Neutral Citation Number: [2025] EWHC 159 (Comm)

Claim No: CC-2023-MAN-000014

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre,

1 Bridge Street West,

Manchester

M60 9DJ

Before:

HHJ PEARCE

(sitting as a judge of the High Court)

BETWEEN

ELECTRIC MANIA LIMITED

Claimant

-and-

AVRON TRADING LIMITED

Defendant

- -

- -

MR SIMON HILTON instructed by **HILTON LAW** for the **Claimant**

MR AIDAN REAY instructed by **CMS CAMERON MCKENNA NABARRO OLSWANG LLP** for

the **Defendant**

Hearing dates: 6, 7, 8 August 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 29 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Note: Two bundles were prepared for the trial of this action, a Core Bundle, in respect of which the pages numbers are given in the judgment with the prefix CB and a Main Bundle, where the prefix MB is used.

HIS HONOUR JUDGE PEARCE

INTRODUCTION

1. This is a claim for damages for breach of contract and/or misrepresentation relating to the sale of a quantity of hand sanitiser. On 3 April 2024, at the beginning of the first lockdown during the COVID-19 pandemic, the parties agreed to the sale by the Defendant to the Claimant of hand sanitiser gel known as Lonstin and liquid hand sanitiser known as GCG. The goods were duly delivered and paid for. Sales of the products were slow, and in January 2021, before more than about 1,000 bottles had been sold, the Claimant received a letter from the Medicines and Healthcare Regulatory Agency ("the MHRA") warning it as to potential prosecution if it continued to market the Lonstin. The Claimant ceased to sell both products.

2. By this claim, the Claimant contends that the products it received were worthless (or worth substantially less than it paid for them) and that the Defendant is liable both in breach of contract and misrepresentation in respect of the consequential losses. It sues for the price of the goods or damages in the same amount, whether by way of restitutionary relief following rescission of the contract, damages for misrepresentation in lieu of rescission or damages for breach of contract.

3. The Defendant's case is that the Claimant made a bad bargain in that it bought hand sanitiser at the peak of the market and then was unable to sell it. The allegations of breach of contract and misrepresentation are simply a convenient hook on which to seek compensation for its own bad bargain. In truth, there was neither a contractual term of which the Defendant was in breach nor a representation upon which the Claimant relied. In any event, given the bad bargain that the Claimant had made, the true value of its claim is at best very low and in reality it has suffered no loss.

THE PARTIES

4. The Claimant is a company involved in the manufacture and supply of consumer products, particularly electrical and electronic goods such as televisions and air fryers. It sells mainly direct to consumers under the brand name EMtronics, though it sometimes deals in other brands and sometimes sells to other businesses. Its founder and director is Mr Reni Reis. The Claimant employs Mr Jack Luke as a manager.

5. The Defendant is an import and distribution business, dealing mainly in hand tools and car products. The managing director of the Defendant is Mr Vijay Kumar Sahdev. Mr Jonathan (known as Jon) Ashby is a Senior Sales Manager with the Defendant.

6. Prior to the COVID-19 pandemic, neither the Claimant nor the Defendant was active in the business of buying and selling hand sanitiser or comparable products. But the pandemic and the associated demand for products such as hand sanitiser created new business opportunities. The Claimant and the Defendant both sought to profit from that market

CONCLUSION OF THE CONTRACT

7. In March 2020, the Claimant was looking to buy hand sanitiser[1]. Within his statement, Mr Reis describes being offered sanitiser by other suppliers on 19 and 20 March and thereafter investigating the market for buying and selling PPE in the light of the COVID pandemic. Mr Reis says that the decision was "*to target high grade quality goods so that customers would feel confident they were buying something strong enough to kill the virus*[2]*."* Mr Reis goes on to say that he and Mr Luke investigated and discussed relevant standards and considered that the type of product for which they were looking might be expected to comply with British Standards BSEN1276 and BSEN13727 and might make claims in respect of pathogens such as MRSA[3], Salmonella Typhinurium, Listeria Moncytogenes, Pseudomonas Aeruginosa, Escherichia Coli[4], Staphylococcus Aureus and Enterococcus hirae. It is Mr Reis' evidence that, following this discussion, the Claimant "*followed a policy of only purchasing high grade, medical grade or equivalent PPE."* So, for example, it did not contact the suppliers who had offered stock on 19 and 20 March, in the case of one supplier because the product was not of Medical grade. Mr Reis also refers to another offer of sanitiser by Multibrands on 3 April 2020 at £1 per unit. The

[1] See for example the email at MB55.
[2] CB37, [18].
[3] MRSA is an abbreviation for methicillin-resistant staphylococcus aureus. It is a type of bacterium capable of causing a variety of skin infections and more serious illnesses.
[4] Commonly known as E coli. Again E coli is a bacterium which can cause serious illness. [5]
See MB100.

Claimant did not purchase this because, as Mr Reis explained in evidence, the product did not identify that it was effective at dealing with named pathogens.

8. On 3 April 2020, by email timed at 5.40pm, Mr Ashby of the Defendant approached Mr Jack Luke of the Claimant offering hand sanitiser that was due to arrive the following week. His email[5] refers to stock of 20,000 bottles of 60ml hand sanitiser gel with 75% alcohol content (coded as AVSAN60ML) and 40,000 bottles of 100ml liquid hand sanitiser with 70% alcohol content (AVHS040). The price of the former was £2.00, the latter £2.50 with a minimum order of £1,000 excluding VAT. The email stated, "*spec sheets for both options enclosed*." Mr Luke forwarded the offer to Mr Reis.

9. The product sheet for AVSAN60ML appears at CB70. This is the product called Lonstin. No specific claims are made on the product sheet as to the efficacy of the product in respect of particular pathogens, though it does state, "*kills 99.9% common germs."* The product sheet for the AVHS040, called GCG, appears at CB68. It is described as "*a broad bacterial (including MRSA, VRE[5]).."* The sheet includes an image of a container of GCG.

10. Mr Reis says that the Defendant sent these documents together with an image of the Lonstin container (which appears at CB69) to the Claimant. He says that the marketing leaflet for GCG at CB68 makes clear reference to MRSA and that, in respect of Lonstin, "MRSA "and "E Coli" are visible on the label of the container that can be seen on CB69. He says in his statement at [32]:

"*These images were clear and we were able to easily zoom in on the images and assess the quality of the products being offered to us. The images supplied to us by the Defendant clearly stated that – in relation to both products – there were effective against 'MRSA' and 'e-coli.' Additionally the promotional leaflet of the GCG included the description, 'A broad bacterial (including MRSA, VRE, microbacterial … virucidal…' The products claimed to be effective against the named pathogens*.[6]"

11. Mr Reis goes on in his statement to say that he and Mr Luke "*reviewed and scrutinized the promotional and marketing materials relating to Lonstin and GCG - both from the materials provided by the Defendant, and also from research we caried out online regarding the 2*

[5] VRE is an abbreviation for vancomycin-resistant enterococcus, again a bacterium capable of causing serious infection.
[6] CB40, [32]
[8] CB40, [33].

products and we searched up the products on Google. In zooming in on the images of the Lonstin sanitiser we could clearly see the references to MRSA and e-coli…[8]*"*

12. During his evidence, Mr Reis drew attention to messages exchanged between him and Mr Luke relating to the British Standards applicable to hand sanitiser at CB49. He relies on this as evidence that he and Mr Luke were concerned about the issue of the quality of the goods and their compliance with the relevant regulatory regime. It was Mr Reis' oral evidence that the Claimant was anticipating paying around £2 to £2.50 per bottle and selling the product at £6 to £8 per bottle. Within his witness statement at [9] on CB106, he speaks of the price having gone up from "*say £1 a bottle, to around £8 to £9 in the wholesale market"* during March 2020.

13. Following an exchange of emails about price, the parties agreed the sale and purchase of 12,000 bottles of AVSAN60ML (Lonstin) at £2 per bottle and 28,000 bottles of AVHS040 (GCG) at £2.50 per bottle, a total cost including VAT of £112,800.

14. Of the conclusion of the contract, Mr Reis says, "*Purchase of the items was obviously conditional on the labelling of the bottles and on the packaging in which the bottles were supplied. We wanted the products to include the statements that they displayed when offered to us. The packaging, and the claims as to the efficacy of the products clearly displayed on the packaging were part of the product, and a part of what we were paying for. That the product was of high quality was one thing, but it would be pointless to have purchased high quality stock if we could not then offer it for sale with the same packaging and labelling. Without that labelling, there would be nothing about the product to differentiate it from the numerous cheap, low quality hand sanitisers flooding the market. That, in turn, would make it harder to charge a premium for the product.*[7]*"*

15. The products were delivered shortly after conclusion of the contract.

THE CLAIMANT'S ATTEMPTS TO SELL THE SANITISER

16. Thereafter the Claimant marketed the product, but, as Mr Reis acknowledges in his statement, there was not a huge demand for sanitiser at this price. He acknowledges at [41] of his statement at CB41 that "*during the rest of 2020 there was not a huge demand for high quality sanitiser marketed at a higher price point than many cheaper, lower quality products."* Investigations included contacting Mr Ashby of the Defendant to see if he could assist in selling the stock in

[7] CB40-41, [38]

June 2020. The response to that was that "*I have spoken to a number of customers but they all say that at around £2 this is far too expensive*[8]*."*

17. Mr Reis was taken during cross examination to several examples of offering the products for sale, for example emails at MB217[11], MB218, MB220 and MB252 (all offering GCG). He accepted that the offer in MB217 (on 14 April 2020, very shortly after purchase of the goods from the Defendant) was for sale at cost price and that the offer at MB252 (on 17 April 2020) was for sale at below cost price. By 17 April 2020, there was already concern being expressed internally within the Claimant that realistic prices for the product were far below that which the Claimant had paid – for example at MB256 there is reference to potentially selling at £0.40 to £0.42 per unit.

18. Mr Reis was asked about one email of 10 April 2020 at MB206 in which he was trying to sell the product. The email refers to the 60ml sanitiser, that is to say the Lonstin, as now being

"*sold*". He accepted that this was not in fact the case. He described the reference to it being already sold as "*a marketing strategy*," which appears to mean a lie told about the popularity of the product to encourage others to buy it or similar products.

19. As for the Lonstin, the evidence of Mr Reis was to the effect that the Claimant focussed on selling the GCG first because this was where the bulk of the stock was. The only bulk offer that the Claimant received for the Lonstin stock was *"£1 per bottle plus VAT for the lot*" (see MB268), an offer made on 17 April 2020. I note in passing that, apart from the purchase made by the Claimant itself (at which price the Claimant was unable to make more than a very small number of sales), this offer of 17 April 2020, which involves an apparently unconditional offer to purchase a large quantity of stock, is the only firm evidence of the market price of this kind of product (at least in bulk) in April 2020.

20. By mid 2020, Mr Reis accepted that the price in the product had fallen substantially and that it was difficult to sell the goods. He said that the Claimant had the facility to warehouse the stock and was not desperate to sell as demonstrated by the fact that the Claimant did not accept the offer to sell for £1 per bottle.

21. Mr Sahdev gave similar evidence of a fall in the demand for sanitiser in 2020. He said that the price began to fall in April 2020 and that the market was "*flooded*."

[8] See email at MB79. [11]
See footnote 6.

22. Mr Reis refers at [46] of his statement on CB42 to the Claimant having purchased a further 36,400 units of GCG at 15p per unit[9] from Lilanch Limited in October 2020. In explaining this purchase, it was Mr Reis' evidence that, whilst it was obvious that the Claimant was going to make nothing like the profit that it had hoped for from the contract, he anticipated being able to sell it in due course and described the stock as "*trickling out."* However, he asserted that "*we were always comfortable holding on to stock and waiting for a surge in demand.[10]"* Mr Reis refers in his statement at [70] to similar products being able to achieve prices of around £1.99 per bottle on 2024, the reference being to material at MB99-MB104.

23. The Claimant explored various marketing avenues. It sold in all 411 bottles of Lonstin and 483 bottles of GCG and it was considering exporting the remaining stock when, in January 2021, it received a significant communication from the MHRA.

THE INTERVENTION OF THE MHRA

24. By letter dated 20 January 2021, the MHRA contacted the Claimant stating that it had determined pursuant to Regulation 165 of the Human Medicines Regulations 2012 (the "HMR 2012") that the Lonstin Antibacterial Hand Sanitiser purchased by the Claimant from the Defendant and which the Claimant was marketing was a medicinal product within the meaning of the HMR 2012 on the ground that it "*is presented with claims for the elimination of MRSA and E coli on the product labelling*." The letter went on:

> *"**WHAT YOU MUST DO NOW***
>
> *In accordance with the Human Medicines Regulations … , no relevant medicinal product shall be placed on the market unless a marketing authorisation has been granted for it**. TO DO SO IS A CRIMINAL OFFENCE.***
>
> ***You must cease to sell the product with claims for the elimination of MRSA and E coli on the product label with immediate effect.***
>
> *Please note that unless I receive written confirmation from you **within 7 days from the date of this notice** that you have ceased to sell the product with reference to MRSA and E. coli on the product labelling, i shall have no alternative but to refer the matter to our Enforcement Offices for consideration of proceedings in the criminal courts*."

[9] At [65] of his statement on CB45, Mr Reis refers to a total price for this product of £6,702, which equates to 18.4p per unit.

[10] See his statement at [70] on MB45.

25. Mr Reis indicates in his statement that he took the notice to apply to the GCG as well as to the Lonstin. The Claimant withdrew both products from sale.

THE AFTERMATH

26. The Claimant communicated with the Defendant about the MHRA notice in a series of emails. During that communication, the Defendant offered to relabel the Lonstin. That offer can be seen in an email from Mr Ashby to Mr Reis dated 29 January 2021 at CB160 and it involved a payment of £5,000 by the Defendant to the Claimant in addition to the repackaging of the products. Mr Reis rejected that offer by email of the same date at CB159.

27. In a passage of his statement at [55] to [60], most of which is comment rather than evidence of primary fact, Mr Reis deals with this offer. He explains the reason for refusing the offer as follows:

"*The offer was simply unacceptable: we purchased the stock because of it* [sic] *efficacy and appearance in order to charge a premium for it. If the sanitiser was repackaged so that its claims of effectiveness against MRSA and e.coli were removed, it would simply not be the product that we were offered and accordingly purchased. The issue was not the quality of the product and whether it was in fact medical grade or the equivalent – we were satisfied that it was. The issue was that receiving the product back effectively plain-packaged would give us a different product to the one we purchased from the Defendant….If the products' claims are removed then we would not be able to seek such a decent margin and/or high return as we had envisaged when we bought the stock from the Defendant."*

28. It is the Claimant's case that it did not want to sell the sanitiser cheaply or at a discounted price (see [44] of Mr Reis' statement at CB41). They awaited a spike in the market and indeed there was increased demand for hand sanitiser in 2021 but only after the Claimant had removed the product from the market. After receipt of the MHRA notice, the Claimant did not sell any further of the product it had purchased from the Claimant.

29. The Claimant was able to return the stock that it had bought from Lilanch, for which it received a credit of £5,789.40, reflecting a credit per unit of 15.9p. The Defendant would not however agree to take back the Lonstin and GCG that were the subject of its contract with the Claimant.

THE ISSUES

30. The Claimant contends that the Defendant was in breach of contractual terms and/or was guilty of misrepresentation by virtue of the failure of the GCG and Lonstin to meet the MHRA's standards for sale as medicinal products and/or by reason of their failure to be effective sanitiser against various pathogens. It seeks rescission of the contract and return of the purchase price or

alternatively damages based on the value of the product as purchased (which is says is negligible or even zero).

31. The Claimant originally contended in addition that the Defendant was liable on the basis that the contract was illegal and/or on a restitutionary basis separate from rescission. Those arguments were not pursued at trial. Nevertheless the legality of selling the product as packaged is in issue.

32. Having heard the parties' submission and noting the parties' list of issues, the matters before the court can be summarised as follows:

    a. Issue 1 – was it legal for the Defendant to import and/or sell the products and/or for the Claimant to sell the products?

    b. Issue 2 - was the Contract induced by an actionable misrepresentation on the part of the Defendant?

    c. Issue 3 - if the contract was induced by an actionable misrepresentation, has the contract been rescinded or ought it to be rescinded and if so what consequences flow from rescission?

    d. Issue 4 – if the contract was induced by a misrepresentation but rescission is not ordered, what if any damages are recoverable under Section 2(2) of the Misrepresentation Act 1967?

    e. Issue 5 – was the Defendant in breach of the implied term under Section 12(1) of the Sale of Goods Act 1979 (implied term as to right to sell the goods)?

    f. Issue 6 – was the Defendant in breach of the implied term under Section 14(2) of the Sale of Goods Act 1979 (implied term as to quality)?

    g. Issue 7 – was the Defendant in breach of the implied term under Section 14(3) of the Sale of Goods Act 1979 (implied term as to fitness for purpose)?

    h. Issue 8 – what if any loss flows from any breach of contract on the part of the Defendant?

    i. Issue 9 – has the Claimant failed to mitigate its loss?

THE TRIAL

33. The Claimant called Mr Reis as a witness. The Defendant called Mr Sahdev and Mr Ashley.

34. Mr Reis came over as an engaging person, understandably keen to protect his business interests but not in general prone to exaggeration. However certain aspects of his evidence cause me to be cautious about placing reliance on his uncorroborated version of contentious issues:

    a. He was prone to arguing the case rather than simply giving evidence. He did it in the statement for example in the passage at [55] to [60] referred to above. He also argued the case in the witness box. For example, during his evidence, an issue arose on which counsel addressed me, Mr Reay contended in submissions that there was no documentary evidence of Mr Reis and Luke adopting a policy only to take "high quality" sanitiser. The witness interrupted to say this was wrong because of the Skype conversation. This tendency to argue the case is not necessarily an indication that a witness is unreliable and it is understandable that those whose interests may be affected by the outcome of a trial want to ensure that points are put clearly and forcibly. But this approach in the witness box raises the possibility that the witness may be more concerned with arguing points than with giving evidence which is admissible. This in turn may cause concern about the reliability of the evidence that is given.

    b. He admitted the document at MB207 to be a lie about having sold the 60ml bottles of Lonstin – he accepted that they had not in fact sold it and, as I have indicated, described this statement as a "*marketing strategy."* Some would call it a lie.

    c. The PDF of the label to Lonstin just about shows reference to MRSA and E Coli if you know what you are looking for. The Defendant queries whether anyone could possibly have identified these references from the material that is in the trial bundle.

    d. In any event, there is no contemporary record of this apparent position that Mr Reis and Mr Luke were keen that any sanitiser they bought referred to its efficacy against known pathogens. In fact, the communications relied on by the Claimant show a different concern about whether the products complied with British Standards, not their efficacy against named pathogens. The Defendant invites the court to treat with caution the evidence of Mr Reis that the Claimant relied on alleged representations contained in the labelling given when this was not an issue that was recorded as being a matter of interest to Mr Reis and Mr Luke at the time that the contract was entered in.

35. The evidence given by Mr Sahdev and Mr Ashby was essentially by way of background and context. No issue arose as to the accuracy of what they had to say and their evidence was not the subject of challenge on any material issue.

THE LAW

36. It is central to the Claimant's case that the sale of the Lonstin and GCG was unlawful because they are medicinal products. If the Claimant cannot establish this proposition the remainder of its case falls away.

37. In order to consider this and associated matters, it is necessary to look in some detail at the Human Medicines Regulations 2012. So far as relevant, those regulations provide:

> ***"PART 1***
>
> ***GENERAL***
>
> ***Medicinal products***
>
> ***2.*** *(1) In these Regulations "medicinal product" means—*
>
> *(a) any substance or combination of substances presented as having properties of preventing or treating disease in human beings; or*
>
> *(b) any substance or combination of substances that may be used by or administered to human beings with a view to*
>
> *(i) restoring, correcting or modifying a physiological function by exerting a pharmacological, immunological or metabolic action, or*
>
> *(ii) making a medical diagnosis.*
>
> *…*
>
> ***General interpretation***
>
> ***8.*** *(1) In these Regulations (unless the context otherwise requires)*
>
> **…**
>
> *"disease" includes any injury, ailment or adverse condition, whether of body or mind;*
>
> …
>
> ***PART 3***
>
> ***MANUFACTURE AND DISTRIBUTION OF MEDICINAL PRODUCTS AND ACTIVE SUBSTANCES***
>
> ***Wholesale dealing in medicinal products***
>
> *18. (1) A person may not except in accordance with a licence (a "wholesale dealer's licence")*
>
> *(a) distribute a medicinal product by way of wholesale dealing;*
>
> *(b) possess a medicinal product for the purpose of such distribution;*
>
> *(c) import a medicinal product into Great Britain from an approved country for import; or*
>
> *(d) supply a listed NIMAR product from Great Britain to Northern Ireland.*
>
> *(2) Paragraph (1)*

(a) does not apply

(i) to anything done in relation to a medicinal product by the holder of a manufacturer's licence in respect of that product,

(ii) where the product concerned is an investigational medicinal product, or

(iii) if the product is a radiopharmaceutical in which the radionuclide is in the form of a sealed source; and

(b) is subject to regulation 19.

…

(3) Distribution of a medicinal product by way of wholesale dealing, or possession for the purpose of such distribution, is not to be taken to be in accordance with a wholesale dealer's licence unless the distribution is carried on, or as the case may be the product held, at premises located in the UK and specified in the licence.

(4) In these Regulations a reference to distributing a product (including a listed NIMAR product) by way of wholesale dealing is a reference to—

(a) selling or supplying it; or

(b) procuring or holding it or exporting it for the purposes of sale or supply, to

a person who receives it for a purpose within paragraph (5).

(5) Those purposes are—

(a) selling or supplying the product; or

(b) administering it or causing it to be administered to one or more human beings,

in the course of a business carried on by that person.

(6) A wholesale dealer's licence does not authorise the distribution of a medicinal product by way of wholesale dealing, or possession of a medicinal product for the purpose of such distribution, unless—

(a) in the case of a product for sale or supply in Great Britain, a UKMA(GB) or UKMA(UK), certificate of registration or traditional herbal registration is in force in respect of the product,

(b) in the case of a product for sale or supply in Northern Ireland, a UKMA(NI) or UKMA(UK), EU marketing authorisation, Article 126a authorisation, certificate of registration or traditional herbal registration is in force in respect of the product, or

(c) in the case of a listed NIMAR product, a UKMA(GB) or UKMA(UK) is in force in respect of the product,

but this is subject to the exceptions in regulation 43(6).

(7) In paragraph (6)(b), "marketing authorisation" means—

(a) a marketing authorisation issued by a competent authority of a member State in accordance with the 2001 Directive; or

(b) an EU marketing authorisation.

...

Offences: breach of regulations and false information and defence concerning starting materials

34. *(1) A person is guilty of an offence if the person contravenes the provisions of regulation 17(1) or 18(1).*

(2) A person is guilty of an offence if the person knowingly gives false information in response to a notice under regulation 30(1).

(3) A person is guilty of an offence if, without reasonable excuse, the person fails to comply with a notice under regulation 30(2).

(4) The defence in paragraph (5) applies to a person who is charged under paragraph (1) with an offence of contravening regulation 17(1) (prohibition on manufacturing a medicinal product except in accordance with a licence) by virtue of a breach of regulation (requirement that active substances used as starting materials are manufactured or assembled in accordance with the Good Manufacturing Practice Directive).

(5) It is a defence for the person to show that the person could not, by taking all reasonable precautions and exercising all due diligence, have discovered that an active substance was not manufactured in accordance with regulation.

...

Requirement for authorisation

46. *(1) A person may not sell or supply, or offer to sell or supply, an unauthorised medicinal product.*

(2) A person may not sell or supply, or offer to sell or supply, a medicinal product otherwise than in accordance with the terms of—

(a) a UK marketing authorisation;

(aa) an EU marketing authorisation;

(b) a certificate of registration; (c) a traditional herbal registration; or

(d) an Article 126a authorisation.

(3) A person may not possess an unauthorised medicinal product if the person knows or has reasonable cause to believe that the product is intended to be sold or supplied to another person within the United Kingdom or the European Economic Area.

(4) A person may not in the circumstances mentioned in paragraph (5)—

(a) manufacture or assemble a medicinal product; or

(b) procure the sale, supply, manufacture or assembly of a medicinal product.

(5) Those circumstances are that the person knows or has reasonable cause to believe that the medicinal product has been or is intended to be sold or supplied contrary to paragraph (1).

(6) For the purposes of this regulation a medicinal product is unauthorised if none of the following is in force for the product in the country in which the product is intended to be sold or supplied, or offered for sale or supply—

(a) a UK marketing authorisation;

(aa) an EU marketing authorisation;

(b) a certificate of registration; (c) a traditional herbal registration; or

(d) an Article 126a authorisation.

Breach of requirement

47 (1) A person who breaches regulation 46 is guilty of an offence.

(2) A person guilty of an offence under this regulation is liable—

(a) on summary conviction to a fine not exceeding the statutory maximum; or

(b) on conviction on indictment to a fine, to imprisonment not exceeding two years or to both.

…

PART 9

Borderline products

Provisional determination

159. (1) This regulation applies if the licensing authority thinks that a product without a UK marketing authorisation, traditional herbal registration, certificate of registration or 2, only in relation to a product for sale or supply in Northern Ireland, an Article 126a authorisation or an EU marketing authorisation] is a medicinal product.

(2) The licensing authority may give a notice in writing (a "provisional determination notice") to any person (the "recipient")

(a) who has sold or supplied the product, or has offered to sell or supply it; or

(b) whom the licensing authority thinks may sell or supply the product.

(3) The provisional determination notice must

(a) advise the recipient that the licensing authority has made a provisional determination that the product is a medicinal product;

(b) give reasons for the provisional determination;

(c) advise the recipient of the recipient's rights to challenge the provisional determination in accordance with regulation 160; and

(d) specify a period of at least six weeks beginning immediately after the date on which the provisional determination notice is given to the recipient (in this Part "the determination date") within which any written

representations in accordance with regulation 160(2)(a) must be made to the licensing authority.

Challenge to provisional determination

160. (1) A recipient of a provisional determination notice may, within the period of four weeks beginning immediately after the determination date, give notice in writing to the licensing authority requesting the authority to submit the provisional determination to review.

(2) If the recipient gives such notice the recipient must

(a) within the period specified in the provisional determination notice, make written representations to the licensing authority explaining why the recipient thinks the product is not a medicinal product; or

(b) within the period of four weeks beginning immediately after the determination date, inform the licensing authority in writing that the recipient wants to make oral representations explaining why the recipient thinks the product is not a medicinal product.

(3) If

(a) the recipient has informed the licensing authority that the recipient wants to make written representations in accordance with paragraph (2)(a); and

(b) the licensing authority thinks that, because of exceptional circumstances or the nature or complexity of the issues involved, additional time is needed for the preparation of written representations, the licensing authority may alter the period for making written representations.

(4) The licensing authority must inform the recipient in writing of an alteration under paragraph (3) and of the reasons for it.

Written representations procedure

161. (1) If a recipient makes written representations in accordance with regulation 160(2)(a) the licensing authority must appoint a panel of at least two persons ("the reviewers") to advise on the provisional determination.

(2) The licensing authority must provide the reviewers with

(a) the recipient's written representations; and

(b) any written representations of the licensing authority.

(3) The reviewers must advise the licensing authority on the authority's provisional determination taking account of

(a) the written representations; and

(b) any other evidence submitted to them.

(4) The licensing authority must take into account the reviewers' advice and make a final determination as to whether the product is a medicinal product.

(5) The licensing authority must

(a) inform the recipient in writing of its final determination and of the reasons for it; and

(b) if the licensing authority disagrees with the reviewers' advice, inform the recipient in writing of the reasons for that disagreement.

Oral representations procedure

162. (1) If a recipient informs the licensing authority in accordance with regulation 160(2)(b) that the recipient wants to make oral representations, the licensing authority must

(a) appoint a panel of at least two persons ("the reviewers") to conduct the review; and

(b) after consultation with the recipient set a date for the hearing.

(2) The licensing authority may alter the date of the hearing at the request of the recipient or of its own motion if it thinks that because of exceptional circumstances or the nature or complexity of the issues involved additional time is needed for preparation for the hearing.

(3) The licensing authority must inform the recipient in writing of any alteration under paragraph (2) and of the reasons for it.

(4) The recipient and the licensing authority may make oral representations at the hearing.

(5) The reviewers must advise the licensing authority on the authority's provisional determination, taking account of

(a) the oral representations made and any other evidence submitted by the recipient at the hearing;

(b) any oral representations made or other evidence submitted by the licensing authority at the hearing; and

(c) any other evidence heard by the review panel.

(6) The licensing authority must take into account the reviewers' advice and make a final determination as to whether the product is a medicinal product.

(7) The licensing authority must

(a) inform the recipient in writing of its final determination and of the reasons for it; and

(b) if the licensing authority disagrees with the reviewers' advice, inform the recipient in writing of the reasons for that disagreement.

Final determination without representations

163. (1) This regulation applies if the recipient

(a) does not give notification to the licensing authority that the recipient wishes to challenge its provisional determination within the period of four weeks beginning immediately after the determination date;

(b) gives such notification, but fails to make written representations to the licensing authority within the period for making those representations; or

(c) gives such notification, but fails to make oral representations at a hearing before the reviewers appointed for the purposes of advising on the provisional determination.

(2) The licensing authority must

(a) make a final determination as to whether the product is a medicinal product; and

(b) inform the recipient in writing of its final determination and of the reasons for it.

Effect of final determination

164. (1) If the licensing authority makes a final determination that a product is a medicinal product, it may give a notice to any person

(a) who has sold or supplied the product, or has offered to sell or supply it; or

(b) whom the licensing authority thinks may sell or supply the product.

(2) The notice must require the person

(a) to cease to sell, supply or offer to sell or supply the product from the date specified in the notice until a UK marketing authorisation, traditional herbal registration, certificate of registration or, only in relation to a product for sale or supply in Northern Ireland, an Article 126a authorisation or an EU marketing authorisation, is granted in respect of the product; or

(b) not to sell, supply or offer to sell or supply the product unless a UK marketing authorisation, traditional herbal registration, certificate of registration or, only in relation to a product for sale or supply in Northern Ireland, an Article 126a authorisation or an EU marketing authorisation, is granted in respect of the product.

Determination in other cases

165. Nothing in this Part prevents the licensing authority from determining that a product is a medicinal product in relation to these Regulations without following the procedures in this Part when it thinks it appropriate.

Offences relating to borderline products

166. (1) A person is guilty of an offence if that person sells or supplies, or offers to sell or supply a product in breach of a notice under regulation 164(1) imposing a requirement under

(a) regulation 164(2)(a); or

(b) regulation 164(2)(b).

(2) A person guilty of an offence under this regulation is liable— (a) on summary conviction to a fine not exceeding the statutory maximum; or (b) on conviction on indictment, to a fine, to imprisonment for a term not exceeding two years or to both."

38. For the claim in misrepresentation, reference is made to the Misrepresentation Act 1967.

Section 2 provides:

"***Damages for misrepresentation***

(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2) of this section whether or not he is liable to damages under subsection (1) thereof, but where he is so liable any award under the said subsection (2) shall be taken into account in assessing his liability under the said subsection (1)."

39. In respect of the claim for breach of contract, it is necessary to consider several sections of the Sale of Goods Act 1979 ("SGA 1979").

40. Section 12 of SGA 1979 provides:

"***Implied terms about title, etc.***

(1) In a contract of sale, other than one to which subsection (3) below applies, there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.

(2) In a contract of sale, other than one to which subsection (3) below applies, there is also an implied term that—

(a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and

(b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(3) This subsection applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.

(4) In a contract to which subsection (3) above applies there is an implied term that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.

(5) In a contract to which subsection (3) above applies there is also an implied term that none of the following will disturb the buyer's quiet possession of the goods, namely—

(a) the seller;

(b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;

(c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.

(5A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition and the terms implied by subsections (2), (4) and (5) above are warranties.

(6) Paragraph 3 of Schedule 1 below applies in relation to a contract made before 18 May 1973.

(7) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 17 of that Act)."

41. Section 14 of SGA 1979 provides:

*"**Implied terms about quality or fitness***

(1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,

(b) appearance and finish,

(c) freedom from minor defects,

(d) safety, and (e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory

(a) which is specifically drawn to the buyer's attention before the contract is made, (b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or

(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—

(a) to the seller, or

(b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker, any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker."

42. It is necessary also to consider the terms of the corresponding sections of the Sale of Goods Act 1893 ("SGA 1893"), which were applied in authorities to which the Claimant has referred.

43. Section 12 of SGA 1893 provides:

"***Implied undertaking as to title, &c***

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

44. Section 14 of the SGA 1893 provides:

"***Implied conditions as to quality or fitness***

Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

45. In respect of remedies under the Sale of Gods Act 1979, the parties have referred to section 53(3).

"Remedy for breach of warranty

(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

ISSUE 1 – LEGALITY OF IMPORTING AND DEALING IN THE PRODUCTS

(a) The Claimant's case

46. The Claimant contends that Lonstin and GCG, as described and sold, were asserted by their marketing to be effective against MRSA and/or E Coli.

a. In respect of Lonstin, the Claimant's case is that the labelling of the container refers to the product as *"effective at eliminating MRSA and E Coli."*

b. In respect of GCG, the Claimant contends that the product leaflet describes it as *"a broad bacterial (including MRSA and VRE)*" and the Defendant admits in the Defence that the product as supplied was labelled as stating that it was "*effective against MRSA and E Coli"*(see the Defence at [11]).

47. As to the legality of importing and dealing in such products, the Claimant's starting position is to look at definition of diseases in Regulation 8 above. The Claimant says that this is a broad definition that would catch any disease caused by MRSA or E coli since those bacteria are "*ailments*" or "*adverse conditions*" that cause such disease.

48. During closing submissions, the Claimant's counsel handed up a printout from the website of the MHRA headed

"*Guidance: Regulatory status of equipment being used to help prevent coronavirus (COVID19)."*

It is stated to have been published on 26 March 2020. That guidance says:

"*…products which make claims to treat/prevent infection associated with specifically named pathogens are classed as medicines."*

The document goes on:

"If a product is a medicine

A Marketing Authorisation is required. General hand sanitiser products are not permitted to name specific pathogens.

Claims to treat or prevent infection associated with specifically named pathogens (such as SARS-CoV-2) could bring the product within the remit of the medicines regulations."

Reference is then made to another guidance note published by the MHRA, called "*MHRA Guidance Note 8 – A guide to what is a medicinal product,"* which was published in March 2020. That guidance note cites the definition of a medicinal product in Article 4 of Directive 2001/83/EC (as amended), which is, to all intents and purposes, identical to the definition in Section 18 of the HMR 2012.

49. The Claimant contends that MRSA and E coli are clearly pathogens and accordingly that, following MHRA guidance, the court should conclude that they fall within the definition of disease in Regulation 8.

50. Assuming that the Lonstin and/or GCG are medicinal products, the result is

a. Importation is prohibited without a licence and would be a criminal offence under Regulation 34.
b. Wholesale dealing by distribution is prohibited without authorisation[11] and would be a criminal offence under Regulation 47.

c. Sale of the products is prohibited without authorisation and would be a criminal offence under Regulation 47.

51. The Claimant says there it no evidence of a wholesale dealer's licence being in place in respect of the Defendant and/or either of the products being authorised under Regulation 46. Therefore:

a. The importation of the products by the Defendant was an offence;
b. The wholesale of the products by the Defendant to the Claimant was an offence;
c. Any sale of the products by the Claimant (whether by way of wholesale or retail) either was or would be an offence.

(b) The Defendant's case

52. The Defendant accepts the Claimant's case as to the labelling and description of the contractual products set out at [46] above. (For the avoidance of doubt, the Defendant does not however accept the Claimant's case that those markings were necessarily apparent to the Claimant's representatives, a matter relevant not to the first issue but to the second.) Of significance to the

[11] It should be noted that, even if s person holds a wholesale dealer's licence, wholesale dealing under Regulation 18 is prohibited if there is no marketing authorisation or registration.

first issue however, the Defendant contends that the Claimant is in fact in error in arguing that the distribution and/or sale of Lonstin and GCG was illegal.

53. Dealing first with whether Lonstin and/or GCG are in fact medicinal products, the Defendant says that the court should not be swayed by the opinion of the MHRA. Whilst it accepts (both from the extract from the website referred to above and the letter from the MHRA) that the MHRA asserts these product to be medicinal in nature, that is not in fact the case. The only material on which the Claimant relies in support of the assertion that the products are medicinal products is the labelling that states or suggests that the products are effective against certain bacteria, namely MRSA and E Coli. But neither MRSA or E coli are diseases in themselves, whether in the ordinary use of the word or in the technical sense of the HMR 2012. Neither is inherently an "*ailment"* or "*adverse condition*." Indeed, they occur perfectly naturally.

54. If it were said that either the Lonstin or the GCG prevented infection, that might well render them a Medicinal Product within the ambit of Regulation 2. But if the only claims being made are that the products are effective in killing organisms which may cause infection is not such a claim and accordingly these products are not a "*substance or combination of substances presented as having properties of preventing or treating disease in human beings."*

55. The Defendant accepts that it would have been possible for the products to have been determined to be medicinal products by application of the process under Part 9 of the HMR 2012. The Defendant contends that the process is as follows:

a. The function of part 9 of the HMR 2012 is to establish a regime pursuant to which:
    i. The MHRA can make a provisional determination that a product is a medicinal product under regulation 159;
    ii. A merchant can make a challenge to that provisional determination under regulation 160 with written or oral representations in response to which the MHRA makes a final determination under regulations 161 and 162; iii. Alternatively, in the absence of a challenge or representations, the MHRA make a final determination that a products is a medicinal product under regulation 163;
b. The effect of a final notice is then that notice will be given to a range of persons and those who receive the notice must cease to sell, supply or offer to sell of supply the product from the date specified until such time as a marketing authorisation is granted – see regulation 164.
c. Once a final determination has been served on someone, it is an offence for them to sell, supply or offer for sale or supply the product which has finally been determined to be a medicinal product - see regulation 166.

d. However, Regulation 165 sits outside this regime. The effect of regulation 165 of the HMR 2012 is to allow the MHRA to make a determination that a product is medicinal but unlike the rest of the regime in part 9, that does not have the automatic legal consequences that the marketing or sale of the product is unlawful under the HMR 2012.

56. It follows that it was not unlawful to continue to sell the Lonstin in consequence of the letter from the MHRA dated 20 January 2021. It would have been illegal to sell it if a determination that it was a medicinal product had been made under Regulation 166, but there is no evidence that this is so. It would also be illegal to sell were it to be a medicinal product within the meaning of Regulation 8. But for reasons already identified, the Defendant contends that MRSA and E Coli are not "diseases" within the meaning of the HMR 2012 but rather are simply bacteria that may cause disease; and therefore a product that claims to be effective in eliminating the bacteria or otherwise preventing them from causing disease does come within the meaning of a "*medicinal product*."

(c) Discussion

57. During the trial, I was shown better copies of the documents that appear at CB68-70. Having seen those documents, I am satisfied that:

a. The product leaflet from GCG makes statements including:

i. "Portable hand sanitiser;" ii. "Kills 99.9% common germ;" and iii. "A broad bacterial (including MRSA, VRE)."

b. The product leaflet for Lonstin states "kills 99.9% common germs;"

c. The Lonstin container includes on it the words "***75% ALCOHOL*** *specially formulated with antibacterial ingredients which are effective at eliminating MRSA and E Coli whilst leaving your hands gently [cleansed?] and [refreshed?]."*

58. The first two of these are readily discernible from the images in the core bundle. That at (c) is not – however I was provided with better copy images which read as identified above albeit that the writing is not entirely easy to decipher and the bottom line is particularly unclear.

59. These claims are clearly assertions that the products are in each case effective at eliminating or killing bacteria including, in the case of GCG, MRSA and VRE and, in the case of Lonstin,

MRSA and E Coli. Therefore, as the Defence admits at [11], the products delivered by the Defendant to the Claimant had labels which describe the products as being effective against MRSA and E Coli.

60. However, for reasons identified by the Defendant, I am not persuaded that a claim to be effective against specific bacteria amounts to a claim that the product has the property of preventing or treating disease. Rather the products claim to have the effect of being effective against the bacteria which could be capable of causing disease. The evidence does not indicate that the mere presence of the bacteria on or in the human body means that one is suffering any ailment or adverse condition. There is no evidence that their presence is not consistent with a perfectly normal human condition, without the host suffering any ill health or adverse consequences, even if in some circumstances they may lead to the development of infection and/or serious ill health.

61. I accept the Defendant's contentions as to how part 9 of the HMR 2012 operates. It would have been possible for a determination pursuant to the scheme in that Part of the regulations to have "*determined"* (in the language of the regulations) that the products were medicinal products notwithstanding their not meeting the definition in Regulation 8. But it has not been argued that such a determination has taken place here and hence the Claimant's case is not saved by the application of regulations 164 and 166.

62. As I have indicated, the remainder of the Claimant's arguments in this case suppose the court to find that dealing in GCG and/or Lonstin is prohibited by the HMR 2012 and that, if the Claimant cannot establish this, the claim fails. Accordingly this is a central issue to the claim. It follows that the Claimant's case is doomed to failure because of my finding on this first issue. Nevertheless, in deference to the evidence adduced and the arguments advanced, I consider the remainder of the issues in the case, on the assumption that Lonstin and GCG are medicinal products.

63. I accept the Claimant's contention that, if this is so, the importation of the products into the United Kingdom and their sale to the Claimant would, absent the relevant authorisation by way of wholesale dealer's licence, have been illegal and further that it would have been illegal for the Claimant to sell the products to consumers (absent marketing authorisation) or to other business (absent marketing authorisation or possibly, in the case of a business to business sale, a wholesaler dealer's licence). There is no evidence that any authorisation for such dealing existed, nor does the Defendant assert that there was. I therefore accept that in fact such dealing was prohibited by the Act and indeed would have constituted the commission of a criminal offence. I further accept that this is a consequence not of the inherent nature of the products but rather because of their get up advertising them as being capable of targeting certain bacteria.

ISSUE 2 – MISREPRESENTATION

(a) The Claimant's case

64. The Claimant's case is that it was induced to enter into the contract for the purchase of Lonstin and GCG by the Defendant's representations that the products could lawfully be marketed with the labelling present on the containers at the time of the contract. That representation arose from the provision of the material to Mr Reis referred to at [9] and [10] above. It is apparent from Mr Reis' evidence at [33] on CB40 that he inspected this material, observed the references to MRSA and E coli and relied on those references in entering into the contract with the Defendant. The Claimant contends that Mr Reis' concern as to the quality of the product is corroborated by the reference in communication between him and Mr Luke at CB49 to relevant British Standards.

65. The Claimant's pleaded case on misrepresentation is at paragraphs 16 and 17 of the Particulars of Claim (CB11-12):

"*[16] The Defendant offered both products to the Claimant bearing labelling and, in the case of GCG with a product leaflet) claiming that the sanitisers were effective to prevent named pathogens…*

[17] In the premises, the Defendant expressly represented to the Claimant that both the GCG and the Lonstin sanitisers could lawfully be offered for sale as products which were effective to prevent named pathogens. Alternatively, the same representation arose by necessary implication from the facts and matters described. The Claimant relied upon the representation in agreeing to purchase the products."

66. For the avoidance of doubt, the Claimant does not contend that the representations were made fraudulently, but rather relies for its remedy on the common law right to rescission for a contract entered into in reliance on a misrepresentation whether fraudulent, negligent or innocent (see Chitty on Contracts at [10-123] for the statement of principle) or the alternative claim in damages under Section 2(2) of the Misrepresentation Act 1967.

67. In opening, the Claimant contended that the provision of the documents referred to in [16] of the Particulars of Claim amounted to an express representation of that fact or in the alternative an implied representation within the sense referred to by Walker LJ in *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811 at [32], namely, "*a statement which is not a representation of fact, but which by implication carries with it a representation of fact."*

68. In closing submissions, the Claimant accepted that, in order to found an action in misrepresentation, it has to show that a reasonable person looking at the material provided by

the Defendant would conclude that the products could be marketed as labelled. That position might be thought to be inconsistent with the contention that this was an express representation, though the Claimant has not formally abandoned that case. In any event, the Claimant contends that it is obvious that a person reading the labels would come to that conclusion. If it was not legal to sell the products as labelled, why was a different label not applied?

69. As to the evidence of Mr Reis' reliance on the representation, the Claimant contends that his account of inspecting the labels, ascertaining what they said and using that as part of his decision to purchase the goods is uncontradicted, plausible and consistent with the Claimant's broader case that it was looking to sell high quality products.

(b) The Defendant's case

70. As to the contention that there was an express representation, the Defendant contends that there is simply no evidence of this, as the Claimant's position in closing effectively concedes. If one has to look to what a reasonable person would interpret the labelling to mean, one is of necessity looking at what is implicit rather than express in what was represented, since if it was express one would not need to appeal to the concept at all. But there is nothing implicit in the relationship of the parties and/or the conduct of the Defendant from which such a representation is to be inferred.

71. Further, the representation relied on is one as to the effect of the regulatory regime on the right to sell the product, in other words, a representation of opinion as to law. Whilst such a representation may be actionable, the limit of such actionability is usually taken to be that "…*a statement of law may be a misrepresentation if it was reasonable in all the circumstances, for the representee to rely on it"* (Chitty on Contracts at [10-021]).

72. But this is not a case where there is for example an imbalance of information between the parties that might lead to the inference that the sale of the product amounted to an implied representation as to the legality of either that sale or any onward sale. There is simply no basis to conclude that the Defendant had any better knowledge about the legality of the sale than the Claimant did. Absent that kind of imbalance of information, there is no ground to infer the making of a representation because it would not be reasonable for the alleged representee to rely on the statement.

73. The Defendant asserts that its position is even stronger in respect of the GCG product, where the Claimant does not rely upon the labelling of the product at all. The only material from which the court could infer the making of a representation in respect of the GCG was the product sheet. But that document, unlike the labelling, is not a statement being made to the purchaser about the product so could not be the basis of a finding of a representation in any event.

74. Further, the Defendant rejects the contention that the Claimant relied upon any such representation. Whilst it notes Mr Reis' evidence as to his investigations into the properties of the product, it invites me to reject his contention that the Claimant entered into the contract in reliance on that material for several reasons.

75. First, in respect of Lonstin, neither the product sheet at CB70 nor the photograph of the product container at CB69 show legible reference to MRSA and/or e Coli. Whilst the Defendant accepts that both the product sheet and the photograph of the container in fact show those words, the words are extremely difficult to identify and could not have been so identified in the version of those documents that were sent to the Claimant. In so far as Mr Reis says that he was able to examine those documents and find the relevant wording by zooming in to the digital version, the Defendant contends that the Court should reject that evidence. The copy documents which were sent to him could not be read. His evidence is in any event unreliable for reasons that I have identified at [34] and the Claimant contends that I should simply reject this implausible account of a close examination of the documents.

76. Second, in his evidence Mr Reis did not identify that it was the specific reference to avoiding the named pathogens that was the operative inducement to the Claimant entering into the contract.

77. Third, whilst the Defendant concedes that the were references to British Standards in the Skype communications between Mr Reis and Mr Luke at CB49 tend to support the contention that Mr Reis was concerned about the compliance of the goods with relevant standards, in fact they do not support the contention that the Claimant was relying on statements (whether express or implied) made by the Defendant about those standards. Rather, those exchanges are indicative of the fact that the Defendant was making its own investigation into the quality of the goods.

78. Fourth, the Claimant did not call Mr Luke to give evidence. Whilst the case proceeded in the Shorter Trials Scheme, and one cannot expect all corners of the case to be explored as one might in a case of higher value, the court can reasonably have expected Mr Luke to have been called given first that he was, on Mr Reis' evidence, party to a central aspect of the issues in the case, namely the Claimant's investigation into the nature of the product and second that it was he, not Mr Reis, who entered into the contract on behalf of the Claimant. The Defendant puts its case two ways:

    a. That the court can and should draw an inference from the failure to call Mr Luke that his evidence would not have supported that of Mr Reis; and

    b. That the failure to call Mr Luke is fatal to argue in inducement since, as the agent for the Claimant in entering into the contract, the claim can only succeed if it is shown that

he (as opposed to Mr Reis) entered into the contract in reliance on the Defendant's alleged misrepresentation.

(c) Discussion

79. The concept of the implied representation is by no means straightforward. The Court of Appeal pointed out in *Property Alliance Group v RBS* [2018] 1 WLR 3529 at [126] that representations may be implied by conduct as well as words and it will often be more appropriate to consider such representations as arising from conduct rather than words. As Toulson J put it at first instance in *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm) at [50], in a passage upon which the Court of Appeal did not comment but which was cited by the Court of Appeal without disapproval in *Property Alliance Group v RBS*, "*In determining whether there has been an express representation, and to that effect, the court has to consider what a reasonable person would have understood from the words used in the context from which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in the context."*

80. It has been said that a helpful test is whether a reasonable representee would naturally assume the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it (see Colman J in *Geest plc v Fyffes plc* [1999] 1 Alle ER 672 and 683). Whilst the Court of Appel in *Property Alliance Group v RBS* approved the dicta of Colman J, they made clear that "*this is not to water down the requirement that there must be clear word or clear conduct of the representor from which the representation can be implied."*

81. Looking at the circumstances in the present case, it is not asserted that the Defendant said anything about the lawfulness of sale of the products. All it did was to offer those products to

the Defendant, providing product sheets and image that contain the descriptions to which reference has been made. The representation which the Claimant seeks to rely on is one with its to be inferred by that conduct and thus is necessarily an implied rather than express representation.

82. To find that this conduct amounted to a representation as to the legality of sale of the product by the Defendant requires the court to conclude that a reasonable person would conclude from its production of the material to the Claimant that it was making an assertion as to the legality of sale of the products in the UK. In my judgment, that conclusion is not one that can safely be drawn. One might have expected that, if the Defendant knew that the sale of the products in the UK was unlawful, it would have told the Claimant of this. It might be possible to draw the

inference from the production of the material that the Defendant did not believe the sale of the product (whether by itself selling to the Claimant or by the Claimant selling to others in the wholesale or retail market), to be unlawful and to conclude from this that the Defendant represented that it believed the sale of the products not to be illegal. However, there is no evidence that it knew anything of the legality of selling the products or had even investigated this. Thus a representation about the Defendant's state of mind as to the legality of the sale of the product would not be actionable because the Claimant could not prove it to be untrue. In any event this is not the representation relied on.

83. To go further and to assert that producing the material to the Claimant amounted to an assertion that the sale of the product (again, whether by the Defendant to the Claimant or by the Claimant to others) was lawful goes beyond what can reasonably be inferred from the circumstances. A party in the position of the Claimant has no knowledge of what investigations if any the Defendant has made about the regulatory framework for the product. Moreover, the contract was not concluded on terms as to the application of that framework. To imply a representation here would in effect make the Defendant liable for not having given advice to the Claimant as to the regulatory framework, which in turn would have required the Defendant to have taken positive steps itself to investigate that framework in order to avoid liability in misrepresentation. But I see nothing in the parties' relationship that suppose that the Defendant assumed any responsibility for this and, in the absence of express word (whether by way of representation or as terms of the contract), I do not see that it would be right to imply such an obligation by invoking the concept of the implied representation.

84. Indeed, as the Defendant commented in another context, to impose such a liability makes the Defendant the legal adviser to the Claimant. This was not a role that the Defendant can be said to have assumed nor is it one that it was expressly or impliedly paid for. It is not reasonable for the Claimant to rely on such a representation.

85. To put the point another way, applying the dicta of Colman J in *Geest v Fyffes*, whilst a reasonable person might have thought that, had the Defendant known that the sale of the product was unlawful, it would necessarily have told the Claimant of this, such a person would not have thought that the Defendant would necessarily have told the Claimant that it did not know whether the sale of the product was unlawful, still less would that person think that the Defendant would necessarily have investigated the legality of the sale of the product such that it had the knowledge to tell the Defendant about this.

86. It follows that I am not persuaded that the Court can infer the representations on which the Claimant seeks to rely.

87. It of course follows from my finding on Issue 1, that, even if such representations were made, the Claimant fails to establish that they were false. But I should however add that I do not accept the Defendant's argument that the case in respect of the GCG is in some way weaker than that in respect of the Lonstin because the reference to the efficacy of the product was in the product sheet rather than on the container label. If I otherwise accepted the Claimant's case on a misrepresentation relating to Lonstin, I would equally have found that such a misrepresentation had been made in respect of the GCG as a result of the statement in the product sheet which had been sent to the Defendant.

88. Turning to the issue of whether, if the sale of the products did amount to the alleged representation, the Claimant can be said to have relied on it. I have looked with considerable care at the evidence of Mr Reis and the arguments advanced by the Defendant. I accept that caution is required given his tendency to speak beyond matters of which he has personal knowledge as well as his admitted telling of a lie in respect of the document at MB207 for reasons identified at [34] above. I also accept that it is difficult to read the product label for the Lonstin and that I should bear in mind the possibility that Mr Reis is using the fact that it is now, with the benefit of hindsight, possible to establish reference to the pathogens on the label whereas at the time, given the copy of the documents produced in the bundle that it would have been extremely difficult if not impossible to discern the wording on the label. Yet further, if I found Mr Reis to have invented the claim that he and Mr Luke were able to make out what was on the Lonstin label and rely on that, this might significantly undermine his evidence that he relied on the products labels for either the Lonstin or the GCG. Whilst invention of evidence might be taken simply to be a case of bolstering an otherwise good case, I would inevitably be even more cautious about accepting Mr Reis' word if I did find the reference to making out the words on the label to be a lie.

89. Notwithstanding my caution about Mr Reis' evidence, I found his reference to having investigated the quality of the products by looking at the product material to be plausible. The Skype exchanges show an interest in regulatory standards. It is likely that someone in the position of Mr Reis would want to do their best to ensure that they were purchasing a product that was likely to be profitable. Further, whilst I accept that the references to MRSA and E coli are virtually illegible on the version of the documents produced to me in the core bundle, it is not necessarily the case that they were similarly illegible in the format in which they were sent to the Claimant. I have no information from which I can safely conclude whether the quality of the images was different to what is before me or the same. On balance, Mr Reis' firm and unambiguous evidence on this issue persuades me that he probably did read both the products

label for the Lonstin and the product information sheet for GCG before he took the decision to purchase the products.

90. I should add that am not persuaded by the Defendant's other points.

91. First I did not draw an averse inference from the failure to call Mr Luke. The principles to be applied when considering whether to draw an adverse inference from the failure to call a witness were considered by Brooke LJ in his judgment in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at page 343, in a passage with which the remainder of the Court of Appeal agreed:

"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified".

92. In *Royal Mail Group v Efobi* [2021] UKSC 33, Lord Leggatt JSC said these were "*sensible statements.*" He added, "*Relevant considerations will include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole.*"

93. Given that the case was heard in the Shorter Trials Scheme, the selective use of witnesses is understandable. Whilst Mr Luke could have been called, it is understandable that the Claimant considered Mr Reis' evidence to suffice on this issue. I am not satisfied having regard to the context of this trial that an adverse inference can safely be drawn.

94. Second, I am not persuaded that the Claimant needed to call Mr Luke to prove reliance on the statement. Given Mr Reis's evidence that he and Mr Luke discussed this issue because the quality of the product mattered to them, the court can reasonably infer reliance on the representation if it is proved that the representation was made and that it was reasonable to rely on it.

95. Accordingly, on Issue 2, I conclude that the Claimant was not induced to enter into the contract by any representation on the Defendant's part, because the statements on the information sheet and the product label cannot be taken to be representation at all. In any event, since the Defendant has not made out that Lonstin and/or GCG were not medicinal products, it cannot satisfy the court that a representation that it made was false. But I accept that the Claimant read and was able to make out the references to their being effective against MRSA in respect of both products and E Coli in respect of Lonstin.

ISSUE 3 – RESCISSION

(a) The Claimant's case

96. The Claimant claims rescission of the contract, relying, as I have indicated on the common law right that arises in any case of misrepresentation. As to the Defendant's argument that, if the Claimant makes out a case in misrepresentation, the Court should, in place of rescission, order damages under Section 2(2) of the Misrepresentation Act 1967, the Claimant contends that it would not be equitable to exercise the discretion to order damages in lieu where:

    a. The misrepresentation went to the heart of the contractual bargain;
    b. The Claimant would likely suffer loss if the contract were not rescinded unless the Court is of the view that the measure of damages awarded should be assessed on the tortious basis such that the Claimant is put back in the position it would have been in if it had never entered into the contract by being reimbursed the contract price; and/or
    c. The Defendant would not suffer loss by an order for rescission, because repaying the Claimant the purchase price is not loss but rather a restoration of the status quo ante.

97. In so far as the Defendant argues that there are other bars to the remedy of rescission, the Claimant rejects the argument:

    a. Whilst the Claimant has sold a small quantity of the product, it cannot be said that the Claimant cannot make substantial restitution, even if it cannot make full restitution. Whilst the common law requires full restitution, the equitable doctrine of restitution is not so inflexible, as is made clear by Lord Blackburn in *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, where he stated that a court of equity, "*can take*

account of profits and make allowance for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

b. The Claimant has not affirmed the contract; and

c. There has been no delay between the discovery of the misrepresentation and the steps taken by the Claimant to bring it to the Defendant's attention and to seek redress.

(b) The Defendant's case

98. The Defendant draws attention to the evidence of a collapse in the market price for the sanitiser. It cites McGregor on Damages (and *Erlanger v New Sombrero*) in support of the proposition that this may be a bar to rescission of the contract, and may limit the representees' recovery in damages to the deteriorated market price. The authors of McGregor put it thus at [50-089]:

"It has always been accepted that a claimant representee claiming rescission must be capable of putting the defendant representor back in the position the defendant was in before the contract was made and this cannot be done where the subject-matter of the contract has deteriorated in the claimant's hands - and a vast reduction in market value must count as a deterioration."

The decision in *Lagunas Nitrate v Lagunas Syndicate* [1899] 2 Ch 392 is cited in support of this proposition.

99. The result of the collapse in the market price for hand sanitiser is that the product that the Claimant bought became practically worthless almost overnight. That collapse has no causal connection with the misrepresentations on which the Claimant relies. If recession is permitted, the Claimant would recover a windfall relating to the value of the goods and will be put in a better position than it would have been had the representations been true, their being no evidence to suggest (on the assumption that the sale of the product was illegal under the HMR 2012) that the product would have sold any better prior to the intervention of the MHRA had it in fact had market authorisation or otherwise have been legal to sell it.

100. The Defendant draws attention to the fact that the Claimant tried without success to sell the products over a considerable period of time. There is simply no evidence to suggest that the absence of the market authorisation had anything to do with this (since the products were being marketed as thought they had such authorisation). Thus, this is the classic case of the bad bargain misrepresentation case where the Claimant's losses have no connection to the misrepresentation and the ordering of rescission would give the Claimant a windfall by

recompensing it by putting it in the position it would have been in had no contract had been entered into.

(c) Discussion

101. I do not consider this to be a case where the Defendant can sensibly argue that there was delay in seeking recession or some kind of affirmation of the contract and it was sensible not to pursue those arguments. Moreover, I do not consider that the sale of a small quantity of the product is a bar to rescission. in light of the principle set out in *Erlanger v New Sombrero Phosphate* and the recognition that the court can reflect the benefit of the Claimant having made some profit from the goods, the court could make a relevant allowance in ordering rescission by making an appropriate reduction to the purchase price recovered by the Claimant.

102. But, assuming that the sale of the products by the Claimant would have been unlawful and that the Claimant had been induced to purchase them from the Defendant by misrepresentation on its part, the facts of this case give rise to an acute example of the problem identified by the authors of McGregor at [50-089]. By the contract, the Claimant came into receipt of goods that it had huge difficult in selling for reasons unrelated to the putative misrepresentation. But, the misrepresentation having become known and the Claimant seeking rescission, the products that the Claimant can return to the Defendant if rescission is ordered are worth a fraction of the price that the Claimant paid for them. If rescission were ordered, the Claimant would get the windfall of recovering the purchase price of goods that in fact were (at least when the misrepresentation came to light) nearly worthless for reasons unrelated to the alleged misrepresentation; if rescission is not ordered, the Claimant is left with having paid for goods which, on its case it would not have purchased but for the misrepresentation.

103. In my judgment, there is a real potential injustice to the Defendant in permitting rescission where the market price has collapsed as much as is the case here. The court is better able to reflect the issues that rise by the awarding of compensation in lieu of rescission, especially if that award is one of equitable compensation (see Chitty on Contracts at [10-140] and the case of *Halpern v Halpern (No. 2)* [2007] EWCA Civ 291 cited therein) rather than an award of damages on the conventional contractual or tortious measures, both of which may cause difficulties for reasons identified below. In those circumstances, I consider an order for rescission would be inequitable, even if the Claimant were able to make out its claim in misrepresentation.

104. Accordingly, my conclusion on Issue 3 is that, had the Claimant otherwise made out its case, I would not have permitted rescission of the contract but rather would have ordered damages in lieu.

105. I am not deterred from this conclusion by my finding on the next issue that no damages are properly awardable in lieu of rescission. The very reasons that the Claimant has not suffered loss consequent upon the alleged misrepresentation is intimately bound up in my finding on this issue that rescission should not be permitted, since to allow rescission of the contract to take effect would give the Claimant an unjustifiable windfall.

106. For the sake of completeness, had I been persuaded to order rescission, the Claimant would only have been required to return the residual stock and would have needed to give credit of the value of stock sold. There is no convincing evidence of what sums were received by the Claimant from sales of the product. The evidence would appear to suggest that the Claimant was seeking to market it at around the purchase price. Certainly the very small level of sales suggests it was a price that was well above what the true market level was. Doing the best I can on the available evidence, I would have valued the receipts from the Defendant of such sales on the basis of the price it paid for the goods, a total of £2,029.50, reflecting the sale of 411 bottles of Lonstin at £2 per bottle and 483 bottles of GCG at £2.50 per bottle, and would have deducted that figure from the purchase price to be repaid to the Claimant to reflect the sale.

ISSUE 4 – DAMAGES IN LIEU OF RESCISSION

(a) The Claimant's case

107. The Claimant contends that, in the event that damages in lieu of rescission are not awarded and instead it is compensated under Section 2(2) of the 1967 Act, the appropriate measure of loss is, as with the assessment of damages under Section 2(1) Act, the tortious measure.

108. Section 2(1) uses the phrase *"if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding".* This appears to render the appropriate measure of damages to be the same as that in fraud, namely the tortious measure, a conclusion supported by the authors of Chitty at [10-088].

109. Thus, the Claimant contends that the appropriate measure of damages is the contractual price (with a discount for the value of the goods sold), reflecting the position the Claimant would have been in had it not entered into the contract.

(b) The Defendant's case

110. The Defendant points out that the Claimant's approach to the measure of damages effectively gives it a windfall where, as here, the market price in the goods has collapsed for reasons unrelated to the misrepresentation. Such a result is inconsistent with the decision of the Court of Appeal in *William Sindall plc v Cambridgeshire CC* [1994] 1 WLR 1016. If damages under

Section 2(2) are measured on the basis of the full consequence of recission being refused, the representor might be liable for losses which do not flow from the representation but rather from the change in the market price. The Court of Appeal rejected this result, Evans LJ and Hoffman LJ, on the facts of that case, each limiting the representee's recovery to the contractual measure of loss (the difference between the value of the goods as represented and the value of the goods had the representation been true). The authors of Chitty at [10-119] doubt this reasoning and contended that "*in a case where property has been bought as a result of a misrepresentation, damages under the Misrepresentation Act 1967 s 2(2) should be limited to any difference between the contract price and the actual value of the property taking account of the misrepresentation but not taking into account the general fall in the value of the property.*"

111. Mr Reay for the Defendant puts the point this way: the award of damages under Section 2(2) is a special equitable jurisdiction. Where goods are sold, but a sum is awarded in lieu of rescission under section 2(2), the measure of loss should be the contractual measure if the bargain was a bad bargain for the purchaser (avoiding making the representor being the warrantor of the value of the goods in respect of facts that have no connection with the misrepresentation) but the tortious measure if the bargain was a good one (avoiding the purchaser gaining a windfall).

112. In any event, the Defendant notes that the products could be relabelled and resold and are not necessarily worthless now.

(c) Discussion

113. The starting point in considering the appropriate measure of damages under Section 2(2) is to consider the purpose for which damages are awarded. The purpose of Section 2(1) is to put the person who relies on an "negligent" misrepresentation in the same position as one who relies on a fraudulent misrepresentation for the purpose of the award of damages. In that context, it is perfectly understandable that the measure of loss is the tortious measure, putting the representee back into the position they would have been had the representation not been made, which is the established measure in cases of fraud. That loss is measured at the time when the representation is effective, that is when the purchase price is paid. Accordingly no question of the consequences of changes in market price subject to the payment of the purchase price arises. Of course, the representee might also be able to recover consequential losses, but such losses would be subject to different control measures and different principles that do not arise here.

114. But it is far from obvious that the same measure of damages should apply for the purpose of the award of damages is not to compensate for the loss caused by the representation having been made, but rather to compensate for the loss of the right to rescind. The right to rescind is

lost when the court awards damages in lieu of recission – in this case on handing down this judgment. Thus, if the same measure of damages is applied under Section 2(2) as under Section 2(1), the representor potentially pays the costs of changes in market price that are entirely unrelated to the misrepresentation.

115. For this reason, there is force in the approach in Chitty at [10-119] cited above, namely that the correct measure of loss is the difference between the contract price and the actual value of the goods, having regard to the misrepresentation but disregarding any general fall in the value of the property. That approach ensures that the damages awarded under Section 2(2) fairly reflect the loss of right to rescind but do not give the representee a windfall for changes in market price. It is consistent with the statutory terms of Section 2(2) where reference is made to awarding damages if the court considers *"that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party."*

116. Accordingly, if an actionable misrepresentation were made out, damages would have been limited to that caused by the fact that the goods were not in accordance with their implied description as being lawful to sell. On the facts of this case there is no evidence that the failure to comply with description caused any loss prior to the fall in the market price of the goods, since the Claimant was unable to sell the goods even when they were marketed in accordance with the alleged implied description of being lawfully for sale.

117. Once the true situation was known and the Claimant stopped marketing the goods, the Claimant had in its possession goods that would have had value if they could lawfully be sold but had no value because they could not be. On the Claimant's case it remains unlawful to sell them and, were the Claimant to make out its case on Issues 1 and 2, there is no reason to think that this is not correct. Accordingly, the products are worthless and the conventional measure of damages would be the difference between the amount paid for them under the contract with no discount for any residual value.

118. That does not provide a windfall for the Claimant since the change in market value is irrelevant to this calculation. It might be said that it does amount to the seller of goods warranting the price, since the Defendant has to pay damages based on the purchase price even if that price has collapsed since the contract. But I do not accept the Defendant's argument that the decision in *William Sindall plc v Cambridgeshire CC* points to a different conclusion. Whatever the subsequent change in value of the goods, there is no reason to think that the Claimant was not paying the market rate for the goods at the time of the contract. Indeed, it seems to have been

unlucky enough to have concluded this contract right at the peak of the market. Thus its loss as measured at that time was the purchase price with no credit for a residual value. The fact that these goods have no residual value at all is not because of a fall in the market price; it is because they cannot lawfully be sold, the very issue to which the representation goes.

119. The position would be different if I were persuaded that the goods were not in fact worth the amount that the Claimant paid for them at the time of purchase, since the claim in damages is not intended to compensate for that kind of loss. The evidence might look as though that was the case because the collapse in prices seems to have come very quickly but in a very volatile market such as that which existed in sanitiser and other PPE in March/April 2020, I am not persuaded that someone such as Mr Reis would have paid the amount he did without having some knowledge of the likely resale value. I have not reason to think that, even with the benefit of reasonable foresight, he was paying over the odds for the goods.

120. I note the Defendant's argument that the goods as sold are worthless, since they could be relabelled. There is no evidence of the cost of relabelling nor is it obvious how relabelling would reflect their value. Whilst relabelling might give some residual value, I am not satisfied that the residual value would be less than the cost of relabelling and therefore I am not persuaded that any credit should be given for the supposed resale value.

121. Given the sale of a small quantity of the goods actually sold as referred to at [23] above, I would have valued the damages claim as:

GCG

28,000 units less 483 units sold – 27,517 units x £2.50 per unit = £68,792.50

Lonstin

14,000 units less 411 units sold – 13,589 units x £2 per unit = £27,178.00

Total £95,970.50

122. If damages were recoverable for misrepresentation, the Defendant contends that the Claimant could and should have then mitigated its loss by taking the steps below. Had they done so, I accept that it would be appropriate to reflect the failure to mitigate in a reduction in the Claimant's damages, whether under Section 2(2) of the 1967 Act (since the loss would be caused not by the misrepresentation but by the failure to mitigate) or for breach of contract on conventional principles. However for reasons set out below I do not accept the argument that the Claimant failed to mitigate its loss.

ISSUE 5 – BREACH OF IMPLIED TERM AS TO RIGHT TO SELL GOODS (SECTION 12 SGA 1979)

(a) The Claimant's case

123. The Claimant contends that the sale of the products (if illegal) rendered the Defendant in breach of the implied term of the contract contained in Section 12(1) of the Sale of Goods Act 1979. At the time of the sale of the goods, the Defendant had no right to sell because it did not hold a wholesale dealer's licence and/or the products did not have market authorisation.

124. In support of this contention, the Claimant draws my attention to the judgment of Atkin LJ in *Niblett Ltd v Confectioners' Materials Company Ltd* [1921] 3 KB 387. The Claimant had purchased tins of condensed milk from the Defendant. The goods arrived with labels which infringed the registered trademark of another condensed milk manufacturer. The goods were impounded by customs authorities at the instance of the other manufacturer and the Claimant was able to get possession of them only after removing the offending labels. It then sold the products at a loss, without any distinctive mark.

125. The Claimant brought an action against the Defendant alleging breach of the implied condition under Section 12(1) of the SGA 1893 (which, as in the corresponding provision in the 1979 Act, is concerned with "*the right to sell the goods"*). Atkin LJ held that, since the seller could have been prevented from selling the goods, he had no right to sell: "*The sellers had not the right to sell these goods … at the time when the property was to pass. It may be that the implied condition is not broken if the seller is able to pass to the purchaser a right to sell notwithstanding his own inability; but that is not so here, for the Nestle company had the same rights against the appellants as they had against the respondents …"*

126. The Claimant further relies on the judgment of Lord Denning MR in *Microbeads AF v Vinehurst Markings* [1975] 1 WLR 218. The Defendant in that case bought from the Claimant special machinery used for painting white lines on roads. Some time later, a third party, who owned a patent in respect of similar machinery, alleged that the machinery bought by the Defendant from the Claimant infringed their patent and sought an injunction to prevent the use of the machines. The issue that arose on the Claimant's claim for the purchase price was whether, if the sale of the machinery did indeed infringe the third party's patent such that it could restrain their use, the Defendant was indeed liable to the Claimant for the price.

127. Lord Denning held that, because there was no subsisting enforceable patent at the time of the sale of the goods by the Claimant to the Defendant, there was no breach of the terms of the contract implied by Section 12(1) of the SGA 1893. However in his judgment at p221H-222A he accepted that, "*The words 'a right to sell the goods' means not only a right to pass the*

property in the machines to the buyer but also a right to confer on the buyer the undisturbed possession of the goods: See Niblett Ltd v Confectioners Materials Co Ltd [1921] 3 KB 387, 401 by Atkins LJ."

128. Thus, argues the Claimant, it is implicit in the judgment of Lord Denning in *Microbeads* that, had the patent been enforceable at the time of sale of the machinery to the defendant, the claimant could have been restrained from selling the goods to the defendant; and following sale, the defendant could have been restrained from selling the goods to others. In those circumstances, Lord Denning would have found the claimant to have been in breach of the implied term under Section 12 due to the inability of the seller to confer on the buyer the undisturbed possession of the goods and its action for the price would have failed.

129. The authors of Benjamin, Sale of Goods, 12th Edition at [4-004] comment on the decision in *Niblett* in these terms*:*

"It may be that the ratio decidendi of Niblett is limited to situations where the property rights which the seller purports to create in the buyer are encumbered by a right vested in a third party such as a copyright, design, patent, or trade mark, or right of prohibition or seizure, which affects the goods in the hands of the buyer. If this were so, it would not extend to a claim by the buyer that the seller had no "right to sell the goods" merely because the sale exposed the seller to a penalty imposed on him personally by the criminal law. A difficult question is whether the principle embodied in the Niblett case is a particular example of a general principle in s.12(1) that a breach occurs whenever the seller can be restrained by process of law from selling the goods, even if the possession of the buyer is in no way disturbed. The words "a right to sell the goods" imply at least that the seller has the power to vest full and complete rights over the goods in the buyer. It has moreover been stated that this is sufficient for the seller to comply with s.12(1), since the seller makes no promise about his own proprietary rights; only that he will be able to create the appropriate rights in the buyer. Consequently, if a seller without title sells goods in circumstances in which the buyer acquires a good title to the goods, it would follow from this dictum that there would be no breach of s.12(1) of the Act. Nevertheless, a buyer acquiring the goods in such circumstances may be limited in his enjoyment of them, whilst not being sufficiently disturbed in his quiet possession of them to have an action against the seller under s.12(2)(b). A cloud on the buyer's title might render it difficult or impossible to resell the goods. To deny this buyer a remedy under s.12(1) would be to recognise an undesirable gap in the protection afforded by s.12. Section 12(1) provides that the seller have a "right" to sell the goods and should be given its plain meaning. It is therefore submitted that a mere power to transfer title is a necessary but not a sufficient requirement of s.12(1). For that

reason, it is submitted that a buyer whose use and enjoyment of the goods is impaired because the seller has no "right" to sell the goods should have a claim under s.12(1)."

130. Here the Defendant did not have the right to sell the sanitiser to the Claimant since it did not hold a wholesale dealer's licence; equally, the Claimant did not have the right to sell the goods to others either for want of such a licence to permit wholesale dealing or for want of market authorisation. The absence of any right in the Defendant to sell the goods arises for the same reason as the Claimant's absence of any such right to sell the goods wholesale (the absence in each case of a wholesale dealer's licence) and arises from a closely related defect as the Claimant's absence of any right to sell the goods on the retail market (absence of market authorisation under the HMR 2012). It follows that the Claimant's use and enjoyment of the goods is impaired because it cannot sell the goods. The mere fact that the Claimant here (as the claimant in *Niblett)* acquired title to the goods did not prevent the court finding a breach of the implied term under Section 12(1) since that section is concerned not with whether title passes, but with the whether the seller is in fact entitled to sell the goods.

(b) The Defendant's case

131. The Defendant contends that the Claimant's argument is misconceived – Section 12(1) is concerned not with the legality of any transaction, whether the sale by the seller to the buyer or any subsequent dealing by the purchaser; rather it is concerned with whether the seller is able to pass title in the goods to the purchaser. Here there is no question about the ability of the Defendant to pass good title, merely about the use to which the Claimant could put the good having purchased them.

132. The particular context of the decisions in *Niblett* and *Microbeads* was the private law situation where a party had intellectual property rights (trade mark in one case, patent in the other) pursuant to which they could restrain the sale of the goods. That the decisions are limited to those circumstances is confirmed by the judgment of Teare J in *Great Elephant v Trafigura* [2012] EWHC 1745, as cited by HHJ Birss QC (as he then was) in *Azzurri Communications v International Telecommunications* [2013] EWPCC 17.

133. In contrast, the situation with which the court is concerned here is the power of a regulator to take steps to restrain the sale of a product to which the seller has good title. If the Claimant's contention as to the effect of the HMR 2012 here is correct and the sale by it of the products would have been only lawful in their current getup, that could be readily solved by relabelling the goods by removing the reference to their having the purpose of eliminating MRSA and/or E. coli. This demonstrates that it would be inappropriate to extend the Section 12(1) remedy to cases such as present where the seller had title to the goods but a third party might be able to

restrain the sale of the goods for regulatory reasons. Such issues are perfectly capable of being adequate regulated through implied terms as to fitness for purpose. Unlike the intellectual property context, the case does not involve limits to the right to sell that are necessarily the same as between the Claimant and the Defendant. Thus, whilst the Defendant concedes that it does not have a Wholesale Dealers' Licence, it could be that the Claimant did have such a licence. In those circumstance, if these were medicinal products, the sale by the Defendant of the products to the Claimant would have been prohibited, but the wholesale of the products by the Claimant would not have been. It would be inappropriate to interpret Section 12(1) in a way that means breach of the section turns not on some feature intrinsic to the product but rather on the regulatory rules that apply to the person selling the product, which may differ as between seller and buyer.

134. The Defendant accepts that this approach would appear to be inconsistent with the wider approach taken by the authors of Benjamin, but it contends that the narrower approach, that the section "*would not extend to a claim by the buyer that the seller had no 'right to sell the goods' merely because the sale exposed the seller to a penalty imposed on him personally by the criminal law,"* is the better construction for the court to adopt.

(c) Discussion

135. It is clear from the passage from Benjamin at [4-004] that the concept of the seller having the "*right to sell the goods*" may be a problematic basis for the implication of a term. Whilst the wording of Section 12 focuses on the seller's rights, the parties are in fact likely to be more concerned with the purchaser's rights. The mere fact that the seller might be personally liable to penalty of the sale is of no concern to the buyer so long as it acquires the right freely to deal in the goods. Thus the authors of Benjamin propose a meaning where Section 12 is concerned both with whether the seller is at liberty to sell the goods and with whether, the buyer obtains an unclouded title to the goods.

136. Whilst it would clearly to have been possible to draft Section 12(1) in these terms, in fact the Section focuses on the seller's rights. To focus on the purchasers' rights potentially does injustice to that wording. It might be suggested that a focus on the purchaser's rights is the inevitable implication of the judgments in *Niblett* and *Microbeads* (which are of course binding on me). But the strain that this broader interpretation would do to the language draws me to the conclusion that the Defendant is indeed to correct to contend that these decisions are specific to the context of the intellectual property issues raised in those case, the point being that the sale of the goods by <u>anyone</u> (in particular the seller as much as the buyer) would (in fact in the case of *Niblett* and hypothetically, assuming that the here had been an subsisting enforceable

patent at the time of sale, in the case of *Microbeads*) have been unlawful and capable of restraint by the holder of the intellectual property right.

137. Where however I part company with the Defendant's contention is in the suggestion that the regulatory regime in the present context should be treated differently from the intellectual property context of *Niblett* and *Microbeads*. If, contrary to my findings on issue 1, Lonstin and GCG were medicinal products. the Regulatory regime would have prohibited any dealing with the goods within the UK (whether by way of wholesaling or retailing) by either the Claimant or the Defendant. Thus, the prohibition on the Defendant as seller from dealing in the goods meets the wording of Section 12(1) and puts the Defendant in breach of the implied term whilst the inability of the Claimant as buyer from dealing with the goods causes it loss because of that breach.

138. This is consistent with the interpretation given to Section 12(1) by the authors of Benjamin and gives effect to the logic that a buyer whose ability to use or to deal in good which it has bought in circumstances where the seller had no right to sell the goods because of a regulatory restraint on dealing with goods of this nature has a right to a remedy under Section 12 for the interference with its use of the goods. Whilst it is correct that such a restriction on the right to deal with the goods might give rise to a parallel claim for breach of the implied term as to fitness for purpose, this is by no means certain as is apparent from my consideration of Issue 6 below. Thus, whilst the possibility of an alternative remedy exists, I do not accept that the buyer in the position of the Claimant here will necessarily have a remedy under Section 14(3) in addition to a remedy under Section 12(1) or that such an alternative remedy renders the broader interpretation of Section 12(1) to be otiose.

139. My conclusion is also consistent with the decisions in *Niblett* and *Microbeads*. Whilst it is of course possible to argue that they are decisions that are specific to the intellectual property context, I see no reason to conclude that they do not set out a more general principle that applies to other contexts where the restriction on the seller's right to sell the goods is in turn an encumbrance on the right of the buyer to deal with the goods.

140. Further, in so far as the Defendant argues that the prohibition of the sale of Lonstin and GCG could have been circumvented by the removal of the labels claiming efficacy in respect of MRSA and E Coli, it was of course similarly true of the product in *Niblett* that the illegality of sale could be remedied by relabelling. As Bankes LJ said in that case, when dealing with the issue of the alleged breach of Section 14(2) of the SGA 1893 (the implied term as to merchantable quality), "*the state of the condensed milk was that it was packed in tins bearing labels. The labels were as much part of the state or condition of the goods as the tins were."*

Equally, under Section 12(1), the buyer had contracted to buy the product (including packaging) which the seller had the right to sell. If the contents of the containers could be sold but only with different packaging, there was nonetheless found to be a breach of Section 12(1).

141. It follows that I conclude that if, contrary to my judgment on Issue 1, the sale of the goods by the Claimant would have been illegal because they were medicinal products within the meaning of the HMR 2012, I would have found that the Defendant was in breach of the implied term in Section 12(1) of the Sale of Goods Act 1979.

ISSUE 6 – BREACH OF IMPLIED TEAM AS TO QUALITY (SECTION 14(2), SGA 1979) (a)
The Claimant's case

142. The Claimant contends that the products were rendered unsaleable by the fact that their labelling described them as effective in dealing with MRSA and E coli. Since the goods were unsalable in the hands of the buyer, they were, contends the Claimant, not fit for one of the purposes for which they were supplied, namely resale.

143. The Claimant draws attention to the fact that the concept of satisfactory quality in Section 14(2) includes consideration of

a. Section 14(2A):

"*For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances;"* and

b. Section 14(2B):

For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods … (b) appearance and finish…"

144. I have already noted above the passage from the judgment of Bankes LJ in *Niblett* in which he refers to the labelling of the condensed milk tins in that case to be "*as much part of the state or condition of the goods as the tins were."* The Claimant contends that the labelling was an important feature of this product in that the ability of the product to eliminate MRSA and E Coli rendered it attractive. In the event, the fact that the labelling referred to these qualities rendered the product unsaleable because of (presumptively) non compliance with the HMR 2012.

(b) The Defendant's case

145. The Defendant notes that the Claimant makes no assertion that either Lonstin or GCG were not of satisfactory quality as hand sanitiser. The only issue that the Claimant raises is as to the legality of selling the product in its current get up.

146. But there is no failure of quality in the labelling of the product any more than there is in the product of itself. For example, the Claimant does not assert that the product is not in fact capable of eliminating MRSA or E coli.

147. In any event, the Defendant urges caution in considering the application of *Niblett* to the issue 9. as we have noted, *Niblett* was decided under the SGA 1893, in which the concept equivalent to the "satisfactory quality" a 1979 was that of "merchantable quality". The two concepts are not identical as is apparent from comparing the two statutes.

(c) Discussion

148. I accept that the packaging of a product, including its labelling, form part of the product to which the obligation in the term implied by Section 14(2) of the SGA 1979 applies. I am not persuaded that the differences between the wording of that section and the corresponding earlier section of the SGA 1893 render the point made by Bankes LJ in *Niblett* any less cogent.

149. However, on the assumption that the labelling of GCG and Lonstin rendered them medicinal products, I am not persuaded that the products were thereby not of satisfactory quality. If the labelling had claimed some quality for the products which they did not have, that might well have put the Defendant in breach of the implied term in section 14(2). But the Claimant is clear that it is not alleging any defect in the quality of the hand sanitiser itself, nor it alleging that the hand sanitiser was not in fact effective against E Coli and MRSA. Thus the sole "defect" that it can identify is the lack of marketing authorisation or any authority for the Defendant, the Claimant or anyone else to sell these products (as packaged) in the United Kingdom. This however is not an issue as to either the quality of the product itself or the quality of the packaging of the product. I do not consider that that renders the products of less than satisfactory quality.

150. It follows that, were these products in fact to be medicinal products contrary to my finding on issue 1, the Claimant would not have shown a breach of Section 14(2) of the SGA 1979.

ISSUE 7 – BREACH OF IMPLIED TERM AS TO FITNESS FOR PURPOSE (SECTION 14(3), SGA 1979) (a) The Claimant's case

151. The Defendant contends that the Claimant bought the sanitiser from the Defendant for the purpose of sale to others. This was common ground as between the parties' witnesses and in

particular Mr Ashby confirmed that he was aware that the Claimant was involved in the resale of goods that it bought. However the Claimant contends that these products were not fit for resale because they could not lawfully be offered for sale and that the Defendant consequently was in breach of the implied term under Section 14(3) of the SGA 1979.

152. In so far as it might be suggested that the Claimant was not entitled to rely on the skill and judgment of the Defendant as to the legality of resale, the Claimant points out that the Claimant was the importer of the goods and asserts that it can reasonably be expected to have made enquires as to the legality of trading in the product in the UK.

(b) The Defendant's case

153. The Defendant concedes that one of the purposes (if not the sole purpose) of the sale of the products by it to the Claimant was for resale by the Claimant. Accordingly, there in no dispute that there was an implied term that the products were fit for resale.

154. However the Defendant disputes that an implied term as to fitness for the purpose of resale extends to an implied term as to the legality of such resale. It points to the concluding words of Section 14(3) and raises the question as to whether it would be reasonable *"for him to rely, on the skill or judgment of the seller or credit-broker."* To find the Defendant in breach of the implied term in these circumstances would be the equivalent of making the seller a warrantor of the legality of resale by the purchaser. That in effect would make the seller the legal adviser to the purchaser.

155. In truth there might be several reasons why the sale by the purchaser of a product would be illegal. The seller cannot be expected to take responsibility for whether sale would be illegal and Section 14(3) is not addressed at "fitness for purpose" in this sense. Accordingly, if the court were to consider that the illegality of resale by the Claimant potentially rendered the product unfit for purpose, it should conclude that it was not in fact reasonable for the Defendant to rely on the "*skill or judgment"* of the Defendant as whether resale was in fact lawful.

(c) Discussion

156. I see considerable danger in the Claimant's argument that, if these products are medicinal products such that their sale was unlawful in this get up, the Defendant was in breach of an implied term as to fitness for purpose. By way of example, it is unlawful to sell alcohol in the United Kingdom save in certain circumstances as regulated in particular by the Licensing Act. Can a wholesale purchaser of alcohol who intends to sell the product on the retail market (a purpose which it makes known to the seller) but who does not in fact have the relevant licence assert that the product was unfit for purpose because the purchaser was not at liberty to sell? It

might be said that such a case would raise different issues to those in the instant case since the retail sale of alcohol is not unlawful if one has the relevant licence so there are circumstances in which it could not be said that the product was not unfit for purpose; in contrast, in the current case, so long as market authorisation is not granted, it would be unlawful for anyone to ell the product in the UK. But of course, as has been identified previously, it would not (even on the Claimant's case) be unlawful to sell the product if it were relabelled. Whilst I accept that the labelling is an integral part of the product, applying the dictum of Bankes LJ in *Niblett*, nevertheless it may seem that the concept of fitness for purpose is ill-suited to regulate issues

about the legality of dealing in products rather than the inherent quality of the products themselves.

157. My doubt about the applicability of Section 14(3) to this context reflects in part the wording of the proviso to the section where reference is made to the reliance on the "*skill or judgment"* of the seller. It is one matter to expect the seller of goods to have some skill or judgment in determining whether the product itself has qualities that are being claimed for it or has qualities that the seller knows the buyer is looking of when buying the products. It is another matter to expect the seller to exercise skill or judgment in the field of the regulatory regime for the product and the lawfulness of dealing with it. To hold the Defendant liable for this is tantamount to finding that, by selling the products to the Claimant, the Defendant was impliedly asserting that it was lawful for the Claimant to sell the products on. I harbour some doubt as to whether Section 14(3) is really either intended or suited to the situation where the unsuitability for resale arises not from some defect inherent in the product but rather in the manner in which the relevant market is regulated.

158. Notwithstanding my doubts as to the proper application of Section 14(3), I accept the Defendant's concession, reflecting the evidence of its own witness, that the resale of the products was the known purpose of purchase. It would follow on a strict reading of Section 14(3), that that the product was not in fact fit for the purpose for which the Defendant knew it was being purchased because it could not be sold on,

159. But on the assumption that Section 14(3) could apply in this situation, I agree with the Defendant's argument that it would not be reasonable for the Claimant to rely on the Defendant's implicit assertion that the resale of GCG and Lonstin would be lawful. The Defendant was in no better position than the Claimant to know about the legality of the proposed resale.

160. I am not persuaded to an alternative conclusion on the grounds that the Defendant was the

importer of the product, the regulatory regime for import is different from that for distribution, as noted above. In particular, market authorisation is not a pre-requisite for the lawful import of the product, it sufficing that the importer have a wholesale dealer's licence. The need for the Defendant to ensure that its importation was lawful would not inform the question of subsequent dealing in the product and I would consider it unreasonable to expect an importer to hold an informed view on the lawfulness of dealing with the product by a subsequent purchaser of the goods.

161. It follows that, were these products in fact to be medicinal products contrary to my finding on issue 1, the Claimant would not have proved a breach of Section 14(3)) of the SGA 1979.

ISSUE 8 – DAMAGES FOR BREACH OF CONTRACT (a) The Claimant's case

162. In assessing damages for breach of contract, the Claimant contends that the Court should start by looking at Section 53(3) of the Sale of Goods Act 1979. In so far as the Claimant case is based on breach of warranty as to quality (the issue dealt with as Issue 5 above), the prima facie measure of damages is the difference between the actual value of the goods at the time of delivery to the buyer and the value they would have if the answered to the warranty. At the date of delivery, 8 April 2020, the goods had no value because they could not have been lawfully sold. On the other hand, the Claimant contends that the values ascribed to the products, namely £3 per bottle for GCG and £2.50 per bottle for Lonstin, were reasonable. The Claimant draws attention to Mr Reis' oral evidence referred to at [12] above that the Claimant anticipated selling the goods at £6 to £8 and that the wholesale price had gone up to £8 or £9. Based on these figures, which Mr Hilston described in closing as a "*modest mark up,"* the Claimant's anticipated figures are said to be a realistic indication of the value that the goods would have had at the time of delivery if they answered to the warranty.

163. The Claimant resists the Defendant's argument that the measure of damages should be ascertained not at the time of delivery but rather when the alleged breach became known, that is to say January 2021 when the Claimant received the letter from the MHRA. However, if that date is to be taken, the Claimant contends that there is limited evidence as to what the true value was. The market was clearly fluctuating wildly, but the very fact that the Claimant bought a large quantity of similar product from Lilanch is an indication that it did not think it was holding the result of a bad bargain from its contract with the Defendant and that therefore the value of those goods was not insubstantial.

164. Mr Reis referred to other offers of the product at various times, including a screenshot of the sale of Lonstin at £12.99 for a pack of 6 bottles in April 2022 (MB514) , GCG being offered at

£4.99 per bottle in November 2020 (MB375) and a product called Nilaqua which had previously seemingly been advertised at £3.99 per bottle being sold for £1.99 per bottle in January 2024.

(b) The Defendant's case

165. The Defendant contends that, where the breach of duty is not known until a later date, the prima facie rule under Section 53(3) of Sale of Goods Act 1979 of assessing the value of warranted goods at the date of their delivery is displaced. In this respect, reliance is placed on the decision in *Bominflot Bunkergesellschaft fur Mineralole mbH & Co v Petroplus Marketing AG* [2012] EWHC 3009 (Comm), as cited in Chitty on Contracts at [47-420].

166. The Defendant contends that the value of the goods should be determined at the time that the breach becomes known. There is no unfairness in using the later date of calculation, since it

reflects the reality of the fact that the Claimant was attempting to sell goods which were (unbeknownst either to the Claimant or to the potential purchasers) not in fact of satisfactory quality. The losses flow from their inability to sell the goods when the market price was higher. But that inability to sell was not related to the Defendant's presumed breach of warranty and the consequent loss should not be visited on the Defendant as though it had warranted the value of the goods but rather as the Claimant who had taken the risk of purchasing goods and seeking to resell them at a profit.

167. Thus, as the Defendant put it in closing, the correct approach when one discovers one has purchased defective goods is to go into the market to buy replacement goods and then sell those. The measure of loss for the breach is then the difference between the price of buying conforming goods and the amount recoverable by sale of those goods.

168. If one looks at the price of conforming goods at the time that the putative breach came to light in January 2021, the evidence is that it was very low. The price at which others might be seeking to sell the goods is irrelevant unless it is shown that others were buying the goods. But the only evidence as to the price paid for goods that were actually purchased at any time close to January 2021 is the Claimant's purchase of 36,400 units of GCG at 15p per unit from Lilanch in October 2020. Of course, at the time that the Claimant purchased the product, it did not know that the sale of the product whether by the seller to it or by it into either the wholesale or retail market was prohibited. But there is no reason to think that the seller was any more aware than the Claimant of the illegality of the sale. Accordingly, the price of those goods reflects the best evidence of the wholesale purchase price of this kind of product. The Defendant also draws attention to the fact that, in December 2020, the Claimant was packaging sanitiser with thermometers (see MB392), an indication that the intrinsic value of the sanitiser alone was probably very low.

169. The Defendant notes that Lonstin was purchased at £2 per unit as against the £2.50 per unit paid for GCG. Applying the same proportion to the value of the Lonstin as against the price of 15p per unit paid for GCG, one might think that the Defendant would argue that value of the product as of January 2021 should be calculated as 28,000 bottles of GCG at 15p per unit and 12,000 bottles of Lonstin at 12p[12] per unit. In fact, in [80] of the original skeleton argument for the Defendant, the Lonstin is seemingly valued at 18p per unit, making the value of the Lonstin 120% of that of the GCG. This error was corrected in [4] of the Defendant's supplemental skeleton argument and it is agreed that the Defendant's case is that the figure of 12p per unit should be used for Lonstin.

170. The Defendant does not accept that the goods as sold are worthless, since they could be relabelled. There is no evidence of the cost of relabelling, but the Defendant refers to its own offer to relabel referred to and contends that this should be reflected either as evidence of the residual value of the goods or as a failure to mitigate.

171. The Defendant points out that the figures are VAT exclusive and VAT should not be added to any damages.

(c) Discussion

172. Following the terms of Section 53(3) of the Sale of Goods Act 1979, it is clear that the correct starting point for the assessment of damages for breach of warranty as to the quality of goods is the time of delivery thereof. On the face of it, that principle would apply with equal force to breach of the warranty of the right to sell and breach of term as to fitness for purpose, both of which go to the quality of the goods. (The contrary has not been argued).

173. However, I also accept that where, as here the defect in the goods, their fitness for purpose or the title to sell them is in fact not known at the time of delivery, it would work an injustice to the general concept that the risks and benefits of changes in the value of goods lie with the owner not the person who sold them to the owner, a feature of the broader concept of *caveat emptor*. As with the argument as to misrepresentation, there is a danger that court will interfere with the rights of parties freely to deal with each other at their own risk if the seller of goods becomes in effect the guarantor of the value of those goods. Yet that consequence would flow from the Claimant's position since, where the change in market price of the goods has no

[12] i.e. 80% of 15p.

connection to the breach of warranty of the seller, the buyer would still be able to sue so as to take advantage of a collapse in the market in circumstances such as the present.

174. I therefore agree with the Defendant's position that, in the circumstances of the present case, the better approach is that in *Bominflot*, namely to look at the difference between the value of compliant goods at the time that the breach of warranty comes to light and the value of the goods as in fact warranted.

175. On the former issue, there is minimal evidence as to the price that the Claimant would need to have paid to purchase such products, limited in reality to the actual purchase of GCG from Lilanch in late 2020 at a time when the market price appears to have been particularly low. The Claimant is able to point to evidence that products such as these have been marketed at higher prices from time to time, and doubtless, if one had a full picture of the market, one might be able to identify purchases at a higher price. The mere fact that the court might have been provided with better evidence on an issue does not prevent it from reaching conclusions based on sound inferences from the limited evidence that is before it. But here, there is very little evidence at all. The Claimant's own evidence is that the market for higher quality sanitiser was not buoyant and it has not been able to provide any sound evidence of sales at a figure of above 15p per unit.

176. It is of course the case that the price of 15p per unit was a business to business sale of the product in bulk. But the Claimant's inability to sell the products it had purchased from the Defendant is an indication that retailing the product was providing difficult and whilst of course any trader in the position of the Claimant would hope to make a profit from the purchase and resale of goods, there is no sound evidence that it could have achieved any more by retail sale.

177. Based on the evidence before the court, I am forced to the conclusion that the Claimant (who after all bears the burden of proof on this issue) cannot establish that the true value of GCG that conformed to any terms that might be implied at the time of discovery of the breach was any more than 15p per unit for GCG and 12p per unit for Lonstin.

178. As to the residual value of the goods at the time of discovery of the breach, I agree with the Claimant's argument that these were worthless. It was illegal to sell the product as labelled. Therefore to realise any value in the residual goods would have required the Claimant to relabel those goods. The cost to the Claimant of doing so and the value of the goods if relabelled are both unknown. It may well be that the cost of relabelling would have exceeded the value of the product, in any event, it would have been a recoverable consequential loss, but there is no evidence of the costs of doing so. I cannot safely conclude therefore that the goods have any residual value.

179. The Defendant argues that its offer to relabel the goods is relevant to this issue. In my judgment that is incorrect. The refusal of the offer to relabel is an argument as to mitigation dealt with separately below, but it has no bearing on the factual issue as to the true value of the goods when the breach was discovered, which is determined by comparing those goods in their complaint and non-compliant conditions.

180. Noting the actual sale of some goods by the Claimant as set out above, I would have calculated the losses as below:

GCG

28,000 units less 483 units sold – 27,517 units x 15p = £4,127.55

Lonstin

12,000 units less 411 units sold – 11,589 units x 12p = £1,390.68

Total - £3,827.55 + £1,630.68 = £5,518.23

ISSUE 9 – MITIGATION (a) The Claimant's case

181. Consistent with my approach on other issues, I deal with the Claimant's case first on this issue, though, as it points out, the burden of proving a failure to mitigate lies on the Defendant.

182. The so-called duty to mitigate is simply a rule that a claimant cannot recover losses caused by the defendant's breach of the contract if those losses could have been avoided by taking reasonable steps. In this case, the failure to mitigate relied on by the Defendant is the failure to accept the offer referred to at [26] above to relabel the goods. But if that offer had been accepted, there were several obvious problems:

a. The offer only related to the Lonstin and therefore would not have altered the loss caused in respect of the larger part of the goods sold, namely the GCG.

b. In any event, it is entirely unclear what the effect of repackaging the goods would have been in terms of the marketability of the product, the relabelled packages would not have referred to efficacy against MRSA and E coli. But, as Mr Reis says, packaging that removed reference to this efficacy might have rendered the product unsaleable (or even more difficult to sell than it was already).

c. In any event, given that the price for the product was volatile, the effect of relabelling the product may have reduced its value by far more than the £5,000 being offered by the Defendant by way of compensation.

(b) The Defendant's case

183. The Defendant argues in the Particulars of Claim that the Claimant should have mitigated its loss by accepting the Defendant's offer to relabel the goods and pay £5,000. This would immediately have resolved the issue of lawfulness of the sale of the product.

184. In its skeleton argument, the Defendant advances the alternative case that the Claimant should itself have had the goods relabelled or sold them on for relabelling. Either way, the Defendant contends that any loss suffered by the Claimant would have been reduced.

(c) Discussion

185. In my judgment, the Claimant's points as to the reasonableness of its failure to accept the offer are well made. If the product had been relabelled, it may well have been less attractive. The Claimant may have had to reduce the price and it is quite plausible that its loss would have been far higher than the £5,000 offered by the Defendant. Quite simply, if the Claimant proves its case on breach of contract and/or misrepresentation, relabelling the product would have left it with a different product than that which it had been intending to sell, for which the proffered compensation might have been wholly inadequate. Its failure to accept this offer cannot be categorised as unreasonable.

186. In so far as the Defendant advances an unpleaded case of alternative ways to mitigate its loss:

a. Given that there is no evidence of the cost of relabelling or the value of the goods if they were sold for relabelling, the Defendant is unable to show that it was unreasonable to take either step;

b. Even if such information were available and availed the Defendant, it is likely that the other issues identified in the previous paragraph would have been fatal to an argument that the Claimant failed to take reasonable steps to mitigate its loss.

187. I conclude on Issue 9 that the Defendant is not able to show that the Claimant failed to take reasonable steps to mitigate its loss.

CONCLUSION

188. It follows that I answer the issues set out above as follows:

a. Issue 1 – the products sold by the Defendant to the Claimant are not medicinal products to which the HMR 2012 apply. This resolves the case unfavourably to the Claimant, though I answer all other issues on the assumption that I am wrong on issue 1.

b. Issue 2 – the Claimant was not induced to enter into the contract by a representation by the Defendant (and in any event such a representation would not have been false).

c. Issue 3 – if the Claimant had been induced to enter into a contract by the Defendant's misrepresentation, I would not have permitted rescission of the contract but would have ordered damages in lieu.

d. Issue 4 – if I had ordered damages in lieu of rescission, I would have assessed the damages at £95,970.50.

e. Issue 5 – but for the answer to issue 1, I would have found the Defendant in breach of the implied term as to its right to sell the products.

f. Issue 6 – regardless of the answer to issue 1, I did not find the Defendant to be in breach of the implied term as to the quality of the products.

g. Issue 7 - regardless of the answer to issue 1, I did not find the Defendant to be in breach of the implied term as to the fitness for purpose of the products.

h. Issue 8 – had the Claimant shown a breach of contract, I would have assessed its loss as £5,518.23.

i. Issue 9 – the Claimant did not fail to take reasonable steps to mitigate its loss.

189. The parties have agreed an order consequent upon this judgment. I note that the Claimant seeks permission to appeal and that the application will be listed before me for determination on paper or at an attended hearing. I have extended time for service of the Appellant's Notice to accommodate the adjournment of the application for permission to appeal.