



Neutral Citation Number: [2020] EWHC 1563 (Ch)

Case No: BL-2018-002269

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 19/06/2020

Before :

MR MICHAEL GREEN QC

(sitting as a Deputy Judge of the Chancery Division)

Between :

ADVINIA CARE HOMES LIMITED

Claimant

- and -

- (1) BUPA CARE HOMES INVESTMENTS
(HOLDINGS) LIMITED
(2) BUPA CARE HOMES (CFHCARE) LIMITED
(3) BUPA CARE HOMES (ANS) LIMITED
(4) BUPA CARE HOMES (CARRICK) LIMITED
(5) BUPA FINANCE PLC

Defendants

- and -

ADVINIA HEALTH CARE LIMITED

Third Party

Mr Derrick Dale QC and Mr Daniel Hubbard (instructed by Fladgate LLP) for the
Claimant and the Third Party
Mr Edward Cumming QC and Mr Adam Cloherty (instructed by Slaughter and May) for
the Defendants

Hearing dates: 3 and 4 June 2020

Approved Judgment

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

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10:30am on 19 June 2020.

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MR MICHAEL GREEN QC

MR MICHAEL GREEN QC:

Introduction

1. These are applications brought by the Claimant, Advinia Care Homes Limited (**Advinia**) and its parent, the Third Party, Advinia Health Care Limited (**Advinia Holdings**), together referred to as the “**Advinia Parties**”. Advinia operates some 37 residential care homes in England and Scotland, employing approximately 3,500 persons and providing residential care to around 3,200 residents.
2. The Defendant companies are all members of the BUPA Group, the well-known global health insurance and health care provider.
3. These proceedings arise out of transactions between the Advinia Parties and the Defendants whereby the Defendants sold certain care homes and related businesses to Advinia Holdings, by its purchase of the shares in Advinia. Those transactions will be described in detail below. The share purchase completed on 14 February 2018 but there were ongoing obligations of the parties that form the subject matter of these proceedings and these applications.
4. The applications by the Advinia Parties have arrived at this hearing in a slightly back to front way. The original application notice was issued on 19 February 2020 and it sought an urgent listing for two applications that were as follows:
 - (1) A variation of the Order of Nugee J dated 24 October 2018 (the **Nugee J Order**) to adjust the fortification of Advinia’s cross-undertakings given in relation to the mandatory injunction that was ordered, in particular to release the sum of £3,981,167.31 that had been paid into Court (the **Money in Court**) (the **Variation Application**);
 - (2) An interim payment pursuant to CPR 25.7 from the First Defendant to Advinia Holdings in the sum of £2,131,393 (the **Interim Payment Application**).
5. On 24 April 2020, the Advinia Parties issued an amended application notice that has changed its nature quite fundamentally. By the amended application notice the primary relief sought by Advinia is now summary judgment pursuant to CPR 24.2 on a major part of its claim (the **Summary Judgment Application**). It is asking the Court to declare that two of the agreements were not varied so as to permit the First Defendant to set off sums owing to one or more of the Defendants by Advinia against sums held on trust by the First Defendant for Advinia, without obtaining Advinia’s prior consent. Advinia also seeks payment of all such trust funds received by the First Defendant from 8 August 2018 (in the application notice) or 12 August 2018 (in its skeleton argument), unless such trust funds had been paid away or used in accordance with the directions of Advinia. In its skeleton argument for this hearing, Advinia claimed a figure of £15,885,964.70 plus interest, and appeared to be seeking summary judgment in this amount. As it turned out, it was eventually conceded that it could not, on any view, be entitled to such an amount.

6. On the day before the hearing, a further application notice was issued on behalf of Advinia Holdings seeking permission to amend its Defence to the Additional Claim and Counterclaim dated 13 February 2019 (the **Amendment Application**). This was said to deal with a pleading point that had arisen on the Interim Payment Application. I did not understand the Defendants to object to this application being heard, although they do oppose the amendment.
7. Mr Derrick Dale QC, appearing with Mr Daniel Hubbard on behalf of the Advinia Parties, made clear from the outset of his submissions that the Summary Judgment Application was their main focus and that the Variation Application was an alternative that only arises if I am not prepared to grant summary judgment. (It is part of the Summary Judgment Application that Advinia seeks the payment out of the Money in Court.) Mr Dale QC submitted that the Summary Judgment Application involves a short point of construction which is eminently suitable for determination under CPR Part 24 and, as he said on a number of occasions, that I should “*grasp the nettle*” and resolve that point in Advinia’s favour.
8. Mr Edward Cumming QC, appearing with Mr Adam Cloherty on behalf of the Defendants, submitted that the Summary Judgment Application, and indeed all the Applications, are misconceived and the construction issue should be determined at the trial scheduled for early next year with the benefit of full disclosure and relevant admissible factual matrix evidence.
9. Before turning to the substantive issues on the Applications, I will set out the factual background and procedural chronology which is relevant to a proper understanding as to how the Summary Judgment Application came to be made when it did, so long after the Nugee J Order and the pleadings were closed.

Factual Background

(a) The transactions between the Advinia Parties and the Defendants

10. On 31 August 2017, BUPA Care Homes Limited (**BCH**), not a party to this litigation, entered into a Business Transfer Agreement with Advinia, then called BUPA Care Homes Investments Limited, pursuant to which BCH agreed to sell and Advinia agreed to purchase certain residential care home assets in England (the **BTA**). On the same day a materially similar Business Transfer Agreement was entered into by the Second, Third and Fourth Defendants and Advinia in relation to the transfer of residential care home assets in Scotland (the **Scottish BTA**). Reference will hereafter only be made to the BTA on the basis that its meaning and effect on all relevant matters is equally applicable to the Scottish BTA.
11. The purpose of the BTA was to transfer the relevant assets within the BUPA Group to one entity which could then be sold to the Advinia Group. It was the precursor to the Sale and Purchase Agreement dated 14 October 2017 between the First and Fifth Defendants and Advinia Holdings whereby the entire issued share capital of Advinia was sold to Advinia Holdings (the **SPA**).
12. There are a number of relevant clauses of the BTA:

- (1) Clause 9 provided for the transfer of Relevant Business Contracts from BCH to Advinia with effect from the relevant completion date. Clause 9.5(A) provided that from the date of completion:

“(A) [BCH] shall be treated as holding the benefit of that Relevant Business Contract, to the extent permitted by that Relevant Business Contract, on trust for [Advinia] and any benefit will be promptly paid over to [Advinia].”

- (2) Clause 10 provided for BCH’s obligations and liabilities in respect of those Relevant Business Contracts to be assumed by Advinia as from 11 November 2016. These are called the “*Assumed Obligations*” in the BTA but have been referred to by the parties as “**Opening Balance Liabilities**” and form the subject matter of a continuing dispute between the parties.

- (3) Clause 11.4 provided for a trust of monies received by BCH for Advinia after completion. It said as follows:

“11.4 Without limiting clause 9.5(A), all moneys or other items belonging to [Advinia] which are received by [BCH] on or after the Relevant English Completion in connection with the Relevant Business or any Relevant Business Assets shall be held in trust by [BCH] for [Advinia] and shall be promptly paid over to [Advinia].”

- (4) Clause 17.2 provided for no set-offs or counterclaims to be applied against sums due under the BTA. It said that:

“17.2 All sums payable under this Agreement shall be paid free and clear of any set-off, counterclaim, deduction or withholding whatsoever, save only as may be required by law.”

- (5) Clause 19 preserved the parties’ rights and remedies even if there is delay in enforcement. It provided:

“19.1 No delay or omission by any party in exercising any right, power, or remedy provided by law or under any Business Transfer Document shall:

(A) Affect such right, power or remedy; or

(B) Operate as a waiver of it.

19.2 The single or partial exercise of any right, power or remedy provided by law or under this Agreement shall not preclude any other or further exercise of it or the exercise of any other right, power or remedy.

19.3 Save as provided in this Agreement, the rights, powers and remedies provided in this Agreement are cumulative and not exclusive of any rights, powers and remedies provided by law.”

- (6) Curiously, clause 20 provides for BCH’s maximum liability under the BTA to be limited to £1 only. It provided as follows:

“20.1 The maximum aggregate liability of [BCH] under or in connection with the Business Transfer Documents and / or the Original English BTA (to the extent that it relates to a Relevant Care Home or any of the Businesses or any of the Business Assets) in respect of all claims on any ground whatsoever (in the absence of [BCH’s] own fraud or dishonesty) shall not exceed £1.

20.2 [Advinia] undertakes that it shall not itself...make any claim against [BCH] under or in connection with the Business Transfer Documents unless the maximum amount of that claim is expressly stated and is limited to an amount which...does not exceed [BCH’s] maximum aggregate liability as set out in clause 20.1.

...

20.4 In the event of any conflict or inconsistency between this clause and any other provisions of this Agreement, this clause 20 shall prevail.”

(7) Clause 22 contained entire agreement and no oral variation provisions as follows:

“22.1 The Business Transfer Documents constitute the whole and only agreement between the parties relating to the sale of the Businesses and the Business Assets from [BCH] to [Advinia].

...

22.5 This Agreement may only be varied in writing signed by or on behalf of all of the parties. For this purpose, a variation to this Agreement shall include any addition, deletion, supplement or replacement, howsoever effected.”

13. On 14 December 2017, BCH was sold and left the BUPA Group. The First Defendant thereafter assumed or succeeded to BCH’s rights and obligations under the BTA, including in relation to the trust established under clauses 9.5 and 11.4.
14. The fees paid by or on behalf of the residents in the care homes are the principal income generated for these businesses. It is not in dispute that these fees continued to be paid to the First Defendant after completion and that such fees were thereby held on trust for Advinia and required to be paid over promptly and without any set-off, deduction or withholding of any sort (they are referred to as “**Trust Money**” by the Advinia Parties and I will do likewise in this judgment). Mr Dale QC submitted that the enforcement of that simple right is what the Summary Judgment Application is all about.
15. At the same time as entering into the SPA on 14 October 2017, the Third and Fifth Defendants, entered into a Transitional Services Agreement with the Advinia Parties (the **TSA**). By the TSA, the Fifth Defendant agreed to provide or to procure the provision of certain transitional services to Advinia, presumably because of the complications in immediately switching responsibility on to the Advinia Parties. One of the services to be provided by the Fifth Defendant was in relation to the payroll for both central and care home staff. These payroll services comprised management, systems support and operational services and it was agreed that they, together with all

other services under the TSA, would be provided for a period of one year following completion of the SPA. The actual payroll liability of course was Advinia's and it was clearly obliged to ensure that the BUPA parties were put in funds each month so as to ensure that the care home staff were paid. As will be seen, this liability was normally discharged out of the Trust Money, that is the residents' fees received by the First Defendant and held on trust for Advinia.

16. By clause 6 of the TSA, the process for payment of service charges by Advinia was set out. The Fifth Defendant was obliged to provide monthly invoices to Advinia which were payable within 30 days and there was a dispute notice procedure if Advinia was contesting any particular invoice. Clause 6.11 is relevant to these applications and it says as follows:

“6.11 All payments made by [Advinia] to [the Fifth Defendant] under this Agreement shall be made in full without any set-off, restriction or condition and without any deduction for or on account of any counterclaim or Tax...”

17. As referred to above, the SPA was entered into on 14 October 2017. It completed on 14 February 2018. The total consideration for the purchase of the entire share capital of Advinia was stated to be £62,250,000 but there was a mechanism in the SPA for adjusting the consideration by reference to Completion Accounts that had to be prepared. By an amendment to the SPA, the base consideration was changed to £53 million.

18. The Completion Accounts process is relevant to the Interim Payment Application. It is set out in Schedule 6 to the SPA. In short summary:

- (1) The First Defendant must prepare a prescribed form of balance sheet that specifies figures for certain items; these are called the “**Draft Completion Accounts**” (clause 1.1);
- (2) Within 30 Business Days (as defined) of receiving the Draft Completion Accounts, Advinia Holdings can serve a “*Disputes Notice*” that specifies items in dispute and puts forward its reasons and the monetary adjustments required (clause 1.2); the length of time was subsequently increased from 30 to 50 Business Days;
- (3) If Advinia Holdings does not serve a Disputes Notice, then the Draft Completion Accounts become the “**Completion Accounts**” and the sums become due either way on certain specified dates (clauses 1.3(A) and 2);
- (4) If Advinia Holdings does serve a Disputes Notice, the parties are obliged to use their reasonable endeavours to resolve the dispute; if they do reach agreement within 20 business days of the service of the Disputes Notice, then the agreement is incorporated in the Draft Completion Accounts which then become the Completion Accounts and the sums become due on the same basis as above (Clauses 1.3(B)(i) and 2);
- (5) If no agreement is reached, the dispute has to be referred to an accounting expert whose decision “*shall in the absence of fraud or manifest error be final and binding on the parties*”; that expert's decision will adjust the Draft

Completion Accounts which will then become the Completion Accounts with sums payable as above (Clauses 1.3(B)(ii), 1.4 and 2).

19. Therefore, any dispute in relation to the Draft Completion Accounts can only ultimately be resolved through that expert determination process and not the Court.

(b) The “Netting-Off Agreement”

20. Following completion of the SPA, the residents’ fees continued to be received by the Defendants and Advinia was obliged to pay for the services being provided pursuant to the TSA. In the period from February to June 2018, as I understand it (the evidence is somewhat sketchy on this), payments each way were paid gross, not subject to any netting off. Advinia’s payroll liabilities, and possibly other third-party liabilities, were met out of the Trust Money and were applied by the Defendants pursuant to some form of direction or authorisation of Advinia to use the money that was being held on trust.
21. On 20 June 2018, Mr Joe Genova, who was the finance director of Advinia, requested of the BUPA Group a netting-off arrangement to deal with that week’s payments. He sent an email at 16:28 to Ms Kathryn Prayle, the Head of Finance Programme Delivery of BUPA UK (the organisation within BUPA responsible for dealing with the care homes business and the transitional arrangements with Advinia). The email said:

“Hi Kathryn

Would it be acceptable to pay the net amount instead of Advinia sending £5.6m and BUPA sending £2.2m?

Please advise so I can make payment and bring the account up to date.

	Income receipts	
	Owing from BUPA	2,172,536.00
	Payable to BUPA-	<u>5,636,164.25</u>
_____	-	<u>3,463,628.25</u>

Regards

Joe”

22. Following a little confusion on Ms Prayle’s part as to what was being suggested, Mr Genova sent a further email at 16:35, saying:

“Hi Kathryn

I was suggesting Advinia make a payment of £3,463,628.25 today, with no need for Bupa to pass through £2.2m tomorrow.

Is this acceptable? Otherwise, full payment tomorrow for both parties.”

23. This was accepted by Ms Prayle and it avoided excess money having to go into the banking system from both sides. In Mr Genova's witness statement dated 22 October 2018 he said that the purpose of his request was so that the "*monies held on trust for [Advinia]...would be used in order to fund [Advinia's] "payroll" and "pay cycle" expenses...I made this suggestion in order to reduce the workload of Ms Prayle and myself on this specific occasion.*"
24. It is clear that there must have been a telephone conversation between Ms Prayle and Mr Genova following this net payment by Advinia and that it is likely to have been a request by Mr Genova for such a netting-off arrangement to be conducted on an ongoing basis. This was not referred to in Mr Genova's witness statement; nor was the 28 June 2018 email referred to below (Mr Genova's witness statement was used for the *ex parte* application to Nugee J). Ms Prayle said in her witness statement dated 23 October 2018 (prepared very quickly for the hearing that day before Nugee J) that "*Mr Genova had requested an ongoing netting arrangement*". This was picked up in an email of 28 June 2018 from Mr Thomas Sharp (a colleague of Ms Prayle) to Mr Genova in which he said:
- "Hi Joe,
- I have just spoken with Kathryn.
- The "netting" has not been formally agreed within Bupa at present and is not in line with the SPA requirements. Kathryn is pushing given it is in both parties interest."
25. Within 10 minutes of receiving that email, Mr Genova responded to Mr Sharp to say: "*Thanks for the update. Will proceed on the basis that we continue to remit payments as required.*" In other words, unless there was agreement by BUPA on netting-off, the parties would have to revert to gross payments being made. The email exchange also shows that the proposed netting-off arrangement was being considered at a higher level within BUPA.
26. On 4 July 2018 there was an exchange of emails between Ms Prayle and Mr Genova which are at the centre of this current dispute. They contain the terms of the agreement between the parties which Mr Dale QC submitted I must decide at this stage what they are and whether they amounted to a binding and enforceable contract or variation of the transaction Agreements.
27. The email from Ms Prayle was at 10:45 and she said as follows:

"Hi Joe,

As discussed, attached schedule for the Net Payment as at 4th July.

For the record, Bupa will assess the Net Payment position on an ongoing basis and on ad-hoc agreement by both parties, Bupa or Advinia will settle the net position each week. This weekly arrangement is without prejudice to the ongoing rights under clause 6.11 of the TSA, and either party has the right to revert to a process of payments without netting if it wishes to.

Please confirm by return you are in agreement with net payment of £1,173,493.34 and we will arrange the payment via CHAPS today.

Many thanks
Kathryn”

The attached schedule was headed “*Advinia Net Payment & Receipts - Status as at 4th July 2018*”. It recorded that the fee income collected by the Defendants on behalf of Advinia for the week ending 1 July 2018 was £2,687,199.94, and that the “*Payments*” which were described as “*overdue*” that Advinia owed to the Defendants amounted to £1,513,706.60. There was therefore a “*Net Amount to be Paid by BUPA*” of £1,173,493.34. The Schedule concluded with a box containing the following:

“Netting of Payments”

Fee income comprises Resident Fees paid by LA/CCGs and Self Funders – to be passed through by Bupa to Advinia
Payment consist of invoices submitted to [Advinia] by [the Fifth Defendant] under the Transitional Service Agreement (TSA costs and reimbursements e.g. Payroll)
Net Payment = Receipts less Payments

Bupa will assess the Net Payment position on an ongoing basis and on ad hoc agreement by both parties, Bupa or Advinia will settle the net position each week. This weekly arrangement is without prejudice to the ongoing rights under clause 6.11 of the TSA, and either party has the right to revert to a process of payments without netting if it wishes to.”

That last paragraph is identical to the wording in the main body of the email.

28. In an email of the same date timed at 18:53, Mr Genova responded by saying:

“Hi Kathryn

Confirm terms as outlined.

Regards

Joe”

29. The emails of 4 July 2018 constitute what has been called the Netting-Off Agreement. The Defendants say that the Netting-Off Agreement was an agreement in writing, electronically signed by the parties, and so validly varied the BTA in accordance with clause 22.5 and that the terms were as follows:

- (1) On a weekly basis, the Defendants would net off (a) all sums due from Advinia to the Defendants under any of the Agreements (ie the TSA, BTA and SPA), against (b) all sums due from the Defendants to Advinia under those Agreements, including the fees received and held on trust for Advinia;

- (2) Whichever of Advinia or the Defendants owed more to the other would make a payment of the net sum; but
 - (3) Both parties had the right to withdraw from the netting-off process by giving notice to the other side.
30. Advinia says that no binding agreement was entered into on 4 July 2018 and the emails merely set out a framework for “*future ad hoc agreements*” to be agreed each week by the netting off of the amounts due from each party. There was no intention to disturb or vary the parties’ contractual rights under the Agreements. Further Advinia says that there was no valid variation of the BTA, there was no intention to create legal relations and there was no consideration from the Defendants to Advinia.

(c) Events leading to the Nugee J Order

31. Whatever the terms of the Netting-Off Agreement and whether it was a binding enforceable agreement or not, payments were made pursuant to the arrangements by both the Defendants and Advinia, whoever owed the net sum, until the middle of August 2018. Mr Genova’s witness statement dated 22 October 2018 stated that “*this ad hoc arrangement persisted until 12 August 2018 but ceased thereafter*”. He does not explain why it came to an end then. In Dr Kanoria’s third witness statement dated 22 May 2020 (Dr Sanjeev Kanoria is the Chairman and a director of the Advinia Parties) he says that there were three “*ad hoc agreements ...on 18 July, 30 July and 16 August 2018*” and implies that there were no further such agreements and so the arrangement ceased on or around 16 August 2018. From the documents he exhibited in support of that statement, it appears that there were three net payments that were actually made by Advinia on those dates. It is accepted that no further payments were made by Advinia.
32. On 29 August 2018, the Defendants sent by email to Advinia a schedule showing the “*net payment position as at 29 August*” which was a sum of £1,992,544.68 owing by Advinia to the Defendants. The same wording from the 4 July 2018 email appeared in the schedule. Clearly the Defendants did not consider that the Netting-Off Agreement had come to an end. There is nothing in the evidence before me that indicates any response by Advinia, whether to dispute the sums being claimed or to suggest that there was no ongoing netting-off arrangement.
33. This was repeated on 5 September 2018 when the Defendants sent Advinia the “*latest netting statement*” showing a sum of £955,634.83 owing by Advinia. Again I have not seen any response to this by Advinia.
34. On 13 September 2018, Ms Prayle sent to Mr Genova a statement of the “*net settlement position*” which showed that Advinia now owed the Defendants £4,600,269.39. Included within the sums due from Advinia to the Defendants were some Opening Balance Liabilities. On 27 September 2018, Ms Prayle sent a further email to Mr Genova with the “*Net position as at 26 September, this shows Advinia owes Bupa £2.24m.*” There followed a dispute over whether Opening Balance Liabilities should be included in the netting-off arrangements.
35. There is some confusion in the evidence as to how Advinia’s payroll liability was being paid. From the schedules attached to the emails referred to above, the payroll

liability that had been paid by the Defendants on behalf of Advinia was included in the netting-off arrangements. In other words, the Defendants were being reimbursed out of the Trust Money for the payroll liability that they had discharged on Advinia's behalf. Before the Netting-Off Agreement came into effect from 4 July 2018, Advinia says that there was an agreement between the parties that the payroll liability would be funded out of the Trust Money, although I have seen no contemporaneous evidence to support that.

36. In Mr Genova's second witness statement dated 23 October 2018, he said that, in relation to both the August and September 2018 Payroll Liability, Advinia "*has already directed BUPA to apply a portion of the funds that it holds on trust for [Advinia] in satisfaction of*" the Payroll Liability. However, Mr Genova did not exhibit or point to any evidence of a specific direction to such effect. If the Netting-Off Agreement had come to an end in mid-August 2018, as is Advinia's case, it is unclear upon what authority the Trust Money could have been applied for such purpose. It is of course the Defendants' case that the Netting-Off Agreement remained in force during August and September 2018 and so the Payroll Liabilities were allowed to be set off against the Trust Money pursuant to it.
37. At the end of September 2018, there was a telephone conversation between Ms Prayle and Mr Genova in which, according to Mr Genova, Ms Prayle had said that in order to fund the October Payroll, Advinia would have to send additional money in advance to the Defendants in order for them to be in sufficient funds to discharge that liability. The suggestion was made presumably because as a result of the netting off arrangements that the Defendants had continued to operate there was then insufficient Trust Money under their control from which to meet Advinia's Payroll Liability and they were unwilling to use their own funds for such purpose. In an email of 28 September 2018, Mr Genova said:

"Morning Kathryn

Coming back to [sic] on the comment to fund next payroll.

You will know that the income receipts are used to fund payroll and those funds are now held by Bupa.

Excluding the opening balance sheet payments being sought for repayment – Bupa owes Advinia.

I am still of the view that those opening balance payments are net off from the completion statement monies owing [sic] to us. That amount needs to be included in the net calculation."

There was no indication in that email that there was no netting-off arrangement in place between the parties or that it had been brought to an end. Mr Genova appears to be questioning some of the items used in the netting-off process, namely the Opening Balance Liabilities. Ms Prayle responded by email the same day to say that such liabilities had been properly included.

38. On 4 October 2018, Ms Prayle emailed Mr Genova under the subject "*Advinia upfront payroll payment October 2018*" and she said:

“As discussed on the Payroll separation meetings and subsequently on last Friday’s call with Charles Richardson, we require you to settle the Payroll amount due to your employees up front from October payroll onwards.

For October, the monies need to be cleared funds in Bupa’s bank account by close of business on the 23rd October to enable us to release the BACS file.

Subsequent Payroll monies for the remaining period of the TSA will also be required in advance, we will notify you nearer the time as to the timings.

Please confirm your acknowledge [sic] and understanding of this request by return of email by end of day, Monday 8th October.

Please be advised it is your responsibility to communicate any non payments to your employees directly.”

39. On 8 October 2018, Mr Genova responded to Ms Prayle’s email of 4 October 2018 asking where the requirement for “*prepayment*” in respect of the Payroll is in the TSA. Ms Prayle answered the same day as follows:

“The TSA obliges Bupa to provide Payroll administrative services, not to actually pay the Payroll lump sum up front each month.

Therefore, we require Advinia to raise a CHAPS at time we raise the BACS payment with effect from October payroll (COB 23rd October).”

40. On 9 October 2018, Mishcon de Reya, the Advinia Parties’ then solicitors, sent a letter before action to the Defendants’ solicitors, Slaughter and May. This concerned the SPA and the dispute concerning the Completion Accounts, the subject matter of the Interim Payment Application.

41. On 16 October 2018, the First Defendant wrote to Mr Genova concerning the monies held by the Defendants and the amounts due to the Defendants. Under the heading “*Amounts due to Bupa*”, the letter stated:

“As communicated by email by Kathryn Prayle to Joe Genova on 16 October 2018, Advinia owes [the First Defendant] £16,631,990 (the “**Gross Amount**”). The Gross Amount includes various pay cycle, payroll, fixed costs TSA payments and opening balance payments which Advinia owes [the First Defendant]. Settlement of the Gross Amount is required immediately.

Without prejudice to the amounts owing to [the First Defendant] as set out above, we note that [the First Defendant] has accrued £14,165,067 of fee income (the “**Accrued Fee Income**”) which it holds on trust for [Advinia] under the BTAs.

We are owed a net payment of £2,466,923 (the “**Net Amount**”), being the Gross Amount less the Accrued Fee Income, in full settlement of the matters referred to above, on the basis that this is to be credited to [the First Defendant’s] account in cleared funds no later than 5pm (London time) on Friday 19 October 2018. Details of [the First Defendant’s] account have already been provided to you.

However in the event that full payment of the Net Amount is not received by this date, Bupa will take immediate steps to exercise its legal rights to recover the sums owed to it in full.”

42. Mr Dale QC placed much reliance on this letter as showing an inconsistency in the Defendants’ case because the letter indicated that the Defendants had not applied the Netting Off Agreement to the gross figures and had treated them as separate amounts. The letter did go on to deal with the “*Payroll costs*” and repeated Ms Prayle’s demand that Advinia provide the money up front. It said:

“As we have already communicated by email on 4 October 2018, Bupa is not prepared to extend credit to or incur additional costs on behalf of Advinia any longer. This is particularly the case in light of Advinia’s persistent delays in paying amounts owed to Bupa and the terms of the letter sent by Advinia’s advisers to Slaughter and May dated 9 October 2018 (to which we will respond separately). Therefore, Bupa requires you to transfer the amount that will be notified to you by 2pm on Monday 22 October 2018 in respect of the October payroll amount (the “**October Payroll Amount**”) in cleared funds into [the First Defendant’s] bank account by 5pm (London time) on Tuesday 23 October 2018. To the extent you require Bupa to continue to provide payroll administrative services going forward, we will notify you of the relevant payroll payment dates for subsequent months in due course.

Bupa will not make goodwill payments on your behalf in respect of payroll for October unless it has received both the Net Amount and the October Payroll Amount within the timeframes set out above, nor will it make goodwill or any other payments on your behalf in respect of the payroll for any future months unless it receives the requisite funds in advance of the payment date.”

43. It seems to me that the only reason why the Defendants found themselves with insufficient Trust Money from which to pay Advinia’s October Payroll Liability was because the Trust Money had been netted off against Advinia’s liabilities to the Defendants pursuant to the Netting-Off Agreement. As is clear from the paragraph quoted above, even though the gross amounts each way were identified, the Defendants were seeking payment of the Net Amount and the October Payroll Amount, as so defined, and I do not think that there is much of an inconsistency there in the Defendants’ position.
44. On 18 October 2018, Mishcon de Reya responded to the First Defendant’s letter by writing to Slaughter and May. They referred to clauses 11.4 and 17.2 of the BTA and said that the £14,165,067 which the First Defendant had acknowledged was held on trust for Advinia had to be paid over promptly and without set-off or counterclaim. Mishcon de Reya said that it had previously been agreed that the trust funds could be used to discharge Advinia’s payroll liabilities and they instructed the First Defendant to use such trust funds to discharge the October 2018 Payroll Liability.
45. On 19 October 2018, Slaughter and May responded to say that the Defendants would not be complying with the “*instruction*”. Slaughter and May referred to the Netting-Off Agreement:

“(A) Your letter wholly disregards the practical arrangement adopted by Advinia and Bupa in preceding months of paying “net” amounts to each other rather than swapping gross amounts owed. Further, and, contrary to what is set out in your letter, these net amounts did not just set off amounts due from Advinia to fund its payroll obligations, but also included amounts owed by Advinia in respect of other liabilities including pay cycle, fixed costs and opening balance amounts. An example of this netting occurred on 20 June 2018, where Bupa accepted a net payment on the request of Advinia. Since then, in emails between Kathryn Prayle and Joe Genova on 4 July 2018, it was agreed, again on the request of Advinia, that “Bupa will assess the Net Payment position on an ongoing basis and on ad-hoc agreement by both parties, Bupa or Advinia will settle the net position each week”, and subsequent payments have conformed to this arrangement.”

Mr Dale QC submitted that this letter was also inconsistent with the Defendants’ current position on the Netting-Off Agreement.

(d) The *ex parte* application to Nugee J

46. Advinia decided to apply to the Court for a mandatory injunction requiring the Defendants to meet the October Payroll Liability. On 22 October 2018, Advinia gave 2 hours notice of its application to the Defendants, and at 2pm the parties appeared before Nugee J in the Applications Court. As there had been no time for the Defendants to prepare for the hearing, the matter was adjourned until 2pm the following day. By the time of the hearing at 2pm on 23 October 2018, the Defendants had managed to prepare Ms Prayle’s witness statement, and Advinia had served a further witness statement by Mr Genova and had issued the application notice. Nugee J heard argument all afternoon until 4.45pm and adjourned until 10am the next day for judgment and any argument on consequential matters.
47. On 24 October 2018, Nugee J delivered a short judgment and made the mandatory injunction on certain terms and undertakings. It is clear from Nugee J’s judgment that he had reservations about the strength of Advinia’s case but he was ultimately persuaded to grant the injunction because of the risk of injustice to Advinia and in particular to its care homes’ staff who might not have been paid without the order being made. The learned Judge considered that “*as the proper running of care homes is a matter of public interest...that the Court can have regard to the interests of third parties who are innocent but are affected by the dispute between the litigating parties.*” This was to be balanced against the risk of injustice to the Defendants which was that they would have to pay the £3.9 million October Payroll Liability out of their own money and Advinia would not ultimately be good for the money on its cross-undertaking. This was resolved by requiring fortification to the cross-undertaking by, in particular, placing the Money in Court and extracting a further cross-undertaking from an apparently substantial trust called the Kanoria Foundation.
48. As to the strength of the claim, and the defence of the Netting-Off Agreement, Nugee J said:
 - “9. All those are matters which are not suitable for resolution on this application. They all seem to me to raise questions that could be characterised as triable issues. They all seem to me questions of some

difficulty. If the question is whether they raise serious issues to be tried, they do. If the question is whether I can have a high degree of assurance that the applicant will succeed at trial then I have to say, at the moment, I do not feel that high degree of assurance.

...

11. As I have said, I do not regard the facts, which have been put before me at very short order and necessarily leave something to be desired as to the evidence, as sufficient to give me a high degree of assurance that the claimant will establish that there is currently, sitting in the hands of Bupa, a trust fund of more than £3.9 million which is available for the applicant to draw on at will. That is undoubtedly something that is seriously arguable and there is a serious issue to be tried but I do not regard it as something which, at this stage, I can say the claimant is very likely to succeed on.”
49. It is in my view material that Nugee J concluded on the evidence before him, which is the same as the evidence before me in relation to the short construction point, as Mr Dale QC put it, that is the basis of the Summary Judgment Application, that they were all triable issues on which he did not have a high degree of assurance that Advinia was correct. It was because of those concerns as to the merits of the claim that the Order provided for the Money in Court to remain there until trial by way of security to the Defendants should they prevail at the trial. Over 19 months after this judgment, Advinia now says that there is no answer to its claim to the Trust Money. Mr Dale QC said that Nugee J did not have the benefit of the parties’ pleaded cases and that the decision was based on evidence that had been hurriedly put together by both parties. Nevertheless, there is no escaping the fact that this was Nugee J’s view of the case and there is no other evidence relied upon by Advinia now on the Summary Judgment Application than that which was before Nugee J in October 2018.
 50. The Order of Nugee J dated 24 October 2018, upon the cross-undertakings of Advinia and the Kanoria Foundation (an Indian law trust), provided as follows:
 - “1. The [Defendants] shall and shall take such steps as may be necessary to discharge [Advinia’s] payroll liability in respect of the month of October 2018 (the “October Payroll Liability”), using such sums as they may continue to hold (if any) that were originally paid to any of them to hold on behalf of [Advinia], or such traceable proceeds as they may continue to hold of any sums (if any) that were originally paid to any of them to hold on behalf of [Advinia], and (to the extent necessary) such of the [Defendants’] own funds as may be required.
 2. Following discharge of the October Payroll Liability under paragraph 1:
 - a. As security for [Advinia’s] undertaking set out in paragraph 1 of Schedule 2 to this Order, and subject only to sub-paragraph 2(c) below, each of the [Defendants] may retain any further sums that they have received on behalf of [Advinia] since receipt by email of [Advinia’s] application at 12.12pm on Monday 22 October 2018 and might receive on behalf of [Advinia] from the date of this Order on the basis that the [Defendants] shall, on [Advinia’s] behalf, then pay

any such sums into court (where, for the avoidance of doubt, they shall stand as security for [Advinia's] undertaking set out in paragraph 1 of Schedule 2 to this Order).

- b. Each of the [Defendants] shall serve notice on [Advinia] upon paying any sums into court.
- c. Once a total of £3,981,167.31 has been paid into court pursuant to this Order (whether under this paragraph 2 or by [Advinia] under its undertaking set out in paragraph 2 of Schedule 2 to this Order), the [Defendants] will have no further right to retain any sums received on behalf of [Advinia] as security under paragraph 2 of this Order, or any further obligation to pay sums into court under paragraph 2 of this Order.”

51. As stated above, Advinia gave the usual cross-undertaking and this was coupled with an obligation on its part to pay into Court the sum of £3,981,167.31 by way of fortification of the undertaking. As envisaged by the Order, the sum was paid into Court by the Defendants out of Trust Money. Schedule 3 of the Order provided further fortification by way of the undertaking from the Kanoria Foundation which undertook not to dispose of, deal with or diminish the value of its assets in England and Wales up to a total value of £4 million otherwise than with the Defendants' consent or with the leave of the Court.

52. By the Variation Application, Advinia is seeking the return of the Money in Court and to replace the Kanoria Foundation's cross-undertaking with a cross-undertaking from Advinia Holdings.

(e) The Pleadings

53. The Claim Form was issued on 25 October 2018. In the Particulars of Claim that followed, Advinia is seeking the following relief:

- (1) A declaration that the Defendants hold or held the monies received by them in connection Advinia's business, on or after completion, on trust for Advinia;
- (2) An account as to the quantum of such sums held by each Defendant and an account as to what has happened to such sums insofar as they are not still held by the Defendants;
- (3) An order that any monies held on trust by the Defendants be paid over to Advinia or as Advinia may direct;
- (4) An order that the Money in Court be paid out to Advinia or as it may direct.

54. The Defence and Counterclaim relies principally on the Netting-Off Agreement as contained in the 4 July 2018 emails. The Defendants allege that the Netting-Off Agreement was in the terms set out in paragraph [29] above and that it only came to an end at 12.12pm on 22 October 2018, when Advinia served its application notice and witness statement of Mr Genova, which the Defendants say was the notice required “*to revert to a process of payments without netting*”. The Defendants

therefore say that, until that time, they had authority under the Netting-Off Agreement to apply any sums received and held on trust for Advinia to discharge any of Advinia's outstanding debts to them. If that is correct, it would mean that, on 16 October 2018, the Defendants had lawfully applied some £14.165 million of Trust Money to discharge part of Advinia's greater liability to the Defendants of £16.631 million.

55. By their Counterclaim, the Defendants allege that they were not obliged to discharge Advinia's October Payroll Liability and that accordingly Advinia must pay the sum of £3,532,557.48 which was the amount of the Defendants' own funds that they had to use to fund the October Payroll Liability pursuant to the Nugee J Order. The Defendants also claim the sum of £297,416.29 being the net sum owed by Advinia as at the end of the Netting-Off Agreement on 22 October 2018, which sum included the Opening Balance Liabilities.
56. Further, the Defendants claim any further sums due under the Agreements from Advinia since the date of Nugee J's Order and they calculated the amount to be, as at the date of the Defence and Counterclaim, £831,819.59. The Defendants contend that ultimately, at the trial of these proceedings, the Court will have to determine the sums owed each way and to come up with a net position as between the parties. In effect there will have to be an account and an order that the net sum found on taking the account is paid out to whichever party is owed more. Indeed, Mr Cumming QC pointed out that until a very recent amendment to its Reply and Defence to Counterclaim (ie after the Summary Judgment Application had been issued), Advinia appeared to be asking the Court to make such an order to reflect the overall net financial position as at the date of the trial between the parties. It seems to me that this will inevitably be what the Court has to do, whether or not Advinia succeeds on its Summary Judgment Application.
57. There is also an Additional Claim brought by the First Defendant against Advinia Holdings. This claim concerns the Completion Accounts under the SPA and is the basis of the Interim Payment Application. The principal issue is whether the Draft Completion Accounts served by the First Defendant on 19 April 2018 have become final and binding. That depends on whether the Disputes Notice served after expiry of the time limit in the SPA is valid. Advinia Holdings has counterclaimed against the First Defendant, raising what has been called the "**Wet Rooms Issue**" which concerns whether the Defendants are liable for breach of warranty and/or misrepresentation in not providing for, in Advinia's accounts, the regulatory requirement of the Scottish Care Inspectorate to install en suite shower wet rooms in some of the Scottish care homes. While that issue is not before me, it is relevant context for the Variation and Interim Payment Applications because the Advinia Parties say that there is an urgent need for them to comply with this requirement and that it will cost in the region of £11 million to do so and they do not have sufficient liquidity to pay for this.

(f) Further relevant procedural history

58. The main pleadings were closed on or around 27 March 2019. There was no suggestion of an application for summary judgment until more than a year later.
59. The first Case Management Conference (CMC) in this matter came before Deputy Master Henderson on 9 October 2019. He gave directions for a split trial, comprising:

(a) a ‘Stage 1 trial’ dealing with all issues arising on the claim, except for the issue of remedies and quantum of damages (if any) on Advinia Holdings’ Counterclaim, i.e. quantum on the Wet Rooms Issue; and (b) a ‘Stage 2 trial’ dealing with that latter issue, if so required. Deputy Master Henderson also directed that disclosure should be given by 14 February 2020. There was insufficient time to deal with all of the outstanding issues (including issues as to the appropriate scope of the disclosure exercise) so the CMC was adjourned part-heard.

60. Subsequently, the parties agreed that the deadline for the exchange of disclosure relevant to the Stage 1 trial should be extended to 4.00pm on 1 May 2020, and this was recorded in a consent order dated 4 December 2019.
61. The adjourned CMC was listed to be heard on 24 February 2020. Before then, at 5:01pm on Friday 14 February 2020, the Advinia Parties’ new solicitors, Fladgate LLP, (**Fladgate**) emailed a letter to the Defendants’ solicitors, Slaughter and May, in which they said they were “*instructed by [their] clients to make an urgent application to vary the [Nugee J] Order...and for the First Defendant to make an interim payment to [Advinia Holdings]*”. This is the relief that was originally being sought in the application notice ie the Variation and Interim Payment Applications. Fladgate’s letter enclosed a draft of the original application notice, a draft order and Mr Kanoria’s second witness statement dated 11 February 2020 which had a 761-page exhibit. Fladgate’s letter demanded a response by 12 noon on 19 February 2020, on the basis that the application was urgent. The alleged urgency was said to arise as a result of “*pressure*” from the Scottish Care Inspectorate “[*as recently as 9 December*” concerning the installation of wet rooms in Advinia’s Scottish care homes, which they had not been able to progress “*given the very significant costs of doing so*”. Therefore, Fladgate said that their clients needed the Money in Court and the sums due under the SPA in order to start the work required to the Scottish care homes.
62. Slaughter and May responded by letter dated 17 February 2020 to explain why the Defendants did not consent to the relief sought and why there was no reason for an urgent listing or hearing. The court actually required the Advinia Parties to make an application for expedition if they wished to have the application listed for an early return date. However, they never made such an application, despite their position that the need for the money was very urgent.
63. On 24 February 2020, Master Kaye heard the restored CMC. The learned Master ordered that the parties should give extended disclosure according to the agreed regime set out in the Disclosure Review Document (**DRD**). This included an order by consent that extended disclosure should be given on the basis of Model C for DRD Issues 1a, 1b, 1c and 1d, which were all concerned with the existence, terms and carrying out of the Netting-Off Agreement. Thus, the Advinia Parties were consenting to a regime of disclosure in relation to the central issue on the Summary Judgment Application before that application was even mooted. Mr Dale QC said that this disclosure was “*all utterly irrelevant*” but that was clearly not the position that his clients were adopting only four months ago.
64. On 30 March 2020, Fladgate wrote to Slaughter and May enclosing a draft amended application notice that added the Summary Judgment Application as the primary relief sought and indicating that the Advinia Parties intended to file the amended application notice at 2:00pm on 1 April 2020.

65. On 1 April 2020, Slaughter and May sought further information regarding the proposed Summary Judgment Application but it appears that nothing further was heard on this for more than three weeks, when, on 24 April 2020, Fladgate wrote to Slaughter and May and the Court enclosing the amended application notice and asking that the Summary Judgment Application be heard at the same time as the original Applications. This was of course during the period of lockdown because of the Covid-19 pandemic.
66. Meanwhile, on 23 April 2020, just over a week before the deadline for disclosure, the Advinia Parties sought the Defendants' agreement to extend that deadline by eight weeks to 26 June 2020, and to consequential amendments to the pre-trial timetable. The Defendants consented to this and an order to that effect was made on 29 April 2020.
67. I do find the way that the Summary Judgment Application has come about to be quite extraordinary. Mr Dale QC explained it on the basis that he had only become involved in the case sometime earlier this year and that when he looked at the defence based on the Netting-Off Agreement he immediately concluded that this was untenable. If the straightforward construction point upon which the Summary Judgment Application is based is so clear and obvious, it is curious, to say the least, that for 18 months, it did not occur to any of those previously instructed on behalf of the Advinia Parties or indeed Nugee J. The bringing of the applications originally as only the Variation and Interim Payment Applications and the agreement to extended disclosure on the Netting-Off Agreement all indicate that the Advinia Parties did not have such confidence in their position on the Netting-Off Agreement. In my view there is substance to Mr Cumming QC's suggestion that the real purpose of all the Applications is to get accelerated payment of sums that may ultimately be found not to be due to the Advinia Parties on the taking of an account.
68. Nevertheless, despite my misgivings as to the manner by which the Applications have been made and the Advinia Parties' real motive, I must approach the Applications on their merits and consider the substantive arguments that were made at the hearing.

The Summary Judgment Application

(a) The Application

69. I therefore turn to the Summary Judgment Application. The draft Order attached to the amended application notice sought the following relief by way of summary judgment pursuant to CPR 24.2:
- (1) A declaration that the BTAs were not varied so as to permit the First Defendant, without first obtaining the agreement of Advinia in respect of each such transaction, to set-off sums which Advinia owed to one or more of the Defendants against sums which the First Defendant held on trust for Advinia;
 - (2) A declaration that the First Defendant was and is obliged to pay Advinia all Trust Money received by the First Defendant in respect of the period after 8 August 2018 without any set-off, deduction or withholding;

- (3) To the extent that it has used any Trust Money referred to in paragraph 2 other than by way of payment to or in accordance with the directions of Advinia, the First Defendant shall (in so far as it has not already done so) restore the Trust Money out of its own funds.
 - (4) The Nugee J Order is discharged;
 - (5) The sum of £3,981,167.31 paid into Court in accordance with paragraph 2 of the Nugee J Order be paid to Advinia within 14 days of the date of this Order.
70. In a draft Order attached to the Advinia Parties' skeleton argument, which the Defendants did not see until after they had served their skeleton argument, the relief sought was amended to include a specific order for payment of sums other than in respect of the Money in Court. Advinia was effectively now seeking a money judgment. Paragraphs (1) and (2) were in the same terms as the Order attached to the application notice, save that the date in paragraph (2) was changed to 12 August 2018. However, the following new paragraphs (3) and (4) were added:
- “3. The Defendants shall, within 21 days, pay [Advinia] the sum of £15,885,964.70, being the amount of Trust Money received by the Defendants since 12 August 2018 and not paid to [Advinia] or paid into Court pursuant to the [Nugee J Order].
 4. The Defendants shall pay [Advinia] [] in respect of interest on the amount set out at paragraph 3 above, up to 4 June 2020.”
71. This change to seeking a money judgment came in for severe criticism by Mr Cumming QC. According to paragraph 81 of the Advinia Parties' skeleton argument, the figure of £15,885,964.70 derives from what the Defendants pleaded in paragraph 39.2.1 of their Amended Reply to the Defence to Counterclaim in which the Defendants said that they had received, since 13 August 2018 to the date of the pleading (26 March 2019) a total of £28,056,594.42 of fees from care homes residents, ie Trust Money. From that figure, the Defendants deducted the Money in Court, a sum of £448,609.83 which was used to pay the October payroll at the specific request of Advinia, and a sum of £8,116,027.88 which had been paid over to Advinia after 19 November 2018. That left a net figure of £15,885,964.70.
72. A major flaw in that figure of £15,885,964.70, as was accepted by Mr Dale QC, is that it does not take account of the August and September 2018 Payroll Liabilities, which Mr Dale QC had conceded in his oral submissions the Defendants were entitled to deduct from the Trust Money pursuant to some form of authorisation to such effect given by Advinia. That third party liabilities had to be deducted from the gross figure of Trust Money had been clearly pleaded in paragraph 39.2.2 of the Defendants' Amended Reply to the Defence to Counterclaim (ie the one following the paragraph relied upon by Advinia) but this was not referred to by Advinia in this context. The August and September 2018 Payroll Liability was just over £9 million.
73. Mr Dale QC was prepared to concede that the Payroll Liabilities should be deducted but he was not willing to go so far as to accept that all third party liabilities discharged on Advinia's behalf by the Defendants should also be deducted. I have some difficulty seeing the distinction but, be that as it may, it is significant that Mr Dale QC withdrew

the £15,885,964.70 figure and in his reply submissions suggested that I should give Advinia summary judgment on the point of principle and make the declarations sought and then in the consequentials' hearing the parties would be able to agree the actual figures to which Advinia would be entitled in the form of a money judgment.

74. I think that such a course would be wholly inappropriate, particularly as there would be likely to be scope for disagreement as to the extent of the third party liabilities that were authorised to be discharged and I am not being asked to adjudicate on those disputes. Furthermore, I do not have the evidence with which to do so. Given the dramatic changes of position by Advinia both in its skeleton argument and at the hearing, it would be inappropriate for me to consider any sort of money judgment in the way suggested in the draft order attached to the skeleton argument, even if I am with Advinia on the point of principle. Therefore, I propose largely to consider the Summary Judgment Application on the basis of the Amended application notice and draft order attached to it.

(b) The relevant test for summary judgment

75. The general principles in relation to summary judgment were not really in dispute. CPR 24.2 provides that:

“The court may give summary judgment against a ... defendant on ...a particular issue if –

(a) it considers that –

...

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

76. On the established authorities:

- (1) Advinia has the burden of proving that the Defendants have no real prospect of success and that there is no other compelling reason for a trial;
- (2) A real prospect of success is one which is more than fanciful, the applicable criterion being not one of probability, but an absence of reality;
- (3) The proper disposal of an application under CPR Part 24 does not and should not require the court to conduct a mini-trial; and
- (4) In reaching its conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

77. However, Mr Dale QC submitted that, as the Summary Judgment Application involves a short point of construction and that all the relevant factual matrix evidence is before the Court and undisputed, the Court should actually decide the point, as it

would if this had been brought by way of a preliminary issue. Mr Dale QC relied heavily on what Moore-Bick LJ said in *ICI Chemicals & Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725:

- “12. In my view the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.
13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.
14. Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.”
78. Mr Dale QC also referred me to a short passage from Lord Hodge's judgment in the Privy Council case of *Hallman Holding Ltd v Webster and anor* [2016] UKPC 3:
- “11. Neither party has pleaded as the relevant factual matrix any background facts which existed in 1984, when the contract was made. When a party wishes to rely on relevant background facts known to the parties at the time of an agreement, it must plead them...”
79. On the basis of these authorities, Mr Dale QC cautioned me not to look beyond the limited factual matrix that Advinia relies upon and not to accept the Defendants' suggestions that the construction point can only properly be considered at the trial as part of the Court's overall reconciliation of the net position between the parties. In particular, he submitted that the Defendants had not pleaded relevant factual matrix

and had not adduced any evidence in such respect and so I should not be influenced by the Defendants' suggestions that further relevant evidence on the construction point may emerge from disclosure or during cross examination.

80. The Defendants do indeed say that relevant documents may emerge from the delayed disclosure process and that it is obvious the factual matrix will be key to determining the true meaning of the short informal Netting Off Agreement. Furthermore, they say that the factual matrix has been clearly pleaded and there is already evidence before the Court, in the form of the witness statements of Mr Genova and Ms Prayle, dealing with factual matrix that will have to be tested at trial.
81. I will deal with the materiality of these points below. First I must consider the parties' submissions on the principles of contractual construction.

(c) Principles of contractual construction

82. Despite Mr Dale QC warning me not to be drawn by the Defendants "*into a number of textbook errors which are traps which your Lordship should avoid at all costs as to what indeed is the correct test for contractual construction of any document*", I believe that there was a lot of common ground in relation to the well-established modern principles of contractual interpretation. Many cases could have been referred to for the general principles; Mr Dale QC cited both *Investors Compensation Scheme Limited v West Bromwich Building Society and ors* [1998] 1 WLR 896 and *Arnold v Britton* [2015] AC 1619. The overall objective approach to interpretation is exemplified in Lord Hoffmann's oft-quoted test:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

In the next subparagraph, Lord Hoffmann defined the relevant "*background knowledge*" as follows:

"The background was famously referred to by Lord Wilberforce as the "matrix of fact" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

(The exception is the previous negotiations of the parties and their declarations of subjective intent.)

83. Mr Dale QC also referred me to what was said in *Lewison on The Interpretation of Contracts* 6th Ed, in which the following definition of relevant background is given:

"In construing any written agreement the court is entitled to look at evidence of the objective factual background known to the parties or reasonably available to them at or before the date of the contract. This principle applies even if the contract appears to be unambiguous. There is no conceptual limit to background.

It can include anything relevant which would have affected the way in which the document would have been understood by a reasonable person. However, this does not entitle the court to look at evidence of the parties' subjective intentions; nor to ascribe to the words of the contract a meaning that they cannot legitimately bear."

84. From *Arnold v Brittan*, Mr Dale QC submitted, uncontroversially, that the following factors are relevant to the process of contractual construction:

- (1) The natural and ordinary meaning of the clause;
- (2) The overall purpose of the clause;
- (3) Any other relevant provisions of the contract;
- (4) The facts and circumstances known or assumed by the parties at the time the contract was executed; and
- (5) Commercial common sense.

85. In relation to the relevance and amount of background material depending on the nature of the contract under consideration, Mr Cumming QC referred me to Lord Hodge's judgment in *Wood v Capita Insurance Services Limited* [2017] AC 1173 at paragraph 13 (emphasis added):

"13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance..."

86. There is no dispute that:

- (1) Post-contractual conduct is inadmissible as an aid to construction - see eg *Whitworth Street Estates (Manchester) Limited v James Miller & Partners Limited* [1970] AC 583, 603E per Lord Reid;
- (2) The subjective intentions of the parties are inadmissible and irrelevant;
- (3) The pre-contractual negotiations are similarly inadmissible on a question of construction; and
- (4) Parties do not normally give up valuable rights without making clear by express words that they intend to do so – see eg Briggs LJ (as he then was) in

Nobahar-Cookson and ors v The Hut Group Limited [2016] EWCA Civ 128 and Moore-Bick LJ in *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691 at para [29].

87. Mr Dale QC also submitted that it is important to bear in mind the Court's approach to "no oral variation clauses", such as clause 22.5 of the BTA, and the policy behind such clauses. Lord Sumption identified at least three reasons for the existence of such clauses in his judgment in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2019] AC 119:

"The first is that it prevents attempts to undermine agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them."

However, at the hearing, Mr Dale QC said that Advinia was not contesting the fact that the Netting-Off Agreement contained in the 4 July 2018 emails did not infringe clause 22.5 of the BTA, in that the emails would be treated as "*in writing signed by or on behalf of all of the parties*". (Mr Cumming QC referred to *C&S Associates UK Ltd v Enterprise Insurance Company Plc* [2015] EWHC 3757 (Comm) and *Neocleous v Rees* [2019] EWHC 2462 (Ch) to make good that proposition because it was challenged in Advinia's Amended Reply and Defence to Counterclaim.) Mr Dale QC was not of course conceding that, on their proper construction, the emails constituted a variation of the BTA.

(e) Factual matrix and other relevant factual issues

88. As stated above, Mr Dale QC submitted that the relevant admissible factual matrix is limited and uncontroversial, covering the brief period leading up to the 4 July 2018 emails. He said that it was only the 20 June 2018 exchange of emails in which Mr Genova suggested, for the first time, that there should be a net payment that week, that is the only relevant context for the 4 July 2018 emails and the interpretation of their meaning. As the relevant factual matrix evidence is before me, Mr Dale QC submitted that I can and should decide what the 4 July 2018 emails mean.
89. By contrast, Mr Cumming QC submitted that it is obvious that whether, and if so how and on what terms, the parties concluded the Netting-Off Agreement is a "*fact-sensitive enquiry*" and that the Defendants have shown, at the very least, that they have a real prospect of successfully defending Advinia's claim in this respect. He challenged Advinia's suggestion that the relevant factual matrix had not been pleaded by the Defendants or that it had not been raised in the evidence presently before the Court. He relied on the quote from Lord Hodge's judgment in *Wood v Capita Insurance Services Ltd*, in particular that the Netting-Off Agreement was concluded in an exchange of emails that were informal and brief and drafted without any skilled professional assistance.
90. In my view Mr Cumming QC's approach to the relevant factual matrix in this case is correct for the following reasons:

- (1) In their Defence and Counterclaim, the Defendants plead as follows in relation to the Netting-Off Agreement (underlining added):
- “33. In June 2018 (including during a telephone call between Mr Genova and Ms Prayle on or before 28 June 2018), [Advinia] (acting by Mr Genova) asked the Defendants to agree to a netting arrangement to avoid both [Advinia], on the one hand, and the Defendants, on the other, both having to make gross payments to each other every week.
34. By an agreement in writing (the “**Netting-Off Agreement**”) concluded on 4 July 2018 between the Defendants (acting by Ms Prayle) and [Advinia] (acting by Mr Genova) the parties agreed that:
- 34.1 the Defendants would, on a weekly basis, net off (a) all sums due from [Advinia] to the Defendants under the Agreements, against (b) all sums due from the Defendants to [Advinia] under the Agreements (including sums held on trust for [Advinia]); and
- 34.2 whichever of (a) [Advinia] or (b) the Defendants owed more to the other would make a payment to the other of the net sum due.”
35. The Netting-Off Agreement was concluded by and contained in an exchange of email correspondence between Ms Prayle and Mr Genova...”
- (2) The underlined words above show that the Defendants rely on both oral and written communications between the parties in June and July 2018 as the crucial context for the Netting-Off Agreement. That Agreement was said to have been “*concluded*” on 4 July 2018 by the exchange of emails, which suggests that the emails in question were the end of a process. This does not mean that pre-contractual negotiations are being relied upon (Mr Cumming QC accepted that pre-contractual negotiations and the parties’ subjective intentions would not be admissible for the purposes of construction) but rather it is to understand the background to the exchange of the emails.
- (3) Ms Prayle’s 4 July 2018 email referred to their previous discussions which she wanted to record in the email (“*For the record...*”) and Mr Genova responded by saying: “*Confirm terms as outlined*” which also suggests that the email was the culmination of their discussions.
- (4) In Ms Prayle’s witness statement (which was produced at very short notice for the hearing before Nugee J), she referred to the telephone call she had with Mr Genova prior to 28 June 2018 in which he “*requested an ongoing netting arrangement*”. She also challenged the suggestion that the Netting-Off Agreement came to an end on or around 12 August 2018 and says that Advinia never objected and indeed seemed to accept that the Netting-Off Agreement continued until it made the *ex parte* application to Nugee J.

- (5) Mr Genova's first witness statement, prepared for the *ex parte* application, did not refer to the telephone conversations with Ms Prayle; nor did it refer to the 28 June 2018 emails. (He has not put in any witness statement since the Nugee J Order and so has never dealt with those telephone conversations in evidence.) Nevertheless, he did refer to the Netting-Off Agreement as an "*ad hoc arrangement [that] persisted until 12 August 2018 but ceased thereafter*". That seems to me to be arguably more consistent with the Defendants' view of the Netting-Off Agreement than Advinia's current position as it suggests that the agreement or arrangement set out in the 4 July 2018 emails was itself the "*ad hoc agreement*" referred to in Ms Prayle's email. In other words, there was no requirement for there to be a weekly "*ad hoc agreement*" to a netting-off, which is how Advinia now seeks to interpret it.
- (6) In its Amended Reply and Defence to Counterclaim, Advinia admitted the telephone conversation between Ms Prayle and Mr Genova and the fact that the suggestion of an ongoing netting-off arrangement came from Mr Genova. In paragraph 27, Advinia pleaded (underlining added):

"27. Subsequently, during a telephone conversation between Mr Genova and Ms Prayle on or around 28 June 2018, Mr Genova suggested that for reasons of practical convenience the parties might repeat the arrangement discussed in paragraph 26 above, such that subject to agreement of the amounts, where in a particular week the sum owed by [the First Defendant] to [Advinia] in respect of Fee Income was greater than that owed by Advinia to [the Fifth Defendant] in respect of TSA Amounts, the BUPA Group would make a net payment to [Advinia]."

That is a fairly clear recognition by Advinia that the telephone conversation is relevant factual matrix evidence. It also indicates that any such ongoing arrangements were subject only to agreement on the figures, not to the principle of netting-off. The Defendants should be entitled to test Advinia's case at trial as to the actual contents of the telephone conversation and its impact on the interpretation of the 4 July 2018 emails.

- (7) Advinia has also challenged the liabilities that can properly be netted-off pursuant to the arrangements. In paragraph 35 of the Amended Reply and Defence to Counterclaim, Advinia pleaded (underlining added):

"35. It is further specifically denied that the parties agreed that the Defendants were entitled to net-off alleged Opening Balance Liabilities against sums which the Defendants (or any of them) owed to [Advinia]. At the time of their discussions in late June and early July 2018 about netting off, the sums which the parties contemplated might be netted off against each other (subject to agreement to do so in respect of a particular week) were the Fee Income, on the one hand, and the TSA Amounts, on the other. The parties did not contemplate that any netting off agreement in respect of a particular week might extend to any Opening Balance Liabilities. In support of its case in this regard [Advinia] will rely, *inter alia*, on Ms Prayle's email of 4 July 2018 which stated, in a schedule thereto,..."

Advinia itself therefore relies on what the parties allegedly contemplated would be included within the netting-off arrangement. Quite obviously, the Defendants must be entitled to test that after full disclosure and cross examination at a trial. In paragraph 36 of the same pleading, Advinia relies on Mr Genova's "*mistaken belief*" as to the inclusion of Opening Balance Liabilities in one of the net payments, and this too must be susceptible to challenge at the trial, the Defendants arguing that this was not mistaken at all but a correct application of the Netting-Off Agreement by Mr Genova.

91. The above aspects of the factual matrix have been fairly raised by the Defendants and it seems to me that they are relevant and admissible evidence for the purposes of construing the Netting-Off Agreement, as Advinia seemed to accept in its Amended Reply and Defence to Counterclaim.
92. In addition to factual matrix, it is an important part of Advinia's case on the Summary Judgment Application that whatever the arrangement was as set out in the 4 July 2018 emails it came to an end on or around 12 August 2018. The Defendants say that it came to an end on 22 October 2018 when the draft *ex parte* application notice was served on them.
93. In paragraph 45 of its Amended Reply and Defence to Counterclaim, Advinia pleads that "[a]fter 17 August 2018 the parties did not reach any further *ad hoc* agreements authorising [the Defendants] to apply any money received and held on trust for [Advinia] to discharge any sums alleged to be due from [Advinia] to the Defendants." The basis for this plea appears to be that this was the last time that a payment was made by Advinia pursuant to the Netting-Off Agreement, or as Advinia would say, that there was an *ad hoc* weekly agreement.
94. The Defendants say that no indication was given by Advinia in August that it wanted to end the Netting-Off Agreement and "*revert to a process of payments without netting*". In preparing for disclosure, the Defendants have discovered a number of documents that show the Defendants continuing to operate the Netting-Off Agreement by sending to Advinia on 29 August, 5, 13 and 27 September 2018 statements of the "*net settlement position*" between the parties. There is no evidence that Advinia ever objected to these statements. (See paragraphs [31] to [37] above.) The Defendants further say that other documents would be likely to come to light on this from Advinia on disclosure.
95. At this stage, the Court cannot determine which party is correct on this and it will only be able to do so after disclosure has been given and at trial. The fact that Advinia agreed only four months ago to there being extended disclosure on the issue of whether the parties made the Netting-Off Agreement and, if so, its terms and consequences indicates recognition that these are live issues that can only be determined at a trial after disclosure has been given. The only reason that there are no further disclosed documents presently before the Court is because the Advinia Parties obtained an extension to the deadline for disclosure the day before the Summary Judgment Application was issued (by amendment of the existing application notice).
96. In the circumstances, I find it impossible to see how I can fairly grant summary judgment to Advinia when there are a number of disputed factual issues relevant to the construction of the Netting-Off Agreement and its implementation that I would

have to be satisfied on in order to grant summary judgment. I cannot conclude, based on the material before me, that the Defendants have no real prospect of successfully defending the issues that arise on the Summary Judgment Application.

(f) The meaning of the 4 July 2018 email exchange

97. Having come to the above conclusion, it would not be appropriate for me to express any sort of opinion on the true construction of the 4 July 2018 email exchange, or the Netting-Off Agreement, as the Defendants call it. I do however shortly make a few points on this.
98. Mr Dale QC submitted as follows:
- (1) The Defendants accept that this was an “*agreement in writing*” and therefore the established canons of construction apply;
 - (2) The words “*on ad hoc agreement by both parties*” in Ms Prayle’s email of 4 July 2018 are crucial and the Defendants simply ignore them; those words together with the reference in the next sentence to “*this weekly arrangement*” make clear that any netting-off was subject to agreement of the parties each week;
 - (3) There was accordingly no automatic netting off allowed and the 4 July 2018 emails merely set out a framework for future weekly agreements to net-off liabilities;
 - (4) The words “*...either party has the right to revert to a process of payments without netting if it wishes to*” are not otiose on Advinia’s construction because they refer to each party’s right to stop the weekly process of attempting to agree a net position;
 - (5) The Defendants’ interpretation lacks commercial common sense in that it involves Advinia giving up its “*extremely valuable right promptly to receive Trust Money free from any set-off*” without anything in return; it is inherently unlikely that Advinia would have agreed to do that and it would have required clear words for it to do so – see the *Seadrill Management Services* case (supra);
 - (6) As the 4 July 2018 email preserved the Defendants’ rights under clause 6.11 of the TSA, there was no consideration moving from the Defendants for Advinia’s agreement to give up its right promptly to receive Trust Money.
99. Mr Cumming QC responded by making the following submissions:
- (1) The email exchange of 4 July 2018 was, at the suggestion of Mr Genova, to record the parties’ agreement to provide for an ongoing netting-off arrangement whereby the Defendants would, on a weekly basis, net off all sums due from Advinia to the Defendants against all sums due from the Defendants to Advinia, including Trust Money and for payment by whoever owed more;

- (2) Ms Prayle and Mr Genova are not lawyers but they wanted to record in writing something that they had agreed and which would be a practical arrangement that avoided excess money being placed in the banking system; even if a lawyer might have worded the agreement differently, it is clear that something of significance was being put into writing – “*For the record...*” – albeit in an informal way – “*Hi Joe*”;
 - (3) The words “*on ad hoc agreement by both parties*” refers to the Netting-Off Agreement itself and not to separate weekly agreements that had to be reached in relation to netting-off;
 - (4) In order to end the Netting-Off Agreement, both parties had the right to do so but they would have to give notice to the other party that they wished to do so; in the absence of any such notice, the Agreement would continue and a netting-off would take place based on the figures produced by the Defendants;
 - (5) No valuable right of Advinia was being given up because it could end the arrangement at any time;
 - (6) There was consideration provided by both parties because it was in their mutually beneficial interests not to have to put the gross amounts of their respective liabilities into the banking system and losing interest and the use of that money as a result.
100. The words “*on ad-hoc agreement by both parties*” are unusual and their meaning is unclear. They are pivotal to the meaning of the Netting Off Agreement. Mr Dale QC seemed to be saying that “*ad hoc*” in this situation meant “*from time to time*” or “*weekly*” as this would be consistent with the term “*weekly arrangement*” in the next sentence. However, I do not think that “*ad hoc*” is ever used in that sense. Its literal translation from the Latin is “*to this*” and it is normally used in the sense of something being done for a particular purpose, such as an “*ad hoc committee*” or an “*ad hoc arbitration*”.
101. If Mr Dale QC is right about the meaning of the 4 July 2018 emails, the parties merely decided to consider the figures each week and then, once they had done so, whether to agree to net them off. It was merely an arrangement whereby they might reach an agreement. Whereas on Mr Cumming QC’s construction, the parties actually agreed that there would be such a netting off unless and until either party decided that they did not want to do so. It was either an opt-in or an opt-out arrangement.
102. I agree with Nugee J’s conclusion over 18 months ago that these raise “*questions of some difficulty*” and that they are “*seriously arguable*”. That remains the case. I would not feel comfortable in having to “*grasp the nettle*” and actually construe the emails, as Mr Dale QC urged me to do, without there having been full disclosure and evidence, particularly as to the telephone conversations between Ms Prayle and Mr Genova preceding the emails, and for their evidence to be subject to cross-examination. The words are not clear enough for me to be able to ascertain what they would convey to a reasonable person having all the reasonably available background knowledge that the parties had as it is necessary for full factual matrix and contextual evidence to be considered in order for the Court to come to a definitive and fair conclusion on this.

103. Furthermore, even though both parties accepted that post contractual conduct is inadmissible as an aid to construction, to a certain extent they both did rely on some such conduct. The Defendants submitted that Advinia's acceptance of the deduction of the August and September Payroll Liabilities from the Trust Money could only have been because of its acceptance that the Netting Off Agreement continued to operate after the middle of August 2018. For its part, Advinia submitted that the Defendants' case on the meaning of the Netting-Off Agreement is inconsistent with what they were saying in correspondence in October 2018 before the application to Nugee J, which recognised that no netting off had actually been done.
104. Again these are factual issues that cannot be resolved on a summary judgment basis. The trial judge will have to determine whether the evidence is admissible for the purpose of construing the 4 July 2018 emails and, if so, the weight to be attached to it. In any event, that evidence will be material on the question as to when the Netting-Off Agreement came to an end which is another point that Advinia had to succeed on at this stage or at least it had to show that the Defendants have no real prospect of establishing that it only ended on 22 October 2018.

(g) Other compelling reason for a trial

105. In his oral submissions, Mr Cumming QC also claimed that there were other compelling reasons for a trial within CPR 24.2(b). I think his main points on this concerned the manner in which the Summary Judgment Application had been brought and the fact that Advinia was now claiming a money judgment of over £15 million whereas at the trial it would be likely that Advinia would owe the Defendants substantial sums once the overall account between the parties had been determined. Mr Cumming QC directed me to Advinia's Amended Reply and Defence to Counterclaim, which was amended on 18 May 2020, just over two weeks before this hearing, in which the following had been deleted:

“The order made by the court should reflect the net financial position, as at the date it is made, between [Advinia] and the Defendants”.

Accordingly, until then, both parties had been proceeding, and agreeing the extent of their disclosure obligations, on the basis that there would be a trial at which the “*net financial position*” would be determined. If that approach was accepted by Advinia, it had also implicitly accepted that the Trust Money would be part of that ultimate setting-off and so would not be payable until the account had been done.

106. Mr Cumming QC also referred me to clause 20.1 of the BTA which limits the First Defendant's liability to Advinia to £1. He suggested that such a clause was there because the BTA was, at the stage it was entered into, a purely internal BUPA transaction and the trust arrangement was to protect the purchasing entity (Advinia) from an insolvency of the selling entity (the First Defendant) but that if there was a hostile claim such as the present by an outside company, clause 20.1 was there to extinguish it. I am not convinced by that argument and find it difficult to understand the purpose of clause 20.1. Fortunately, I do not need to decide these matters. It is also relevant to point out that whatever reliance is now placed on this clause by the Defendants it has not to date been pleaded.

107. Nevertheless, there is something in Mr Cumming QC's argument on there being another compelling reason for a trial. In issuing the Summary Judgment Application over a year after the main pleadings were closed and when the parties appeared to have agreed that all live issues would be determined at a trial with full disclosure including in relation to the Netting-Off Agreement, and where that trial would arrive at the "*net financial position*" between the parties, the only real purpose of the Summary Judgment Application appears to be to release the Money in Court, which is the purpose of the earlier Variation Application. Mr Cumming QC said that this is because of the Advinia Parties' desperate need for cash but that, in the circumstances of this claim and the way it has progressed, it would be grossly unfair for the Defendants to be exposed to the Advinia Parties' credit risk by having to pay them cash at this stage when it is likely that the Advinia Parties will be owing the Defendants after the trial has taken place. There will be a trial even if Advinia is right on the construction point and so it would be fair for everything to be sorted out at that trial because the real decision for the Court is the "*net financial position*" between the parties, as Advinia seemed to recognise until recently.

(h) Conclusion on the Summary Judgment Application

108. Despite my misgivings about the way the Summary Judgment Application has been approached, I prefer to base my decision on my finding that the central issue of construction is unsuitable in this case for summary judgment and the Defendants have a real prospect of successfully defending that issue. I direct that it should proceed in accordance with the existing directions to the stage 1 trial.

The Variation Application

(a) Introduction

109. As I have found against Advinia on the Summary Judgment Application, I have to consider its Variation Application. There was, it seems to me, some confusion on its part as to the basis upon which it was pursuing the Variation Application, once it had been relegated in priority to the Summary Judgment Application. While Mr Dale QC was arguing that there had been a material change of circumstances since the Nugee J Order, he seemed to base the Variation Application on the fact that I should have a high degree of assurance that Advinia will succeed at trial. I am not sure whether he was limiting that to the construction point or all issues, but in any event, there is an obvious tension within that submission, given that Advinia has not succeeded in persuading me to grant summary judgment.
110. I think however that Mr Dale QC was correct to set the bar that high in an application to vary the Nugee J Order so long after it was made, particularly in relation to the Money in Court. Nugee J required the Money in Court to secure the Defendants' potential claim under the cross-undertaking precisely because the learned Judge did not have a high degree of assurance that Advinia would succeed at trial. The balance that was struck was for the Money in Court to be paid in and held as security for the Defendants plus cross-undertakings from Advinia and the Kanoria Foundation. It seems to me that that balance should only be upset if either Advinia can now show that it does actually have very good prospects of succeeding at trial or if there has

been such a material change of circumstances that it would be just and fair to vary the original undertakings.

111. By the Variation Application, the Advinia Parties seek to vary the Nugee J Order in the following ways:
- (1) The Money in Court to be paid out to Advinia within 14 days;
 - (2) The Kanoria Foundation be discharged from its undertakings;
 - (3) Advinia Holdings be substituted for the Kanoria Foundation and provide a cross-undertaking in its place.
112. The Advinia Parties wish the Nugee J Order to be so varied because they have an urgent need for cash in order to address the Wet Rooms Issue in their Scottish care homes. The liability in respect of the Wet Rooms Issue will be determined as part of the Stage 1 trial in due course (although only as to whether Advinia Holdings' Disputes Notice is valid or not – see below) and it is certainly not before me now. It is relied on here because it provides context to the Variation Application and is the basis for the Advinia Parties' submission that they are suffering prejudice by being prevented from using the Money in Court.
113. The Defendants say that there is no good reason and no material change in circumstances that would justify a variation to the Nugee J Order. Furthermore, they say they have their suspicions as to why the Advinia Parties want to substitute Advinia Holdings for the Kanoria Foundation and that no such change to the “*delicate balance*” struck in the Nugee J Order should be made.

(b) Legal Principles

114. The Advinia Parties apply pursuant to CPR 3.1(7) – “*power to vary or revoke the order*” – and/or the liberty to apply in paragraph 5 of the Nugee J Order. It is common ground that the same principles apply in respect of both jurisdictions.
115. In *Tibbles v SIG plc* [2012] 1 WLR 2591, Rix LJ reviewed a number of authorities in this area and in paragraph 39 said as follows:

“(ii) ...the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

...

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a Court's orders that it ought normally to take something out of the ordinary to lead to variation

or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.”

116. A material or significant change in circumstances has been required since the Court of Appeal’s first consideration of this jurisdiction in *Chanel Limited v FW Woolworth & Co Ltd* [1981] 1 WLR 485. Buckley LJ stated the principle as follows (at pp.492-493) (underlining added):

“The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position.”

(*Chanel v Woolworth* and *Tibbles v SIG plc* have been expressly approved by the Supreme Court in *Thevarajah v Riordan* [2016] 1 WLR 76.)

117. In the context of undertakings, Teare J in *Today'sure Matthews Limited v Marketing Ways Services Limited* [2015] EWHC 64 (Comm), referred to the principles set out in *Chanel v Woolworth* and said:

“26 ...That principle requires good cause to be shown for a person to be released from an undertaking. What is good cause will depend upon all the circumstances of the case though typically a change of circumstances or the discovery of some new fact will be required. A person will only be released from an undertaking if it would otherwise be unjust to hold him to his undertaking

Although an order resulting from the court's exercise of a discretion and a consent order resulting from the parties' agreement are both orders of the court, a consent order has a feature which is lacking in an order which results from the court's exercise of a discretion, namely, it is the product of careful negotiation and agreement between the parties themselves. That additional factor is, it seems to me, relevant when considering whether it is just to set aside the order. It is a factor in favour of holding the parties to their agreement... before a party may be released from an undertaking good cause must be established.”

(c) The Change of Circumstances relied upon

118. The Advinia Parties say that the following are material changes of circumstances since the Nugee J Order:

(1) That Trust Money has been paid into Court, as directed (ie the Money in Court);

- (2) Advinia Holdings has been joined to the proceedings and has offered to provide a cross-undertaking; Advinia Holdings is said to have substantial net assets; and
- (3) Advinia's need for cash to deal with the Wet Rooms Issue.

119. In my view these are not material changes of circumstances:

- (1) It was part of the Nugee J Order itself that the Money in Court be paid in. It is difficult to see how compliance with the Order means that the Order should be varied.
- (2) Advinia Holdings offering to provide a cross-undertaking in place of both the Money in Court and the Kanoria Foundation's cross-undertaking is not a change in circumstances relevant to the basis upon which the Nugee J Order was made. It is merely what the Advinia Parties want to happen.
- (3) While the Advinia Parties' need for cash to deal with the Wet Rooms Issue may be real, they have known about this issue for over two years and from well before the Nugee J Order. It is also curious that the Advinia Parties say they have insufficient cash to fund the investment required but say that the Court and the Defendants should accept Advinia Holdings' cross-undertaking because it will be good for the money.

120. Accordingly, I do not believe that the Advinia Parties can establish any material change of circumstances since the Nugee J Order that would justify a variation to it.

(d) The Money in Court

121. By the end of his submissions on this, I was not sure if Mr Dale QC was pursuing the release of the Money in Court. In any event, I am not prepared to countenance a release of the Money in Court in return for a cross-undertaking from Advinia Holdings. The Money in Court was a carefully calibrated requirement of the Nugee J Order so that the Defendants would have real security for what was a fairly draconian mandatory injunction requiring them to discharge the October Payroll Liability out of their own funds. Nugee J was not convinced as to the strength of Advinia's case but was prepared to make the Order to ensure the care homes' staff got paid and also that the Defendants had adequate security should they succeed at the end of the day.

122. Having rejected the Summary Judgment Application, the Advinia Parties do not get past the high threshold that they set as to their prospects of success; nor have they demonstrated any sufficient change in circumstances to justify the payment out of the Money in Court.

(e) Substitution of Advinia Holdings for the Kanoria Foundation

123. While I am prepared to accept that there may be a somewhat lower test applicable to this aspect of the Variation Application, the lack of any material change of circumstances together with the unwillingness of the Defendants to accept Advinia Holdings in substitution for the Kanoria Foundation seems to me to be fatal to the application.

124. The Advinia Parties put forward accounts for Advinia Holdings up to 31 March 2020 and projections for the year ahead which are said to show that there would be substantial assets available to satisfy its cross-undertaking. Most of the figures were of the consolidated Group position rather than Advinia Holdings' own position. The Defendants made various points on the accounts in particular that they do not show as rosy a picture as was being presented by the Advinia Parties. They also have serious concerns about the Kanoria Foundation's assets and particularly the assets that it actually owns in the UK. They have had difficulty getting information from Dr Kanoria and there were serious flaws in his first witness statement which had to be corrected in his second.
125. I do not think that it is open to the party which has given certain undertakings as the price for obtaining a mandatory injunction to return to Court to ask for those undertakings to be given by another person when there is no good reason save that it suits that party to do so. Even if the Defendants might, on an objective basis, have no reasonable grounds for resisting the substitution, I consider that they are entitled to have the *status quo* remain unless there has been a material change of circumstances to justify imposing that substitution on them.
126. As there has been no material change of circumstances, there is no good reason to vary the Nugee J Order by substituting Advinia Holdings for the Kanoria Foundation and I dismiss the Variation Application.

The Interim Payment Application

127. The Interim Payment Application is brought under CPR 25.7(1)(a) and Advinia Holdings seeks an order that the First Defendant pay it £2,131,393 plus interest on the basis that the First Defendant has admitted that it owes this sum. This concerns the Completion Accounts process in the SPA and the determination of the final consideration payable by Advinia Holdings to the First Defendant for the shares in Advinia. The relevant provisions of Schedule 6 of the SPA have been set out in paragraph [18] above.
128. CPR 25.7(1)(a) provides as follows:
- “25.7-(1) The court may only make an order for an interim payment where any of the following conditions are satisfied –
- (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant...”
129. Advinia Holdings does not rely on any other of the conditions set out in CPR 25.7(1). Therefore, I only have jurisdiction to order an interim payment if Advinia Holdings proves that the First Defendant has admitted liability to pay the sum of £2,131,393. As Mr Cumming QC stated, the conditions for an interim payment are to be strictly construed because CPR 25.7(1) represents “*an exception to the general principle that a defendant has a right not to be held liable to pay until liability has been established by a final judgment*” (see the notes at 25.7.1 of the White Book).

130. Mr Dale QC took me to the way the First Defendant has pleaded its Additional Claim and they indicate as follows:
- (1) The Additional Claim Form shows a value of the claim as being £2,131,393.
 - (2) The Particulars of Additional Claim assert that the First Defendant served the Draft Completion Accounts on 19 April 2018 but that the Disputes Notice from Advinia Holdings was served more than 50 Business Days later and so was invalid.
 - (3) The First Defendant's position is that the Draft Completion Accounts are the Completion Accounts and Advinia Holdings is not allowed to challenge them.
 - (4) The First Defendant claims a declaration that there was no valid Disputes Notice and that the Draft Completion Accounts have become the Completion Accounts for the purposes of the SPA.
131. In paragraph 14 of the Particulars of the Additional Claim, the First Defendant pleaded (emphasis added):
- “14. For the avoidance of doubt, [the First Defendant] has confirmed (including in letters to [Advinia Holdings] dated 26 July 2018, 15 August 2018 and 29 October 2018) that, if [Advinia Holdings] accepts that the Draft Completion Accounts are the Completion Accounts, [the First Defendant] stands ready and willing to pay it the £2,131,393.00 that it will thereupon owe to [Advinia Holdings] (pursuant to paragraphs 1.3(A) and 2 of Part A of Schedule 6 to the SPA).”
132. Mr Dale QC submitted that this is, together with the correspondence referred to therein, an admission that, whatever the outcome of the Additional Claim, the First Defendant will owe Advinia Holdings the sum of £2,131,393. If the First Defendant succeeds on its Additional Claim and the Disputes Notice is declared invalid and the Draft Completion Accounts become the Completion Accounts, the First Defendant will be obliged to pay that sum. If on the other hand the First Defendant loses the Additional Claim, then Advinia Holdings would be able to pursue its Counterclaim in relation to the Wet Rooms Issue (the claim is for over £13.5 million) but the First Defendant's minimum liability remains at £2,131,393. Therefore, Mr Dale QC submitted, the First Defendant will, on any view, be liable for that sum and so the Court should order it to be paid immediately pursuant to CPR 25.7(1)(a).
133. Mr Cumming QC submitted that the crucial word in paragraph 14 of the First Defendant's Additional Claim is the one underlined above: “*thereupon*”. The First Defendant is not admitting that it is liable for the sum now; rather its position is that, if Advinia Holdings accepts that the Draft Completion Accounts are the Completion Accounts, at that point it will be entitled to payment of the sum. However, Advinia Holdings does not accept that and seeks in its Counterclaim a declaration that the “*Draft Completion Accounts do not constitute the Completion Accounts for the purposes of the SPA.*”
134. In his skeleton argument, Mr Cumming QC submitted that there was a fatal flaw in the Interim Payment Application in that Advinia Holdings did not allege in its

Defence to the Additional Claim and Counterclaim that the First Defendant owed it the sum of £2,131,393; nor did it seek an order requiring the First Defendant to pay it that sum. In response to this point, Advinia Holdings issued the Amendment Application by which it seeks permission to plead that the sum is admittedly due and to claim it in the prayer for relief. I am prepared to grant permission to amend but I do not think it actually helps Advinia Holdings, as there can be little doubt that the First Defendant will deny it is liable while the Draft Completion Accounts remain as Draft Completion Accounts.

135. Mr Cumming QC took me through the provisions of Schedule 6 of the SPA, as set out in paragraph [18] above and the critical point is that it is only when there are Completion Accounts as so defined that there is any liability to pay from one party to the other. If the Court makes the declarations sought by the First Defendant at the Stage 1 trial, then and only then will it be liable to pay £2,131,393 to Advinia Holdings. If the Court however upholds the validity of the Disputes Notice, then according to clauses 1.3(B), 1.4 and 2 of Schedule 6 to the SPA, the parties need to go through the disputes resolution process there set out which may involve an accounting expert making a final and binding determination. At the end of that process, there will be Completion Accounts finalised and only then will the liability become due and enforceable.
136. Mr Cumming QC submitted that by Schedule 6 of the SPA the parties accepted a process whereby whoever was owed money by reference to the Completion Accounts, would not get their money until the Completion Accounts were finalised in accordance with Schedule 6. He said that this was a valuable part of the contractual bargain to the Defendants because it in effect meant that nothing was agreed until everything was agreed, and until everything was agreed in the form of final Completion Accounts nothing has to be paid. He further said that this provided a strong disincentive to Advinia Holdings to stall the process by raising spurious, time consuming disputes over the Draft Completion Accounts because it would not get any money until they had all been resolved. If an interim payment in the sum of £2,131,393 was ordered to be paid now while the Draft Completion Accounts are still being heavily disputed, then that valuable contractual right would have been effectively lost and the bargain between the parties rewritten.
137. These are powerful points and explain why the Interim Payment Application is so strongly resisted by the Defendants. But the simple reason why I have to dismiss the Interim Payment Application is because Advinia Holdings has not shown that the First Defendant has "*admitted liability to pay...some other sum of money*" to Advinia Holdings. The First Defendant has only said it will pay that sum if Advinia Holdings admits that the Draft Completion Accounts are the final Completion Accounts and Advinia Holdings is definitely not prepared to concede that. Accordingly, I do not have jurisdiction to make an order under CPR 25.7(1) as the only condition relied upon by Advinia Holdings has not been satisfied.

Conclusion

138. I dismiss all three applications: the Summary Judgment Application; the Variation Application; and the Interim Payment Application. Insofar as it wishes to proceed

with it, I will grant permission to Advinia Holdings to amend its Defence to Additional Claim and Counterclaim in the form attached to the Amendment Application.

139. I would hope that the parties would be able to agree the costs position arising out of this judgment but if there are any issues in relation to costs or any other consequential matters then they can either be dealt with by way of written submissions or at a further hearing, if necessary.
140. I am grateful to Counsel for their clear and helpful submissions.