Neutral Citation Number: [2020] EWHC 1430 (Ch)

Case No: CR-2019-002843

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST (

Royal Courts of Justice
The Rolls Building
Fetter Lane
EC4A 1NL

Date: 05/06/2020

Before:

SIR ALASTAIR NORRIS

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Between:

(1) DISCOVERY(NORTHAMPTON) LIMITED **(2) DISCOVERY (NUNEATON) LIMITED** **(3) SOUTHAMPTON ESTATES LIMITED** **(4) DISCOVERY (TORQUAY) LIMITED** **(5) DISCOVERY (FOLKESTONE) LIMITED** **(6) DISCOVERY (HARROGATE) LIMITED**	**Applicants**
- and -	
(1) DEBENHAMS RETAIL LIMITED **(2) JAMES ROBERT TUCKER** **(3) EDWARD BOYLE** **(4) GLAS TRUST CORPORATION LIMITED**	**Respondents**

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Daniel Bayfield QC, Ryan Perkins and George McDonald (instructed by **Shoosmiths LLP** and then from 14 February 2020 by **Stewarts Law LLP**) for **Southampton Estates Ltd**
Tom Smith QC and Richard Fisher (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **First Respondent**
Andrew Shaw (instructed by **Travers Smith LLP**) for the **Second and Third Respondents**
Matthew Abraham (instructed by **Baker & McKenzie LLP)** for the **Fourth Respondent**

Written submissions: 7-20 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
This Judgment was handed down by circulation to the parties' representatives by email and by release to Bailii. It was not handed down in court due to the present

COVID19/coronavirus pandemic. The deemed time for hand-down is 10.30pm on Friday 5th June 2020.

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SIR ALASTAIR NORRIS

SIR ALASTAIR NORRIS :

1. It now remains to deal with various costs issues outstanding from the applications. To set the context, the applications were these:

   (a) An application made on 10 June 2019 by six associated landlords to set aside the Debenhams CVA ("the CVA Challenge Application").

   (b) An application by Debenhams dated 27 August 2019 to exclude certain evidence (of Mr Barnes and Mr Rose) adduced in support of the CVA Challenge Application and to eliminate one line of argument advanced in support of the CVA Challenge Application ("the Exclusion Application").

   (c) An informal application pursuant to a permission to apply (originally brought by the six landlords but in the event only argued by Southampton Estates Limited ("Southampton")) that I should reconsider my decision in the CVA Challenge Application to sever an unlawful forfeiture provision in the Debenhams CVA ("the Review Application").

   (d) An application made on 9 December 2019 by Southampton Estates Limited alone to review the decision on the CVA Challenge Application (under Insolvency Rule 12.59) on the ground that a subsequent decision on a point not argued in the CVA Challenge Application was incompatible with the reasoning of my decision on the CVA Challenge Application ("the Rule 12.59 Application").

   (e) An application dated 21 January 2020 by Debenhams to strike out the claims of five of the six applicants for relief in the Review Application (leaving only Southampton Estates Limited) on the ground that one of the five had entered administration and the remaining four of the five were now in receivership ("the Strike-out Application").

2. Although these are identifiable applications, they are not entirely discrete: it is necessary to maintain an overall view because the resolution of one may well have an impact upon another.

3. I must also note another part of the context. The CVA Challenge Application was originally advanced also by SportsDirect.com Retail Ltd and Sports Direct International plc (together "Sports Direct"). They were removed as parties by order of Mann J dated 29 July 2019, an order made by consent. When the Sports Direct applicants were removed, they consented to an order that they should "pay any costs order made in favour of the Respondents against the First to Sixth Applicants in the CVA Challenge Application". The "Respondents" were at that point Debenhams Retail Ltd (to whom I

have referred as "Debenhams") and the Joint Supervisors of the Debenhams CVA. GLAS were not joined formally as respondents until 31 July 2019. Whilst this part of the order related to adverse costs orders I was told that Sports Direct had also given the applicant landlords an indemnity against their own costs, though I was not shown a formal record of this (but only a short reference in an e-mail). I note that there is now on the Court file correspondence (to which I have not been referred) referring to adverse costs undertakings. I will call the combined "adverse costs" and "own costs" package "the Sports Direct indemnity".

4. The starting point for any order as to costs is CPR44.2(1). This confers upon me a discretion: and CPR44.2(2) contains the general rule about how that discretion should be exercised (by reference to who is the "successful" party and who is the "unsuccessful" party), together with an affirmation that the Court may make a different order. CPR 44.2(4) and (5) set out in a non-exhaustive way some of the material considerations that may indicate that such a different order is just in the circumstances. These considerations include success (or failure) on particular issues and also matters of conduct in relation to the application. This is trite law and it would add nothing to this judgment were I to set it out more extensively. I note it simply to record that, familiar as it is, I have reminded myself of the detailed provisions of this regime and have them well in mind. I also bear in mind that orders about costs should provide an outcome that (i) achieves broad justice between the parties (ii) provides the costs judge with a convenient and workable framework (iii) does not trespass upon the assessment function of the costs judge and (iv) does not involve the parties in avoidable expense.

The Strike-out Application

5. Because of the interaction between costs orders it is useful to begin with the "Strike-out Application". Debenhams applied to remove as parties the five applicant landlords who were in administration or receivership. The applicant landlord which was in administration compromised the application. The administrators did not oppose an order that the company should pay Debenhams' costs provided that Debenhams did not seek to recover those costs as costs in the administration.

6. The boards of directors of the receivership applicants resisted the "Strike-out Application" on the grounds that their companies' equity of redemption in respect of the loans which conferred the right to appoint the receivers gave them a sufficient interest to oppose their removal as applicant landlords in relation to leases with (in theory) many years to run. But the receivers were in receipt of the immediate rents due under the leases (and were content to receive the reduced rents due under the Debenhams CVA). If the applicant landlords acting by their directors were to be permitted to challenge the CVA under which those reduced rents were payable (in order to preserve their entitlement to full rents at some future point) they could only do so if that attempt would not stultify the current receivership or deplete the assets of the applicant landlord company to the prejudice of the receivership. So, they were given the opportunity to obtain (i) the confirmation of their respective receivers that the CVA Challenge Application would not obstruct that receivership and (ii) the confirmation of the Sports Direct defendants that the Sports Direct indemnity covered the all the costs of resisting the Strike-out Application and of pursuing the CVA Challenge Application. If such confirmations were not forthcoming, then the Strike-out Application would succeed.

7. No such confirmations were forthcoming. The "Strike-out Application" succeeded. The receivership applicants were ordered to pay the costs of Debenhams of the Strike-out Application (which I had summarily assessed). In the events which happened they were also ordered to pay Debenham's costs of the CVA Application (from which they were removed as parties) down to 5 February 2020, those costs to be assessed on the standard basis.

The CVA Challenge Application

8. As is apparent from the preceding paragraph, I have already ordered the applicant landlords other than Southampton to pay Debenhams its costs of the CVA Challenge Application, from which they were removed as applicants as a result of the success of the Strike-out Application (or in one case, by consent), those costs to be assessed on the standard basis.

9. I gave permission to Debenhams to apply for a payment on account to be made by the applicant landlords (other than Southampton), the relevant costs schedules not having been prepared for the hearing. That application was made by letter dated 19 February 2020, but only seeking a payment on account by the Fifth Applicant (which was in administration). The total of the costs claimed (down to 5 February 2020) was £2.296 million: 75% of that was sought on account. The overall level of costs is very high: but in part that is a consequence of the applicant landlords obtaining an order for an expedited hearing during the vacation (which necessitated Debenhams having to change Counsel and to work to tight deadlines over a holiday period). Debenhams is in financial distress: that is why the Debenhams CVA was promoted. In my judgment it is not just that Debenhams should wait until the conclusion of the assessment process to receive any of the costs of defending the CVA. There is nothing to displace the presumption in CPR 44.2(8) that a payment on account ought to be ordered. The making of an order would have no impact upon the Fifth Applicant. Whilst it is agreed that in the insolvency of the Fifth Applicant Debenhams shall be treated as an unsecured creditor in respect of its costs, the Fifth Applicant will not be making any distribution to unsecured creditors. However, an order for an interim payment will facilitate recovery from (and, if necessary, enforcement against) Sports Direct which has consented to be liable in relation to any adverse costs order made against the Fifth Applicant.

10. I can see that there may well be challenge to the hourly rates and to the amount of partner involvement disclosed by the Debenhams schedule. On that account (and because, given the financial difficulties of Debenhams, any overpayment may be difficult to recover) I will take a cautious approach to the assessment of the proportion of costs and will award 60% of the sum claimed viz £1,377,877. That sum will be payable by the Fifth Applicants 14 days from the date of this judgment. As will appear, I do not at this stage intend to make a direct order against Sports Direct.

11. The fact that the Fifth Applicant in administration consented to an order for costs and that the Joint Receivership landlords did not appear to oppose an order for costs in relation to the CVA Challenge Application does not constrain in any way the opposition which Southampton may wish to mount. The primary position of Southampton was that there should be no order as to costs (and, indeed, consideration should be given to ordering Debenhams to pay the applicants' costs). This was because (i) the CVA Challenge Application was analogous to the advancing of objections to a scheme of

arrangement under Part 26 of the Companies Act; and (ii) in relation to such objections the Court had developed a "practice" which departed from the approach set out in CPR 44 (and which I have summarised above). I do not accept the analogy: and I consider that the "practice" referred to is a working out of, rather than a departure from, the approach adopted by CPR 44.

12. Before shareholders or creditors can be bound by a scheme of arrangement the Court must (as an integral part of the statutory procedure) give its sanction and make an order. The company proposing the compromise or arrangement with its creditors or shareholders must apply for that sanction and must discharge the burden of showing that it should be given. There are no respondents. It is not sensible to speak of a "successful party" or an "unsuccessful party" for the purposes of seeking to apply the "general rule". However, affected creditors or shareholders are entitled to appear at the sanction hearing to argue that sanction should not be given, that an order should not be made and that they should not become bound. They do not thereby become "parties". It is in relation to any extra costs incurred by the applicant company (over and above the unavoidable costs of seeking sanction) as a result of the objectors doing so that the "practice" has developed.

13. In a CVA dissentient creditors are bound by the outcome of the statutory meetings (not by any order of the Court). They can seek a Court order overturning or varying that outcome within a limited time and only on the grounds specified in s.6 of the Insolvency Act 1986. That requires an application with respondents; and the need to establish one of the specified grounds creates a classic "*lis*". There will in the end be a "successful party" and an "unsuccessful party" and the "general rule" is capable of application (though of course with the proviso that in all the circumstances a different order might be made). If the dissentient creditors' challenge is successful, then the company may expect to be viewed as the "unsuccessful party" and under "the general rule" to face the prospect of paying the dissentient creditors' costs. If the dissentient creditors' challenge is unsuccessful, then they may expect to be viewed as the "unsuccessful party" under "the general rule" and to face the prospect of paying the company's costs.

14. Counsel for Southampton argued that the differences to which I have referred were purely procedural differences and that there were significant similarities between applications for sanction and applications to set aside a CVA which distinguished each of them from ordinary litigation. They highlighted: -

    (a) That both processes are designed to impose a variation of rights upon dissentient creditors.

    (b) That even unsuccessful opposition may assist the Court.

    (c) That scrutiny by the Court is desirable lest defective CVAs are approved by creditors (as, they said, my judgment showed had happened in many retail CVAs).

15. But in my judgment the differences (which I have sought to summarise in paragraphs [12] and [13] above) are substantive and not merely procedural. The Court does not sanction (and has no need of "assistance" in deciding whether to sanction) a CVA. A challenge to a CVA is simply adversarial litigation between parties.

16. Debenhams is the successful party overall. But I must consider whether in all the circumstances an order that Southampton should pay Debenhams its costs of the CVA Challenge Application is just. In my judgment it would not be.

17. Counsel for Southampton relied on the success of their argument that a right of forfeiture could not be altered by a CVA ("Ground 3"). Counsel for Debenhams correctly characterised Ground 3 as a pure point of law and correctly submitted (i) that in civil litigation the successful party will almost inevitably have lost on some point and (ii) that lack of success on every issue cannot of itself justify an order for costs which displaces the general rule. Alongside these submissions I also bear in mind the words of Jackson LJ warning against a too-ready departure from the "general rule": see Fox v Foundation Piling [2011] EWCA Civ 790 at [62].

18. However, Ground 3 was not just "a point" or even "an issue". It was a fundamental argument affecting the dynamics and structure of the standard model CVA: its effect on the Debenhams CVA was limited because of (late) reliance upon modification provisions within the CVA itself. But Southampton (amongst others) established that the Debenhams CVA as approved by creditors was defective and required modification; and it would, upon consideration, be unjust to require Southampton to pay Debenhams its costs of wrongly resisting the correct legal analysis.

19. It does not follow that Debenhams should pay Southampton its costs of presenting the correct analysis: Debenhams had an answer to the correct legal analysis (albeit one which entailed the modification of the CVA), so although Southampton won the argument that success did not bring a halt to the implementation of the Debenhams CVA and/or its being set aside (which were the real objectives of the CVA Challenge Application). In my judgment departure from the general rule should occur only when (and to the extent that) the needs of justice and the particular circumstances of the case require. The needs of justice do not in this case require Southampton to be awarded its costs of the issue.

20. Both sides are agreed that, if an order for costs is to be made that reflects the degree of success on an issue, then it should not be strictly issue-based, but should adopt the approach recommended by CPR 44.2(6)(a). I do not accept the submission on behalf of Southampton that Debenhams' costs claim should be discounted by 40% because of the substantial success of Ground 3 - that discount reflecting both a deduction of Debenhams' own costs of the issue and compensation for the costs incurred by Southampton (and others).

21. In my judgment Debenhams' costs claim should be reduced by 15% and Southampton should be ordered to pay 85% of Debenhams' costs of and incidental to the CVA Challenge Application. In making that assessment I have had particular regard (amongst all the circumstances) to the facts (i) that the argument was one of pure law not requiring extensive evidence (ii) that it must have involved consideration of Southampton's position paper (common to other applicants) (iii) that it required the formulation of Debenhams' own case (and its presentation in a skeleton argument) and a consideration of Southampton's' skeleton argument (iv) that this work is likely to have been undertaken by Counsel and at partner level with little delegation. By contrast, other grounds required substantial quantities of evidence or a much wider survey of authorities.

22. I shall therefore order Southampton to pay 85% of Debenhams' costs of and incidental to the CVA Challenge Application. Given the terms of the order of Mann J of 29 July 2019 I would have been prepared to order that the Sports Direct applicants should be jointly and severally liable with Southampton under that order (notwithstanding that Sports Direct are not at present parties). However, there is on the Court file a letter dated 17 February 2020 from Sports Direct to Southampton referring to an undertaking by Sports Direct to put the solicitors for Southampton in funds to discharge any interim payment on account of costs that I may order, and to do so within 72 hours of any deadline stipulated in the order. I will give that machinery time to work but give permission to Debenhams to apply in writing (supported by a witness statement exhibiting all relevant communications) if it does not.

23. Counsel for Southampton argued that because of the Sports Direct indemnity I should include a provision that the order should be enforceable against Sports Direct before it became enforceable against Southampton (in order to preserve the assets of Southampton). I decline to accede to this request. The litigating party was Southampton: its directors chose to risk its assets in this litigation and they now face the consequences of that. It is for them to call upon the Sports Direct indemnity: they have cleared the way in correspondence. Debenhams might be able itself to call upon Sports Direct to "pay any costs order made in favour of the Respondents against the First to Sixth Applicants in the CVA Challenge Application": but in conferring that benefit the order of Mann J of 29 July 2019 did not subject Debenhams to the obligation *not* to have recourse to the remaining applicants in the usual way.

24. Debenhams seeks an order for payment on account. CPR 44.2(8) says that the Court will make such an order unless the needs of justice indicate otherwise. I adopt the same approach as that set out in paragraphs [9] and [10] above. The position of Southampton is not materially different (save that it is liable for only 85% of Debenhams' cost). The sum to be paid on account 14 days from the date of this judgment is £1,171.195.

The Exclusion Application

25. In respect of the applicant landlords other than Southampton I have already ordered that they shall jointly and severally pay Debenhams its costs (on the indemnity basis) of this application (such costs to be assessed if not agreed).

26. The fact that I have done so does not inhibit Southampton from advancing any argument in favour of some other order.

27. Its primary position was that I should make no adverse order for costs (and might even consider ordering Debenhams to contribute to Southampton's costs). I have rejected the analogy upon which that submission was founded. Southampton's secondary position was that I should treat these costs simply as part of the costs of the CVA Application. That would avoid seeking to identify the costs of part of the proceedings (which is desirable): but (i) it would result in Debenhams bearing 15% of the costs of an application which (as to its key part) resoundingly succeeded; (ii) such an assessment will be undertaken in any event as a result of orders I have made in relation to applicants other than Southampton (so that the impact of that inhibition is reduced).

28. If treated as a separate application there is no doubt that Debenhams is the successful party. Although Debenhams did not succeed in excluding everything it sought to

exclude the needs of justice do not require a departure from the general rule: the modest degree of interlocutory success achieved by Southampton was in the result immaterial.

29. The real battleground here was whether Debenhams' costs should be assessed on the indemnity basis (as I have ordered be the case with the applicants other than Southampton) or upon the standard basis (as Southampton now argue). I am in no doubt that the proper basis for assessment is indemnity costs. It is not the norm to seek to introduce evidence on an issue that had been removed from the issues to be determined at the expedited trial (as Mr Rose sought to do). It is not the norm (i) to introduce in highly tendentious terms evidence that is irrelevant to the issues to be determined at the expedited trial or (ii) (in effect) to use the CVA Challenge Application as a platform from which Sports Direct could launch a general attack on the management of Debenhams or (iii) to raise evidential issues the resolution of which would obstruct (rather than assist the Court in) the resolution of the CVA Challenge Application expeditiously, economically and in a proportionate way (as Mr Barnes sought to do).

30. Debenhams seeks a summary assessment of these costs. A costs judge will already be assessing Debenhams' costs on the indemnity basis and it does not make sense for me to undertake a summary assessment of those same costs. I shall therefore order that these costs be assessed.

31. That means I must consider whether to depart from the presumptive position that a payment on account will be ordered. I see nothing in the circumstances of the case as regards Southampton (or the Fifth Applicant in the CVA Challenge Application) to justify such a departure.

32. The Debenhams costs schedule for Exclusion Application amounts to £212,252. Even if assessable on the indemnity basis I intend to adopt a cautious approach. Debenhams' financial predicament should not be worsened by an over-restrictive approach to the exercise of this jurisdiction: but I must pay proper regard to the risk of non-recovery of any overpayment. I shall award 75% of the sum claimed namely £159,189. That sum will be payable 14 days after the date of this judgment. The order will be against Southampton, and the Fifth Applicant. Although the evidence in question was plainly adduced in support of the CVA Challenge Application and as part of that Application (and so falls within the scope of the order dated 29 July 2019) Sports Direct has in correspondence filed with the Court confirmed an intention to perform its obligation without an order. I will afford Sports Direct the opportunity to do so: and give Debenhams permission to apply (in the form indicated above) if it does not.

Review Application

33. Southampton's primary position here was that I should make no order for costs (by analogy with the "scheme" jurisdiction). I have rejected the analogy. Its secondary position was that I should make an issues-based order, having regard to the degree of success achieved by Southampton; and should order it to pay only 60% of Debenhams' costs. I have accepted that an issues-based order in the CVA Challenge Application was an appropriate departure from the general rule having regard to the significance of the issue on which Southampton succeeded and notwithstanding the need for caution in departing from the rule. I do not accept that a similar departure is warranted in the instant case.

34. My starting point would be to make orders for costs which are simple to implement and where possible cover the costs of an action as a whole. However, in the instant case the Review Application was discrete post-judgment application which failed. It is true that, as a result of it, the Debenhams CVA was further modified: but those modifications were achieved largely by agreement, and on those modifications that were in issue Southampton did not achieve significant success. To treat the Review Application as part of the general costs of the CVA Challenge Application and to award Debenhams only 85% of its costs would not be a fair outcome where it was clearly successful in its resistance.

35. I shall therefore order Southampton to pay the costs of Debenhams of and incidental to the Review Application, those costs to be assessed on the standard basis in default of agreement. I do not know the position as between Southampton and Sports Direct in relation to the Review Application and the Sports Direct indemnity; I would not consider making a joint and several order against Sports Direct. No doubt the "undertakings" referred to in correspondence cover the matter adequately.

36. Debenhams asks that I undertake a summary assessment of those costs by reference to a Schedule in the sum of £130,473. Given that there will be an assessment of costs of the CVA Challenge Application in any event and given that the sum claimed is not insubstantial it is in my judgment fair and convenient that the costs of the Review Application be included in that process.

37. With such a form of order the Court will (unless the needs of justice otherwise require) order a payment on account. Nothing in the circumstances of this case indicates a departure from the presumptive position. Adopting a cautious approach and balancing Debenhams' financial predicament against the risk to recovering any overpayment I will order that 60% of the scheduled costs (viz. £78,283) be paid by Southampton 14 days from the date of this judgment.

The Rule 12.59 Application

38. Counsel for Southampton's principle submission was that I should make no order for costs on the ground that the Court does not make adverse costs orders against objectors to a CVA where the objections were not frivolous and where the submissions in support of them assisted the Court. I have rejected that submission. Counsel for Southampton accepted that if I did so, then "the general rule" applied and I might properly order Southampton to pay 100% of Debenhams' costs of and occasioned by the Rule 12.59 Application.

39. Debenhams says that its costs of the Rule 12.59 Application total £104,866 (including £5000 in respect of the costs of preparing the Third Witness Statement of Craig Montgomery which Southampton has agreed to pay in any event). It seeks a summary assessment of those costs. Southampton objects to a summary assessment. It raises a number of general objections to Debenhams' schedules (e.g. hourly rates, partner involvement and Counsel's fees). It would be inappropriate for me to address these in a summary assessment when a skilled costs judge will be addressing the same objections as part of an assessment of the costs of the CVA Application. So, costs will be assessed on the standard basis (and the costs judge will allow £5000 in relation to the costs of the Montgomery witness statement).

40. Having reached that view, I must consider a payment on account. I again see nothing in the general circumstances to cause me to disapply the general rule. I shall adopt the approach previously set out and award 60% of the sum claimed and to be assessed (together with £5000) viz. £64,919. This sum will therefore be payable by Southampton 14 days from the date of this judgment: and it will be for Southampton to arrange matters with Sports Direct.

The Second and Third Respondents (the Joint Supervisors)

41. The Joint Supervisors seek an order that the Southampton should pay their costs of the CVA Challenge Application to be assessed on the standard basis in default of agreement. They submit a schedule of costs in the sum of £444,824 and seek an order for an interim payment of 50%. It is apparent from that schedule that the costs of the Exclusion Application, the Review Application and the Rule 12.59 Application are treated as part of the costs of the CVA Challenge Application (although these costs do not include attendance at the hearing on 3 to 5 February 2020).

42. The Joint Supervisors point out that there was no need to join them to the CVA Challenge Application (Re Naeem [1990] 1 WLR 48 at 51): but the landlord applicants chose to do so and also to assert (i) that the Supervisors were complicit in an attempt to reduce the voting power of the landlords as much as possible and at the direction of Debenhams (rather than in exercise of an independent judgment) and (ii) had failed to give proper notice to the landlords. The totality of these allegations was only withdrawn very shortly before the hearing of the CVA Challenge Application. Thereafter the role of the Joint Supervisors was to provide evidence and to assist the Court, and the scale of their representation was reduced.

43. Southampton objects to any adverse costs order for reasons which I have already found unconvincing. Its alternative position is that there was no need for the Joint Supervisors to attend the hearing of the CVA Application or, indeed, to retain the size of legal team that they did, and that the only costs allowable should be costs in relation to the provision of evidence.

44. The real issue is whether I should make an order for costs in relation to part only of the proceedings (e.g. the costs of the proceedings until 21 August 2019 when Southampton's solicitors cleared up an area of doubt as to the nature of Southampton's case, but without withdrawing the evidence from which those doubts arose); or whether I should accept that it was reasonable for the Joint Supervisors to remain engaged with the proceedings to which they had been joined (and to leave it to the costs judge to assess the proper costs of such engagement). The latter is the fairer alternative. Given the nature of the evidence advanced by the applicant landlords, the terms of their position papers (in particular, the maintenance of the allegation that the proposal to creditors did not fairly disclose the prospects of a successful preference claim), and the terms of their solicitors' correspondence it is not possible to identify with confidence a point in time when one can say: "The Joint Supervisors need no longer engage with the proceedings to which they have been joined as respondents by the applicant landlords and should stand down their legal team."

45. In my judgment the Joint Supervisors are entitled to their costs of the CVA Challenge Application (including the Exclusion Application) and of their limited participation in the Review Application and the Rule 12.59 Application, those costs to be assessed on

the standard basis. But I would ask the costs judge to have particular regard to the reasonableness and proportionality of the costs incurred in relation to the *hearing* of the CVA Application and the conduct of Review and Rule 12.59 Applications having regard to the function that the Joint Supervisors were at those points discharging. I would also observe that I found the Skeleton Argument of Counsel for the Joint Supervisors to be of assistance; but that the oral submissions added nothing of substance. I should make clear that I do not regard the question of whether Southampton should be ordered to pay any element of the costs claimed as the same as the question whether the Joint Supervisors may properly recover those costs in the administration of the CVA. They are quite separate questions.

46. The Joint Supervisors seek an order for the assessment of their claimed costs of £444,824. I must again address the question of a payment on account. The Joint Supervisors seek a payment of £222,412, being 50% of their scheduled costs. That discount on the scheduled costs is prudently conceded. I will make an order for payment of that sum by Southampton 14 days from the date of this judgment.

47. There is no reason why the order made against Southampton should not also be made (on a joint and several basis) against Southampton's co-applicants; they were parties at the time when the Joint Supervisors' costs were incurred.

The Fourth Respondent

48. The Fourth Respondent ("GLAS") is the security agent for finance creditors of Debenhams. GLAS was not an original party to the CVA Challenge Application. On 18 July 2019 it applied to be joined (and was by consent joined on terms that it did not duplicate submissions being made by Debenhams) as a party. GLAS's interest was that the CVA Challenge Application alleged that the security interests created by Debenhams were liable to be set aside ("the preference claim"), and that a significant factor justifying expedition was the need to determine this issue.

49. In the event Mann J on 22 July 2019 granted expedition but excluded the preference claim from the expedited hearing because it could not be determined within the tight timetable required. The preference claim survived in shadowy form as a complaint (noted above) that the promoters of the CVA should have disclosed to creditors that there was a significant prospect of setting aside the security interests, and that if they were set aside within an insolvency the comparative return in an insolvency would be better than under a CVA. Mann J's order set out a timetable giving Debenhams, the Joint Receivers and GLAS until 16 August 2019 to respond to a revised "position paper" to be prepared by the applicant landlords.

50. GLAS appeared at the CVA Application by Leading and Junior Counsel and on the Review Application and the Rule 12.59 Application by Junior Counsel. GLAS seeks an interim payment in respect of a bill totalling £489,411.

51. Southampton objects to any costs claim by GLAS. But it is clear that until 22 July 2019 Southampton and its co-applicants were directly attacking the security held by GLAS, and that GLAS was entitled to take its own responsive protective steps (and not to rely on others). Once that ground of challenge to the CVA was removed there remained a period during which the reformulated grounds of challenge advanced by Southampton and its co-applicants required consideration. But by 16 August 2019 it should have been

clear to GLAS that it was not *necessary* for it to remain an active party and that its position was identical to that of Debenhams: indeed, the exchange of skeleton arguments on 28 August 2019 made that abundantly clear. (Whether some involvement was *desirable* for the purposes of the protection of the security within the terms of cost recovery provisions of the security documentation is a different question on which I express no view). On the material available it is not possible properly to re-formulate an order by reference to a date as an order to pay a proportion of GLAS' costs.

52. In my judgment Southampton should pay GLAS' costs of and incidental to the CVA Challenge Application down to 16 August 2019, those costs to be assessed on the standard basis in default of agreement. The same order should be made on a joint and several basis against each of Southampton's co-applicants.

53. I must once again consider ordering a payment on account. As I have indicated it is not possible to measure the costs down to 16 August 2019 as a proportion of the total costs. But (i) having looked at the hourly rates of the solicitors and the fees of Counsel for advice and for representation (ii) bearing in mind that the work had to be done with expedition (iii) taking into consideration that although the joinder application was only made on 18 July 2019 the relevant costs are "costs of and incidental to" the CVA Challenge Application and that such costs have a heavy front loading element and (iv) noting that representation in the later stages of the litigation was reduced, I can be confident that £90,000 will be recoverable on assessment.

54. That sum will be payable by Southampton and its co-applicants 14 days from the date of this judgment and it will be for Southampton to make any appropriate arrangements with Sports Direct.

55. I will hand down this judgment without requiring the attendance of parties.