

Neutral Citation Number: [2020] EWHC 3607 (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: 22 December 2020

**Before :**

**Mr Justice Michael Green**

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**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**

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**Daniel Hubbard** (instructed by **Wordley Partnership**) for the **Claimant**  
**Edward Cumming QC** and **Alina Gerasimenko** (instructed by **Slaughter and May**) for the  
**Defendants**

Hearing dates: **22<sup>nd</sup> December 2020**

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**JUDGMENT**

**Mr Justice Michael Green**  
(3:45pm)

**Tuesday, 22 December 2020**

Judgment given orally by **MR JUSTICE MICHAEL GREEN**

1. This is an application by the Claimant, Advinia Care Homes Limited, hereafter “**Advinia**”, and the Third Party, Advinia Health Care Limited, “**AHC**”, which together will be referred to as “**the Advinia Parties**”, for permission to amend their pleadings in this matter. Those pleadings are the Particulars of Claim and AHC's Amended Defence to the Additional Claim and Counterclaim. The application is also coupled with an application to withdraw an admission and, if necessary, if I am minded to grant those applications, wholly or partially, an application to adjourn the trial which is listed in a five-day window from 15 February 2021 with a time estimate of two weeks. A pre-trial review is due to take place in the first week of next term, but this was considered urgent enough to be listed now before Christmas so as not to imperil the trial date if amendments are to be permitted.
2. The Defendants say that if any amendments are permitted at this stage, there might have to be an adjournment of the trial. Clearly it would be most undesirable for this trial date to be lost. It would not be conducive to the administration of justice and it would mean that there may not be a trial for over a year, well into 2022, when the parties are now in a position in one way or another for the already scheduled trial.
3. There is a complicated background to these proceedings and this application but I have had the advantage of having heard in June 2020 as a deputy judge of the High Court a substantial application, again brought by the Advinia Parties, for summary judgment and interim payment and various other relief. I dismissed those applications and my judgment is reported under neutral citation number [2020] EWHC 1563 (Ch). I adopt the defined terms and abbreviations I used in that judgment. I set out in that judgment some of the background to the dispute and, insofar as

necessary, I adopt that background in this judgment. I will only add to it as necessary for the purposes of understanding the issues that arise on this application.

4. The Defendant companies are all members of the Bupa group, the well-known global health insurance and health care provider. They are represented before me today by Mr Edward Cumming QC and Ms Alina Gerasimenko. The Defendants' solicitors are Slaughter and May. The Advinia Parties are represented before me today by Mr Daniel Hubbard and their solicitors are now the Wordley Partnership. At the time of the hearing in June their solicitors were Fladgate LLP.
5. The case concerns a number of transactions between the Advinia Parties and the Defendants whereby the Defendants sold certain care homes in England and Scotland and related businesses to AHC by the purchase of the shares in Advinia. Advinia, when part of the Bupa group, was called Bupa Care Homes Investments Limited. The share purchase formally completed on 14 February 2018 but it was preceded by what had been called business transfer agreements or BTAs. There were separate BTAs for the English and the Scottish care homes businesses but they were both in the same or similar terms. The English BTA was entered into on 31 August 2017 and by that agreement Bupa Care Homes Limited, "**BCH**", a company that is not a party to this litigation and actually left the Bupa group shortly after the transaction transferred its residential care home assets and businesses to Advinia, then called Bupa Care Homes Investments Limited. This was the preliminary step for putting all the relevant Bupa assets into one entity that could then be then sold to the Advinia group. The Scottish BTA was entered into between the Second, Third and Fourth Defendants and Advinia. Both BTAs were the precursors to the sale and purchase agreement between AHC and the First and Fifth Defendants, which was entered into on 14 October 2017.

6. In the Particulars of Claim Advinia was essentially claiming under the BTAs. It alleged that under the BTAs certain sums of money received by the Defendants were held on trust for Advinia, and that there was no right to set-off against such sums any monies owing by Advinia under the BTAs or any of the other agreements entered into at the time, such as the Transitional Services Agreement whereby Bupa continued to provide services such as payroll administration after completion.
7. That was also the basis of an *ex parte* on short notice application made by Advinia to Mr Justice Nugee, as he then was, on 23 October 2018. On 24 October Mr Justice Nugee granted the injunction sought, requiring the Defendants to pay the outstanding payroll liability, if necessary out of their own funds, but requiring so-called trust money to be paid into court thereafter by way of fortification for Advinia's cross-undertaking in damages.
8. This was how the proceedings started. When it came to me in June 2020, Advinia was essentially seeking summary judgment on its trust money argument and was relying on certain terms of the BTA to say that there could be no set-off against the requirement of the First Defendant to pay over the trust money. While I rejected their case on this, the way it was put will be important to bear in mind in considering some of the amendments for which permission is sought.
9. The other part of the claim that needs to be explained shortly at this stage is the Additional Claim brought by the First Defendant against AHC. This concerns the Completion Accounts under the SPA. One of the issues concerns whether the draft Completion Accounts served by the First Defendant have, under the terms of the SPA, become final and binding. AHC says that they have not for various reasons, and it has raised a Counterclaim against the First Defendant, raising claims for breach of warranty and misrepresentation in relation to the Scottish care homes.

10. This has become known as the “**wet rooms issue**” and has arisen because of the Scottish care inspectorate, “**SCI**”, the regulator of care homes in Scotland, requiring as a condition of the transfer that *en suite* shower wet rooms have to be installed in most of the Scottish care homes. AHC says that it relied on the fact that there had been representations to it by Bupa representatives that there would be no significant capital expenditure to the Scottish care homes, and the wet rooms issue had not been disclosed to it before the SPA completed. AHC is seeking to add a new misrepresentation claim to its existing one in the proposed amendments.
  
11. Before dealing with some more of the procedural detail and looking at the amendments more closely, it is important for me to put this in context. There have been delays in the progression of this case and both sides blame each other, but also the Advinia Parties do hold their hands up and admit that they have struggled to keep to the timetable in certain respects. As these parties know better than most, the COVID-19 pandemic has caused incredible stresses and strains on the care home sector. Throughout the course of this year, as has been carefully explained by Mr Mark Cash, Advinia's CEO, most of their management time has inevitably had to be spent on dealing with the impact of the pandemic on their care homes. That has made it difficult at times for detailed instructions to be given to their lawyers and the delays have been caused as a result. Bupa face similar difficulties, but they are a far larger organisation. In fairness, Bupa accept that it has been difficult for all concerned. The focus however must now be on making sure that a fair trial can be heard in February 2021.
  
12. Whilst I appreciate the importance of this litigation to both parties and the fact that everything seems to be being fought to the extreme within it, I do think that the documentation produced for the purposes of this application was quite disproportionate, both in terms of the lengthy correspondence between the parties and the unnecessarily long witness statement, in particular from Mr Jeens of

Slaughter and May, which was 30 pages long and 87 paragraphs. Not only has this application been brought on in the vacation shortly before Christmas, but also the court has been burdened with having to read a mountain of material to deal with something that should probably have been capable of agreement by the parties out of court. Of course, I have read carefully all such material and listened intently to the submissions. My decision will be elaborated on during the course of this judgment, but I do urge the parties to adopt a more proportionate approach to this litigation. Even with knowing something about this case, it took far longer than the two hours both sides suggested would be enough for pre-reading.

### **The Proposed Amendments**

13. So I turn to the proposed amendments. Even in the short space of time since the amendments were first proposed, they have evolved further such that some of those originally proposed are now not being pursued, some have been widened in the last week or so and some are not opposed by the Defendants. I will try and summarise where we are:

(1) The Defendants have consented to two or possibly three sets of amendments, as follows, and that is of course on the usual basis as to costs occasioned by the amendments.

(i) First, they have consented to amendments to the Particulars of Claim that relate to the start date of Advinia's claims for an account. These are amendments to paragraphs 1, 4, 5, 5(a), 7, 8, 13, 17.1 and paragraph 1 of the prayer.

(ii) Secondly, they have consented to amendments to AHC's Amended Defence and Counterclaim which add to the background of the wet rooms issue. These are contained within paragraphs 31 to 38 of that pleading.

(iii) Thirdly, they have pretty much accepted the amendments to the loss and damage claim in paragraph 48 of the Amended Defence and Counterclaim.

(2) The second category is of those amendments that have now been withdrawn. The Advinia Parties have withdrawn a new estoppel defence that they wish to plead in AHC's Amended Defence and Counterclaim. They did so, as Mr Hubbard said in his skeleton argument, to narrow the issues in dispute for today.

(3) The third category is where the amendments are disputed as follows:

(i) First of all, what has been called the “**Succession issue**”. Advinia wishes to withdraw an admission it has made as to the First Defendant taking over BCH's rights and obligations under the English BTA. This is contained in paragraphs 6 and 8(b) of the Particulars of Claim.

(ii) The second main area is in relation to the allegations of negligent mis-statement in relation to the wet rooms issue. There are amendments which bring in a new claim in negligent mis-statement, paragraphs 38A to 38F of the Amended Defence and Counterclaim, and there are amendments that expand on the existing claim in respect of negligent mis-statement contained in paragraphs 41 to 47.

(iii) There is also a new claim that was introduced on 15 December 2020, which is a claim to unjust enrichment. I think the Defendants were not actively opposing this amendment, but I will deal with it shortly at the end of this judgment.

14. Perhaps predictably, Mr Hubbard claimed that while tight, the amendments will not unduly prejudice the Defendants or their preparation for trial, while Mr Cumming emphasised that it will

cause severe disruption to their trial preparation, indeed that it is not possible fairly to proceed with the trial if the amendments are allowed. It is curious that the Defendants vehemently opposed the hearing of this application on an expedited basis, claiming it was not so urgent, whereas they now oppose these amendments on the basis that they cannot be ready for the trial in February. Mr Hubbard says that the Defendants have completely exaggerated the consequential effects of the proposed amendments.

15. As is usual in these applications, it is necessary to find the right balance so as to ensure that both parties are treated justly and fairly, that a trial should only go ahead if it can fairly do so, and to also bear in mind the effect on the proper administration of justice and other court users, something that we have all become acutely aware of during the pandemic.

### **Procedural Background**

16. Before looking at the disputed amendments, it is necessary to set out some of the recent procedural background.
17. On 7 October Wordley Partnership wrote to Slaughter and May requesting an explanation of when and how the First Defendant had "assumed or succeeded to BCH Limited's rights and obligations under the English BTA". In the same letter, Wordley Partnership raised various questions regarding the Opening Balance Liabilities, a term that I defined in my June judgment.
18. On 13 October Wordley Partnership sent additional requests for complex financial information concerning the Opening Balance Liabilities. Then on 14 October the Advinia Parties served the Defendants with a request for further information under Part 18 of the CPR "**October RFI**". The



October RFI in effect repeated the requests made on 7 and 13 October, and required a response by 29 October. It was fairly clear that something was being lined up by the Advinia Parties on that front.

19. By a letter dated 29 October 2020 Slaughter and May set out the Defendants' objections to complying with the October RFI and emphasised that a request for further information in relation to an issue which is not in dispute is not permitted and is therefore improper. Furthermore, the witness evidence had now been served for the trial, and so the information sought in the October RFI was not necessary for such a purpose.
20. On 2 November 2020 for the first time Advinia stated that it would be seeking to amend its Amended Reply dated 21 May 2020 to put the First Defendant to proof as to whether and how it succeeded to BCH's rights and obligations under the English BTA.
21. On 11 November 2020 supplemental disclosure was given by both parties. As part of Bupa's supplemental disclosure were documents in relation to the Disclosure Review Document disclosure issue 9, which was essentially the wet rooms issue, including in particular communications between Bupa and the SCI in relation to that. The Defendants say that this was voluntary disclosure. Whatever it was, it has come quite late in the day.
22. Factual evidence was exchanged on 23 October 2020 and reply factual evidence was exchanged on 13 November 2020.
23. On 13 November 2020, Slaughter and May wrote to the Wordley Partnership to say that the Defendants would not, without first seeing a draft amended pleading from Advinia, answer the

October RFI. On 16 November 2020 Advinia served Bupa with draft Amended Particulars of Claim and by letter of 20 November 2020 the Defendants refused to consent to the same.

24. On 26 November 2020 Wordley Partnership served on the Defendants a draft application for permission to amend the Particulars of Claim and to re-amend AHC's Amended Defence and Counterclaim. There was also a witness statement accompanying that application from Ms Alison Proctor.
25. The amendments went far wider than the draft Particulars of Claim served on 16 November, which was limited to the Succession Issue. In the letter accompanying those documents, the Wordley Partnership sought the Defendants' dates to avoid, a time estimate, and agreement to the application being listed before a Master on an expedited basis.
26. On 29 November 2020 a long letter from Slaughter and May set out the Defendants' objections to the proposed amendments and consented to those that I have identified before, namely the amendments to the Particulars of Claim in relation to the accounting date and the amended background segment to the wet rooms issue in the Amended Defence and Counterclaim. This was also confirmed in the letter of 2 December 2020 from Slaughter and May. Slaughter and May were also suggesting that the application for permission should be dealt with at the pre-trial review at the beginning of next term. Slaughter and May's and the Defendants' counsel's ability to respond quickly and effectively to events arising in this litigation is amply demonstrated not only by this letter but also by their preparation for and ability to make excellent submissions at this hearing. I think that that is a material factor that I will have to consider in relation to the impact on any trial date of any allowed amendments.

27. On 30 November 2020 the Advinia Parties issued their application. By their application notice they seek as follows:
- (1) first, permission for Advinia to amend the Particulars of Claim and for AHC to amend the Amended Defence and Counterclaim pursuant to CPR Rule 17.1(2)(b);
  - (2) second, if necessary, permission for Advinia to withdraw an admission pursuant to CPR Rule 14.1(5); and
  - (3) thirdly, if necessary, to adjourn the two-week trial.
28. On 1 December 2020 the Wordley Partnership was informed that the application had been released to a judge and was asked for its dates to avoid. On Friday, 4 December 2020, having chased Chancery listing, Wordley Partnership was told that it was looking at February 2021 for an application to be heard with this time estimate. On Monday, 7 December 2020 the Advinia Parties therefore applied to the interim applications judge for expedition of the application. They asked for their expedition application to be listed on Friday, 11 December but on 9 December, having followed up with Chancery listing, Wordley Partnership was told that the expedition application had not been listed for Friday in respect of which the list was full, but it could be listed on Monday, 14 December 2020.
29. Throughout this time Slaughter and May were maintaining that the application was not urgent and should be heard at the pre-trial review, the expedition application should be decided on paper and that none of their three instructed counsel was available to attend a one-hour hearing of the latter application, since they were all detained by hearings and hearing preparation until 18 December 2020. They also maintained, and this has been persisted in before me, that the Advinia Parties went about the expedition application in the wrong way, and they pointed to a criticism that I made of the

way they went about making a similar application in relation to the matters that were before me in June. I think that that was a very different situation, and I make no criticism of the way the expedition application was brought before the court.

30. As it turned out, the expedition application was successful. Mr Justice Snowden heard the application on 14 December 2020 and ordered that the application for permission to amend be listed to be heard on an expedited basis in the three-day window from Monday, 21 December 2020. That is how we have got to this hearing.
31. Following the hearing before Mr Justice Snowden, on 15 December 2020 the Advinia Parties served the Defendants with further drafts of their proposed amendments. The Defendants sought to make a big play in their skeleton argument on the fact that no new application notice had been issued in respect of these further changes. But in my view that was overplaying the technicalities, and, in fairness, it was not pursued before me by Mr Cumming. If I had thought that the Defendants had been disadvantaged in any way by having to deal with these further amendments without an application notice, then there may have been some justification for the complaint. But I agree with Mr Hubbard that this is really quite unnecessary quibbling with everything.
32. The 15 December further amendments were essentially twofold: (i) first of all, to withdraw the proposed estoppel plea in the Amended Defence and Counterclaim, and (ii) secondly, to plead a claim for restitution on the basis of unjust enrichment in the Particulars of Claim in respect of two allegedly mistaken payments. The Advinia Parties say that the facts had been pleaded by them since February 2019 and this causes no prejudice.

### **Succession Issue Amendments**

33. So I turn to the Succession Issue amendments. This was an issue that I must say I was a little troubled by at the June hearing. In my judgment then, at paragraph 13, I said as follows:

"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."

The reason I was concerned was because there was no documentary evidence of such an assignment of rights and obligations to the First Defendant. But as the parties seemed to accept that that was the case, there was no reason to doubt that the assignment had taken place. Indeed, it appeared to be a necessary part of Advinia's claim that I was considering that the English BTA governed relations between the First Defendant and Advinia.

34. That novation to the First Defendant of the rights and obligations of BCH under the English BTA is what is now questioned by Advinia. They say that because the Defendants had said that that had happened, they had assumed it to be true, and their claim had proceeded on that basis. However, they have recently thought twice about this, and insofar as they have previously admitted that to be the case, they now effectively want to put the Defendants to proof of it. The reason why they wish now to challenge this is because they want to say that the First Defendant has no title to sue Advinia under the English BTA in respect of, particularly, the Opening Balance Liabilities that I referred to earlier, the claim that is said to be worth some £6.5 million, although that may include Scottish liabilities which would be unaffected by this.

35. However, the submission is not so simple. As Mr Cumming has pointed out, at the end of the day, ie at the end of this litigation, there will be an accounting between the parties, and the **“net financial**

**position**" (as I called it in paragraphs 105 to 107 of my June judgment) will be determined.

Whether the First Defendant is an express trustee, as provided for in the BTA, or a trustee de son tort, if the BTA does not bind the First Defendant and as Advinia now wishes to allege, is neither here nor there on an accounting between the parties. Similarly, on the other side, it should not matter which Bupa party is making the claim in respect of sums due from Advinia. The only issue really should be whether the sums are indeed due from Advinia under the BTA, and if they are, that those sums will go into the calculation of the overall net financial position between the parties.

36. This is therefore, it seems to me, a technical point which leads in practical terms nowhere, and that is even more so in the context of it being assumed not to be a point at all ever since the claim was begun, and indeed from before the takeover.

37. So how has this been pleaded? In its Particulars of Claim, Advinia pleaded as follows, paragraph 6:

*"The claimant understands that BCH Limited's trustee role under the English BTA has been taken over by BCH Holdings, that is the First Defendant."*

It then went on to claim that the First Defendant had breached the English BTA in not handing over the trust monies. So the fact that the First Defendant was bound by the English BTA was fairly central to the claim as originally put.

38. In response, the Defendants pleaded as follows in paragraph 17 of their defence:

*"As averred in paragraph 6 (which is admitted) BCH Limited has left the Bupa group. This occurred in or about December 2017, from which date BCH Holdings assumed or succeeded to BCH Limited's rights and obligations under the English BTA, including (as*

averred in paragraph 6) in relation to its trustee role under the English BTA. It is admitted, if alleged, that BCH Holdings now receives the sums referred to in clause 11.4 of the BTAs, previously received by BCH Limited. [As read]"

The "*in or about December 2017*" might have been a clue that this was not a simple novation by one dated document.

39. Bupa was thereby confirming what Advinia had pleaded in paragraph 6, namely that the First Defendant had assumed or succeeded to BCH's rights and obligations under the English BTA. In other words, it was saying that there had been a novation of BCH's rights and obligations under the English BTA to the First Defendant. Of course, at that stage, in December 2017, all relevant parties -- the First Defendant, BCH, and Advinia -- were all part of the Bupa group. All the information in relation to any such novation would therefore be solely contained within the Bupa group or the Defendants. Advinia says that because of that, it had no reason to doubt what had been said by the Defendants in their Defence and attested to by a statement of truth.

40. In its reply to that case, Advinia pleaded as follows in paragraph 4:

"As averred in paragraph 17 [of Bupa's defence], BCH Holdings, the First Defendant, has succeeded to BCH Limited's rights and obligations under the English BTA. References hereafter to the First Defendant, BCH Holdings, include where relevant references to BCH Limited. [As read]"

41. The Defendants say that this paragraph in the Reply amounts to an admission that the novation took place, and that therefore Advinia requires the permission of the court to withdraw it under CPR Rule 14. This descended into a rather unnecessary argument about whether this was an admission and whether, given that Advinia is only applying at this stage for permission to amend the Particulars of

Claim, while recognising that the Reply will, in due course, have to be amended to withdraw that admission, the court can give some form of prospective permission to withdraw the admission in Reply should the Defendants maintain that the novation took place, and I should say that the Defendants do maintain that the novation took place.

42. In my view, not only was this an admission by Advinia that the novation had taken place, but there was positive reliance on it having taken place in order to found the claim. It was relied upon for the purposes of the *ex parte* application to Mr Justice Nugee, and it was relied on in the summary judgment application that I heard. It was not Advinia just going along unthinkingly with an averment of the Defendants'. It was a crucial part of the way that it was putting its case. I therefore do think it is appropriate to consider the application as being in part an application to withdraw an admission, and I will come on to deal with the principles involved in such a case.

43. Advinia has offered an explanation as to how they came to suspect that they might have wrongly admitted this. Ms Proctor explained in her witness statement that because there was some disclosure in September 2020 from the Defendants that suggested that the wet rooms issue had arisen earlier than the Defendants had previously pleaded it had, they began to suspect that other matters within the Defendants' exclusive knowledge might not have been accurately pleaded or disclosed. I have to say that I find this a little far-fetched. These two issues are very far apart. But for whatever reason, at the beginning of October 2020 the Wordley Partnership started asking questions about the novation. I have described above the letters and the RFI that they sent. Mr Hubbard criticised the Defendants' responses or lack of any helpful or meaningful response.

44. Eventually, in Slaughter and May's letter of 29 November, they said:



"As we understand, the succession/novation arose from the course of various dealings and understandings between the relevant parties (there is no single document in which it is conclusively contained). [As read]"

45. Mr Hubbard said that this did not sound much like a novation, and certainly not one in which prior written consent had been given. However, I remind him that this was all intra Bupa at that stage, and some form of consent would likely have been given by the relevant party.
46. Mr Cumming says that the Defendants have accepted that there is not one single novation document, indeed that was made clear in Slaughter and May's letter, but that it would be necessary to go back to that time to see how this happened and whether there are memoranda recording this and how it was generally sorted out. It seems to me that at the time Advinia would have wanted to be satisfied, as it knew BCH was leaving the group, that all parties were contractually obliged to perform the BTA and that they would want to be satisfied of that prior to the takeover. That must have been assumed to have happened not only prior to the takeover, but also in the dealings between the parties leading up to the proceedings where the netting-off was taking place, including in relation to the Opening Balance Liabilities.
47. The whole point of things being admitted is that parties can move on and not be bothered with investigating such matters. There have been nearly two years since the novation was admitted, and it is even longer back to when it must have been assumed by the Advinia Parties to have taken place. After such a length of time for such an admission to be withdrawn shortly before the trial is a very serious step indeed and not one which the court should indulge lightly.

48. As I have said above, I consider that Advinia has admitted the truth of a part of the Defendants' case in its reply, and that that is therefore within CPR Rule 14.1(1) and (2). That admission was consistent with its pleaded case in the Particulars of Claim that it now seeks to withdraw.

Accordingly, the permission of the court is required under CPR Rule 14.1(5).

49. The CPR Practice Direction to Rule 14 in paragraph 7.2 sets out the relevant applicable principles relating to a withdrawal of an admission. Paragraph 7.2 says as follows:

"In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including:

- (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
- (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
- (c) the prejudice that may be caused to any person if the admission is withdrawn;
- (d) the prejudice that may be caused to any person if the application is refused;
- (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
- (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
- (g) the interests of the administration of justice."

50. Mr Justice Briggs, as he then was, in *Kojima and HSBC Bank Plc* [2011] EWHC 611 Ch paragraph 19 described these as:

"... a useful and uncontentious distillation of earlier authority as to the discretion to permit the withdrawal of admissions."

51. Obviously every application to withdraw an admission will turn on its own facts. Mr Cumming referred me to the helpful explanations of the principles by Mr Justice Popplewell, as he then was, in

*Bayerische Landesbank Anstalt v Constantin Medien AG* [2017] EWHC 131 (Comm), and he said at paragraph 55:

"If the evidence which the party seeking to withdraw an admission chooses to put forward in support of that application involves an explanation which is inadequate or unsatisfactory or in some way deficient, then that is a factor which the court will take into account. [As read]"

He more particularly relied upon paragraphs 67 and 75, in which Mr Justice Popplewell said as follows:

"All this must be seen against the background of the circumstances in which the admission was first made. It must have been the subject of the most careful consideration. It was contrary to the findings which had been made at the trial before Mr Justice Newey. It was made with the benefit of disclosure from that trial. It must have been made with the benefit of legal advice with the involvement of experienced solicitors and leading and junior counsel. One would have expected it to be informed by expert advice. There can be no doubt that there would have been close focus on the terms of Mr Justice Newey's judgment which set out the evidence available to him, including written evidence which had emanated from members of the Formula 1 team. This is not, therefore, a case in which the admission could be said to have been made negligently, carelessly or casually. It must have been a careful and fully considered decision. That provides all the more reason for careful scrutiny of why it is said to be wrong. [As read]"

And at 75 he said:

"A further reason for refusing the amendment is that in my view it is the withdrawal of an admission for tactical forensic advantage rather than in order to define the true issues in the proceedings. [As read]"

52. Mr Hubbard pointed me to two other paragraphs in the same case in order to distinguish it from our situation. In paragraph 454, Mr Justice Popplewell said that:

"Each case turns on its own facts and all the circumstances of the case must be taken into account and Rule 14.1(5) confers a wide discretion. [As read]"

And it is clear from paragraph 62 that the case that was under consideration by Mr Justice Popplewell was one in which the person applying to withdraw the admission was the person who was in a position to know the truth or otherwise of that which has been. So it was a different situation to this case, where the only information in relation to the novation lies within Bupa, not within Advinia, which is the party that is seeking to withdraw the admission.

53. I take on board those distinctions with that case, but I think that all that Mr Justice Popplewell was actually doing was essentially working through the requirements of paragraph 7.2 of the Practice Direction, and that is the approach that I propose to take to this case.

54. So taking each of the paragraphs of 7.2 in turn:

- (a) this concerns whether new evidence has come to light. That is not the reason why this application is being made. There is no new evidence that has come to light since this admission was first made. Rather, Advinia merely now has a suspicion that the novation may not have happened in the way that it thought it might have happened.
- (b) This concerns the conduct of Advinia in making the admission. Mr Cumming submitted that this must have been carefully thought through by the solicitors and leading and

junior counsel who were then acting for Advinia at the time the admission was made. Furthermore, the claim itself was predicated on there having been a novation, and the Reply made averments on the basis of its having happened. Also, as I have said, I cannot understand why this would not have been clarified as part of the due diligence process prior to the takeover.

(c) As to the prejudice that will be suffered by the Defendants if the admission was allowed to be withdrawn, the Defendants submit that this would be substantial, and in particular, because of everything that would need to be done if the withdrawal is allowed, they say the trial date would be lost and it would be severely prejudicial to the Defendants. The Defendants say that they would have to conduct wide-ranging factual enquiries in order to re-plead and adduce further evidence in response. Mr Hubbard strongly criticised any such suggestion of wide-ranging factual enquiries being needed and says that this is all exaggerated. The further pleadings that may need to be made, amended in the light of this, may include (so Mr Cumming says) issues of estoppel, rectification and restitution, and the parties' understanding and intentions at the time of the BTAs and the novation. It may be necessary even to seek to join BCH, which is outside the group.

I did not at first understand the reference to rectification, but Mr Cumming explained it is because of a small but potentially quite important difference between the Scottish and the English BTAs, the latter of which was confined to an indemnity to a particular Bupa entity, whereas the former had an indemnity to the Bupa group generally.

He said that there were over 40 drafts of the BTAs, so the preparation for an investigation into such a rectification argument would be incredibly burdensome at this critical time, shortly before the trial.

In relation to estoppel, this would not only be an estoppel arising during the course of these proceedings, but also going back to Advinia's conduct and assumptions from prior to the takeover, and the restitution argument comes into play in terms of Advinia being liable to Bupa generally in respect of liabilities it has discharged on behalf of Advinia. The availability of personnel who would need to be consulted at this time will not be good as it is Christmas in the middle of a worsening pandemic, and those personnel being heavily engaged on other matters to do with the pandemic and also Bupa's end-of-year accounts. Mr Cumming also said there would be further disclosure required and the parameters of such disclosure would have to be finalised, probably at the pre-trial review, which is itself very close to the trial. He also said that further witness evidence would have to be prepared.

Advinia, of course, say that this is all exaggerated and they are probably correct to some extent that that is so. However, the suggestion that because Bupa plead the novation as part of its defence, that the basis for such a plea should be readily to hand is itself an exaggeration, in my view. Where such has not been an issue for nearly two years, the Defendants were entitled to assume that they did not need to prepare for such an issue. The withdrawal of an admission like this would give rise necessarily to other pleas such as estoppel and/or restitution if the Defendants were unable now to prove the novation.

- (d) Turning to (d) in the Practice Direction, the prejudice to Advinia was said by Mr Hubbard to be extreme if it is not allowed to run the succession defence. It would mean, so he says, the court potentially proceeding on a false basis, namely that the novation took place, and that it would only be doing so because the Defendants have presented that false basis from early on in the proceedings, which Advinia was led to believe must have been the case.

However, I think this is exaggerated. Clearly the parties, both within these proceedings and before, assume that BCH's rights and obligations had been novated to the First Defendant, and there is no question that the Defendants have incurred liabilities on Advinia's behalf which it is liable to reimburse them for. All of Advinia's arguments in relation to the Opening Balance Liabilities are still open to them without the amendments. The precise entity that is claiming is really neither here nor there. What matters, as I have already said, is that there will be an accounting of the net financial position between the parties, and payment whichever way the balance lies. I do not think that Advinia is substantially prejudiced by not being able to run the Succession defence, and to the extent that it is, it is really its fault in raising the matter so late and so close to the trial, having admitted it for so long.

- (e) the next matter is the stage at which the application is made. As is clear from what I have said, this is shortly before the trial and in my view that is a highly material factor.
- (f) the prospects of success are impossible to say, except that I have questioned where it really gets Advinia if there has to be an accounting between the parties.
- (g) This concerns the administration of justice, which will obviously not be well served by a late adjournment of the trial.

55. So on the basis of the above factors, and my findings in respect of them, I am not prepared to grant permission to withdraw the admission in relation to the succession issue. For the same reasons, I would not have been prepared to grant permission to amend to plead the Succession Issue. That aspect of the application is therefore dismissed.

### Legal Principles in relation to permission to amend

56. Before turning to the negligent mis-statement proposed amendments, I should deal with the legal principles around permission to amend. These are largely uncontroversial between the parties.

57. Both counsel referred me to the general principles applicable on amendment applications helpfully summarised by Mrs Justice Carr, as she then was, in *Quah Su Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraph 38, and this is what she said there:

"(a) Whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

(b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

(c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

(d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

(e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;



(f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

(h) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

58. That statement about lateness echoed a passage in the judgment of Lord Justice Briggs, as he then was, in *Hague Plant Limited v Hague* [2014] EWCA (Civ) 1609 that:

"Lateness, used in this way, is a factor of almost infinitely variable weight, when striking the necessary balance in determining whether or not to permit amendments. The weight to give to this consideration in any particular instance is quintessentially a matter for the case management judge, not lightly to be interfered with on appeal unless shown to have been seriously flawed either by taking into account irrelevant matters, omitting relevant matters, or perversity."

59. The concept of lateness is therefore fact-sensitive. It is always a question of striking a balance. The balancing of the relevant various relevant factors has to lead to a just outcome for all parties in the circumstances of that particular case.

### **Negligent Misstatement Issues**

60. So turning to the negligent mis-statement issues, the relevant sections of the amended Defence and Counterclaim that include the proposed amendments are as follows:

- (1) first, paragraphs 26 to 38, in which AHC alleges breaches of warranties contained in the SPA in relation to the wet rooms issue;
- (2) secondly, paragraphs 38A to 38F are the allegations of a new negligent mis-statement claim, and this relies principally on an email of 8 December 2017 from a Ms Kirsty Dace to Mr Mark Cash; and
- (3) thirdly, paragraphs 39 to 47, which AHC says is the original negligent mis-statement claim but which has been added to in the proposed amendments.

61. The Defendants have consented to the first item, the amendments to paragraphs 26 to 38, on the basis that some of the amendments arise out of late disclosure by them. They do, however, object to the other amendments and have grouped them together on the basis that they are all essentially new negligent mis-statement claims, although I think Mr Cumming adjusted that slightly during his submissions. AHC says that to regard them as all new negligent mis-statement claims is a misreading of the proposed amendments and that item 3 above, the original negligent mis-statement, is what has always been there, and there could be no proper basis for opposing the amendments to that section. They say that there is more justification for the Defendants' opposition to paragraphs 38A to F on the basis that this is wholly new, albeit all based on the same factual context, but that permission should be granted because it does not imperil the trial date.

62. The original plea of negligent mis-statement is indeed contained in paragraphs 39 to 47. That case was based on the following:

- (1) that the Defendants knew prior to completion of the SPA that the SCI's consent to the transfer of the Scottish care homes to Advinia was conditional on significant improvements being made to

those homes, including in particular the installation of wet floor showers into each bedroom at each such home, except for one home.

- (2) when the defendants notified Advinia that the SCI had given its consent to the transfer (and that was by an email from Ms Alexandra Eadie of 20 December 2017, and again when the Defendants sent Advinia the certificates of re-registration by an email from Ms Dace of 22 January 2018, it failed to draw that condition which they call the “**wet rooms condition**” to Advinia's attention.
- (3) that failure was negligent and made the relevant emails misleading; and
- (4) but for such negligence, AHC would not have completed the SPA on the terms that it did.

63. As a result of what Advinia describes as late disclosure by the Defendants as to their communications with the SCI, the amendments to paragraphs 31 to 38 of the Amended Defence and Counterclaim were made. This details what the Defendants knew of the conditions that the SCI would be imposing on any transfer of the care homes to Advinia. This background material, which the Defendants have agreed should be allowed in, is the basis for not only the breach of warranty claim but also the negligent mis-statement claims. Therefore, the amendments to paragraphs 39 to 47 containing the original negligent mis-statement claim build on those averments.

64. AHC pleads one further email from Mr Charles Richardson, sent to AHC on 21 December 2017. That email merely attached the email of 20 December 2017 of Ms Eadie to AHC, an email that, as I have referred to, is in the original pleading and relied upon. I have some difficulty seeing how the Defendants can properly object to these amendments.

65. Just going through them in a little more detail:

- (1) the amendment to paragraph 39 merely inserts a shorthand definition of a phrase that was already pleaded.
- (2) The amendment to paragraph 40 inserts merely the word "then" to clarify that the recipient of the relevant email is no longer the finance director of AHC.
- (3) The amendments to paragraphs 41 and 43 are short factual clarifications, and I did not understand Mr Cumming to be actively opposing them.
- (4) The objection to paragraph 42 was largely based on an amendment to change the words in there of "*failed to refer to the fact*" (namely the wet rooms condition), to "*concealed*" that condition. But as Mr Hubbard accepted that he was not making an allegation of knowing wrongdoing by making that change, he also sensibly agreed in his reply submissions to the original wording going back into this paragraph. He did also make the point that this what is being said in this paragraph, is essentially a matter for submissions and for the court, namely the way that the relevant email would have been understood by a reasonable person in the position of AHC. That is a legal question and does not depend on what was meant by the maker of the representation.
- (5) The amendments to paragraphs 45 to 46 concern AHC's state of mind and reflect the evidence which they have already put in, and
- (6) the amendments to paragraph 47 plead, by way of setting out the basis on which the Defendants owed AHC a duty of care to see that any information which it supplied to AHC about satisfaction of the BTA condition was accurate, that the Defendants knew that AHC was relying on it to supply such information.

66. The new email is pleaded in paragraph 41(a). As I said before, this email merely attached the earlier email of Ms Eadie which had been sent to someone else at AHC. Ms Eadie's email is the one that contains the alleged negligent mis-statement, being that it asserted that the BTA condition had been satisfied without explaining that it was still conditional on complying with the wet rooms condition.

In repeating that misrepresentation, Mr Richardson was basically stating it again. The Defendants may want to deal with this in Mr Richardson's evidence, and he has already served a witness statement for the trial, so that should not be a problem. I agree with Mr Hubbard that the real issues that arise are essentially legal, namely what the email would have conveyed to a recipient and whether Mr Richardson was negligent in not checking the contents of Ms Eadie's email before forwarding it.

67. Mr Jeens, the partner at Slaughter and May who put in a witness statement on this application on behalf of the Defendants suggested that they might want to get evidence from Ms Eadie in relation to this, but that this would be difficult because she had left Bupa and was now working elsewhere. However, Ms Eadie's email was at the heart of the original negligent mis-statement claim and the Defendants were not intending to rely on any evidence from her at trial. I believe that it is highly unlikely that they would want to do so in relation to these amendments, which do not materially add to the allegations made against her.
68. The Defendants say that the 21 December email was uncovered during the disclosure exercise which Advinia undertook in July 2020. Advinia does not deny that but says that it would not, however, have been sensible to amend AHC's Amended Defence and Counterclaim then in order to rely on such an email and before the Defendants had given full and proper disclosure in relation to the wet rooms issue, since it was clearly preferable to introduce all amendments in relation to that issue at the same time, as was in fact done, rather than piecemeal. I think that in those circumstances they should probably have notified Bupa that this is what they were intending to do. They also say that the 21 December email became more significant in terms of AHC's claim in negligent mis-statement when it became clear on 13 November 2020 that the Defendants would not be serving evidence from either Ms Eadie or Ms Dace, ie the individuals responsible for writing two of the emails at the

centre of AHC's claim in negligent mis-statement, and the 21 December email therefore ties in Mr Richardson to give evidence about it, he being one of the Defendants' witnesses. Mr Cumming sought to make a play on this reason, but I think the point that was being made was that it was precisely because Mr Richardson was giving evidence that it would not be burdensome on the Defendants to deal with it for the trial.

69. In all the circumstances, but particularly because I do not believe that it changes materially the Defendants' original case on negligent mis-statement and because I believe that the Defendants are well able to deal with this amendment and be ready for a trial in February, I grant permission to amend those paragraphs of the Amended Defence and Counterclaim.
70. Turning to the new negligent mis-statement claim, AHC seeks permission in relation to paragraphs 38A to F of the Amended Defence and Counterclaim. This is, in my view, not a wholly new claim. It is still based on the same underlying facts, namely that the Defendants failed to bring to AHC's attention the wet rooms condition that the SCI had imposed. That is the basis for the existing negligent mis-statement allegation, and it is the reason why AHC says that Ms Dace's email of 8 December was similarly misleading. The same loss and damage is claimed as a result.
71. The email was sent by Ms Dace of the Defendants to Mr Mark Cash of Advinia on 8 December 2017. Both Mr Cash and Dr Kanoria have explained in their evidence before me that the email was unearthed in the course of preparing Advinia's reply fact evidence. The precise date when it apparently came to the attention of Advinia's legal representatives was 11 November 2020. It had not been caught, apparently, by either side's searches pursuant to the DRD, although Mr Cumming said that it may not have been considered relevant by the Defendants, and indeed he said in his submissions that it is not relevant to the issues in the case.

72. Turning to the emails themselves, Mr Cash asked Ms Dace in his email for "*a summary by home of all the 'unfulfilled' CAPEX plans/wishlist that were put together by H.MGRS managers/RDs*". Ms Dace responded to Mr Cash saying that:

"I'm afraid this wouldn't be something we would be able to provide as we wouldn't have a list, and to be honest, they would be minimal anyway. [As read]"

This was pleaded in paragraphs 38A and 38C of the proposed amendments.

73. AHC's complaint, on the basis of that exchange, as set out in paragraphs 38D to F, is that a reasonable person in the position of Ms Dace would have understood from Mr Cash's email that AHC wished to know what future CAPEX (capital expenditure) AHC might be required to spend on the relevant homes. By failing to refer, in her answer to that question, to the money which it would be necessary to spend in order to comply with the wet rooms condition, Ms Dace's email, it is said, was misleading. Needless to say the Defendants say that it was not dealing with the wet rooms condition at all and on its terms it is therefore clearly irrelevant. That argument can clearly be made at the trial.

74. There are other amendments involving reference to Ms Dace and correspondence that she had with the SCI in paragraphs 31A and B, which the Defendants do not object to. Furthermore, she was referred to in the existing negligent mis-statement claim in paragraphs 41 and 43, in which her email of 22 January 2018 was described as misleading in that it did not expressly refer to the wet rooms condition. That email was one of the main planks of the negligent mis-statement claim, AHC having relied on it in entering into and completing the SPA. Ms Dace was accused of negligence in

failing to explain to AHC the wet rooms condition. It can be seen that Ms Dace was always at the centre of the negligent mis-statement allegation, and I am therefore very sceptical of the Defendants' assertion that because of the amendments it may now be necessary to get evidence from Ms Dace. I would not wish to stop them doing so, but I am not prepared to accept that that is a reason to disallow the amendments and that it would imperil the trial date. They chose not to serve witness statements from Ms Dace on the basis of the original claim which pointed the finger at her, for whatever reason, and it would be opportunistic for them to say that evidence from her is now essential.

75. Mr Cumming sought to suggest that there was a distinction in the way the two allegations were pleaded against her. In the original it was a case of failure and omission; now it is said she made positively misleading statements which she knew AHC would be relying on without making independent enquiry. But I do not believe that the essential character of the allegation has changed much at all, and I do not accept that this is a weighty factor against the grant of permission.
76. Furthermore, I do not believe that any more disclosure or factual evidence is required to deal with these amendments and I consider that Mr Jeens and Slaughter and May have greatly exaggerated what it would be necessary for them to do if the amendments are allowed in. The further consequential amendments would not be difficult to do, and the ease with which this new allegation can be absorbed within the Defendants' trial preparation has been amply demonstrated by the way in which they have managed to file voluminous evidence and submissions at short notice on this application.



77. While I do not underestimate the pressures and time and expense of preparing for a trial of this sort, I really do not believe there is any material prejudice to the Defendants in allowing this allegation to be run at trial.

78. In the circumstances, although it is late, and although the explanation for how the email came to light is rather thin, in my judgment it is not too late for the parties to be able to prepare for a trial in February that includes this extra allegation. Without the Succession Defence there is no need for any adjournment of the trial, and I propose to allow all the amendments to the Amended Defence and Counterclaim on the usual terms as to costs.

### **Other Amendments**

79. It now remains for me to deal with one or two outstanding matters. First of all, the new plea of unjust enrichment proposed to be made in the Particulars of Claim in paragraphs 18A and 18B. That picks up the allegation that is made in the Reply by Advinia that there were two mistaken payments that should not have been paid as part of the Opening Balance Liabilities, and that that should be taken account of in the overall finding of the net balance between the parties.

80. What they want to do is to bring that into the Particulars of Claim and to make a formal claim for restitution in respect of those mistaken payments, and even though I'm not really sure that it takes the matter very much further, I cannot really see that there can be any proper objection to them doing so. All of the factual basis has been pleaded for some time in the Reply, and this is merely tidying up the pleadings so that it is clear that the mistaken payments do lead to a claim for unjust enrichment, and that is the basis upon which they put it.

81. Mr Cumming made a few short points in relation to the unjust enrichment allegation, but I did not understand him to be strenuously resisting it. He did make the point that if the Succession amendments were not allowed, there would have to be a tweak to paragraph 18A, and I think that was accepted by Mr Hubbard. So I am prepared to allow the amendments to paragraphs 18A and 18B in relation to unjust enrichment, subject to that tweaking by removing Roman (i) in paragraph 18A.
82. Paragraph 48 of the Amended Defence and Counterclaim concerns loss and damage. Again, I do not think that was strenuously resisted and in any event loss and damage is reserved for stage 2 of the trial, this being a split trial and only liability being considered in February. So I will allow that in.
83. Two final short matters concerning paragraphs 9 and 12 of the Amended Defence and Counterclaim. Paragraph 9 was to add the words in "*by way of example but without limitation*", and then there are following the existing pleading of three subparagraphs, with the particulars being provided about responses from BCH Holdings to AHC's request. I do not think it is appropriate to leave this pleading open-ended by amendment at a very late stage in that form. So I disallow that amendment.
84. But paragraph 12, which is also in the same pleading, which seeks to add the words "*or otherwise supply information to AHC so close to the deadline that AHC did not have a reasonable opportunity to consider it*", I think that should be allowed in because it ties in (ii) in that paragraph to the overall averment that is being made therein.