Neutral Citation Number: [2023] EWHC 1631 (Ch)

Case No: BL-2022-000921

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

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

Date: 30/06/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

VENTURA CAPITAL GP LIMITED

Claimant

- and –

(1) DNANUDGE LIMITED

(2) PROFESSOR CHRISTOFER TOUMAZOU

(3) DAVID LYONS

Defendants

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- -

Timothy Collingwood KC (instructed by **Fladgate LLP**) for the **Claimant**
David Peters (instructed by **Dorsey & Witney (Europe) LLP**) for the **Defendants**

Hearing date: 19 April 2023

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Approved Judgment

This judgment was handed down remotely at 12noon on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN :

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II Introduction

1. There are before the court applications in the nature of summary judgment and striking out of parts of the respective cases. It is made both by the Claimant ("Ventura") against the Defendants and by the Defendants against Ventura. It is in respect of an issue whether an email dated 18 January 2021 ("the 18 January Email") from Mr El Husseiny to the First Defendant ("DNA") gave rise to a binding obligation to subscribe for shares in DNA to an amount of £40,000,000, and if there was such an obligation, whether it was varied and/or abrogated.

2. The underlying proceedings are to the effect that the investment of Ventura was procured by fraudulent misrepresentation. Whatever happens on these applications, it will not dispose of the action in that the claim for fraud remains to be tried.

3. Ventura acts in these proceedings on behalf of the two Cayman exempted Limited Partnerships/investment funds, namely Ventura Capital LP Fund IV and Ventura Capital MG1 LP Fund. It sues as the general partner of those funds and references to Ventura are to it in those capacities.

4. DNA is a medical and health technology company in the business of supplying products for rapid PCR testing for Covid-19 and providing genetic services intended to nudge users to a healthier lifestyle. The Second Defendant ("Professor Toumazou") is a co-founder of DNA and a shareholder in and director of DNA. The Third Defendant ("Mr Lyons") was formerly the in-house general counsel of DNA.

5. In about late 2020 to early 2021 DNA was seeking to raise significant funding from investors in reliance on a substantial contract for the supply of clinical products to the NHS worth up to about £161m ("the DHSC Contract").

6. Over the course of 2021, Ventura made investments in DNA in a sum of almost £40m by way of subscription for shares in DNA. It alleges that it was induced (in the cae of £30 thereof) to do so by fraudulent misrepresentations made by the Defendants concerning the commercial performance of DNA's business. These are alleged to have consisted principally of misrepresentations concerning DNA's relationship with its then main customer, the Department of Health and Social Care ("the DHSC"). They related in particular to the status of the DHSC Contract for the provision of Covid test kits. Ventura claims damages for fraudulent misrepresentation and/or unlawful means conspiracy against all Defendants and further (against DNA) for damages under s.2 Misrepresentation Act 1967 and breach of contract.

7. In the Defence and Counterclaim, the Defendants deny every element of the claims based on fraudulent misrepresentation and related wrongs. They also say that the alleged misrepresentations occurred after 21 January 2021, by which time Ventura was already contractually bound to invest a further £40m into DNA. They say that that occurred as a result of the 18 January Email. The Defendants rely upon this as (a) providing a complete defence to Ventura's claim; and (b) founding a counterclaim of approximately £10m (being the difference between the further amount which they say Ventura was obliged to invest in DNA and the further amount which it actually did invest).

8. Ventura denies that the 18 January Email gave rise to an obligation to subscribe to shares in DNA to a total value of £40m (on top of an initial subscription in the amount of about £10m). DNA has made a counterclaim against Ventura for a sum of £10,242,596. This is the extent to which the sum of £40m exceeds the shares to which Ventura has subscribed.

III The contractual documents

9. Ventura and DNA negotiated terms of an investment to be made. On about 7 October 2020 Ventura and DNA agreed heads of terms concerning a proposed investment by Ventura in DNA ("the Heads of Terms"). Its purpose was to summarise the terms on which Ventura was to invest in DNA. It expressly provided that its terms were not intended to be exhaustive and were not binding (save to the extent that the contrary was expressly stated in the Heads of Terms itself).

10. The Heads of Terms included the following terms:

    (i) Clause 1.1 identified the shares which DNA was to receive for its investment.

    (ii) Clause 1.2 provided for the relevant "Investment Round" to be in a sum of up to £50m.

    (iii) Clause 1.4 (which was stated to be legally binding) provided for Ventura to pay a "Ventura Deposit" of £502,999 by 30 November 2020, in return for which it was to receive 214 shares in DNA at a price of £2,350 per share.

    (iv) Clause 1.5 (which was stated to become legally binding upon payment of the Ventura Deposit) provided Ventura with an option to make "the Initial Ventura Investment" of £10m within 60 days of the Heads of Terms (i.e., by 6 December 2020). In return, it was to receive shares in DNA at a price of £2,350 per share.

    (v) Clause 1.6 (which was stated to be legally binding upon completion of the Ventura Deposit and the Initial Ventura Investment) granted Ventura an option to invest a further £15m in DNA. The amount of the further investment (defined as "the Subsequent Ventura Allotment") which Ventura wished to make pursuant to this option was to be notified to DNA within 60 days (i.e., by 6 December 2020). The Subsequent Ventura Allotment was to be completed within 90 days (i.e., by 5 January 2021).

    (vi) Clause 3.3 stated that the Heads of Terms was subject to the conclusion of definitive legally binding agreements relating to the Investment Round.

11. In October 2020, pursuant to the Heads of Terms, Ventura paid to DNA the sum of £502,900.

12. On about 19 November 2020, Ventura and DNA agreed a term sheet ("the Term Sheet"). Its purpose was to provide an updated summary of the terms on which Ventura was to invest in DNA. It expressly provided, subject to certain specific exceptions which are not relevant for present purposes, that its terms were not binding. Among its terms, it provided as follows:

    (i) Clause 1.1 identified the shares which DNA was to receive for its investment.

    (ii) Clause 1.2 provided for the relevant "Investment Round" to be in a sum of up to £50m.

    (iii) Clause 1.4 acknowledged that Ventura had paid the Ventura Deposit of £502,999 and stated that the shares in DNA which were to be issued to Ventura in return for that payment would be issued to Ventura upon completion of the Initial Ventura Investment.

    (iv) Clause 1.5 dealt with the Initial Ventura Investment. It provided that Ventura would have the right to subscribe for up to £10m worth of shares in DNA (at a price of £2,350 per share). The right to subscribe for these shares was stated to last for 60 days from the date of the Term sheet – i.e., until 18 January 2021.

    (v) Clause 1.6 dealt with what the Term Sheet refers to as "the Subsequent Ventura Allotment". It granted Ventura the right to subscribe for up to £40m worth of shares in DNA (at a price of £2,350 per share). It provided that Ventura was to notify DNA of the amount of the Subsequent Ventura Allotment which it intended to take up within 60 days of the date of the Term Sheet (i.e., on or before 18 January 2021), and that the Subsequent Ventura Allotment was to be completed within 90 days (i.e., by 17 February 2021).

    (vi) Clause 3.3 stated that the Term Sheet was subject to the conclusion of definitive legally binding agreements relating to the Investment Round.

13. On about 17 December 2020 Ventura sent a letter to DNA concerning its subscription for shares in DNA which letter was ultimately agreed and signed by both parties ("the Subscription Letter"). It was expressly provided that *"the parties acknowledge and agree that the terms of this subscription letter agreement are binding and irrevocable between the parties, subject to the conditions set forth herein".* The Subscription Letter provided among other matters that subject to obtaining the approvals as therein defined (which were obtained by 21 January 2021):

    (i) Ventura thereby irrevocably applied and subscribed for the issuance and allotment of 4256 shares for the amount of £10,001,600 (the "Initial Subscription"). This was a price of £2,350 per share;

    (ii) DNA granted Ventura "the first right to apply and subscribe for the issuance and allotment of up to 17,021 shares for the amount of up to GBP40,000,000 ("the Subsequent Subscription").

14. It was further provided:

> *"Ventura will notify [DNA] in writing of the specific amount of its commitment for the Subsequent Subscription on or before 18 January 2021 (or such later date as Ventura and [DNA] may agree in writing). To the extent that Ventura does not so notify [DNA] and commit for some or all of the Subsequent Subscription, [DNA] shall be free to grant rights to other investors to apply and subscribe for the issuance and allotment of the remaining Shares under the Series A Offering (subject always to compliance with any governing agreements, instruments or documents applicable to the [DNA])."*

15. The Subscription Letter provided when the closing of the Initial and Subsequent Subscriptions should occur. As regards the closing of the Subsequent Subscription, it was provided that:

> *"The closing of the Subsequent Subscription (if any) shall occur upon receipt of all Approvals on or before February 18, 2021 (or such later date as Ventura and [DNA] may agree in writing) when Ventura shall remit by electronic transfer the Subsequent Subscription amount (exclusive of bank charges) to the Company Bank Account as referenced above."*

16. On about 29 December 2020 and 13 January 2021 Ventura made further payments of £6,667,000 and £2,800,000 to DNA in respect of its acquisition of shares.

17. On 18 January 2021 Mr Mo El Husseiny, director of Ventura, sent an e-mail to the Second Defendant under the caption "Notification of the Subsequent Ventura Investment". In the e-mail Mr El Husseiny stated:

> *"Pursuant to the terms of our term sheet we are notifying you in writing regarding the Subsequent Ventura Allotment. We intend to take up the entire £40 million subsequent Ventura Allotment. Please note that we have a substantial portion of this additional capital £20 million already committed and we are in process of firming up the remainder via several parties known to you who will be helpful to the Dna Nudge diagnostic and consumer health businesses."*

18. On 20 January 2021 Ventura paid the sum of £150,000 to DNA, bringing to the sum of £10,001,600 the total amount paid by Ventura to DNA in respect of the Initial Subscription. On or about this date the parties executed a deed of adherence in respect of Ventura's acquisition of shares .

19. At some point on or after 21 January 2021 DNA allotted 4,256 preference shares to Ventura. On 20 February 2021 DNA filed a form SH01 Return of Allotment of Shares at Companies House electronically, which recorded the allotment of 4,256 preference shares for a price of £10,001,600.

20. On 23 February 2021 Mr El Husseiny sent a further email to the Second Defendant in which he (i) stated that Ventura had signed an engagement letter with an institutional investor which had requested an extension of the final closing date until 8 April 2021, and (ii) asked *"could you kindly confirm via email that we will have up to £75m total allocation to us until that date [8 April 2021]?"*. The Second Defendant replied on the same date *"that's great news re Investor. Yes, i confirm the 75 million".*

21. There was an exchange of correspondence on 29 March 2021. By an e-mail at 10:52, the Third Defendant wrote to Mr El Husseiny stating:

> *"Further to the Subscription Letter of 17 December 2020, the Subsequent Subscription is now to close on 6 April 2021 (Closing Date.).*
>
> *I would be grateful if you could confirm the amount of the Subsequent Subscription which we can expect on the Closing Date."*

22. The response at 11:07 from Mr El Husseiny was as follows:

> *"We confirm entering into binding documentation with several groups for an additional £28 million and (subject to receipt of funds) we confirm to remit to you not less than this amount on or around April 6th.*
>
> *Please note this amount does not include the receivable from Sumitomo Mitsui Trust Bank who have today also received final approval for their £2m investment."*

23. The board minutes of DNA dated 6 May 2021 [JMB1 pages 129 - 131] record as follows (among other matters):

    (i) Pursuant to the Term Sheet and the Subscription Letter Ventura:

        (a) subscribed for 4,256 series A preferred shares in DNA in the sum of £10,001,600 which was closed and funded on 21 January 2021; and

        (b) was granted rights to make a further subscription for shares up to the amount of £40 million.

    (ii) By 7 April 2021 Ventura had funded and transferred to DNA via separate tranches an additional total amount of £23,730,570 pursuant to the rights for further subscription.

(iii) A reduced price per share was agreed.

(iv) Ventura had transferred a further sum of £6,006,834 pursuant to the rights for further subscription.

(v) Due to the change in the valuation of DNA, DNA had agreed with Ventura to issue additional shares to Ventura:

(a) The initial allotment of 4,256 preference shares would be increased to 6,047 preference shares.

(b) Any and all additional shares that were to be issued to Ventura pursuant to the rights for further subscription would be calculated and based upon the reduced price.

24. In the Deed of Amendment of the same date, 6 May 2021 ("the Deed of Amendment"), DNA and Ventura expressly agreed to vary the terms of the various agreements already reached, including the Heads of Terms, the Term Sheet and the Subscription Letter. The Deed of Amendment provides (among other matters) for the following:

(i) The replacement of the price per share with the new reduced price (and similarly in respect of the pre-money valuation of DNA).

(ii) The increase of the number of shares issued to Ventura initially from 4,256 shares to 6,047 shares.

(iii) Any and all additional shares to be issued to Ventura pursuant to the agreements to be calculated and based on the amended price of £1,654 per share.

(iv) The terms and conditions and all rights granted to Ventura under the pre-existing agreements would remain in force and unchanged, save as amended by the Deed of Amendment and save that they were amended to the extent necessary to give effect to the purpose and intent of the Deed of Amendment (Section 2.1).

25. The Deed of Amendment contained an entire agreement clause which stated:

> *"This Deed of Amendment contains the entire understanding of the parties hereto with respect to its subject matter and supersedes any and all prior agreements, notices or other arrangements or correspondences, oral or written between the Parties and neither it nor any part of it may in any way be altered, amended, extended, waived, modified, discharged or terminated except by a written agreement signed by each of the Parties hereto."* (Section 6).

26. On about 6 May 2021 DNA issued Ventura with a further 19,770 shares pursuant to Ventura's further subscription rights.

27. In September and October 2021, there were allegations by Ventura that DNA had misled it with respect to its DHSC contract, and solicitors were instructed on both sides. During the time of the negotiation and signing of the Deed of Amendment, and the correspondence regarding misleading statements, there was no reference to an alleged obligation of Ventura to subscribe for £40m worth of shares in DNA.

28. Further, there was consideration of insolvency proceedings on the part of DNA in early 2022, but there was still no statement to the effect that there was a shortfall in sums paid by Ventura to DNA until a letter from DNA's solicitors dated 22 April 2022. In that letter, DNA asserted a claim against Ventura for £35,260,996 (on the basis of an alleged obligation to subscribe for shares to a total value of £75 million), alternatively for £10,262,596 (on the basis of an obligation to subscribe for shares to a total value of £40 million).

IV The issues

29. The primary issue between the parties is whether the 18 January Email gave rise to an obligation on the part of Ventura to subscribe £40m worth of shares in DNA. Ventura say that there is no real prospect in this allegation being sustained at trial, as a result of which summary judgment should be given in part in favour of Ventura and the striking out of paras. 3-16 of the Defence and paras. 93-97 of the Counterclaim. Ventura says that this is a result of the construction of the 18 January Email. Alternatively, if the 18 January Email did contain an obligation to subscribe £40m worth of shares in DNA, that obligation was varied and/or abrogated subsequently.

30. The Defendants say that there should be summary judgment and a striking out of relevant parts of the case to opposite effect. It says that there should be summary judgment in relation to particular issues, namely that (a) there was a binding obligation on Ventura to subscribe for shares in DNA to an amount of £40 million, and (b) such obligation was not subsequently varied or abrogated. Since the representations, which are denied by the Defendants, were made after the 18 January Email, the Defendants say that there should still be summary judgment on these issues and a striking out of parts of the statements of case relating to these issues.

31. The arguments are all said to the effect that there is no real prospect of success in contending the contrary. This then forms the basis of the respective applications for summary judgment/strike out. It will therefore be necessary to consider first the principles of summary judgment/strike out applications, second the meaning and effect of the 18 January Email and third to consider the effect of the subsequent communications.

IV Summary judgment – legal principles

32. CPR 24.2 provides that the Court may give summary judgment on the whole of a claim or on a particular issue if it considers that the claimant or defendant has no real prospect of succeeding on the claim (whether prosecuting or defending) or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

33. The general principles were set out by Lewison J (as he then was) in *Easyair Ltd (Trading As Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch):

(i) The court must consider whether the claimant (or defendant) has a "realistic" as opposed to a "fanciful" prospect of success.

(ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

(iii) In reaching its conclusion the court must not conduct a "mini-trial".

(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in its statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application, but also the evidence that can reasonably be expected to be available at trial.

(vi) Although a trial may turn out not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so effect the outcome of the case.

(vii) On the other hand, it is not uncommon for an application under CPR 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 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 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.

34. Ventura adds reference to the 'cautionary precepts' in *Partco v Wragg* [2002] 2 BCLC 323 at paras. 27 – 28 per Potter LJ:

(i) The purpose of summary relief is to help resolve the litigation.

(ii) The court must have regard to the overriding objective.

(iii) The court should be slow to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event and/or where summary disposal of a single issue may delay (because of appeals) the ultimate trial of the action. The court should consider whether the objective of dealing with cases justly is better served by summary disposal or by letting matters go to trial so that they can be fully investigated and a properly informed decision reached.

(iv) Summary disposal is frequently inappropriate for complex cases.

(v) It is inappropriate at an interim stage where there are issues of fact involved unless the court is satisfied that all the relevant facts can be identified and clearly established.

VI Construction: The 18 January Email

(a) The submissions of the Defendants

35. The Defendants say that the 18 January email was a notice by which Ventura exercised the right to take the Subsequent Subscription in accordance with the terms of the Subscription Letter ("the Option"). They rely on the following matters in particular:

(i) It was sent on 18 January 2021 – the day on which the Option was due to expire.

(ii) It was headed *"Notification of the Subsequent Ventura Investment"*.

(iii) It stated in terms that it was sent *"Pursuant to the terms of our Term Sheet".* That is formal language consistent only with the 18 January Email being intended as a contractual notification of some description. In context, the only such formal notification which Ventura could or would have been sending on 18 January 2021 was notice of exercise of the Option. It is immaterial that the email refers to the "Term Sheet" rather than the "Subscription Letter". It related to the same subject matter, and the Mr El-Husseiny is not a lawyer but a businessman.

(iv) The sentence *"we intend to take up the entire £40 million Subsequent Ventura Allotment"* is the form of words one would expect to find in a notice exercising

the Option. Ventura is identifying the amount of the further investment in DNA which it intended to make in accordance with the parties' then subsisting contractual rights. Here too, it matters not that Mr El Husseiny used the words "Subsequent Ventura Allotment" rather than "Subsequent Subscription".

(v) The third sentence does not contain anything which undermines that conclusion. It provides DNA with technically superfluous information concerning the steps which Ventura was taking to raise the finance which it would require to comply with its obligation to complete the Subsequent Ventura Allotment. It did not contain any request for an extension of time for the exercise of the Option or for payment under it.

(vi) The reference in the final sentence to Ventura *"look[ing] forward to completing the Series A Investment Round"* is consistent with the exercise of the Option rather than letting it expire. Further the reference to the Series A Investment Round is consistent with the Initial and Subsequent Subscriptions being referred to in the Subscription Letter as "the Series A Offering".

(b) The submissions of Ventura

36. Ventura submits that any exercise of the option must be clear and unequivocal. It is usually to be construed objectively so that a reasonable recipient would recognise it as the exercise of the option. In the event that the recipient knew that the person apparently exercising the option did not intend to exercise an option, then the recipient is not entitled to take advantage of a mistake on the part of the person giving the notice.

37. Ventura submits that in the instant case there was no exercise of the option for the following reasons:

(i) The 18 January Email did not comprise an unqualified exercise of an option and/or was not a clear and/or unequivocal acceptance of the right conferred in the Subscription Letter.

(ii) The 18 January Email expressed only an intention to take up the allotment: "*we intend to take up*" (emphasis added), which was not the language of final and unqualified expression of assent. This was an intention that it would wish to purchase further subscription shares, but that it was not ready to do so at that stage.

(iii) The 18 January Email specifically stressed that Ventura did not have the funds committed by investors (indeed it only had half of the necessary funds) but was "*in [the] process of firming up the remainder*". The language of the January Email itself was that Ventura was not committing to the investment of funds until it had committed funds from those third-party investors. In the circumstances, it was apparent that Ventura was not and could not be entering into a binding obligation on behalf of the funds and it was not expressing final and unqualified assent to acquiring shares in a binding fashion.

(iv) This was different from the language of commitment used in the Subscription Letter itself, namely "*Ventura hereby irrevocably applies and subscribes for the issuance and allotment of 4,256 Shares…*" (emphasis added). The January Email did not contain language of firm commitment or specificity, which did not identify "*the specific amount*" of any commitment, whether in the number of shares or the specific sum of money to be paid as required by the Subscription Letter. Indeed, £40 million did not correspond to the nearest pound to an exact number of shares.

(v) The January Email is to be construed against the factual matrix, a part of which is that DNA knew that Ventura was building a book for investment from third parties and that it was the investment funds which were investing in the Preferred Shares: Ventura simply acted as General Partner on behalf of the fund, such that it operated on the basis that it would only commit to the investment of funds once its investors had committed funds and that the commitment to invest would only be confirmed when the monies had been paid to DNA. (This factual matrix is not accepted by the Defendants who deny that they knew prior to this email (or even following it) that Ventura operated on this basis.)

(vi) Although the time for the exercise of the option was about to expire, and there was no specific request for an extension, the 18 January Email was to the effect that Ventura was not in a position to commit on behalf of the funds, and, as stated, it needed more time to lock in commitments from its investors.

(c) The law

38. It is not entirely clear whether the true analysis of the 18 January Email was that it was a contractual notice pursuant to an existing agreement or whether it was acceptance of an offer previously made.

39. It was submitted on behalf of Ventura that the option is an offer which is capable of acceptance by the offeree. It is therefore said that the analysis of offer and acceptance has to be applied. Accordingly, the exercise of the option is analogised with the communication of acceptance. Attention is drawn to *Chitty on Contracts* 34th Edition *Chitty* at para.4-031, referring to *OTM Ltd v Hydranautics* [1981] 2 Lloyds Rep 211, at 214 which states as follows concerning the definition of "acceptance":

> "*An acceptance is a final and unqualified expression of assent, whether by words or conduct, to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer. On this test, a mere acknowledgement of the receipt of an offer does not amount to an acceptance; nor is there acceptance if a person, to whom an offer to sell goods had been made, merely replies that it is his "intention to place an order" or asks for an invoice.*" (emphasis added)

40. The analogy of acceptance has its limitations: its oddity is that this option is conferred only by a contract of the parties, namely the Subscription Letter. It is not an offer

outside a contract leading to a contract on acceptance. There is a contract in existence. This was expressed in the case of *In re Mulholland's Will Trusts* [1949] 1 All E.R. 460, Wynn-Parry J. quoted, at p. 464, from Sir George Jessel M.R. in *Gomm's case, 20 Ch.D. 562* , 582, and said:

> *"As I understand that passage, it amounts to this, that, as regards this option, there was between the parties only one contract, namely, the contract constituted by the provisions in the lease which I have read creating the option. The notice exercising the option did not lead, in my opinion, to the creation of any fresh contractual relationship between the parties, making them for the first time vendors and purchasers, nor did it bring into existence any right in addition to the right conferred by the option."*

41. In *Spiro v Glencrown Properties Ltd* [1991] Ch 533 at 544, Hoffmann J (as he then was) said:

> *"An option is not strictly speaking either an offer or a conditional contract. It does not have all the incidents of the standard form of either of these concepts. To that extent it is a relationship sui generis. But there are ways in which it resembles each of them. Each analogy is in the proper context a valid way of characterising the situation created by an option."*

42. Approaching the option as being sui generis, albeit with resemblances to an offer or a conditional contract, the courts have applied the law relating to unilateral contractual notices to an option: see *Peaceform Ltd v Cussens* 2006 WL 2929563 (Mr Stuart Isaacs KC sitting as a deputy judge of the High Court) applying *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] A.C. 749. In *Mannai*, the House of Lords applied the test for the validity of a notice of Goulding J in *Carradine Properties Ltd v Aslam* [1976] 1 WLR 442, 444, *namely "is the notice quite clear to a reasonable tenant reading it? Is it plain that he cannot be misled by it?"* and he went on to say that the reasonable tenant must be taken to know the terms of the lease. On this basis, the notice should be construed against the background of the terms of the lease so that a mistake which could have misled no reasonable tenant would be immaterial: see per Lord Hoffmann at p.779G-780G. As with commercial contracts, the construction of notices is to be *"construed in the light of all the background which could reasonably have been expected to have been available to the parties in order to ascertain what would objectively have been understood to be their intention".*

43. Lord Steyn in *Mannai* said the following at 767G-768D:

> *" (2) The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the*

> *notices must be construed taking into account the relevant objective contextual scene. The approach in Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, which deals with the construction of commercial contracts, is by analogy of assistance in respect of unilateral notices such as those under consideration in the present case. Relying on the reasoning in Lord Wilberforce's speech in Reardon Smith, at 996D to 997D, three propositions can be formulated. First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is admissible as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the enquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind. It follows that one cannot ignore that a reasonable recipient of the notices would have had in the forefront of his mind the terms of the leases. Given that the reasonable recipient must be credited with knowledge of the critical date and the terms of clause 7(13) the question is simply how the reasonable recipient would have understood such a notice. This proposition may in other cases require qualification. Depending on the circumstances a party may be precluded by an estoppel by convention from raising a contention contrary to a common assumption of fact or law (which could include the validity of a notice) upon which they have acted: Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v. Paul Munday Ltd. (The "Vistafjord") [1988] 2 Lloyds Rep. 343. Such an issue may involve subjective questions. That is, however, a different issue and not one relevant to this appeal. I proceed therefore to examine the matter objectively."*

(d) Discussion

44. The question in the instant case is whether the 18 January email would reasonably be understood by a person reading it as an exercise of the Option. This depends on looking at the words used against the objective contractual scene. At the forefront are the terms of the Subscription Letter. There are also the circumstances known to the parties against which the 18 January Email is to be construed.

45. In my judgment, the construction of the 18 January Email is not suitable for summary determination. This is because there are too many uncertainties inherent in the document which cannot be resolved without reference to the factual matrix as to which there are important issues of fact.

46. The language in the 18 January Email is imprecise. This is especially so in the following respects, namely:

(1) The language of intent to take up the allotment in the second sentence instead of containing a definitive statement that the subscription is being thereby taken up. The Defendants submit that the language of intent is akin to the language of taking up the subscription, whereas Ventura contrast an intention to do something with the language of irrevocably subscribing in the Subscription Letter;

(2) The third sentence referring to what is to happen is (a) on the Defendants' construction one of the provision of non-essential information and is otiose (in the event that the subscription is being taken up), or (b) on Ventura's construction it is information of how Ventura hopes to be in a position to proceed when the remaining funds have been raised in the hope or expectation that DNA will permit the subscription to take place after the money has been raised;

(3) The opening words of the first sentence might be formal and consistent with the exercise of the right to subscribe. On the other hand, they refer not to the Subscription Letter but refer to the term sheet. The caption "Notification of Subsequent Ventura Allotment" was not precise in that it ought to have referred to the Subsequent Subscription. These matters by themselves may have been capable of being read in a manner consistent with a subscription under the Subscription Letter, but the imprecise language adds to the state of confusion and imprecision.

47. I have considered the submissions of the parties set out above about the meaning and effect of the words and the factual matrix. The arguments about the words used have some force on each side. The Court is unable to say whose submissions would prevail at trial. It would be wrong to make assumptions about the construction of the 18 January Email without having the full context. Applying the legal tests set out above, the three factors referred to by Lord Steyn in Mannai are matters which can only be brought fully to bear at trial. They are as follows:

(1) the contextual scene;

(2) the meaning the language would have against the objective contextual scene;

(3) the interpretation of the reasonable recipient of the notice who would construe the document objectively based on all of the knowledge available to the recipient at the time.

48. I shall first consider the wording of the 18 January email. DNA's case is, as set out above, that the words of the 18 January email are clear and unambiguous. I have considered carefully the submissions on both sides. There are unsatisfactory features about the submissions on both sides. As regards the submissions of DNA, there is a

problem about the language of the second and the third sentences. It is not apparent why the words used are of intent, namely "we intend to take up the entire £40 million" allotment, rather than to say that they are thereby taking it up. That by itself might be explained by reference to the point that Mr El Husseiny was a lay person who would not be expected by another business person to be as precise as a commercial lawyer. However, it is not the only point because the third sentence appears to contain unnecessary information about how far Ventura was in procuring additional capital. It is possible to interpret this as the provision of unnecessary information to fill in DNA as to how the contractual obligation being taken on by the exercise of the option would be fulfilled. In another sense, in the context of the second sentence, it may be that there is no more at this stage to say than that there is an intention to proceed, but that Ventura cannot give an unconditional obligation without having financial commitment of third parties to the extent of the option.

49. As regards the submissions of Ventura, there is a problem about the above mentioned caption giving notification and then referring in the first sentence to giving notice of the allotment. In that context, the reference to "*We intend to take up the entire £40 million"* might be understood as meaning that the entire £40 million was being taken up. The mistake about referring to the term sheet is an obvious mistake, and one which would seem to be immaterial to a recipient of the January email.

50. As regards the third sentence, this does not provide an obvious explanation as to why the notice was being sent on the last day provided in the Subscription Letter and without a request for an extension of time. Without more, the option would lapse, and this valuable entitlement would be lost unless DNA in their absolute discretion chose to agree an extension of time. It can be said that it would appear odd for Ventura to allow this to happen, particularly in circumstances where they were in funds up to £20 million and could have at least secured the exercise of rights limited to that sum. None of these difficulties would take place in the event that the January email were construed as meaning that the option was being exercised as to £40 million. In that context, the third sentence might be construed as meaning that there was a confidence in being able to fulfil the obligation as to £40 million because the £20 million had been raised, and the balance of £20 million was in the process of being firmed up. Even if it were the case that the usual practice of Ventura was to raise the money before commitment, which might indicate a basis on which to proceed.

51. Considering the January email on the basis of the information known to the parties at the time and not by reference to subsequent conduct, there are real difficulties about interpreting the email without having a full factual matrix. There is already a difference between the parties as to whether (a) there was a settled practice of Ventura in not making a contractual commitment without the investor's commitment, and (b) such practice was known to DNA.

52. In order to understand the January email, and to be informed about how to resolve the above points of difference, it is necessary to know far more about the factual matrix than is currently before the Court. The position is that there is very limited information before the Court. At the moment, there are a few references in the pleadings and almost no evidence. As regards the pleadings, there are paras. 7 and 8 of the Reply to the following effect:

> *"7. As each of the Defendants knew and understood (both before and following this email), Ventura operated on the basis that it would only commit to the investment of funds when its investors had committed funds and that the commitment to invest would only be confirmed when the monies had been paid to DNA and the shares were about to be allotted. Ventura was seeking to raise funds and wished to maximise its investment, but was unable to confirm the specific amount.*
>
> *8. ... As DNA knew and understood, Ventura sought the opportunity to apply for up to £40 million in additional shares and could not commit to a specific amount until it had itself received commitments from investors to a specified amount."*

53. DNA's reply to this, which is strictly a rejoinder, states at para. 2.1 that para. 7 of Ventura's reply is inadequately particularised and does not identify how and when DNA is said to have acquired the knowledge referred to, and denies the knowledge. In any event, DNA says that the way in which Ventura may have been accustomed to act is not legally relevant having regard to the terms of the Subscription Letter. Ventura was given a right to participate and it served a notice of its intention to do so and therefore upon obtaining the Approvals was bound to complete the Subsequent Subscription. The only viable interpretation of the 18 January email was that it was a notification that Ventura was exercising the option.

54. The Defendants submit that the factual matrix did not matter because the drafting of the 18 January Email was inconsistent with the practice contended for by Ventura. That was because the Subscription Letter did not refer to any conditions relating to Ventura having secured its funding position. Further, the deadline was 18 January and so the only way in which Ventura could not miss the investment was exercising the option on 18 January. The very fact that the 18 January Email was served points, say the Defendants, to the conclusion that if Ventura had the alleged practice of only subscribing with the money in place, it chose to depart from it on this occasion. It must have done so in order to secure the ability to subscribe. The problem about these submissions is that without seeing the 18 January Email in a contractual and factual context, it is not possible to say definitively what was its true meaning and effect.

55. As regards evidence, there are two witness statements of Mr Buckley. He is a solicitor and not a person having direct knowledge of the matters relevant. As noted above, the notices are to be construed in the context of the surrounding circumstances and the contractual documentation. These matters about the knowledge and understanding of the parties may require consideration of more than the particular notice. They may or may not be evident from the contemporaneous documents. In seeking to find this, there are the above assertions in the statements of case, but they are sparse and undetailed. The evidence is very limited, that is to say only from a solicitor for Ventura and none on behalf of DNA.

56. These matters are in my judgment of importance in order to view the 18 January email in context. They are likely to shed light on the meaning of the third sentence in particular. Why was it that Ventura was giving information relating to its raising

money? It may be as Ventura contend. It may be that there is nothing in it. It may be that the knowledge was shared. It may be that it was not. It may be that a reasonable person in the position of the DNA with the information would understand that. It may be that it was irrelevant information.

57. At a trial, there will be difficult questions for both sides. By way of example only, Ventura will have to deal with why it was the case that it ever wrote the 18 January Email unless it was to exercise the subscription. It will have to explain why it wrote on the last day provided contractually for the taking up of the subscription. It will also have to explain why, if it wanted extra time, this was not expressed in the 18 January Email. Likewise, the Defendants will have difficult questions to answer. This will include how it was to understand the third sentence of the 18 January Email. Noting that the test is an objective test about what the notice meant, it is to be construed by reference to the knowledge of the DNA about the transaction. If it was the case that the obligation was to be unconditional, what was the purpose of providing information about the fact that not all of the funds had been raised and the level of confidence thereafter of raising the balance of the money? In these circumstances, it will be necessary to consider the factual matrix. For all the reasons set out above, these matters ought not to be determined on a summary judgment.

58. Applying the citations of law above as regards summary judgment cases to the facts of the instant case:

(i) This is a case where the terms of the January email require a greater context to be understood. It is what Lord Steyn in *Mannai* referred to as *"evidence of surrounding circumstances…to influence the question of interpretation"* and the meaning of the notice *"read against the objective contextual scene"*. A much more extensive investigation of this may take place at a trial than is currently before the Court.

(ii) There are indicators that both parties are able to rely upon in support of their case, but the critical question is what the third sentence would mean to parties having the relevant background knowledge. It is clear that there is much more to be gleaned by evidence of contemporaneous documents and oral evidence, but that has not been placed before the Court. That is understandable because it does not suit the respective cases of construction of the January email if they are to find the short cut of a Part 24 application.

(iii) However, the Court sometimes has to resist the trap of an over-simplistic short-cut. The Court ought to allow for the evidence which is likely to be before the Court at trial. A fuller investigation is required into the facts at trial than is possible or permissible on summary judgment. The Court should hesitate about making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

(iv) This is reinforced by the fact that in the instant case, a summary judgment will not bring the proceedings to an end. The misrepresentation case and the construction case in respect of the January email are likely to involve evidence

from the same sources. The same witnesses can be expected to give evidence about how investments are made in Ventura and what DNA knew about the source of the investments. There is a danger that any decision at an interim stage about part of the case may be rendered questionable by more informed assessments at a subsequent trial of the misrepresentation case.

(v) This is not a case of what Sir Robert Megarry V-C once referred to as *"all surmise and Micawberism"* (*The Lady Anne Tennant v Associated Newspapers Ltd* [1979] FSR 298, 303) which is the mere hope that something may turn up at trial. This is a case where relevant information relating to the factual matrix is likely to exist, but the inference is that it has not been adduced by both sides in the danger that it may detract from summary judgment applications. Given especially that summary judgment will not obviate the need for a trial about closely related matters, the Court should allow the material to be deployed alongside the related material that might be deployed about the trial of the matters not subject to the summary judgment application.

59. I therefore conclude that the construction of the 18 January Email ought not to be resolved at this summary judgment stage, and that there are real prospects of success which are an answer to the respective applications for summary judgment. This is subject to an important matter. It is whether evidence of subsequent conduct or communications or agreements can be taken into account in the exercise of construction. I have thus far ignored such evidence in the question of construction. It is now necessary to consider this and the extent to which it affects the conclusion thus far.

60. There is an argument raised by Ventura that examination of the post-contractual notice conduct shows that the parties did not consider that the 18 January Email amounted to the subscription being taken up. It points to a period of 15 months when the point that the Option had been exercised would have been taken up. This reflects, it is said, the objective intention of the parties at the time that the 18 January Email was not the exercise of the Option.

61. The starting point is that subsequent conduct is not admissible as an aid to contractual construction- see *Hyundai Merchant Marine Co Ltd v Daelim Corp* [2012] 1 Lloyd's Rep 211 *per* Flaux J (as he then was) at para. 13. A fuller quotation is as follows:

> *"The inadmissibility of a subsequent contract as an aid to construction of a written contract is merely one aspect of the general principle of English contract law that (save in exceptional circumstances not applicable in the present case) the subsequent conduct of the parties cannot be looked at to interpret a written contract: see James Miller & Partners v Whitworth Street Estates [1970] AC 583 per Lord Reid at 603D–E; Schuler AG v Wickman Machine Tool [1974] AC 235 per Lord Reid at 252C–F; Lewison: The Interpretation of Contracts 4th edition para 3.15. It seems to me that the principle that the subsequent contract is inadmissible is equally applicable whether it is made the following day or long after."*

62. Since contractual notices are analogous to contracts themselves, it is strongly arguable that contractual notices stand to be construed by rules at least analogous to contracts. In that event, subsequent conduct would be inadmissible as to the interpretation of the contractual notice save in certain limited circumstances. The subsequent conduct may be relevant to a variation, which does arise in this case, but that is as to whether there was a variation or a discharge, but not as to the effect of the contractual notice. Subsequent conduct may be relevant to an estoppel, such as an estoppel by convention. The language of para. 44 of the skeleton argument on behalf of Ventura refers to a common understanding as to the absence of any specific commitment or binding obligation on the part of Ventura to invest an additional sum of £40m being evidenced by the course of conduct of the parties after the 18 January Email. Although canvassed during the hearing, no estoppel has been pleaded at this stage.

63. Even if subsequent conduct could be prayed in aid in respect of construction, there are arguments with a real prospect of success that it does not assist. The reason for this is that the conduct is to be construed objectively and not by reference to the subjective understanding of the parties at the time. Further, as will be discussed in more detail below, the subsequent communications of the parties, relied on by Ventura, were remarkably informal, given the large sums involved. There is an argument that they are not so clear so as to show the question whether or not the subscription was taken up can be determined summarily either way.

64. I therefore conclude that the argument that the Court must take into account post-contractual notice conduct in interpreting the 18 January Email to be not suitable for summary judgment for the following reasons. First, whilst it may well be that such conduct is inadmissible, there are matters of legal complexity as to the extent, if at all, to which such post-contractual notice documentation will be admissible. Second, even if this material is admissible, there are arguments going both ways as to the probative value of such communications. Those arguments will be set out in the section about variation which follows. Third, if this information is admissible, it will only add for the need for hearing oral evidence and possibly for documents on disclosure to be sought in order to have full understanding of the nature and effect of such post-contractual notice conduct.

VII Variation issue

(a) The submission of Ventura

65. Even in the event that there was a binding obligation to subscribe to £40m of shares, Ventura submit that the agreement was varied or discharged by reference to subsequent conduct. The subsequent conduct in the instant case can be summarised as follows.

66. First, on the basis of the Subscription Letter, the option was to be exercised by 18 January 2021, and payment was to be by 18 February 2021. In the event, the latter came and went and so there was no insistence of payment by that date. If the January email had been recognised as the exercise of the option, then it is said by Ventura that it would have been expected that DNA would have relied upon its rights, but that did not occur. Ventura submits that this evidences that if there was agreement to subscribe, it was treated as at an end by the absence of insistence on payment in February 2021.

DNA says that there was nothing in this point because the parties were discussing variations in the amount of the subscription and the time for payment, as is evidenced by the subsequent correspondence of 23 February 2021. This did not mean that there was an intention to abandon accrued rights.

67. Second, it is said by Ventura that the correspondence of 23 February 2021 was inconsistent with the option having been exercised on 18 January. The reference to a request for an extension date would not have been required if it had already been exercised. The £75 million would not have been referred to by itself but would have referred to including the original £40 million or being in in addition to the £40 million to date if there was a continuing agreement to subscribe £40 million. DNA says that it is not significant because either way the obligation to subscribe for £40 million was unaffected.

68. Third, Ventura submits that in the event that the option had been exercised as regards the £40 million, the subsequent correspondence of 29 March 2021 would have related the additional £28 million to the £40 million contained in the January email if there was a continuing obligation to subscribe the balance of the £40m. DNA submits that this was unnecessary. The £28 million formed a part of the £40 million, and the balance remained due.

69. Fourth, Ventura submits that any agreement was amended on 6 May 2021 by the board minutes of DNA and the Deed of Amendment amending the subscription price and increasing the number of shares issued by reference to the moneys paid thus far. There was no reference to any agreement of Ventura to invest in the sum of £40m. Ventura submits that this must have been on the basis that there was no obligation to subscribe for further shares, such that this superseded any previous agreement. Attention is drawn to an entire agreement clause in the Deed of Amendment (section 6).

(b) The submission of the Defendants

70. The Defendants' submission logically starts from the premise that there was a binding obligation to have a subscription for £40m, and there is no allegation by Ventura that this obligation was discharged by express agreement. It is the inconsistency of the subsequent agreements which is said to lead to a variation or discharge of the obligations.

71. The Defendants say that the particular subject matter of 23 February exchange was not inconsistent with the continued existence of the obligation taken on by the 18 January Email. The request for a final closing date of 8 April 2021 did not seek to extinguish the obligation of Ventura to invest. The request to subscribe £75m of shares did not seek to extinguish the £40m obligation but provided a higher ceiling.

72. The Defendants submit that the Deed of Amendment had recitals and Clause 2.01 to the effect that the prior agreements remained including the Term Sheet and the Subscription Agreement remained in full force and effect unless specifically amended by the Deed of Amendment. There was no provision abrogating what had gone before. The amendments of price per share was relevant to what would be acquired for £40m but did not affect the continuing obligation to invest £40m.

(c) Discussion

73. The nature of the arrangements between the parties appears to have been informal or without full attention to detail. The result is that it is not possible to reach a conclusion in favour of one party or the other that if the Option had been exercised that it was subsequently abrogated. It may turn out that that was the case or not the case, but it requires a trial in order to consider the various documents against the factual matrix and hearing evidence of the protagonists.

74. Ventura is right to draw attention to the curiosity that for over a year on the Defendants' case, there was no contention that Ventura was in default in respect of an obligation to subscribe a total of £40m. The Defendants are entitled to draw attention to the fact that there was no express cancellation of the £40m subscription.

75. Just as there are critical matters to be explored about the factual matrix relating to the 18 January Email, so too in respect of the subsequent communications from February to May 2021 especially. This is all more of the same. This is not a case which can be decided on a series of documents and evidence limited to that of a solicitor for one side. For very similar reasons as were given above in respect of the 18 January Email as to why a trial was required (at paragraph 58 above), so too the same applies to the subsequent communications which cannot be readily understood without evidence of the protagonists.

VIII Conclusion

76. For all the above reasons, both the application of Ventura and the application of the Defendants for summary judgment and for strike out of statements of case are dismissed. The Court is grateful to Counsel on both sides for the intelligent and moderate way in which they expressed themselves and for the quality of their respective oral and written submissions.