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Advanced Multi-Technology for Medical Industry & Ors v Uniserve Limited & Ors [2024] EWHC 1725 (Ch)

Introduction

Advanced Multi-Technology for Medical Industry ("**Hitex**") & Ors v Uniserve Limited ("**Uniserve**") & Ors [2024] EWHC 1725 (Ch) concerns a dispute under various agreements for the procurement of personal protection equipment ("**PPE**") during the COVID-19 pandemic.

It serves as an example of the legal issues arising in supply chain arrangements where the rush to make a deal lays bare a lack of care in addressing issues of agency, misrepresentation, and repudiatory breach of contract.

Parties

The parties involved in the case were as follows:

1. The first Claimant, Hitex, a manufacturer of medical supplies based in Jordan;
2. The second Claimant, Caramel Sales Limited ("**Caramel**"), the company through which the contract for the surgical face masks were arranged;
3. The third Claimant, David Popeck, the sole shareholder and director of Caramel;
4. The Defendant, Uniserve, the company that entered into the supply contract with Hitex for the surgical face masks;
5. The third party, Maxitrac Limited ("**Maxitrac**") the company Uniserve used to manage the contract; and
6. The fourth party, Andrew Stead, the sole director and shareholder of Maxitrac.

Facts and issues

Hitex entered into a contract with Uniserve to supply 80 million surgical facemasks to Uniserve (the "**Supply Contract**") during the height of the COVID pandemic in April 2020. The Supply Contract was arranged by Caramel through Mr Popeck, who entered into a

commission contract with Uniserve (the "**Commission Contract**").

Hitex claimed that Uniserve breached and wrongfully terminated the Supply Contract by failing to pay and take delivery of most of the masks supplied. Hitex claimed damages of USD 23,1000,000 plus interest. In its defence, Uniserve claimed:

1. it was induced to enter into the Supply Contract and the Commission Contract by fraudulent or negligent misrepresentation by Hitex; and
2. Hitex had failed to meet its contractual delivery obligation, and this justified the termination of the Supply Contract.

Two interesting points arose. First, Uniserve had found an alternative and cheaper supplier and wanted to get out of the Supply Agreement. Motivation can be irrelevant to determine the validity of termination, but it was interesting context and perhaps helps explain the (arguably) desperate allegations. Second, the exchanges between Uniserve and Hitex were always via Caramel/Mr Popeck, and Maxitrac/Dr Stead.

Taking each of these in turn:

(1) Misrepresentation

Uniserve alleged it was induced to enter into the Supply Contract with Hitex. Caramel (Uniserve's agent) became aware of Hitex through a business contact, Mr. Andrew Waller. Uniserve relied upon an email Mr. Waller sent to Dr Stead (the "**Waller Email**") prior to any surgical masks being delivered, and it read:

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

Uniserve pleaded that the statements in the Waller Email were untrue when made or became untrue prior to the time that the Supply Contract and the Commission Contract were exchanged, and that at either of both such times:

- i) the representations were known by Hitex to be untrue, or
- ii) Hitex had no reasonable grounds for these statements and/or had no belief in their truth, and /or
- iii) Hitex was reckless in that the representations were made not caring whether they were true or false.

(2) Variation to the Supply Contract

It was agreed that the original delivery schedule as set out in the Supply Contract was not met by Hitex, but conversations took place between Dr Stead and Hitex to discuss a revision of the original schedule.

The discussions between Dr Stead and Mr Khader (Hitex) (following a conversation between Dr Stead and Mr. Liddell (Uniserve)) set out in writing the revised schedule. This schedule set out plans for delivery of 79 million further masks. Dr Stead asked Mr Khader to confirm the schedule, to which Mr. Khader replied:

"Kindly be noted that the schedule bellowed (sic) is agreed as discussed and according to the plan of receiving the new machines."

Two main questions arose following the discussions of the revised schedule, namely (a) whether Dr Stead intended to vary the contract, and (b) whether Dr Stead had authority to agree to a variation. Both are discussed below.

Decision

(1) Misrepresentation

In order for Uniserve to be successful in its claim for misrepresentation by Hitex, they would have had to satisfy the following:

- i) the representations complained of were made by Hitex;
- ii) those representations were false;
- iii) the representations were made either knowing them to be untrue or recklessly not caring whether they were true or not;
- iv) that the representor must intend for the representee to rely on the statement in the sense that it was false; and
- v) the representee must have been induced to take action, such as entering into a contract, in reliance on the representations. However, the misrepresentation does not need to be the only reason for the representee's decision to enter into the contract.

The Court held that the statements in the Waller Email about Hitex's delivery capabilities were not

representations made by Hitex and nor by anyone with authority from Hitex. There was no evidence to suggest that Mr Waller was appointed as an agent of Hitex, and there was nothing on the facts to suggest to Uniserve that Mr Waller had authority to make the statement on behalf of Hitex. For example, Hitex were not copied in on the Waller Email and there is no suggestion that Hitex became aware of the statements made within the Waller Email prior to the Supply Contract.

As to whether the Waller Email contained false information, the Court held that there were valid grounds on the facts to believe that the supply of 5 million masks on the 15th of April could be met. However, with regard to the second and third statements, being the supply of 5 million on the 22nd of April and 5 million a week from there, should Hitex have been the author of the Waller email, these representations would have been made as a false statement of Hitex's belief, or Hitex would have been viewed as reckless or careless as to whether it was true or false.

The Court held that Uniserve did not rely on the Waller Email in deciding to go ahead with the Supply Contract, which was demonstrated by the fact that Uniserve did not trust the information that was provided to it by Mr Waller and conducted its own due diligence on Hitex's production capabilities.

Uniserve could only rely upon a claim of fraudulent misrepresentation because the Supply Contract contained an entire agreement clause at Clause 26.6. which excluded Uniserve's claims under S2(1) of the Misrepresentation Act 1967, a clause preventing claims for misrepresentation, unless such representation was made fraudulently (Clause 26.6). Fraudulent misrepresentation must be specifically pleaded, which it was not in this case, and so Clause 26.6 did not apply.

(2) Variation to the Supply Contract

On the question of whether Dr Stead intended to vary the contract, the Court found that there was a clear intention for the Supply Contract to be varied. Dr Stead confirmed that he believed he had authority to agree to a revised schedule, and the Court found that Dr Stead had actual authority to agree to a variation.

As to the question of whether Dr Stead had authority to agree to a variation, the Court found that despite the clause in the contract between Maxitrac and Uniserve stating that *"Maxitrac Ltd (Andrew Stead) is, and shall always remain the agent or source for any product or product price communicated on the specifications provided on the 29/3/20"*, there was no clear understanding that Maxitrac could alter contracts agreed by Uniserve. The question therefore was whether Maxitrac had been provided with specific

authority to alter the original timetable. Dr Stead was told by Mr Liddell to "get on with it", which Dr Stead took to provide authority to alter the contract. Further, following the revised schedules being agreed, it was reported to Uniserve, who made no comment of Maxitrac going beyond its instructions, suggesting specific authority had been granted. Judge Thompsell agreed that this conversation likely took place, and resultantly decided that Dr Stead had specific authority to alter the contract.

Judge Thompsell stated that even if Maxitrac did not have specific authority, it likely had actual or ostensible authority to do so. In its role as agent, Uniserve allowed Maxitrac to represent it in relation to its contract with Hitex without the supervision of any of its own employees or directors. Regardless of any restrictions between Uniserve and Maxitrac, these restrictions were not made known to Hitex. Hitex knew that Maxitrac were Uniserve's agent and had no reason to doubt the power of the agent to manage contracts and variations on behalf of its principal.

It was perfectly reasonable for Hitex to believe Maxitrac had authority and therefore Uniserve were estopped from denying the validity of the variation. Further, it could not be shown that Hitex did not have the ability to adhere to the requirements of the revised schedule, and Hitex were therefore not in breach.

Since Uniserve had failed to show Hitex were in breach of the Supply Contract and the revised schedule, it had no grounds to terminate the contract. On the contrary, by refusing to perform its contractual obligations, Uniserve were in anticipatory breach of the Supply Contract. Hitex argued that it had not accepted the breach, and that by keeping sufficient masks in the warehouse it was still willing to adhere to the conditions of the contract. However, it was held that Hitex had not kept sufficient masks to keep up with the cumulative totals of the schedule, and by 13 July had not made an attempt to arrange pick up of deliveries for four consecutive weeks. It was concluded that by the 13 July the Supply Contract had been accepted as terminated by the conduct of Hitex.

Hitex were awarded damages of USD 16,940,000 plus interest under the contract market differential principles set out in section 50(3) of the Sale of Goods Act 1979.

Analysis

This case highlights two key issues for parties entering into commercial contracts:

1. The importance of careful drafting of those contracts required in a supply chain arrangement between both parties and the agents. Uniserve brought a claim for misrepresentation despite the contract (which was on their template) excluding claims for misrepresentation unless fraudulent. Contracting parties should consider whether a statement or representation it is relying upon in negotiations prior to making a contract should be included as a contract term, such as delivery obligations and time of the essence terms.
2. The use of contracts with, and control of, agents. From reading the case, it was clear that the agents had a large financial stake in the performance of the Supply Contract. A key point made in this case was that Hitex had no reason to doubt the ability of an agent, who was free to deal directly and without supervision, to enter into contract variations on behalf of its principal. When using agents, the principal should be sure to either (a) supervise the role of the agent or (b) make it clear to potential contracting parties the bounds of the agent's authority.

The full decision of *Advanced Multi-Technology & Ors v Uniserve Limited & Ors* can be found [here](#).

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