Neutral Citation Number: Double-click to add NC number

Case No: BL-2022-000171

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

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 August 2022

Before :

Deputy Master Arkush

- -

Between :

OCEANFILL LIMITED	**Claimant**
- and -	
(1) NUFFIELD HEALTH WELLBEING LIMITED	**Defendants**
(2) CANNONS GROUP LIMITED	

- -
- -

Stephen Jourdan Q.C. and Imogen Dodds (instructed by **Teacher Stern LLP**) for the Claimant
James Tipler (instructed by Eversheds Sutherland (International) LLP) for the Defendants

Hearing date: 1 July 2022

- -

JUDGMENT

DEPUTY MASTER ARKUSH :

1. This is the application of the Claimant ("Oceanfill") for summary judgment against the Defendants (respectively "Nuffield" and "Cannons") by notice dated 29 April 2022. The hearing took place remotely on 1 July 2022 when the oral arguments took up most of 1 day. The hearing was then adjourned so that I could consider the submissions and documents and deliver this written judgment.

2. The Claimant was represented at the hearing by Stephen Jourdan Q.C. and Imogen Dodds of counsel and the Defendants by James Tipler of counsel. I am grateful to them for their written skeleton arguments and helpful oral submissions.

3. The Claimant is the registered freehold owner of Centaur House, 91 Great George Street, Leeds LS1 3BR. This claim concerns the ground and lower ground floors of Centaur House (the "Premises"). By a Lease dated 29 September 1998 the Premises were let to Nuffield, then known as Vardon Health and Fitness Limited for a term of 25 years commencing on that date (the "Lease"). At all relevant periods the Premises have been used as a gym. Cannons, then known as Vardon PLC, was a party to the Lease as guarantor of Nuffield's obligations under its terms.

4. In 2000 the Lease was assigned to Virgin Active Limited ("VAL") which continues to be the tenant of the Premises under the Lease. This was effected by a Licence to Assign, Authorised Guarantee Agreement and Guarantee dated 15 September 2000 to which the parties were (1) Oceanfill, (2) Nuffield (at that time known as Cannons Health & Fitness Ltd), (3) VAL, (4) Voyager Group

Limited (as guarantor for VAL), (5) Cannons (the "Licence to Assign"). Pursuant to the terms of the Licence to Assign Nuffield guaranteed the performance of VAL under the terms of the Lease and covenanted to indemnify Oceanfill against any non-performance. The Licence to Assign further provided that Cannons guaranteed the performance of Nuffield of its obligations arising under the Licence to Assign.

5. By clause 4 of the Lease the tenant covenanted to pay to the landlord the yearly rent of £112,000, subject to revision on the rent review dates in the Fourth Schedule. As a result of successive rent reviews the current annual rent is £209,875.36 exclusive of VAT. By clauses 4.5 and 4.6 of the Lease the tenant covenanted to pay as additional rent any VAT chargeable in respect of the rent and any other sums payable by the tenant pursuant to the Lease.

6. Oceanfill's claim in these proceedings, and on its application for summary judgment, is for arrears said to be due from the tenant under the Lease. These comprise for the most part the rent for the quarters starting on 29 September 2021 and 25 December 2021 and some additional sums for legal costs and disbursements payable under the Lease. The total claimed is £141,255.22.

7. The sums comprised in the arrears claimed by Oceanfill would in normal course have fallen due to be paid by VAL as the current tenant under the Lease. However, on 12 May 2021 the High Court approved a restructuring plan for VAL pursuant to Part 26A of the Companies Act 2006 (the "Plan"). An essential issue in these proceedings is whether the legal effect of the Plan re-wrote the terms of the Lease and released the tenant from liability for rent and other sums, so that the sums claimed by Oceanfill have not fallen due pursuant

to the Lease (as Nuffield and Cannons contend), or whether the Plan merely altered the liability of VAL by operation of law, leaving unaffected the liabilities of Nuffield and Cannons under the Lease and Licence to Assign (as Oceanfill contends).

8. In order to address this issue, it is necessary to consider the terms of the Plan and analyse its legal effect.

9. The Plan was approved by Snowden J, as he then was, under Part 26A of the Companies Act 2006 ("Part 26A"), having been proposed by VAL and other group companies. His reasons are set out in a detailed written judgment dated 12 May 2021: *In re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch). In very summary terms, the reason for the proposed Plan was that the pandemic forced gym and leisure facilities to be closed for lengthy periods, depriving VAL and group companies of the income required to pay the rent and placing them in serious financial difficulties. The sanctioning of the Plan was opposed by certain landlords of the gym premises used by the companies, who were owed approximately £30 million in rent and other unsecured debt.

10. Under the Plan, Oceanfill is a "Class D Landlord" and the Lease is a "Class D Lease". The effect of the Plan in respect of Class D leases was summarised by Snowden J in his judgment at [66] as follows:

> "*a) From the Restructuring Effective Date, no past, present or future rent, service charge, insurance or other liabilities will be payable and the relevant Plan Company will no longer have any obligations towards them. In exchange, each Class D Landlord will be entitled to a Restructuring Plan Return.*
>
> *b) Each Class D Landlord will have a rolling break right exercisable on 30 days' notice. If a Class D Landlord serves a Notice to Vacate within six months of the Restructuring Effective Date, the relevant Plan Company*

will pay 30 days' worth of Contractual Rent and, to the extent that this payment is insufficient to provide the relevant Class D Landlord with a Restructuring Plan Return, they will be entitled to receive a further payment to make up the shortfall,"

11. This was effected by Schedule 2 paragraph 5.1 of the Plan, in these terms:

"*Subject to Clause 5.4(b)(i), with effect from the Restructuring Effective Date, all of the Tenant Plan Companies' obligations and Liabilities (whether past, present or future including dilapidations claims and claims in respect of Class D Lease Rent Arrears) pursuant to each Class D Lease or in any way related to the Class D Premises shall be irrevocably and unconditionally compromised, released, discharged and brought to an end and any sums payable under or in relation to each Class D Lease, other than any sums which are due under this Restructuring Plan, shall be reduced to nil, in exchange, consideration, and in full and final settlement of all Liabilities to each Class D Landlord in respect of each Class D Lease for:*

(a) if the Class D Landlord serves a Notice to Vacate in accordance with Clause 5.4(a), the entitlement of the Class D Landlord to receive the amounts outlined in Clause 5.4(b); or

(b) otherwise (including where Landlord Determination Action is taken by a Class D Landlord), the entitlement of the Class D Landlord to receive a Compromised Property Liability Payment in an amount equal to its Restructuring Plan Return in respect of its Allowed Claim in accordance with the terms of this Restructuring Plan."

12. Paragraph 7 of the Plan implemented Schedule 2 and contained the following provision at paragraph 7.1:

7. IMPLEMENTATION OF ARRANGEMENTS WITH LANDLORD CREDITORS

7.1 In accordance with and at the times specified in the Restructuring Implementation Deed and in consideration of the rights provided to the Landlord Creditors under this Restructuring Plan:

(a) Schedule 2 (Landlord Compromise Terms) shall take effect; and

(b) subject to Clause 7 .2:

(i) each Landlord Creditor shall waive, and release, each Plan Company, any other member of the Group and VHL from any actual or potential default, event of default or

> *other breach by each Plan Company of the terms of any Lease between that Landlord Creditor and the relevant Plan Company and any consequences thereunder existing as at the Restructuring Effective Date or arising before the Restructuring Effective Date or as a result of the terms of this Restructuring Plan or any Plan Related Event;*
>
> *(ii) no Landlord Creditor, from such time, shall be entitled as a result of any such waived actual or potential defaults, events of defaults and breaches to take any Landlord Action, and any attempt by a Landlord Creditor to change or vary the terms of any Lease without the written consent of the Tenant Plan Company shall be void and unenforceable; and*
>
> *(c) Schedule 2 (Landlord Compromise Terms) shall be deemed to take effect, for all purposes whatsoever and without limitation, as having been made by deed.*

13. The Plan also provided, at paragraph 7.4, as follows:

> *"Save as expressly provided in this Restructuring Plan or in the Restructuring Implementation Deed, nothing contained herein effects a modification or cancellation of any Landlord Creditor's rights under the Leases to which it is a party, other than in the manner and to the extent explicitly contemplated herein or therein."*

Neither side made any submissions on this provision. Its terms seem to me to be of at least possible significance, in that they could be construed as preserving Plan Landlords' rights against third parties. It is equally possible to construe them as merely confirming that the landlords' rights against Plan Companies were unaffected save as provided by the terms of the Plan. Neither side submitted that the Plan contained any terms that clearly addressed landlords' rights against third parties such as those asserted by Oceanfill in this claim.

14. In this context, Mr Tipler drew attention to Snowden J's judgment at [72]:

> *"As explained above, the Plans vary the rights of certain Landlords against certain guarantors within the VA Group. This falls within the scope of a compromise or arrangement between the Plan Companies and the Landlords, since the guarantors would otherwise have a "ricochet" claim against the relevant Plan Companies which would defeat the purpose of the Plans: see Re Gategroup Guarantee Ltd [2021] EWHC 304 (Ch) at [163], where the authorities are considered."*

The reference to the Plans falling within the scope of a compromise or arrangement between the Plan Companies and the Landlords demonstrates that Snowden J was not addressing the potential claims of the Landlords against third parties. These might also produce "ricochet" claims at the instance of the third parties, but it does not appear that this fell due for consideration, and it is not clear whether such claims were even contemplated.

15. All of the Class D landlords voted against the Plan: see Snowden J's judgment at [80(v)]. Snowden J nonetheless sanctioned the Plan because, applying the provisions of Part 26A, he considered that the Class D landlords would not be any worse off than they would be in the "relevant alternative", which was entry into administration followed by an accelerated sale of the business of the Plan Companies: see the Conclusion to the judgment at [317(v)].

16. As the result of the sanctioning of the Plan, VAL did not pay the rent and other sums that would have fallen due had the Plan not been sanctioned. Nuffield and Cannons paid some of the rent, but subsequently took the position that they are not liable for them, leading to the issue of this claim.

17. Turning to the legal effect of the Plan, Part 26A was introduced into the Companies Act 2006 with effect from 26 June 2020, by Schedule 9 of the Corporate Insolvency and Governance Act 2020. Its purpose and effect can be seen from the following extracts of the Explanatory Notes to the 2020 Act:

"3. *Due to the Covid-19 pandemic, many otherwise economically viable businesses are experiencing significant trading difficulties. In addition, the Government-enforced social distancing measures and reduced resources are making it hard for many businesses to continue to trade and meet their legal duties. This Act is aimed at ensuring businesses can maximise their chances of survival."*

"9-16 *These provisions will allow struggling companies, or their creditors or members, to propose a new restructuring plan between the company and creditors and members. The measures will introduce a "cross-class cram down" feature that will allow dissenting classes of creditors or members to be bound to a restructuring plan. This means that classes of creditors or members who vote against a proposal, but who would be no worse off under the restructuring plan than they would be in the most likely outcome were the restructuring plan not to be agreed cannot prevent it from proceeding. These provisions introduce a new Part 26A into the Companies Act 2006: Arrangements and Reconstructions for Companies in Financial Difficulty (a "restructuring plan"). The new Part represents the culmination of the policy work undertaken since a restructuring plan procedure for companies was consulted on as part of "A Review of the Corporate Insolvency Framework", published in May 2016. ... 194 of 1294 Claim/Case No. 194 11 In schemes of arrangement creditors (and sometimes members) are divided into classes (based on the similarity of their rights, which may vary significantly across a company's creditor base) and each class must vote on the proposed scheme. If all classes vote in favour of the scheme (requiring 75% by value and a majority by number of each class), the court must then decide whether to sanction it. Not all creditors or members of a company need to be included within a scheme. A company may propose a scheme in such a way as to exclude some creditors or members from it. Those creditors or members who are not bound by the scheme retain their existing rights. The new restructuring plan procedure is intended to broadly follow the process for approving a scheme of arrangement (approval by creditors and sanction by the court), but it will additionally include the ability for the applicant to bind classes of creditors (and, if appropriate, members) to a restructuring plan, even where not all classes have voted in favour of it (known as cross-class cram down). Cross-class cram down must be sanctioned by the court and will be subject to meeting certain conditions. As is the case with Part 26 schemes, the court will always have absolute discretion over whether to sanction a restructuring plan. For example, even if the conditions of cross-class cram down are met, the court may refuse to sanction a restructuring plan on the basis it is not just and equitable. As long as the eligibility criteria for the new moratorium are met, it will also be available (but not mandatory) to use whilst the company develops a restructuring plan thereby providing a streamlined restructuring process and allowing a restructuring plan to be developed free from enforcement action. While there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."*

18. The existing Part 26 of the Companies Act 2006 provides for the court to sanction schemes of arrangement for companies seeking a compromise or arrangement with creditors or any class of creditors. The provisions allowing the court to make an order giving effect to a scheme of arrangement were first introduced by section 2 of the Joint Stock Companies Arrangement Act 1870. They have been re-enacted in successive Companies Acts up to and including the current Part 26 of the Companies Act 2006.

19. As appears from the Explanatory Notes to the 2020 Act, Part 26A introduced an additional power, known as a "cross-class cram down", for the court to sanction a composition or arrangement even if it is not agreed by a number representing at least 75% in value of a class of creditors, referred to as "the dissenting class". This is only permissible if the court is satisfied that, if the compromise or arrangement were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the "relevant alternative". The "relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned.

20. A scheme of arrangement binds the creditors to whom the scheme applies by operation of law, and not by virtue of an actual or deemed agreement by the creditors affected. Mr Jourdan Q.C. and Ms Dodds therefore submit that a scheme of arrangement sanctioned by the court under Part 26 and its statutory predecessors does not affect the rights of a creditor bound by the scheme against third parties also liable for the same debt. They cite the following authorities in support at paragraphs 30-33 of their skeleton argument:

"30. As Halsbury's Laws vol 15A (Companies) [1612] says: "*An arrangement need not expressly reserve the rights of any creditors against sureties for the company's debts, as those rights are unaffected*"

31. Or As Buckley on the Companies Act [241] puts it: "*A scheme does not operate as an agreement between the parties affected but it has binding force by virtue of statute once an application to the court has been made, the consent of the relevant parties and the sanction of the court has been obtained and it has been delivered to the registrar. Consequently the discharge under a scheme of one of several debtors, who are jointly and severally liable, does not discharge the other debtors*".

32. By 1937, when Crossman J decided In Garner's Motors Ltd [1937] Ch 594, the law on this point was already settled. At p.599, Crossman J said: "*The scheme when sanctioned by the Court becomes something quite different from a mere agreement signed by the parties. It becomes a statutory scheme … It is settled law that a discharge of one of several judgment-debtors by operation of law does not release the other debtors. But in my judgment the effect of s. 153 of the Companies Act, 1929, is to give a scheme when sanctioned by the Court a statutory operation.*"

33. The authorities on the effect of schemes of arrangement are reviewed in the judgment of Chadwick LJ in Johnson v Davies [1999] Ch 117 at 129-139. At p.137H, he explained that: "*Under the various Companies Acts, considered in the authorities cited, the discharge takes place by virtue of a scheme which becomes operative when it is approved by the court".*

21. Section 901F(5) in Part 26A provides as follows:

"A compromise or arrangement sanctioned by the court is binding—

(a) on all creditors or the class of creditors or on the members or class of members (as the case may be), and

(b) on the company or, in the case of a company in the course of being wound up, the liquidator and contributories of the company."

22. This is identical to Section 899(3) which is the equivalent provision in Part 26 providing for a scheme of arrangement sanctioned by the court to be binding. The previous legislation is in materially the same terms. Mr Jourdan Q.C. and Ms Dodds therefore submit that a restructuring plan sanctioned by the court under Part 26A was plainly intended to have exactly the same effect as a scheme of arrangement sanctioned by the court under Part 26.

23. Both sides told me that there was no direct authority on whether restructuring plans under Part 26A impacted on third party guarantors in the position of Nuffield and Cannons. This no doubts reflects the fact that Part 26A is a recent enactment.

24. The first line of defence to the claim is that the effect of the Plan is that the rents claimed in the Particulars of Claim are not sums that have fallen due pursuant to the Lease. Paragraph 5 of the Defence avers that the legal effect of the Plan, and specifically paragraph 7 and Schedule 2, was to:

24.1 vary the terms of the Lease from the date of the court's approval

24.2 release VAL from any outstanding liability as at that date, and

24.3 reduce the rent falling due pursuant to the Lease to zero during the duration of the Plan.

25. In my judgment this part of the Defence cannot withstand the clear and longstanding authority cited at paragraph 20 above that a scheme of

arrangement under what is now Part 26 of the Companies Act 2006 takes effect by operation of law. It does not take effect by virtue of an agreement between the parties, whether actual or deemed. The parity of language between Part 26 and Part 26A leads to the inescapable conclusion that a restructuring plan under Part 26A takes effect as a statutory scheme by operation of law in the same way as a Part 26 scheme of arrangement takes effect. I remind myself that both enactments are intended to create arrangements or compositions by debtor companies with creditors. It would be anomalous if a restructuring plan under Part 26A did not take effect by operation of law in the same way as a scheme of arrangement under Part 26, on whose language Part 26A was modelled. I can think of no reason in logic or principle which would justify the enactments having divergent effects, all the more so if this would lead to differing consequences including, potentially, impacts on the rights and liabilities of third parties.

26. I would therefore conclude that a restructuring plan under Part 26A, takes effect by operation of law. To the extent that it provides for a tenant to be released from future obligations under a lease, as the Plan did in this case, it does so by means of a statutory scheme that releases or discharges the tenant from liability. In my view it is not correct to say that the Plan re-writes the Lease. It is more correct to say that it releases the Plan Company from future liability under the Lease terms by providing that the rent and other liabilities are not payable on its part. Alternatively, to the extent that this can be described as re-writing the Lease, it is a re-writing only as between the landlord affected by the Plan and the Plan Company. It leaves unaffected the rights of the landlord against third party guarantors. As between them, the Lease remains valid and subsisting.

Rent, for example, continues to 'fall due' under the Lease even if it is not payable by the Plan Company in whom the tenant's interest is vested. But if there are any third parties by whom the rent is payable, such as guarantors who are not parties to the Plan, the rent has fallen due. Nothing has happened which would have the effect of discharging or releasing the rights or liabilities as against such third parties.

27. Mr Tipler pointed to paragraph 7.1 (c) of the Plan which provided that Schedule 2 of the Plan shall be "deemed to take effect, for all purposes whatsoever and without limitation, as having been made by deed". He submitted that this had to mean that Oceanfill was to be treated as having entered into a consensual act with the Plan Companies. This constituted a variation in the terms of the agreement between creditor and debtor which was liable to prejudice the surety and discharge him from liability, unless the contract of suretyship provides to the contrary: see *Holmes v Brunskill* [1878] 3 Q.B.D. 495 CA.

28. In my view there are a number of answers to this submission:

28.1 First, the notional deed would have to state that the variation in the tenant's liability was by virtue of operation of law, and not by agreement between them. If it did not do so, it would fail to reflect the true terms and legal effect of the Plan;

28.2 Secondly, the terms of the contract of suretyship provide to the contrary: see further below at paragraph 35.

28.3 Thirdly, paragraph 7.4 of the Plan cited at paragraph 13 above, provides for the landlord creditor's rights to be preserved, save as specifically provided

by the Plan. It seems to me that this would extend to the rights against third party guarantors.

29. Mr Tipler pointed to the reference in Snowden J's judgment to "ricochet" claims that might defeat the purpose of the Plan (see paragraph 14 above) and submitted that if judgment were given against Nuffield and Cannons, that might lead to such claims being made against VAL by them. He may be correct about that, although I say nothing about whether such claims lie or would succeed. However, I do not see that this would defeat the purpose of the Plan, for these reasons:

30. First, the Lease term ends on 28 September 2023. Taking into account the rent claimed by this claim from 29 September 2021 (and £3,600 legal costs said to have fallen due on 31 August 2021), any "ricochet" claims that might be made against VAL would not exceed approximately 2 years' liability under the Lease. That is a relatively minor sum in financial terms given the release of VAL's liabilities effected by the Plan, which Mr Tipler's skeleton argument puts at some £30 million.

31. Secondly, the context of Snowden J's comments indicates that he was not addressing "ricochet" claims by third parties. Such claims are unaffected the Plan. Whether this was deliberate, because of their restricted amounts or otherwise, or inadvertent due to the point being missed, or because no-one thought about them, seems to me not to matter. For whatever reason, such claims are not addressed by the Plan. I see no compelling reason to take them into account in sympathy for the interests of VAL when VAL itself, assisted by

a team with highly experienced legal and accountancy advice, did not do so in proposing the Plan.

32. Thirdly, if such claims lie against VAL, Nuffield and Cannons can choose to bring them, and they will be likely to concerned only with the question whether VAL has the financial means to meet them. If it has the means, I doubt that Nuffield and Cannons will feel overly inhibited out of sympathy for any relative weakness in VAL's financial position.

33. Accordingly, the first ground of defence to the claim fails.

34. The second ground of defence is that the obligations on Nuffield and Cannons in the Licence to Assign are "to pay the rents and observe and perform the covenants" in the form those covenants exist, as varied, at the relevant time. Accordingly, there are no arrears which have arisen pursuant to the Lease and no breaches of covenant by VAL which could render either Nuffield or Cannons in breach of its obligations in the Licence to Assign.

35. In order for this argument to succeed, it must surmount the hurdle constituted by clause 10 of the Licence to Assign which, so far as material, is in these terms:

> "*10. The rights of the Landlord and the obligations of the Tenant will continue to subsist notwithstanding:-*
>
> *….*
>
> *10.3 (subject to Section 18 of the Act) any variation in the Lease agreed between the Landlord and the tenant for the time being;*
>
> *….*
>
> *10.6 any other act omission matter or thing by which (but for this provision) the Tenant would be exonerated either wholly or in part from its obligations under this Deed other than a release under seal given by the Landlord*

36. The same terms govern the liability of Cannons as guarantor for Nuffield: see clause 32.5 of the Lease, incorporated into the Licence to Assign and Authorised Guarantee Agreement at clause 14 of the Licence to Assign.

37. Provisions of this kind are commonly found and will be given effect to: *Samuels Finance Group plc v Beechmanor Ltd* [1993] 67 P&CR 282.

38. The Licence to Assign therefore contains a clear provision that Nuffield and Cannons would not be released by variations of the Lease, or by any other matter by which the tenant would be exonerated from its obligations under the Licence to Assign, and that any such release could only be by way of release under seal given by Oceanfill. There has been no release under seal.

39. Mr Tipler submits that the provision must be read narrowly. However, he puts forward no construction that would limit what are, to my mind, its clear terms and effect. He further points to paragraph 7.1 of the Plan that deem Schedule 2 to take effect by deed "for all purposes whatsoever and without limitation" and submits that this constitutes a release under seal given by Oceanfill.

40. I have addressed this argument at paragraph 28 above. This was in another context, but it seems to me that the same logic applies. In particular, the notional deed applied by paragraph 7.1 of the Plan would confirm merely that VAL had been released from its obligations by operation of law. The deed would not extend to the liability of third party guarantors and it could not operate by any stretch of the imagination as a release under seal given by Oceanfill to Nuffield and Cannons.

41. For these reasons, and even applying the principle that doubts as to construction must be resolved in favour of the surety, I conclude that the second ground of defence fails by reason of clear contractual terms between the parties which admit of no doubts as to their construction.

42. The Defence contains a third ground, to the effect that the indemnity given by Nuffield in the Licence to Assign is unenforceable for being in breach of the anti-avoidance provision in Section 25 of the Landlord and Tenant (Covenants) Act 1995. However, that point is not pursued.

43. Finally, Mr Tipler submits that there are other compelling reasons for the claim to be disposed of at trial and not summarily.

44. First, the assignment entered into as a consequence of the Licence to Assign is not to hand and neither Oceanfill nor Nuffield and Cannons have been able to locate a copy. Mr Tipler suggests that it might contain provisions material to liability. However, it seems to me that this is highly unlikely. It is even less likely that the assignment would contain terms which are inconsistent with those in the Licence to Assign. I do not consider that the current unavailability of the assignment warrants a refusal to dispose of the claim summarily.

45. Secondly, Mr Tipler points to the well-known statements made in summary judgment applications that the court should not conduct a mini trial. I remind myself that in considering this application for summary judgment there is a risk of injustice to a party who is deprived of the opportunity to have their case considered at a full trial. I intend to direct myself in accordance with the principles set out by Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. At (vi) Lewison J referred to the existence

of reasonable grounds for believing that a fuller investigation of the case would add to or alter the evidence available to the trial judge. I do not consider this is such a case, as the issues raised in the defence go to matters of law. Lewison J then continued, at (vii):

> *"On the other hand 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. If 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, 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: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

46. Mr Jourdan Q.C. and Ms Dodds cited the judgment of Fraser J to similar effect in Multiplex Construction Europe Ltd v Dunne [2017] EWHC 3073 (TCC) at [6]-[7]. In my view, this is a case that gives rise to short, if novel, points of law or construction and I am satisfied that I have before me all the evidence necessary for their proper determination. The sooner the points are decided the better and I am satisfied that I should therefore grasp the nettle and decide them.

47. Mr Tipler submits that the case raises the operation and impact of Part 26A as regards third parties and he rightly says that these may be matters of general importance. If so, the sooner there is a decision the better and, like most decisions, it will be potentially open to review by the appeal court. Mr Tipler also suggests that at the least, VAL and the other Plan Companies ought to be

afforded the opportunity to make representations. I am doubtful that this is correct, for the simple reason that they are not parties to the claim. Moreover, there is no reason to think that Mr Tipler and the legal team acting for Nuffield and Cannons have not raised every relevant argument.

48. Finally Mr Tipler submits that it must be incumbent on Oceanfill to account for any payment received under the Plan. As the Restructuring Plan Return Table (at page 1253 of the bundle) shows, the Plan is forecast to generate a return of no more than 0.43 pence in the £, so the sums involved will be minor. It seems to me that I can deal with this point when I come to make the final order, and I shall be careful to ensure that Oceanfill is not in receipt of double payment.

49. In my view there are no other reasons, whether going to discretion or otherwise, for disposing of the claim at trial as opposed to the summary judgment stage.

50. Accordingly, Oceanfill is entitled to judgment on the claim.