ready, but that the warehouse was full by the end of July, by which time Hitex had reduced the rate of production and was disposing of masks by sales in the local market. At para 398, however, he said that by 13th July Hitex was not maintaining sufficient masks to meet the cumulative total due to be supplied under the revised schedule and that, from that time, the number of masks available declined, with no new masks being produced (or at least entering the warehouse) after 14th July, save for 5,000 masks on 16th August.

32. At all events, the position appears to be that from or soon after 11th July 2020 Hitex did not have available sufficient masks to meet the cumulative total required by the revised schedule, but would have had enough on any given date to supply the number of masks required to fulfil the next shipment.

Hitex's claim

33. Hitex's case in this action has been that Uniserve failed to collect the shipment due for delivery on 14th June and all subsequent shipments, a total of 77 million masks; that on each occasion when Uniserve failed to collect a shipment, Hitex was discharged from any obligation to deliver that shipment; and that it had available sufficient masks to meet each (i.e. the next) instalment as it fell due. It contends that Uniserve was not entitled to terminate the contract and that, to the extent that it purported to do so, Hitex did not accept the termination so that the contract was kept alive. It claims damages under section 50 of the Sale of Goods Act which provides that:

> '50. **Damages for non-acceptance**
>
> (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, the buyer's breach of contract.
>
> (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.'

34. Hitex's case was that there was no available market for the goods by early July 2020, the previously flourishing market having collapsed due to massive oversupply and a dramatic reduction in demand. Its case was that there were no buyers ready and willing to absorb the 77 million masks still due for delivery under the contract and it put forward a calculation of damages amounting to US $23.1 million.

The judgment

35. The judge dealt first with Uniserve's defence that it was entitled to rescind the supply contract for misrepresentation. He found that the Waller email contained two statements, each of which was a statement about the future and therefore a statement of prediction or opinion. These were:

    (1) that 5 million masks would be available on each of 15th April and 22nd April 2020; and

    (2) that Hitex could produce 5 million masks per week from 22nd April.

36. However, he rejected the misrepresentation claim on the ground, contrary to the admission in Hitex's pleading, that Mr Waller was not authorised to make these statements on behalf of Hitex.

37. The judge went on to find that, on 9th April 2020 when the representations were made, Hitex would have had grounds to believe that it could supply 5 million masks on 15th

April, but not on 22nd April, and that it would not have had grounds to believe that it could produce 5 million masks per week from 22nd April, so that:

> '113 … if Hitex had made the representations that were made in the Waller email (which I do not consider to be the case) at least two of these representations were either false as a statement of Hitex's honest belief, or that Hitex would have been reckless or careless as to whether it was true or false.'

38. This leaves an ambiguity whether the judge would have found that the representations were made fraudulently or merely carelessly. That might have been of critical importance as the entire agreement clause in the contract would have excluded liability for a careless, but not for a fraudulent, misrepresentation.

39. However, the judge went on to find that Uniserve did not rely on the representations in the Waller email, but relied instead on the investigations carried out by Majlan. So Uniserve's case would have failed on that ground also.

40. The judge dealt next with the issue whether the exchange of emails resulting in the revised delivery schedule created a binding variation of the contract. He found that it did and, as I have explained, Uniserve's challenge to that finding is no longer pursued.

41. The next issue was whether Hitex complied with the revised delivery schedule. The judge found that it did, at any rate until the delivery due on 14th June 2020, based on the figures shown in the Production Reports (although he does not appear to have made express findings as to the deliveries which fell due between 14th June and 11th July 2020). As a result, he concluded that Uniserve was not entitled to terminate the supply contract and that its purported termination on about 17th June 2020 when Mr Stead told Mr Popeck that the contract was over was a repudiatory breach by Uniserve.

42. The judge rejected Hitex's submission that it could both keep the contract alive for performance and at the same time be discharged from its obligation to have the cumulative total available for collection. The supply contract was not a severable contract with each shipment being treated as a separate contract. If the contract was kept alive for performance, Hitex's obligation was to have available the cumulative total required on each delivery date. It was not open to Hitex to 'recycle' or 'retender' the same masks for each succeeding shipment.

43. If the judge had stopped there, Hitex's claim would have failed. However, contrary to Hitex's pleaded case that it kept the contract alive for performance, the judge concluded that Hitex accepted Uniserve's repudiation as bringing the contract to an end. He reasoned that by 17th or 18th June, or certainly by 11th July 2020, Hitex knew that Uniserve was treating itself as not bound by the contract, and that by 13th July 2020 Hitex was not maintaining production at a sufficient rate to supply the cumulative total required by the revised delivery schedule, and took no steps to contact Majlan or Mr Stead to arrange any further collection of masks. Although he recognised that this was not the case which Hitex had advanced, he concluded that this amounted to an acceptance by Hitex of Uniserve's repudiation of the contract, which was therefore validly terminated by Hitex on 13th July 2020.

44. Accordingly the judge found that Hitex was entitled to damages for repudiation as a result of the termination of the contract by Hitex on 13th July 2020. He found that there was an available market, and that damages should be assessed by reference to the market price as at the date of termination for face masks to be supplied ex works Jordan on about the dates provided for in the revised delivery schedule. On that basis he assessed damages in the sum of US $16.94 million.

The grounds of appeal

45. On behalf of Uniserve seven grounds of appeal were advanced. These were, omitting ground 5 for which Uniserve did not obtain permission to appeal:

(1) It was procedurally unfair for the judge to conclude that Hitex had accepted Uniserve's renunciation of the contract when that was contrary to Hitex's own pleaded case; in any event the conclusion was wrong because Hitex could not accept a renunciation without a clear communication to Uniserve that it was doing so.

(2) The basis on which damages were awarded to Hitex was also procedurally unfair because Hitex had failed to continue to perform the contract and had advanced no market price if there was an available market.

(3) The judge was wrong to hold that the revised schedule was a variation of the contract.

(4) The judge failed to consider Uniserve's alternative case that it terminated the supply contract on 11th July 2020; having accepted the Production Reports as reliable, and it being common ground that 15% of Hitex's stock was reserved for the Jordanian government, the judge should have concluded that Hitex did not have sufficient stock to meet the deliveries due on 21st June and 5th July 2020, so that Uniserve was entitled to terminate the contract on 11th July 2020.

(5) …

(6) The judge's conclusion that Hitex did not make or authorise the representations contained in the Waller email was contrary to Hitex's pleaded case.

(7) The judge applied the wrong test for reliance on a misrepresentation.

46. By a respondent's notice Hitex contended that the judge was wrong to find that it was obliged to maintain sufficient stock to fulfil all deliveries that had fallen due, notwithstanding that Uniserve had failed to accept such deliveries; the judge ought to have found that Hitex was entitled to re-tender the same goods for each shipment in mitigation of its loss.

Deciding a case on grounds not argued

47. Mr David Lewis KC for Hitex conceded grounds 1 and 6. That is to say, he accepted that Hitex had not advanced a case that it accepted Uniserve's renunciation of the contract, and that the judgment could not be supported on that basis. He relied exclusively on the respondent's notice as a basis on which Hitex could be awarded damages. He accepted also that Hitex had admitted that Mr Waller was authorised to make the representations contained in the Waller email.

48. It is a basic principle of our adversarial system of civil justice that the parties identify in their pleadings the case which they seek to advance so that the issues for decision are clear, that evidence and submissions are directed to those issues and need not be concerned with other matters, and that the judge decides the issues thus identified and gives judgment accordingly. The principle was explained by Lord Justice Dyson in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041, para 21, in a passage applied in *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287, [2021] BCC 640:

> 'In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.'

49. In *Satyam* itself, Lord Justice Nugee added that:

> '38. In the present case, the possibility that the Croydon Properties were held on trust for Mr V Sharma does not appear to have been even canvassed by the Judge during the hearing, but, as far as we know, first emerged fully-formed in the Judgment. That, for the reasons given by Dyson LJ in *Al-Medenni*, was not a course that was open to him. Judges may sometimes think – and may even sometimes be right – that their own theory better fits the facts than that of either party, but if it is wholly outside the scope of the pleaded issues, that is nothing to the point, and to decide a case on a basis that has not been explored in evidence or addressed in submissions is likely to leave at least one, if not both, parties with a profound and justified sense of unfairness.'

50. A judge is of course entitled to raise with the parties a point which they appear to have missed, and to decide the case on that basis, provided that the parties are given a fair opportunity to deal with it, whether by adducing evidence or by making submissions, though sometimes it may be too late for further evidence to be adduced without unfairly disrupting the trial. But in the present case the judge gave no warning during the hearing that he was minded to dispose of the misrepresentation case on the basis that Mr Waller lacked authority to make the relevant statements. If the judge had raised this, it would have been pointed out to him that Mr Waller's authority was admitted by Hitex on the pleadings. Similarly, if the judge had warned the parties that he was minded to hold that Hitex had accepted Uniserve's renunciation and was entitled to damages on that basis,

even though Hitex had never communicated that acceptance to Uniserve, the difficulties in the way of that conclusion would no doubt have been pointed out to him. Indeed Mr Lewis did not contend before us that this was a tenable interpretation of events.

51. As it was, both these points made their first appearance in the draft judgment provided to the parties in advance of the formal hand down. We were told that the parties submitted a lengthy list of corrections which needed to be made to the draft, some but not all of a typographical nature, but nothing was said about these two points of substance. I would not wish to say anything to encourage further argument after a draft judgment has been circulated, and I can understand why counsel acting for Uniserve took the view that it was not appropriate to raise these points at that stage. However, when a judge makes a basic error, such as deciding a case without prior warning on a basis which has not been argued, or is contrary to common ground on the pleadings, it is legitimate and would be helpful for this to be pointed out before the judgment is handed down so that the judge can have an opportunity to reconsider, thereby potentially avoiding unnecessary appeals (cf. *Egan v Motor Services (Bath) Ltd* [2008] EWCA Civ 1002, [2008] 1 WLR 1589, para 51).

52. It is apparent from the judgment as handed down (and as I understand it, also from the draft) that the judge realised that he was deciding the case on a basis which had not been argued, at least so far as acceptance of repudiation was concerned. That is one reason why I would not criticise counsel for not raising the point in advance of hand down. The judge said when refusing permission to appeal that he had taken the view that neither side's pleading or argument met the facts as he found them to be and that it was necessary for him to interpret those facts for himself. However, that was a mistake.

The issues on the appeal

53. In these circumstances, it seems to me that the issues arising on the supply contract appeal, and the logical order in which they should be addressed, are as follows:

(1) Was Uniserve entitled to rescind the supply contract for misrepresentation? If not:

(2) Was Uniserve entitled to terminate the supply contract? If not:

(3) Was Hitex entitled to damages for non-acceptance of the goods? If so:

(4) Was the judge wrong to assess damages as he did?

Was Uniserve entitled to rescind the supply contract for misrepresentation?

54. The case that Uniserve was entitled to rescind the supply contract for misrepresentation was addressed by Mr David Walsh KC. He advanced two related submissions. The first was that that the judge failed to apply the correct test for reliance on a misrepresentation set out in *The C Challenger* [2022] EWCA Civ 231, [2022] 1 Lloyd's Rep 521, para 63. The second submission was that the judge failed to give weight to the evidential presumption that when a fraudulent misrepresentation is made which is intended to cause the representee to enter into the contract, the representee will indeed have been induced by the misrepresentation to do so, that presumption having been described as 'very difficult to rebut' (*BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2020] QB 551, para 43).

55. It is well established that in order for a right to rescind to arise, a representation need not be the only reason for the representee's decision to enter into the contract, but it must have played a real and substantial part in inducing him to do so. As explained in *The C Challenger*:

> '61. It is common ground that a party seeking to rescind a contract for misrepresentation must show that the representation played a real and substantial part in inducing it to enter into the contract in question. As explained by Mr Justice Christopher Clarke in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 at [153], the misrepresentation need not be the only reason for the party's decision to enter into the contract, but the representee will have no grounds for complaint if it would have entered into the contract on the same terms even if the representation had not been made. …
>
> 62. What would have happened if the representation had not been made is a question of fact, although (as with any counterfactual) necessarily hypothetical. Once it is proved that a false statement was made which was "material" in the sense that it was likely to induce the contract, it is a fair inference of fact, although not of law, particularly strong in a fraud case, that the representee was induced by the statement to enter into the contract. But that inference is capable of being rebutted.'

56. Mr Walsh relied in particular on what was said in the first sentence of the next paragraph of *The C Challenger* judgment:

> '63.The court is therefore required as a first step to identify the hypothetical factual scenario in which the representation had not been made. In the present case, three possibilities were canvassed. The first was that the Owner said nothing about the vessel's speed and consumption, as if the 22nd November 2016 letter had never been sent. On that scenario, the judge found, not surprisingly, that no charterparty would have been concluded: in practice, a shipowner wishing to let out its vessel on time charter must offer performance warranties.'

57. It is apparent from the context, when the paragraph is read as a whole, that the issue there was to identify the relevant counterfactual, i.e. what if anything would have been said about the topic in question, there the vessel's speed and consumption, if the misrepresentation in question had not been made. That question arose in the context of negotiations for a time charter, in circumstances where in practice something will always be said about speed and consumption before a contract is concluded.

58. Mr Walsh submitted that instead of considering whether Uniserve would have entered into the supply contract if the representations in the Waller email had not been made, the judge sought to assess which was the more powerful motivating factor for Uniserve, the Waller email or the reports by Majlan following their investigations.

59. I would reject this criticism of the judgment. The judge found that Uniserve did not take on trust the information provided by Mr Waller, but instead commissioned its own due diligence on the production capabilities of the Hitex factory. That investigation was undertaken by Majlan. Majlan reported that Hitex's production capabilities were not as described in the Waller email. By the time the supply contract was concluded, Uniserve knew that what had been claimed in that email was not correct, but it decided to conclude the contract anyway.

60. Uniserve's managing director, Mr Iain Liddell, gave evidence that he would not have entered into the contract if he had not been told the information in the Waller email, but the judge did not believe him:

> '129. Mr Liddell in his second witness statement claims that he would not have entered into the Supply Contract if he had not been told that the Hitex had 5 million masks available on 15 April 2020 and 5 million masks available on 22 April 2020 and have the production capacity to produce a further million facemasks every week from then on. In my view this is simply not true.
>
> 130. Mr Liddell sought in cross examination to distance himself from the due diligence efforts, saying that he was relying on Dr Stead. Nevertheless, he was copied into emails and was aware that the results of the due diligence contradicted the information in the Waller Email. By 23 April, Uniserve as an organisation was clearly aware that the predictions of supply and production information in the Waller Email were proving incorrect. This was known by Mr Bonnett, it was known by Uniserve's representative Dr Stead, and it was known by Mr Liddell.
>
> 131. The question of inducement is one of fact. It is apparent from the authorities that the test is not necessarily whether the representation was believed but rather whether the representation in fact induced the contract.
>
> 132. As is noted at *Chitty on Contracts* at 10-045 in *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48 at [44], the Supreme Court held that a settlement of an insurance claim could be avoided by the insurer when it discovered that the amount of loss had been exaggerated fraudulently, even though at the time of the settlement the insurer had doubts over the extent of the claim. It was sufficient that the false claim influenced the insurer in the sum offered in settlement. Lord Clarke said that even in a case in which the claimant knows that the representation was a lie, the claimant "may be able to establish inducement on the facts". No doubt Lord Clarke is correct in this, but the cases where someone is induced by a statement that is known or believed by that person to be false are likely to be few.
>
> 133. In the case before me, I am satisfied that the facts are that the Waller Email did not induce Uniserve to enter into the

> Supply Contract. It is fanciful to believe that Uniserve was still relying on these in preference to its own due diligence which clearly contradicted these statements. …
>
> 136. I find that Uniserve was not relying on the Waller Email (or indeed on any of the other predictions as to production and stock availability that had been made) when it signed the Supply Contract on 23 April. It entered into the Supply Contract in the knowledge that these predictions were unlikely to be met.'

61. This was a finding of fact which, on the evidence, the judge was entitled to make. It is fatal to Uniserve's case on misrepresentation. It means that the evidential presumption that a misrepresentation has induced the contract was rebutted. As I have said, it is not clear whether the judge found that the misrepresentation was made fraudulently or merely negligently. In either case, however, the presumption, albeit stronger in the case of fraud, is capable of being rebutted and, on the evidence, was rebutted in this case.

62. As the judge added, there is nothing surprising about this when the circumstances of the Covid pandemic are considered. At a time of acute demand for PPE, Uniserve decided to conclude a contract despite its doubts about Hitex's ability to perform, but it did so on terms which enabled it to terminate the contract if those doubts proved well founded. In that sense, it had nothing to lose.

Was Uniserve entitled to terminate the supply contract?

63. As explained above, the judge found that on 14th June 2020 Hitex had available the 2 million masks which were due for delivery on that day, that it would have been able to deliver those masks if Majlan had turned up to collect them on behalf of Uniserve, and therefore that Uniserve repudiated the contract on 17th June 2020 when Mr Stead (on behalf of Uniserve) told Mr Popeck (on behalf of Hitex) that the supply contract was over.

64. The position which arises in the event of a wrongful refusal by one contractual party to perform its obligations was described by Lord Ackner in *The Simona* [1989] 1 AC 788, 799:

> 'When one party wrongly refuses to perform obligations, this will not automatically bring the contract to an end. The innocent party has an option. He may either accept the wrongful repudiation as determining the contract and sue for damages, or he may ignore or reject the attempt to determine the contract and affirm its continued existence.'

65. As Lord Ackner went on to explain, citing *Frost v Knight* (1872) LR 7 Ex 111, if the contract is kept alive, it is kept alive for all purposes. This means that the innocent party 'remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it'. It follows that, if the contract is kept alive, but the innocent party then fails to perform its obligations, the party which was in wrongful repudiation may have another opportunity to terminate the contract.

66. The importance of the decision in *The Simona* was the rejection of any theory, said to be derived from the decision of this court in *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543, whereby the innocent party faced with a repudiation is absolved from continuing to perform the contract unless and until the repudiating party gives notice that it is once again able and willing to perform:

> 'I therefore conclude that the decision in *Braithwaite* [1905] 2 KB 543 is not an authority for the proposition advanced by the appellants, alternatively if it is, then it is wrong. When A wrongfully repudiates his contractual obligations in anticipation of the time for their performance, he presents the innocent party B with two choices. He may either affirm the contract by treating it as still in force or he may treat it as finally and conclusively discharged. There is no third choice, as a sort of *via media*, to affirm the contract and yet to be absolved from tendering further performance unless and until A gives reasonable notice that he is once again able and willing to perform. Such a choice would negate the contract being kept alive for the benefit of both parties and would deny the party who unsuccessfully sought to rescind, the right to take advantage of any supervening circumstances which would justify him in declining to complete.'

67. In the present case it is apparent (and is common ground) that Hitex did not communicate any acceptance of the 17th June repudiation to Uniserve. Accordingly the contract remained alive and Hitex remained under an obligation to comply with the revised delivery schedule. This meant that in addition to the 2 million masks which had been due for delivery on 14th June, it had to have 3 million masks available for delivery on 21st June, another 5 million on 28th June and another 5 million on 5th July 2020. These totals were cumulative because, while time was of the essence of Hitex's obligation to have the goods ready for delivery, that was not so in the case of Uniserve's obligation to collect the goods. Accordingly, unless and until Hitex served a notice making the time for collection of the essence, which it never did, it remained under an obligation to have the 14th June shipment available for delivery in addition to the 21st June shipment, and so on.

68. Mr Parsons for Uniserve submitted that Hitex was in breach of this obligation, with the consequence that Uniserve had validly terminated the contract on 11th July 2020 when Mr Stead reiterated that the supply contract was finished.

69. Mr Parsons advanced two submissions in this respect. The first was that Hitex could not be said to have performed its obligation when it did not tender performance by notifying Uniserve or Majlan that the masks were available and ready for collection. This gave rise to some debate whether, in an ex works contract, the seller is obliged to notify the buyer that the goods are available for collection. *Benjamin's Sale of Goods*, 12th Ed (2024) states that:

> '**Ex works, etc. contracts**
>
> Where goods are sold "ex-works", "ex-factory", warehouse", "ex-store" or other similar terms, there is some uncertainty when the property passes, for the exact terms of such contracts are

> somewhat indefinite. In some situations the property may pass when the goods have been appropriated by the seller and placed at the disposal of the buyer at the designated works, factory, etc. provided the buyer has been given reasonable notice as to when the goods will be at his disposal. In others, it may be necessary that the buyer should have subsequently assented to the appropriation, or that the goods should have been delivered to him or to a carrier, before the property will pass.'

70. While this passage refers to appropriation of particular goods which are placed at the disposal of the buyer and to the need for reasonable notice to be given, it is dealing with the passing of property rather than the duty to have goods available for collection. There can be no question in the present case of property having passed or of delivery having taken place. Hitex's complaint is that Uniserve failed and refused to take delivery of these shipments, while Uniserve's position is that goods are not made available unless the seller tells the buyer that they are available.

71. A further passage in *Benjamin*, para 21.003, suggests that the seller is under an obligation to notify the buyer when the goods are ready for collection and to indicate where they are to be collected:

> '**Goods to be delivered from seller's works**
>
> An ex works (or EXW) or ex store contract is, in a sense, not an overseas sale at all, but goods may be sold to an overseas buyer on the terms that they are to be delivered from the seller's works. In such a case the normal rule applies, that the place of delivery is the seller's place of business and the seller performs his duty to deliver by allowing the buyer to collect the goods. The expenses of and incidental to putting the goods into a "deliverable state" must be borne by the seller; he must provide such packaging as is customary, including, if the goods are sold for export, any special packing required for export. This appears to follow from the definition of "deliverable state" in s.61(5) to mean "such a state that the buyer would under the contract be bound to take delivery of them [the goods]". The seller must also notify the buyer when the goods are ready for collection and indicate where they are to be collected. The buyer must pay in accordance with the terms of the contract.'

72. I doubt, however, whether the requirement of notice is an inflexible rule. I can see, for example, that if collection is to take place on a fixed date, notification that the goods will be available on that date may be unnecessary, although the position may be different if the buyer needs something from the seller in order to be able to collect the goods. In my judgment the question whether in any particular case the seller under an ex works contract is obliged to give notice to the buyer that the goods are available for collection must depend on the terms of the contract and all the circumstances of the case.

73. It was not suggested that the terms of the supply contract provide the answer to this question in the present case, but it appears that the practice on those shipments which

were performed was for Hitex to notify Majlan by email that the shipment was ready and to send an invoice and packing list so that payment could be made. That suggests that the parties worked on the basis that notification that the goods were ready was a necessary aspect of tender of performance by Hitex. That would not be surprising in view of the difficulties experienced by Hitex in supplying in accordance with the original delivery schedule. It would therefore make sense, once the revised schedule was agreed, for Hitex to notify Uniserve that the goods were available as shipments fell due. If that is right, Hitex did not at any stage tender performance of the shipments which were due on 21st June, 28th June and 5th July 2020, which would mean that Uniserve was entitled to terminate the contract on 11th July.

74. However, I would prefer not finally to decide this issue because it appears that this was not the way in which Uniserve put its case at the trial, or at any rate it did not do so distinctly, as Mr Parsons candidly acknowledged. The primary focus of Uniserve's case was that Hitex simply did not have enough masks available for collection to fulfil its obligations. That was Mr Parsons' second, albeit principal, submission on this issue.

75. The point here is that, according to Hitex's own evidence, 15% of its stock was reserved for the Jordanian government, and that the judge failed to take account of this when calculating the quantity available for delivery to Uniserve. The witness statement of Mr Ashraf Khader, Hitex's Operation and Export Manager stated that:

> 'On 18 February 2020 Hitex had received a letter from the [Jordanian Food and Drug Authority] (which I have been referred to for the purposes of recalling the date for this statement) stating that we were allowed begin [sic.] production but that we had to keep or sell 15% of production for local market. The Jordanian government were also able to make special requests, depending on the needs of the local market. I have been referred to a letter dated 26 March 2020 from the Ministry of Health which required personal approval from the Minister of Health for any sale or export of masks. Hitex would retain about 15% of production across the warehouses to keep available in case the Ministry of Health came and said they wanted to take for government and military use.'

76. Mr Khader was asked about this in cross examination, by reference to the figures shown in the Production Reports:

> 'Mr Walsh: Now, it's right, isn't it, that all the stock that you had – so that was recorded in this final column –
>
> Yes.
>
> Q. – about 15 per cent had to be retained in case the Jordanian Ministry of Health came and said that they wanted it for government or military use?
>
> A. Yes. Regarding the 15 per cent, when we are looking at any quantity available in the warehouse, we are reserving always a

15 per cent of that quantity in case the Jordanian government came and they asked to collect quantities for –

Judge Thompsell: So does that mean that quantity was – the Jordanian share was reflected in the "Sold" figure, or was it taken off the top before the starting number?

A. No, it was just reserved. Whenever they are coming to ask quantity, it will be calculated from the quantity available. Then when it's taken out, it will be reflected on the second day on the "Sold" –

Judge Thompsell: Right. So if we look at page 1777 –

A. 610.

Judge Thompsell: -- the number there, 86,984, is a number that might have been reduced if the Jordanian authorities had said "can we have our 15 per cent please"?

A. Yes.

Judge Thompsell: But until they ask that, you're regarding it as being available for sale?

A. Yes.

Mr Walsh: Do you have your witness statement there? If you just put the other file to one side for the moment. If you go on to paragraph 42 of your witness statement, you deal with this in the final sentence. You say:

> "Hitex would retain about 15% of production across the warehouses to keep available in case the Ministry of Health came and said they wanted to take it for government or military use".

That's right, isn't it?

A. Yes.

Q. They could come at any time and ask for that, couldn't they?

A. Yes.

Q. So you kept 15 per cent in reserve?

A. Yes.'

77. Mr Khader's evidence in his witness statement, confirmed in the initial questioning by Mr Walsh, was clear: 15% of Hitex's stock was reserved for the Jordanian government and therefore was not available to be supplied to Uniserve. Consequently, the figures

shown in the Production Reports have to be reduced by 15% in order to calculate the quantity available on any given date to be supplied to Uniserve.

78. It appears that the judge misunderstood this evidence, suggesting in his own questions to Mr Khader that all of the quantities shown in the Production Reports were available to supply to Uniserve, unless and until the Jordanian government asked for its 15%. Indeed, what the judge put to Mr Khader directly contradicted what Mr Khader had just said. Although Mr Khader agreed with what the judge put to him, a not uncommon response to judicial questioning, the judge did not make clear that he was inviting Mr Khader to contradict both his written evidence and what he had just said. It seems unlikely that Mr Khader understood this. At all events, it was immediately clarified by Mr Walsh's further questions that the position was indeed as Mr Khader had described it in his witness statement. That position was also confirmed in cross examination by Mr Samer Al Ghrabili, Hitex's Chief Executive Officer and General Manager.

79. The quantities which Hitex had available as shown in its Production Reports, and the quantities which it was required by the contract to have available between 14th June and 11th July 2020 were as shown in the following table:

Date	**Revised Schedule Delivery Amount**	**Cumulative amounts due under Revised Schedule**	**Amounts collected**	**Cumulative outstanding**	**Available per Production Reports**	**Production Reports less 15%**
14.06	**2,000,000**	**5,000,000**		**3,000,000**	**3,785,350**	**3,217,548**
15.06					3,749,700	3,187,245
16.06					4,030,000	3,425,500
17.06			1,000,000	2,000,000	5,781,700	4,914,445
18.06					5,728,000	4,868,800
19.06					5,728,000	4,868,800
20.06					5,707,550	4,851,418
21.06	**3,000,000**	**8,000,000**		**5,000,000**	**5,656,550**	**4,808,068**
22.06					11,331,200	9,631,520

23.06					11,318,450	9,620,683
24.06					11,207,450	9,526,333
25.06					11,173,950	9,497,858
26.06					11,173,950	9,497,858
27.06					11,166,650	9,491,653
28.06	**5,000,000**	**13,000,000**		**10,000,000**	**14,319,100**	**12,171,235**
29.06					14,276,950	12,135,408
30.06					14,261,250	12,122,063
01.07					14,261,000	12,121,850
02.07					16,180,000	13,753,000
03.07					16,180,000	13,753,000
04.07					16,175,950	13,749,558
05.07	**5,000,000**	**18,000,000**		**15,000,000**	**16,118,450**	**13,700,683**
06.07					16,110,950	13,694,308
07.07					18,808,450	15,987,183
08.07					18,807,450	15,986,333
09.07					18,554,450	15,771,283
10.07					18,554,450	15,771,283
11.07					18,419,450	16,656,533

80. As can be seen from this table:

(1) On 14th June 2020 Hitex had available sufficient stock to deliver the cumulative outstanding quantity of 3 million masks even after taking account of the 15 per cent reserved for the Jordanian government.

(2) On 21st June 2020 Hitex had available sufficient stock to deliver the cumulative outstanding quantity of 5 million masks but only if no account is taken of the 15 per cent reserved for the Jordanian government.

(3) On 28th June 2020 Hitex had available sufficient stock to deliver the cumulative outstanding quantity of 10 million masks even after taking account of the 15 per cent reserved for the Jordanian government.

(4) On 5th July Hitex had available sufficient stock to deliver the cumulative outstanding quantity of 15 million masks but only if no account is taken of the 15 per cent reserved for the Jordanian government.

81. On the basis of these figures, and its own evidence, Hitex was in breach of its delivery obligations on 21st June and 5th July 2020; the time for performance of those obligations was of the essence of the contract; and Uniserve was therefore entitled to terminate the contract on 11th July 2020.

82. The judge did not address the 15% point. The closest he came to doing so was at para 335(iv) of the judgment where, responding to a submission that the Production Reports made no allowance for masks which may have been sold forward otherwise than to Uniserve or which may have been needed to meet legal requirements in Jordan to supply customers in Jordan, he said:

> 'If there had been an occasion when Uniserve had turned up to collect masks and masks that were in the warehouse were unavailable for one of these reasons, then there might be something to this point. However, without having tested this point in that way, Uniserve cannot demonstrate that masks that were shown as available in the Production Reports were not in fact available to it. Hitex might have dealt with the requirements of other customers and of the Government of Jordan out of the reduction in the number of masks in the warehouse that we see in the table above between 31 May and 7 June. Hitex anyway might have preferred to let down other customers rather than its biggest customer, Uniserve. If Uniserve's case is that Hitex could never have met the contract because its stock was being requisitioned by the Government of Jordan, it has not done enough to establish that case.'

83. In my judgment there was no rule of law which prevented Uniserve from relying on Hitex's own evidence that 15% of its stock was reserved for the Jordanian government and this speculation was not open to the judge. There was no evidence that Hitex had dealt with the requirements of the Jordanian government in other ways. The evidence was clear that 15% of Hitex's stock was reserved for the Jordanian government and, as a result, not available for supply to Uniserve. If the judge had meant to disbelieve the

evidence of Mr Khader on this issue, despite treating him elsewhere as a reliable witness, he would no doubt have said so and given his reasons. The fact that Uniserve did not seek to collect the goods does not prevent it from relying on Hitex's own records.

84. Mr Lewis sought to avoid that conclusion in two ways. First, he submitted that Mr Khader's evidence had been that all of the quantities shown in the Production Reports were available to supply to Uniserve, unless and until the Jordanian government asked for its 15%. But that only repeats the judge's misunderstanding of Mr Khader's evidence which, when taken as a whole as set out above, is clear.

85. Second, Mr Lewis submitted that the Production Records cannot be an accurate record of what was actually produced on each day. For example, the records show an increase in stock from 5.6 million to 11.3 million masks between 21st and 22nd June, which cannot represent a single day's production. Building on this, Mr Lewis submitted that the records do not prove that Hitex had insufficient stock available on 21st June 2020 because it is likely that millions of masks more were available than shown in the records; and that there may be a similar explanation for the deficiency on 5th July 2020, taking account of the increase from 16.1 million to 18.8 million between 6th and 7th July 2020.

86. I would reject this submission. This explanation did not feature at the trial, where it could have been investigated with the witnesses, but was advanced for the first time in Mr Lewis's oral submissions during the hearing of the appeal. Moreover, it was contrary to Hitex's case at the trial, which was that the Production Records comprised reliable contemporary evidence of the quantities which were in the warehouse on any given day. It was Mr Khader's evidence that, once the goods were produced, there were formalities to be completed, such as obtaining a certificate of origin and an export licence, before they were available for delivery to Uniserve, and that this process would generally take two days. It was not the case, therefore, that Uniserve (or Majlan on its behalf) could simply turn up at Hitex's factory and take whatever masks had been produced. In the circumstances it is too late for Mr Lewis's explanation of the figures shown in the Production Records, which is not based on the evidence.

87. For these reasons the judge should have held that Uniserve was entitled to terminate the supply contract on 11th July 2020.

Was Hitex entitled to damages for non-acceptance of the goods?

88. If, as I would hold, Uniserve was entitled to terminate the supply contract, Hitex's claim for damages for non-acceptance of 77 million masks does not arise. However, on the footing that Uniserve was not entitled to terminate the contract, which therefore remained alive for performance, the question arises whether Hitex is entitled to damages under section 50 of the Sale of Goods Act 1979 when it was not in a position to perform its obligations by delivering the cumulative total quantities set out in the revised delivery schedule. Hitex's case was summarised by the judge as follows:

> '376. Mr Lewis and Mr Knight support their argument that Hitex continued at all times to meet its obligations under the Supply Contract with the proposition that Hitex could "recycle" or as they preferred to put it "retender" deliveries. If 3 million masks

> are due on one date and Uniserve does not collect them on that date, Hitex can proffer the same 3 million masks to meet a requirement to provide 3 million masks at a later date.'

89. The judge rejected this argument, saying that if Hitex was seeking to continue to perform the supply contract after Uniserve's renunciation of the contract, it would have been required to continue accumulating stock to meet the cumulative totals outstanding according to the revised schedule, but that (as was common ground) Hitex had not done that. (I note, incidentally, that although Mr Lewis described this as 're-tendering' the same masks for successive deliveries, he accepted that nothing was actually tendered by Hitex).

90. I agree with that conclusion. If the contract was kept alive for performance, Hitex was obliged to fulfil its own obligations. There is no challenge to the judge's conclusion that the supply contract was not severable. Hitex's obligations, therefore, were to have available for supply to Uniserve the cumulative total set out in the revised delivery schedule. The submission that Hitex was somehow discharged from its obligation in respect of any particular shipment is a variant of the submission firmly rejected by the House of Lords in *The Simona* in the passage cited above. I would reject it here.

91. Moreover, the submission takes no account of the fact that the time for collection of the goods by Uniserve was not of the essence of the contract. It follows that, in the absence of any notice making time for collection of the essence, Uniserve was entitled to collect and Hitex continued to be under an obligation to deliver each shipment notwithstanding that it was not collected on the date stated for delivery in the revised delivery schedule. That is fatal to any notion that Hitex was entitled to 'retender' the same masks for each succeeding shipment. Put shortly, and as a matter of common sense, Hitex cannot recover damages for Uniserve's failure to accept 77 million masks when it never had 77 million masks available for delivery in the first place.

92. Mr Lewis submitted that stopping manufacture was a form of mitigation, but that analysis does not work. Stopping manufacture could not mitigate losses arising from past breaches, and there could be no question of Hitex mitigating future breaches by disabling itself from performing before those breaches had even occurred.

93. Mr Lewis sought also to rely on an estoppel, but no such case was pleaded or advanced at the trial and it is too late for such a case to be raised for the first time on appeal. It is in any event difficult to see what representation was made by Uniserve and there was no evidence of any reliance on any such representation.

94. Accordingly I consider that the judge was right to reject Hitex's damages claim on the basis on which it was advanced and I conclude that the respondent's notice does not provide a ground on which the damages ordered by the judge can be upheld.

Was the judge wrong to assess damages as he did?

95. In view of my conclusion so far, the question whether the judge was wrong to assess damages as he did does not arise and, as this issue received relatively little attention at the hearing of the appeal, I prefer to say nothing about it.

Conclusion on the Supply Contract

96. For these reasons I would allow the appeal so far as the supply contract is concerned, with the consequence that Hitex's claim for damages against Uniserve should be dismissed.

The Commission Contract appeal

97. The commission contract provided for Uniserve to pay a commission to Caramel/Mr Popeck on each shipment under the supply contract. It went on to provide for the amount of the commission to be calculated by reference to the date on which each shipment arrived in the United Kingdom. Commission was paid on the 3 million masks which were supplied under the supply contract, but Caramel and Mr Popeck claimed commission, or damages for its non-payment, on the 77 million masks which (they said) Uniserve had wrongfully failed to accept and pay for. The judge dismissed that claim on the basis that commission was only payable on masks which were delivered to the United Kingdom; that the supply contract was terminated by Hitex's acceptance of Uniserve's repudiation; and that no commission was payable once the supply contract was terminated.

98. The commission appeal was advanced on the basis that the supply contract was not terminated but remained alive, and that Uniserve had wrongfully failed to accept and pay for the 77 million masks which were not supplied. On that basis a question arose whether commission would only be payable on shipments which arrived in the United Kingdom or whether the clause providing for the calculation of commission was no more than non-mandatory machinery which did not prevent commission being earned, or damages being payable, in the event of wrongful failure by Uniserve to accept and pay for shipments under the supply contract.

99. As I have held that Uniserve was entitled to terminate the supply contract, it seems to me that this question no longer arises and the commission appeal must be dismissed. Mr Edward Knight, who argued the commission appeal for Caramel/Mr Popeck, did not at any stage suggest that the appeal could succeed if Uniserve had validly terminated the supply contract.

Postscript

100. Following circulation of the draft judgment to the parties, Mr Lewis and Mr Knight sent an email to the court submitting that there was or might be an oversight in the judgment. They submitted that the facts set out in paras 79 and 80 above show that Hitex was able to meet the cumulative total due under the revised delivery schedule on 14th and 28th June 2020, and was therefore entitled to damages for Uniserve's failure to collect and pay for those two shipments. However, no case was advanced in the court below or in Hitex's Respondent's Notice that, even after taking account of the 15% reserved for the Jordanian government, Hitex was still entitled to recover damages in respect of these two shipments, and there was only very brief allusion to such a possibility in Hitex's skeleton argument for the appeal and in oral argument. In my judgment it is too late for such a claim to be advanced for the first time on appeal. If it had been advanced in the court below, it would have brought into sharp focus the issue whether Hitex needed to tender delivery of those shipments which is discussed at paras 69 to 73 above and the parties and the judge would have been able to address that point properly. Because the point was not live in the court below, this did not happen.

LORD JUSTICE PHILLIPS:

101. I agree.

LORD JUSTICE SNOWDEN:

102. I also agree.