Neutral Citation Number: [2021] EWHC 1453 (Ch)

Case No: CR-2020-004188

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

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/05/2021

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

NERO HOLDINGS LIMITED **Applicant**

- and –

RONALD YOUNG **Respondent**

- -
- -

Tom Smith QC and Henry Phillips (instructed by **Linklaters LLP**) for the **Applicant**
Robin Dicker QC and Adam Al-Attar (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Respondent**

Hearing dates: 17 May 2021

- -

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.

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THE HONOURABLE MR JUSTICE MICHAEL GREEN

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10.30am on 28 May 2021

Mr Justice Michael Green :

Introduction

1. This is an application by Nero Holdings Limited (the **Company**) for an order striking-out or granting summary judgment in relation to the application brought against it and two others by Mr Ronald Young. That application by Mr Young, filed on 29 December 2020 (the **Challenge Application**), is brought under section 6 of the Insolvency Act 1986 (**IA 1986**) challenging the approval given by the Company's creditors on 30 November 2020 to a Company Voluntary Arrangement (the **CVA**).

2. The Challenge Application was originally brought by nine applicants but, following settlements with the other eight, Mr Young is the only remaining applicant. The Company says that, because of arrangements in place between Mr Young and EG Group Ltd (**EG**) in relation to the funding and pursuit of the Challenge Application, it is being continued solely for EG's purposes and Mr Young has no legitimate interest in the relief sought. As such, the Company says that Mr Young's pursuit of the Challenge Application is an abuse of process.

3. The Challenge Application is based on the events that happened on 29 and 30 November 2020. The creditor electronic decision procedure for the proposed CVA was set to conclude at 23:59 on 30 November 2020. At 9pm on Sunday 29 November 2020, EG's solicitors, Kirkland and Ellis International LLP (**K&E**), made an offer to purchase the shares in The Nero Group Limited (**NGL**), the Company's parent, on a debt free and cash free basis (the **Offer**). The Offer included an enhanced return to the Company's landlord creditors of payment of their rent arrears in full, as compared to the CVA proposal to pay 30p/£ of rent arrears. EG asked for a postponement of the creditors' vote so that the Offer could be negotiated and considered by the creditors and directors, as well as the shareholders.

4. However, the Offer was rejected almost immediately by the ultimate shareholders of NGL and the directors of the Company, together with the nominees (the Second and Third Respondents to the Challenge Application), refused to postpone the vote. They published on the CVA portal an announcement in relation to the Offer. They also put forward a modification to the proposal, although most creditors would have voted by the time there was any notification of the modification. The votes cast in favour of the CVA were treated as being cast in favour of the modified proposal.

5. The Challenge Application therefore is based on the directors' and nominees' decision not to postpone the vote. Mr Young says that the two ultimate shareholders of the Company were also two of the three directors of the Company and they had a conflict of interest in relation to this decision; their paramount duty at that time was to the creditors, as the Company was insolvent.

6. While the merits of the Challenge Application are not for consideration by me, it is important to note that, as was accepted by Mr Tom Smith QC, leading Mr Henry Phillips on behalf of the Company, I must assume that Mr Young will be able to establish the grounds for the Challenge Application.

7. The main basis for the Company's strike out application is an agreement entered into between EG and Mr Young whereby, in return for a payment of £100,000, Mr Young agreed to pursue the Challenge Application and to reject any offer of settlement by the Company without the consent of EG. Indeed an open offer by the Company to settle the Challenge Application by the payment of his rent arrears in full was rejected by Mr Young, he says because he himself wants to see the Challenge Application through in the hope of a better deal for himself and the landlords.

8. The Company however says that as a result of the agreement between Mr Young and EG, the Challenge Application is wholly within the control of EG and it is pursuing it to further its own commercial interests and Mr Young himself does not have any legitimate interest in the relief being sought on the Challenge Application. As such, the Company says the Challenge Application is being pursued for an improper collateral purpose and is an abuse of process.

9. The trial of the Challenge Application has been expedited by an order of Adam Johnson J dated 12 February 2021 and is listed to take place over four days at the end of July 2021. On 15 April 2021, I gave directions in connection with that trial at a CMC at which I also decided certain contested disclosure issues.

Factual Background

(i) The CVA Proposal

10. The Company is one of the principal operating companies in the UK part of the Nero Group, a leading international coffee shop retailer with over 800 stores in the UK. Through a number of intermediate companies, NGL is a parent of the Company. NGL itself is ultimately majority owned by Dr Gerald Ford and Mr Benedict Price. They also constituted a majority of the Company's directors.

11. As with many other similar retail businesses, the Nero Group has been seriously impacted by the Covid-19 pandemic. Accordingly on 12 November 2020 the Company's directors proposed a CVA under Part 1 of the IA 1986.

12. The proposal was principally focused on the Company's landlords. The Company is the tenant of 619 of the stores and the proposal sought to compromise the terms of the leases as to arrears of rent, future rent, service charges and insurance. The stores were put into four different categories depending on their performance and value to the Company and different terms were proposed to each category. In very broad outline the terms proposed were as follows:

    (1) Category A (196 stores) – these landlords were largely unaffected by the proposal save that the rent and other charges would be paid monthly, rather than quarterly;

    (2) Category B (291 stores) – these landlords would have their rent arrears compromised at 30p/£ and their future rent would be reduced by being based on a percentage of the store's turnover for the 3-year Rent Concession Period; there are five sub-categories with different turnover bands; in return the

landlords had a new break-right which could be exercised within 90 days of the CVA's approval;

(3) Category C (63 stores) – these are similar to Category B with rent arrears cut to 30p/£ and a move to turnover-based rent but there was no minimum base rent of 25% of contractual rent (as there was for Category B);

(4) Category D (69 stores) – these landlords would have rent arrears compromised at 30p/£ and will receive one month's contractual rent; thereafter the Company is entitled to return the store to the landlord but, if that is not accepted, the rent and other obligations are reduced to zero; these landlords can break their leases at any time.

13. The Company said in the proposal that the CVA was the only way to avoid an insolvent administration, which would have meant that unsecured creditors would receive next to nothing (0.3p/£). To ensure that better return, the Company was to set up a Compromised CVA Creditor Fund of nearly £12 million from which the rent arrears would be paid. The effect of the CVA would be the potential viability of the business and a reduction in the Company's debt burden.

14. The proposal explained the electronic voting decision procedure that was established pursuant to rule 15.3 of the Insolvency Rules 2016. The deadline for creditors to vote on the proposal was 23:59 on Monday 30 November 2020. At that point, assuming the requisite majority was obtained, the CVA would become binding, subject to any challenge under s.6 of the IA 1986.

15. Mr Young is a Category B landlord. He is a semi-retired businessman and, since 2003, he has owned the premises at 6 Henley Street, Stratford-Upon-Avon, Warwickshire, CV37 6PT. On 1 February 2008 he entered into a 15 year lease with the Company. The rental income from these premises and another are his main sources of income.

16. As at 30 November 2020, and according to the CVA, he was owed rent arrears of £37,867 (he thinks he was actually owed at that date £47,333.40). The monthly rent was £4,733.34. Even though he had not been happy with the Company for some time and he did not particularly like the terms of the CVA proposal, on or around 26 or 27 November 2020, he gave instructions to his solicitor to vote in support of the CVA.

(ii) EG's Offer

17. EG is owned by Mohsin and Zuber Issa, billionaire brothers who have recently acquired the supermarket group Asda and the fast food chain Leon. On or around 15 November 2020, through Rothschild & Co, EG enquired of the Second Respondent as to a possible sale or fundraise in relation to Caffe Nero.

18. Then at around 9pm on Sunday 29 November 2020, the day before the close of the voting procedure, K&E sent a letter on behalf of EG to the boards of the Company and NGL. They said that they had a Proposal by EG to acquire 100% of the shares in NGL. They continued as follows (underlining added):

> "EG believes that it can offer you an accelerated transaction at a compelling price with deal certainty. Its Proposal is fully-financed and offers an exceptionally high degree of certainty. Upon acceptance of the terms outlined in the Proposal, EG is prepared to immediately work with you to negotiate the transaction documents and would intend to sign definitive documentation within 10 business days.
>
> **Company Voluntary Arrangement (CVA) Creditors' Decision Procedure - 30 November 2020**
>
> We are of course acutely aware that the CVA creditors' decision procedure (utilising electronic voting) of Nero Holdings Limited ("NHL"), is due to be finalised tomorrow at 23.59, 30 November 2020. As you are fully aware, the directors and nominees of the CVA are subject to a strict legal duty of full and frank disclosure to all creditors, prior to creditors' submitting and finalising their vote. Our compelling, attractive and deliverable offer (as set out in more detail below), is in the best interests of all creditors of NHL, in particular landlords. As part of our offer, our client is willing to pay all landlord rent arrears in full, which offers a materially better outcome to all landlords, based upon what we understand to be the current treatment and material deduction of the rent arrears in the CVA. We are of the view that the most appropriate course of action is for the directors and nominees of the CVA to disclose to the CVA creditors that the board has received this offer which it needs to consider further and to adjourn the CVA decision procedure for at least 14 days to fully consider our client's offer, as set out herein. We and our client, are happy to discuss this further with you and your advisers.

The Proposal itself was explained as follows:

> "**Purchase Price**
>
> EG is submitting a Proposal **ascribing an enterprise value of GBP 350-400 MM to the Company**. This Proposal is presented on a cash-free and debt-free basis, assuming a normalized level of working capital and that all of your transaction fees and related expenses, if any, will be paid from such amount, and is a cash offer payable upon closing. All third party debt financing would be settled in cash at closing. This Proposal is also conditional upon the approval of the CVA. However, our client is willing to offer materially enhanced terms to the CVA, by offering to pay all landlord rent arrears in full (which we understand are to be materially compromised under the current CVA terms). We envisage that all other terms of the CVA will remain as is and so a short adjournment of the decision procedure is only required for the board to : (i) improve landlords overall outcome under the CVA proposal; (ii) modify the CVA terms in relation to the arrears of rent, so that rent arrears are no longer compromised; and (iii) deliver a clear stable platform for the business post the CVA, which is in the interests of creditors as a whole."

The letter sought a response as soon as possible but before the voting deadline.

19. EG was therefore offering to refinance all senior and mezzanine debt and to repay in full all rent arrears, in contrast to the 30p/£ being offered under the CVA. As Mr

Smith QC pointed out, it is pertinent to note that the Offer is conditional on the CVA being approved subject to the modification in relation to the rent arrears.

20. There was, however, no postponement of the decision procedure. NGL's shareholders wrote on 30 November 2020 to K&E saying that they had reviewed the Offer but had concluded that "*we do not wish to accept or progress your client's proposal*".

21. At around 2:40pm on 30 November 2020, the directors of the Company posted an announcement on the CVA website in relation to the Offer. Creditors received an email from the Company informing them of an update to the CVA website. The announcement referred to the Offer that "*purports to provide for payment in full of landlord rent arrears*" but does not refer to other aspects of the Offer such as the refinancing of all debt. The announcement stated that the shareholders of NGL had rejected the Offer and the directors and nominees had decided not to postpone the present CVA timetable.

22. At around 8pm that evening, so 4 hours before the close of the voting, the Company proposed a modification to the proposal and this was posted on the website. The modification introduced a new clause 45 that was said to protect the interests of creditors in the event that the Offer from EG went through in the next 6 months. If that were to happen, the new clause provided that the Company would use its "*best endeavours*" to procure a sale on terms that provided for "*each Compromised Landlord and Category E CVA Creditor to receive a payment equal to the amount of their Allowed CVA Claim less any amounts they have received (or will receive) from the Compromised CVA Creditor Fund*".

23. Mr Robin Dicker QC, leading Mr Adam Al-Attar, for Mr Young, said that clause 45 was wholly inadequate, as the directors must have known, because it depended on the ultimate shareholders engaging with the Offer when they would have no reason to do so if the CVA had been approved.

24. In any event, the important point about the modification is that it is now apparent that some 67% of the CVA creditors had actually voted on the proposal by 9am on 30 November 2020. Those creditors could not have known of the Offer and would not have seen the announcement and modification posted on the website when they cast their votes. Furthermore, those votes in favour of the CVA were counted by the Company as being in favour of the proposal as modified, even though the modification was not even made available until a few hours before voting closed. Mr Dicker QC says that, as a result, the requisite statutory majority for the proposal as modified was not achieved, rendering the CVA invalid and ineffective.

25. The Company says that the CVA was approved by creditors with 92.76% of voting creditors and 89.28% of unconnected creditors and that it came into effect on 23:59 on 30 November 2020.

26. There was a board meeting on 2 December 2020 at which the events of 29 and 30 November 2020 were recorded together with an explanation for the decisions taken by the directors in relation to the CVA and the Offer.

(iii) The Challenge Application

27. It is clear that, following the approval of the CVA, EG was keen to mount an attack on the CVA. As EG itself would have no standing to bring a challenge under s.6 of the IA 1986, it needed disgruntled landlords to come on board and exercise their rights to challenge the CVA. I have seen press reports from as early as 2 December 2020 referring to EG's Offer and the strong possibility of a "*landlord revolt*". An article in the Sunday Times on 20 December 2020 noted that EG had hired solicitors and property agents to "*rally property owners*". The article then referred to a similar tactic adopted by Mr Mike Ashley in relation to the Debenhams CVA saying that the Issa brothers "*hope to derail the insolvency – and ultimately take control of Nero*." The Company's view all along is that the Offer was purely designed to disrupt the CVA.

28. EG's property agents appear to have written to many landlords inviting them to join in the challenge. There was not much time as any such challenge has to be brought within 28 days of the approval of the CVA. EG was offering to fund the challenge.

29. As stated above, the Challenge Application was issued on behalf of nine landlords. There were actually two applications issued, one on 29 December 2020; the other on 31 December 2020. The latter one has been stayed.

30. The Challenge Application relies on both limbs of s.6(1) of the IA 1986: (a) that the CVA is unfairly prejudicial to the landlords; and (b) that there were material irregularities in relation to the proposal or the approval thereof. The relief sought is under s.6(4)(a): revoking or suspending the decision to approve the CVA; or s.6(4)(c): directing the calling of another meeting to consider a revised proposal.

31. Unlike a number of recent challenges to CVAs (for the most recent see Zacaroli J's judgment in *In re New Look Retailers Ltd* [2021] EWHC 1209 (Ch)) the Challenge Application is not based on technical arguments as to the provisions of the CVA and its jurisdictional limits in relation to property rights and discrimination between creditors. Instead the focus of the Challenge Application is on the duties of directors in relation to an electronic decision procedure where there is a material development affecting the proposal which cannot be properly considered by the creditors. Mr Young's case is that the directors' primary duty in relation to a company in financial difficulties is to have regard to creditors' interests and that, in the circumstances, the directors ought to have postponed the decision on 30 November 2020 so that EG's Offer could be properly considered and put to the creditors and explored and perhaps negotiated further with the ultimate shareholders, Dr Ford and Mr Price. There was a potential conflict of interest in Dr Ford and Mr Price being also the majority on the Company's board and therefore making the decision not to postpone the decision process.

32. Since the issue of the Challenge Application, the Company has managed to settle with all the other Challenge Landlords. The terms upon which such settlements were made are not known. A perhaps curious feature of CVAs is that, despite the terms of the CVA whereby such landlords are to receive 30p/£, the Company can actually pay off any creditor who has challenged the CVA after the 28-day limitation period has expired and see off the challenges that way. Once that has happened, there is no other person who can challenge the CVA.

33. However, in this case, Mr Young was not willing to be bought off, despite repeated offers to settle, including an open offer to pay his rent arrears in full. He has explained why he wishes to pursue the Challenge Application in his written evidence. The Company says that he is only continuing with the Challenge Application because he has bound himself to do so pursuant to arrangements he has entered into with EG.

(iv) Mr Young's arrangements with EG

34. Following enquiries made by the Company's solicitors, Linklaters LLP, on 18 January 2021, CMS Cameron McKenna Nabarro Olswang LLP (**CMS**) on behalf then of the Challenge Landlords wrote explaining that EG had agreed to indemnify all of the landlords including Mr Young in respect of their costs and disbursements, and any adverse costs and losses arising as a consequence of bringing the Challenge Application.

35. The Challenge Landlords then made an application for expedition of the trial of their Challenge Application which was due to be heard on 12 February 2021. The evening before that hearing, CMS served a witness statement from a partner of theirs, Mr Luke Pardey, in which for the first time a further agreement between EG and just Mr Young was disclosed. This agreement, dated 4 February 2021, which has been called the "**Supplemental Agreement**" was not disclosed at the time but Mr Pardey had said that the existence of the Supplemental Agreement meant that the grounds for expedition relied on by the others did not apply to Mr Young. Nevertheless, Adam Johnson J made the order for expedition.

36. Despite a number of requests by Linklaters for disclosure of the Supplemental Agreement pursuant to CPR 31.14, this was resisted by CMS. The Company had to issue an application for inspection. On the day before the hearing of that application, CMS provided a copy of the Supplemental Agreement. The hearing of the inspection application was vacated and Mr Young agreed to pay the Company's costs.

37. By clause 2 of the Supplemental Agreement, EG paid £100,000 to Mr Young. This was in return for Mr Young's undertaking not to accept any settlement offer from the Company and not to withdraw the Challenge Application save with the consent of EG. Clause 3.1 provides as follows:

> "3.1 In consideration for the payment in accordance with Clause 2 (Payment), you undertake to EG and confirm that from the Effective Date, you will:
>
> (1) Reject the CNG Offer[1]and any Subsequent Offer[2];
>
> (2) Not take any further step or action whatsoever to progress negotiations or discussions with respect to the CNG Offer or any Subsequent Offer;

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1 This was an offer that had been made by the Company to settle the proceedings brought by Mr Young.

2 This was defined as "*any offer subsequent to the CNG Offer from Nero Holdings Limited and / or its Related Parties or any one of them (including for the avoidance of doubt, Gerald William Ford and any other ultimate beneficial owner of Nero Holdings Limited and / or any person or entity acting for, on behalf of, or in concert with such persons), where such offer is conditional upon withdrawing the Challenge"*

(3) Refrain from taking any step or action that would, or would have the direct effect of withdrawing, terminating, frustrating or otherwise bringing to an end, the Challenge, except with EG's written consent;

(4) Subject to continued indemnity for legal costs and losses on the terms set out in and pursuant to the Deed of Indemnity, use best endeavours to continue to support the Challenge; and

(5) Subject to continued indemnity for legal costs and losses on the terms set out in and pursuant to the Deed of Indemnity, take all steps and actions necessary to continue the due and orderly progression of the Challenge"

38. This is at the heart of the Company's application. No matter what terms the Company might offer Mr Young he has agreed not to accept it without EG's consent. Mr Smith QC said that Mr Young has effectively sold the right to continue these proceedings to EG in return for a sum far in excess of his own claim. He was therefore merely the "*tool*", or "*vehicle*" or "*puppet*" of EG.

39. The Supplemental Agreement also contained the following term:

"4.1 From and subject to the occurrence of the Acquisition Date[3], in consideration of the parties agreeing to perform their respective obligations under this letter, you agree that this letter is in full and final settlement of the Landlord Claims, and you release and forever discharge to the fullest extent permitted by law EG and its related Parties from all Landlord Claims, and that such Landlord Claims shall be fully and finally released and extinguished with effect from the Acquisition Date"

40. This meant that if EG or its Related Party acquired all or part of the Group at some point in the future following the Challenge Application then Mr Young's claims for rent arrears would be treated as released. Neither Mr Young nor EG seemed to have realised that the effect of this clause was that Mr Young would be in a better position financially if the Challenge Application failed because he would then receive his 30p/£ rent arrears (£11,360) plus the £100,000 paid by EG. By contrast, if he won the Challenge Application and EG succeeded in its acquisition, then the effect of the above clause would be that Mr Young would receive nothing further from the CVA and he would be left with only the £100,000 from EG.

41. Once they had been made aware of this potential consequence, EG and Mr Young agreed an "**Amended Supplemental Agreement**" dated 21 March 2021 which purports to "*amend and restate*" the Supplemental Agreement. The Amended Supplemental Agreement is in substantially the same terms but without the clause 4 release. Mr Smith QC said that there was no consideration for the Amended Supplemental Agreement and it was merely an attempt to whitewash the effect of the Supplemental Agreement to avoid the unwelcome potential outcome that Mr Young would be better off if his Challenge Application failed. In any event, Mr Smith QC said that both Agreements show the abusive nature of these proceedings and cannot

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[3] This was defined in the Supplemental Agreement as the completion date of an acquisition by EG or one of its affiliates (a "Related Party") of NGL or one of its subsidiaries.

confer any legitimate interest on Mr Young in the relief that he is seeking. Rather the Agreements show that EG is just seeking to further its own commercial interests and using Mr Young as the vehicle through which to do so, including by taking up significant Court time and resources by a week-long expedited trial in July.

42. It is also material to point out that on 27 January 2021, Mr Young exercised his rights under the CVA to terminate his lease by serving a Notice to Quit. That Notice to Quit was not conditional on the Challenge Application being unsuccessful. The Company accepted the Notice to Quit and the lease was terminated on or around 24 February 2021 from which point on the Company has continued to occupy the premises as a tenant at will. Mr Smith QC relied on this to say that Mr Young no longer had any legitimate interest in the relief sought. I will deal with that argument later.

(v) Open offer to settle

43. As noted above, on 25 March 2021 the Company through its solicitors made an open offer to settle with Mr Young. On the basis that Mr Young's outstanding rent arrears were £37,867 and that this was "*likely to be a fraction of the costs that [the Company] will incur in defending the Challenge Application*", the Company offered to pay that sum "*in full and final settlement of the Challenge Application inclusive of any claim for costs and Mr Young's claim in [the Company's] CVA.*"

44. Mr Dicker QC submitted that, because the offer to settle did not include an offer to settle Mr Young's costs as well, it was not unreasonable for him to refuse it. However, that is not entirely fair as the next paragraph of the letter refers to the fact that the Company understood that EG had provided a full indemnity for Mr Young's costs and that therefore Mr Young himself had not incurred any costs in connection with the proceedings. Linklaters invited Mr Young to respond if their understanding was incorrect in which case the Company would "*consider the position*". Mr Young did not respond to the offer.

Test for Strike out and Summary Judgment

45. Before turning to the core issues on the application, it is important to be clear on the correct approach for the court in considering those issues as the basis for a strike out or summary judgment application.

46. As noted above, on a strike out application, the court has to assume that the facts alleged in the Amended Particulars of Claim are true. Furthermore, it seems to me that unless there is independent credible evidence (such as contemporaneous documents) suggesting otherwise, the evidence of Mr Young as to his reasons for pursuing the Challenge Application must also be accepted at this stage as truthful. In order to strike out the Challenge Application, the court must be satisfied that it is bound to fail. (See the helpful summary of principles in *In re Regis UK Limited (in administration)* [2019] EWHC 3073 (Ch) at [22].)

47. As to the application for summary judgment, the court has to consider whether the claimant or applicant has a "*realistic*" as opposed to a "*fanciful*" prospect of success; and it must not conduct a "*mini-trial*": *Swain v Hillman* [2001] 2 All ER 91.

48. In the context of this case, that means that the Company has to show that there is no real prospect of Mr Young succeeding in showing that he has a legitimate interest in the relief being sought.

49. The Company seeks to prove that on two broad bases:

(1) That the Challenge Application is being pursued for a collateral and illegitimate purpose, namely that of furthering EG's commercial interests in taking over the Caffe Nero Group;

(2) That even if it is Mr Young's purposes that are relevant, he has no legitimate interest in the relief being sought because of the arrangements he has entered into with EG.

Legitimate Interest in the relief sought

Legal Principles

50. In the Challenge Application, Mr Young is asking the court to grant him statutory relief under s.6 of the IA 1986. The persons who can apply under s.6 are limited to those specified in s.6(2). Mr Young is unquestionably within the only relevant category in s.6(2)(a): "*a person entitled, in accordance with the rules to vote at the meeting of the company or in the relevant qualifying decision procedure*". The granting of relief by the court under s.6(4) in the event that the applicant succeeds in establishing the grounds mentioned in s.6(1) is discretionary.

51. The apparent further requirement for an applicant for statutory relief to show that they have a legitimate interest in the relief sought stems principally from the Privy Council's advice in *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 (***Deloitte & Touche***). In that case, which was an appeal from the Cayman Islands Court of Appeal, the claim was struck out because of a lack of a legitimate interest. There have been subsequent cases in England in which *Deloitte & Touche* has been considered but in none of those cases were the proceedings struck out on the basis that the applicant lacked a legitimate interest.

52. In *Deloitte & Touche*, a Cayman Islands company, Omni Securities Ltd, was in voluntary liquidation but subject to the supervision of the court. Its official liquidator, acting on behalf of the company, brought proceedings in negligence against its former auditors. The auditors applied to the Grand Court of the Cayman Islands to remove the official liquidator from office on the alleged grounds that they had a conflict of interest and duty in pursuing the claim against the auditors. The auditors were strangers to the liquidation in the sense that they were neither contributories nor creditors; they were merely potential debtors to the company because of the proceedings brought against them. It was therefore an audacious application and the official liquidator applied to have it struck out.

53. The judge refused to strike out the application but the Court of Appeal of the Cayman Islands allowed the official liquidator's appeal and struck it out. This was upheld by

the Privy Council.[4] Lord Millett delivered the advice of the Board. At p.1611A-G, Lord Millett said as follows (underlining added):

> "In their Lordships' opinion two different kinds of cases must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.
>
> Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he "has an interest in making the application or may be affected by its outcome." It means that he has a legitimate interest *in the relief sought*. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see *In re Corbenstoke Ltd (No 2)* [1990] B.C.L.C. 60. This case was criticised by the plaintiff: their Lordships consider that it was correctly decided.
>
> The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. Section 106(1) does not limit the category of persons who may make the application. The plaintiff, therefore, does not lack a statutory qualification to invoke the section. But the question remains whether it has a legitimate interest in the relief which it seeks."

54. Lord Millett was therefore distinguishing between: (a) the jurisdictional question as to whether the applicant is within the category of persons qualified under the statute to make the application; and (b) the discretionary "*judicial restraint*" question which is whether such a qualified person has a legitimate interest in the relief sought. There is no reference to such a legitimate interest having to be a financial interest.

[4] The headnote in the Weekly Law Reports says at holding (1) that the appeal was allowed, but after holding (2) that the decision of the Court of Appeal was affirmed. This was probably because the Privy Council disagreed with the Court of Appeal on the jurisdictional question but agreed that the claim should be struck out.

55. In that case, the relevant statutory provision as to removal of a liquidator by the court did not prescribe the persons who could apply. Lord Millett held that even though the auditors were not creditors or contributories, they did "*not lack a statutory qualification to invoke the subsection*". They therefore satisfied the jurisdictional question. But because the company was insolvent, only a creditor could have a legitimate interest in removing the official liquidator for cause. Lord Millett concluded at p.1611H:

> "The plaintiff is not merely a stranger to the liquidation; its interests are adverse to the liquidation and the interests of the creditors. In their Lordships' opinion, it has no legitimate interest in the identity of the liquidators, and is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office-holders."

56. In considering *Deloitte & Touche*, it is, in my view, important to bear in mind that there was no statutory qualification for those seeking to avail themselves of the section and so the Board had to decide the legitimate interest question in that context. As the Board also found, the auditors' interests were actually adverse to those of the creditors generally and it is in the creditors' interests that the official liquidator must always act.

57. Mr Smith QC referred me to *Walker Morris (a firm) v Khalastchi* [2001] 1 BCLC 1, a decision of Mr Nicholas Strauss QC sitting as a deputy High Court Judge. This case concerned a company in liquidation that was facing a potential claim from the Inland Revenue. The liquidator requested certain documents from the company's former solicitors, Walker Morris. They were a very small creditor of the company in the sum of £237. They applied to the court for directions that the liquidator should not be at liberty to release any of the documents or disclose their contents to the Revenue without an order of the court. The application was refused by the judge on the basis that Walker Morris were not proper persons to invoke the court's jurisdiction to interfere in the administration of an insolvent liquidation. Furthermore, even though they were a creditor, they were not making the application as a creditor but were instead seeking to advance the interests of possible debtors, which would be adverse to the creditors.

58. The judge referred to *Deloitte & Touche* and then said this:

> "In my view, the situation in this case is in substance the same. It is true that the applicants are creditors, and would have locus standi if acting as such; but this is irrelevant, since they are in fact seeking to advance the interests of possible debtors, which are adverse to those of the creditors. I agree with Mr Moss's submissions that the operative principle is judicial restraint, that there is no doubt about the court's jurisdiction, that there is no absolute rule as to when it will be exercised and that the court might well act to restrain reasonably anticipated impropriety, even if revealed by an unmeritorious application on the part of a person without a legitimate interest."

59. Both this case and *Deloitte & Touche* were somewhat brazen attempts to interfere in the liquidation in a way that was adverse to the interests of creditors generally. While there may be jurisdiction strictly so-called to do so, albeit rather tangential, the applicant will not be granted relief that is contrary to the interests of the creditors in

an insolvent liquidation. In my view this indicates that the court will scrutinise carefully whether an application in a liquidation or other insolvency process is really for the benefit of the creditors as a whole. This stems from the nature of insolvency processes being class-based forms of relief.

60. Mr Smith QC also referred me to *Re Coniston Hotel (Kent) LLP* [2014] EWHC 1100 per Morgan J at [52], where *Deloitte & Touche* was considered.

61. Both Mr Smith QC and Mr Dicker QC relied on Norris J's judgment in *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EGLR 47 (***Debenhams***). The circumstances of *Debenhams* are similar to this case in that the landlords' challenge to the CVA was funded by Mr Mike Ashley with a view to assisting his company, SportsDirect, in its attempts to take over Debenhams. Mr Smith QC was then, as now, appearing for the debtor company and one of his arguments was that relief should be refused under s.6 of the IA 1986 because the applicant landlords did not have a legitimate interest in the relief sought and that the application was being pursued for collateral purposes, namely to assist in SportsDirect's acquisition of Debenhams. It is important to record that this submission was made at the trial and there was no earlier application to strike out the CVA challenge on that basis.

62. A significant feature of the *Debenhams* case is the existence of what was called a "*gentlemen's agreement*" between SportsDirect and the applicant landlords that if the challenge was successful and Debenhams entered administration and SportsDirect purchased the assets out of the administration, that it would pay the landlords rent at a higher rate than they would have received under the CVA. Even though it was probably a non-binding commitment to pay higher rent, the existence of the "*gentlemen's agreement*" was said to give the landlords their own legitimate interest in the relief sought.

63. Norris J rejected most of the substantive challenges to the CVA (there was one jurisdictional challenge which required a modification to the CVA that was allowed). But he seems to have rejected Mr Smith QC's submission in relation to legitimate interest. At [132] to [133], the learned Judge made clear that the issue of legitimate interest arises as a matter relevant to the exercise of the court's discretion in relation to whether, and if so what, relief should be granted under s.6 of the IA 1986.

> "132. If the court is satisfied that a CVA unfairly prejudices the interests of a creditor, or there was a material irregularity in the relation to the holding of the creditors' meeting or the qualifying decision making process, the court may make an order under section 6(4) of the Act to revoke or suspend the decision approving the CVA, directing any person to summon a further company meeting to consider a revised proposal, or directing any person to seek a decision from the company's creditors as to whether they approve a revised proposal.
>
> 133. Mr Smith QC for the Company contends that this discretion is to be exercised with reference to the legitimate interest of the party requesting an order to be made. He relies on Deloitte & Touche A.G. v Johnson [1999] 1 W.L.R. 1605".

64. Norris J recorded Mr Smith QC's submissions about collateral purpose and said that they were "*entirely plausible*". However he rejected the submission that the applicant landlords had no legitimate interest in the relief they were seeking:

> "137. …But it does not mean that the Applicants have no legitimate interest in pursuing the Application. First, because if matters do pan out as anticipated then the Applicants have the benefit of a "gentlemen's agreement" with Mr Ashley that in *his* negotiations they will be treated more favourably than they are under the CVA. Second, the Applicants take a jurisdiction point in relation to which the merits of their conduct and the exact nature of their interest are irrelevant."

65. It seems that Norris J accepted that it was sufficient for the applicant landlords to hope that they would agree better terms for themselves with Mr Ashley pursuant to the "*gentlemen's agreement*". That gave them a legitimate interest in the relief they were seeking which would entail the revocation of the CVA which would in turn facilitate negotiations with SportsDirect to acquire Debenhams.

66. Norris J also seemed to indicate that in relation to substantive challenges that went to jurisdiction, the precise nature of the applicant landlords' interest in the relief sought is irrelevant. By that I think he meant that they are either right or wrong on those substantive jurisdictional issues and there would be no question of judicial discretion having to be exercised. It is only when the court is in the territory of "*judicial restraint*" as Lord Millett put it in *Deloitte & Touche*, or discretion, that the legitimate interest issue arises.

67. It is difficult to see at the strike out stage, how the exercise of the discretion as to whether relief should be denied to the applicants on the grounds of no legitimate interest, can be conclusively determined.

68. Mr Dicker QC also relied on *Brake v Lowes* [2021] PNLR 10 in which the Court of Appeal partially allowed an appeal from HHJ Matthews, sitting as a deputy High Court Judge. Mr and Mrs Brake were former bankrupts as well as trustees of a family settlement and they had sought to sue their trustee in bankruptcy under s.303(1) of the IA 1986 in both capacities[5]. The case concerned the sale by the trustee in bankruptcy of a property to a third party in circumstances where there were complaints as to collusion and in respect of which the former bankrupts claimed that their trustee in bankruptcy had behaved perversely and irrationally.

69. HHJ Matthews struck out all these applications. He held that in their capacity as trustees of the settlement, the applicants were merely unsuccessful bidders for an asset and were therefore outsiders to the bankruptcy and the liquidation and had no standing to sue in that capacity. He also held that in their capacity as former bankrupts, the applicants had to show that there would be a reasonable prospect of there being a surplus in the bankruptcy for them to have a legitimate interest in the application under s.303(1).

70. The Court of Appeal dismissed all the appeals in relation to the settlement trustees' claims. However, it allowed the appeal by the applicants in their capacity as former

[5] There were also separate related proceedings brought against the liquidator of an LLP involved in the transaction under s.168(5) of the IA 1986.

bankrupts. Asplin LJ, with whom Floyd and Henderson LJJ agreed, first held that as former bankrupts they were expressly included within the statutory list of those that could apply under s.303(1) (see [66]). She therefore held that Lord Millett's jurisdictional question was satisfied but she then had to go on to consider "*what more is required in order to have standing under s.303(1)*" (see [70]). She set out some passages from *Deloitte & Touche*. And at [78] – [79], Asplin LJ summarised the law (underlining added):

> "78 …The very nature of the bankruptcy regime is such that the bankrupt having taken the benefit of being relieved of his debts, absent fraud, cannot have standing to interfere with the day-to-day administration of the estate by the trustee on behalf of the creditors. He must be able to show that he has a substantial interest which has been affected by the conduct complained of and a direct interest in the relief sought. The potential existence of a surplus is one way of being able to demonstrate such a substantial interest but it seems to me that it is not the only one.
>
> 79 In my judgment, therefore, although the principles in the *Dodwell* and *Deloitte* cases apply in relation to applications under ss.303(1) and 168(5), the judge was wrong to apply the *Deloitte* case narrowly and to concentrate solely on whether there is a surplus in this case."

71. On the basis of the pleaded facts, Asplin LJ held that, as former bankrupts, the applicants had a legitimate interest:

> "85 It seems to me that in the light of the pleaded conduct, which for this purpose is assumed to be true, the Brakes in their capacity as bankrupts have a legitimate and substantial interest in the relief sought sufficient to give them standing to make an application under s.303(1). At the very least, their interests were substantially affected by the grant of the Licence, the consequences which flowed from it and Mr Swift's alleged unlawful acts. This is not a case such as *Dodwell*, in which the bankrupts seek merely to interfere in every day conduct of the bankrupt estate or in transactions effected by the trustee merely as a matter of commercial judgment. It seems to me that assuming the allegations to be true, it is not only perfectly arguable that at least some of the acts satisfy the substantive perversity test expounded in the *Edennote* and *Mahomed* cases but also that the Brakes have a direct interest in the relief sought. It also follows that when determining the preliminary question of standing, the judge was wrong to decide definitively that the acts complained of were not acts by Mr Swift in the bankruptcy."

72. Mr Dicker QC submitted that this shows that it is not necessary to prove a financial interest in the outcome as the former bankrupts did not have to show that there would likely be a surplus in their estates. However, Mr Smith QC submitted that, while *Brake v Lowes* is authority for the proposition that former bankrupts do not need to prove a surplus in their bankrupt estates to show a sufficient interest, the Court of Appeal did still emphasise that a legitimate interest did need to be proved. In that case the legitimate interest was the fact that they were affected by the grant of a licence over their property.

73. I can summarise what I believe these authorities demonstrate are the applicable principles in relation to legitimate interest in the context of an insolvency application such as this one:

(1) Whether or not the statute specifies the persons who are qualified to apply under the section concerned, it is necessary for the applicant to show a legitimate interest in the relief sought;

(2) That legitimate interest comes into the equation when the court is considering the exercise of its discretion as to whether to grant the relief sought;

(3) There does not have to be a direct financial interest in the relief sought but it is not sufficient for the applicant to say he should be entitled to conduct a roving review of the respondents' conduct or to act as the creditors' policeman – see *Bentinck v Fenn* (1887) LR 12 App Cas 652, per Lord Macnaghten at p.669;

(4) Where it is clear that the applicant's purpose is adverse to the interests of creditors, which is the class in whose interests such applications should be brought, the court may consider that the evidence as to this is so clear that it justifies the striking out of such an application before trial;

(5) But where the application is not clearly contrary to the creditors' interests generally, it would normally be necessary to weigh the applicant's alleged legitimate interest with other factors when the court has made factual findings after a trial and is deciding on whether to exercise its discretion in favour of granting the relief sought;

(6) It is, as Lord Millett carefully put it, a question of "*judicial restraint*" which I take to mean that, as part of the balancing process in deciding whether to exercise a discretion in their favour, the court will take into account the strength and legitimacy of the applicant's interest in that relief being granted.

Application of the principles to the facts

74. It is therefore necessary to examine whether the Company can show that it is inevitable that the court will not grant Mr Young any relief under s.6 of the IA 1986 because he has no legitimate interest in the relief that he is applying for. As I have said above, the Company has two broad arguments as to this: (1) EG's collateral purpose; and (2) no legitimate interest as a result of the arrangements between Mr Young and EG. I will take each in turn.

(1) <u>EG's Collateral Purpose</u>

75. Mr Young's witness statement sets out why he issued the Challenge Application and why he is pursuing it. After explaining some of the background, including why he wanted a large corporate tenant such as the Company to provide certainty of income, he then goes on to say why, for some time, he had been unhappy with the Company's approach to various matters, such as rent reviews and the Covid-19 pandemic. As noted above, Mr Young voted in favour of the CVA but before he had any knowledge

of EG's Offer or the proposed modification. At paragraphs 41 to 42 of his witness statement, he explains his frustration with not being able to consider the Offer:

> "41. It was, therefore, frustrating that the Offer, which if pursued would have been hugely beneficial to small landlords like me, was given such short shrift. [The Company] had been seeking [the Company's] landlords' cooperation in granting waivers of rent for several months and, yet, when presented with an offer which was guaranteeing to pay landlords' full contractual rent, the offer was rejected out of hand.
>
> 42. It was also frustrating that the details of the Offer were not brought to the attention of the [Company's] landlords. [The Company] had sought to appear open with landlords regarding its financial position, presumably in order to persuade landlords to agree to substantial waivers of rent. However, it chose to provide incomplete and selective information regarding the Offer, who had made it, and what had been proposed. I felt that [the Company] was morally bound to consider the Offer and go back to us to inform us of the late bid and what that potentially meant for us. They should have at the very least sought to postpone the vote to consider the Offer, and inform the landlords of the details of the Offer. We could have then voted a few weeks later when we had a chance to see what was on the table."

76. Having found out about the funding indemnity being offered by EG, Mr Young decided to join with the other landlords in issuing the Challenge Application. At paragraphs 45 and 46 he said as follows:

> "45. Given my unhappiness with the way the CVA had been handled throughout the process and in particular following the receipt of the Offer, I decided to register my interest in joining the potential challenge to the CVA.
>
> 46. Subsequently, on 29 December 2020, I issued the CVA Challenge, along with 6 other Landlords. In addition to my issues with [the Company's] conduct of its business and its approach to negotiations regarding the waiving of rent, the CVA and the [Company's] handling of the Offer did not sit well with me, and I wanted to hold [the Company] to account."

77. In paragraph 51, Mr Young explained why he accepted EG's offer in the Supplemental Agreement:

> "51. …By that point, in February 2021, I was concerned as it had been almost a year since I had received rent payments. I explained that, with outstanding rent payments of almost a year and legal costs that I had incurred in relation to NHL's failure to pay rent, my total losses amounted to between £65 – 70,000. He then offered me £100,000, which was obviously attractive to me as I had already challenged the CVA for the reasons I have explained. I understand that EG was willing to pay me this additional amount in order that I should not settle with [the Company]. I was prepared to agree to this because it provided me with immediate monies."

78. Mr Young then set out in paragraphs 57 to 59 the reasons why he entered the Amended Supplemental Agreement so as to remove the release clause when it appeared the Company was saying this showed why the Challenge Application was an abuse of process. He stated that he did "*not think he was doing anything against the interests of other CVA Creditors*".

79. Mr Young referred to the open offer made by the Company on 25 March 2021 to pay the outstanding arrears of rent and other sums as at the date of the CVA. Mr Young recognised that he was bound not to accept such an offer without EG's consent but said at paragraph 61:

> "61. I could not have accepted the [25 March] Offer without EG's consent because of the Supplemental Agreement I have made. However, in any case I had decided that I was going to challenge the CVA, that I would continue with the challenge, and that I would see the challenge through for the reasons I summarise in the next section of this statement."

It is clear that Mr Young himself wanted to proceed with the Challenge Application.

80. His reasons for wanting to do so are set out in paragraphs 63 to 77. Essentially what he says is that he wants to achieve the best financial outcome for his business as a commercial landlord and he sees that as more likely to happen if EG acquires Caffe Nero, his rent arrears are paid in full and he has a well-funded and growing secure tenant. He would like to be in a position, after the Challenge Application is successful, to negotiate a new lease for a term certain at a time when the commercial property market should be recovering after the Covid-19 pandemic and when he would have various options available to him, whether or not EG's bid to acquire Caffe Nero succeeds. At paragraph 77, Mr Young disputes that his interest is adverse to the other CVA creditors:

> "77. In the circumstances, it is my position that I have a legitimate interest in the relief being sought. It is also my position that my interest is aligned with that of other CVA Creditors. My purpose in challenging the CVA, if achieved, will lead to a better outcome for me and for all other Compromised Landlords. My interest is not opposed to theirs and I strongly disagree with Mr Stevenson's assertions that my purpose is improper or hostile to the interests of CVA Creditors. That is not the case."

81. In paragraphs 78 to 84, Mr Young explains how he maintains control over the Challenge Application, despite the Supplemental Agreement and indemnity from EG. At paragraph 81 he says as follows:

> "81. It is correct that I need consent from EG in order to settle the proceedings. However, EG does not have any control as to how I conduct the CVA Challenge. My solicitors, [CMS] act for me alone and, as the sole remaining applicant, only I give instructions and take decisions in relation to the Challenge Application."

82. Obviously this evidence can be challenged by way of cross examination at the trial. Even adopting a realistic and sceptical approach to this evidence, I do not think that at this stage I can disbelieve this evidence and reject it. It would not be fair or appropriate to do so.

83. Mr Smith QC is effectively inviting me to do just that when he submits that Mr Young is merely the "*tool*" or "*puppet*" of EG. Of course Mr Young knows why EG wishes to support the Challenge Application and to see it through. But if there are substantive grounds for the Challenge Application, as it has to be accepted there are, the fact that it is being funded by a third party which has its own purposes in doing so, does not detract from the applicant's own purposes which are to achieve a better deal for himself and, he thinks, for the creditors as a whole. At least they should have the opportunity of being able to consider an alternative to the CVA proposed by the Company. The takeover by EG may be beneficial to the creditors and EG alike.

84. Mr Young is the applicant and he has standing under s.6(2) of the IA 1986 to bring the Challenge Application. EG has no such standing but is funding the Challenge Application and wants it to succeed so as to facilitate a possible takeover. Mr Ashley was doing likewise in the *Debenhams* case and Norris J did not think that his purpose would have deprived the applicant landlords of the requisite legitimate interest.

85. Mr Smith QC relied most heavily on the terms of the Supplemental Agreement to say that control of the Challenge Application was now with EG and so its purpose is the only relevant purpose for the court to consider. However I do not think that I can safely conclude at this stage that Mr Young has so relinquished control of the proceedings that I can ignore what he says in his written evidence. He is apparently making all decisions in relation to the Challenge Application and even though he would have been unable to accept the Company's settlement offer without the consent of EG, his evidence is that he would have rejected it anyway as he wants to be in a position to consider his options to secure his future rental income after the current CVA has been revoked.

86. Accordingly I reject the Company's argument based on EG's collateral purpose.

(2) <u>Mr Young does not have a legitimate interest</u>

87. Mr Smith QC's argument under this ground is that because of the arrangements in place between Mr Young and EG, Mr Young no longer has any continuing interest in the recovery of his rent arrears and nor does he have any continuing interest in the performance of the Company and its covenant strength.

88. As to the recovery of rent arrears, Mr Smith QC said that the Supplemental Agreement makes it clear that the pursuit of the Challenge Application has nothing to do with Mr Young's recovery of his rent arrears. He submitted as follows:

(1) Mr Young was paid £100,000 by EG under the Supplemental Agreement, far in excess of the amount of his rent arrears. Furthermore, in paragraph 51 of his witness statement (set out above) Mr Young said that he had calculated that he had lost £65,000 to £70,000 including rent arrears and legal costs and that was why he was offered £100,000 by EG to pursue the Challenge

Application. Mr Smith QC said that this indicates that the rent arrears were covered by the £100,000 payment.

(2) The release in clause 4 of the Supplemental Agreement showed that the Challenge Application was nothing to do with the rent arrears.

(3) The removal of the release by the Amended Supplemental Agreement was ineffective because Mr Young did not provide any consideration and so is unenforceable.

(4) In any event, the Amended Supplemental Agreement does not amount to anything more than a voluntary undertaking by EG to pay or procure the payment of a further sum in respect of rent arrears if EG acquires the Nero Group.

89. Mr Dicker QC responded to this by saying that the Company was seeking to take advantage of and rely upon a contract to which it is not a party and from which it does not benefit. In any event he said that the payment of £100,000 is irrelevant because the rent arrears are still owed by the Company to Mr Young. As to the effect of the release in the Supplemental Agreement and its removal by the Amended Supplemental Agreement, Mr Dicker QC said that the release was conditional on the acquisition by EG taking place, but it was anyway removed by the Amended Supplemental Agreement. Mr Dicker QC referred me to an extract from *Chitty on Contracts* (33rd Ed) 4-077 to 4-080, and submitted that, quite apart from the Company's lack of standing to challenge the meaning and effect of a contract to which it is not a party, it was an amendment and restatement of the Supplemental Agreement which generated sufficient contractual consideration.

90. In my view, this issue cannot possibly turn on whether consideration was given for the Amended Supplemental Agreement and whether the release was effectively withdrawn. There are, no doubt, many twists and turns still to come in relation to the Challenge Application and the potential takeover by EG. The only thing that can be said for certain at this stage is that Mr Young is still owed his rent arrears by the Company. Those rent arrears have not been discharged by the Supplemental Agreement; they may be reduced to 30% of the total outstanding by the CVA, if the Challenge Application fails. The receipt of the £100,000 by Mr Young did not discharge the rent arrears. And so, Mr Young does still have a financial interest in the relief he is seeking.

91. The other aspect that Mr Smith QC focused on was the exercise by Mr Young of his break right under the CVA. The Notice to Quit that Mr Young served on the Company on 27 January 2021 was not expressed to be without prejudice to his position on the Challenge Application or conditional on it being unsuccessful. The Company accepted the termination and the lease ended on 24 February 2021. From that point, Mr Smith QC submitted that Mr Young had no continuing interest in the future performance of the Company or its covenant strength.

92. Mr Smith QC went on to dismiss Mr Young's suggestion in his witness statement that if the Challenge Application is successful his former lease could be restored and he would then acquire a new break-right under a modified CVA which he would then have the option to exercise depending on the then state of the market. Mr Smith QC

characterised this as Mr Young saying he has a legitimate interest in the relief being sought because he would have the opportunity to decide *again* whether to exercise the same break-right in a subsequent CVA. Mr Smith QC said that this was a contrived attempt to construct some arguable interest of Mr Young in continuing these proceedings.

93. Mr Dicker QC countered these submissions by reference to the acceptance by the Company that the court would have a discretionary power under s.6(6) of the IA 1986, if it were persuaded to revoke the approval given to the CVA, to restore Mr Young's lease that had been terminated pursuant to clauses 10.3 and 18 of the CVA. Section 6(6) gives power to the court to give "*directions with respect to things done under the voluntary arrangement since it took effect.*" There is no direct authority as to the scope of that power and it is certainly not for me on a strike out application to decide whether the power is apt to include the restoration of Mr Young's lease. If it was restored, it would mean that there would be a lease with a term certain to February 2023 and the releases in respect of rent arrears and dilapidation claims would no longer be effective.

94. More importantly, from Mr Young's perspective, is that if EG were to succeed in its takeover of the Nero Group, he would have EG as his tenant, which is his presently preferred outcome. I think that Mr Smith QC trivialises Mr Young's objectives by saying that he merely wants to be in a position to decide *again* whether to exercise the restored break clause. As he made clear in his witness statement, he wants to be in the best possible position to further his commercial interests in the context of an uncertain commercial property market. At the time he exercised his break-right, he felt that was the right thing for him to do in the circumstances then existing. But he has made no secret of the fact that he wants to see EG succeed in its takeover of the Nero Group as he would prefer to have it as his tenant. He believes that would also enhance the value of his reversionary interest. On the other hand, if EG's takeover does not happen for whatever reason, Mr Young will still have the option of continuing with the Company as his tenant under a restored lease for a term certain and, depending on the state of the market at that time, that may be beneficial to him.

95. Mr Dicker QC also pointed to clause 41 of the CVA which provides for no personal liability of the directors and nominees (and their staff) in respect of any aspect to do with the preparation, implementation or conduct of the CVA. At the moment, clause 41 is binding on Mr Young but if the CVA is revoked it would not be. The removal of such a clause was said to give the landlord creditors a legitimate interest sufficient to survive a strike out in *In re Regis UK Ltd (in administration)* [2019] EWHC 3073 (Ch).

96. In my judgment, the Company has not established that there is no real prospect of the court granting the relief sought by Mr Young in the Challenge Application. The court will have to consider whether Mr Young has a legitimate interest in the relief that he is seeking as part of its overall balancing of relevant factors in order to decide how to exercise its discretion in the granting of relief. At this stage, it is not possible to conclude that Mr Young will not prove such a legitimate interest at the trial. He still has a claim for rent arrears; he also has the possibility of having the lease restored to him; and he might well be in the position of having a number of options available to him, depending on whether the EG takeover goes ahead, in terms of whether to continue with the lease or exercise his break-right and look elsewhere for another

tenant. That, it seems to me, is what Mr Young personally wants to achieve by the Challenge Application based on what he has said in his evidence, namely that he will be in a better position than he is now and able to dictate his future in an uncertain market.

97. Accordingly I reject the Company's argument based on no legitimate interest.

Abuse of Process

98. Mr Smith QC also sought to advance the Company's application by reference to the principles of abuse of process. In his skeleton argument this was put on two broad bases: (1) that the Challenge Application was being pursued for an improper collateral purpose, namely EG's commercial purposes; and (2) that the Challenge Application is pointless and wasteful litigation out of all proportion to the benefit that Mr Young could hope to achieve from it. The latter point was abandoned by Mr Smith QC at the hearing; the former point seems to me to be essentially the same as the collateral purpose argument that I have already rejected. But I will deal with them both shortly below.

(1) Improper collateral purpose

99. The categories of abuse are relatively well-established but they are not closed. As was said by Moore-Bick LJ in *Land Securities plc v Fladgate Fielder* [2010] Ch 467, at [77]:

> "The circumstances in which the court will regard conduct as amounting to an abuse of process are not narrowly defined, nor should they be. Although certain types of abuse are well recognised, it is necessary for the courts to have the power to control their own proceedings and to prevent abuse, whatever guise it may take."

100. Improper collateral purpose is a recognised category. In *Lonrho plc and ors v Fayed and ors (No. 5)* [1993] 1 WLR 1489, 1502D, Stuart-Smith LJ said:

> "If an action is not brought bona fide for the purposes of obtaining relief but for some ulterior or collateral purpose, it may be struck out as an abuse of the process of the court. The time of the court should not be wasted on such matters and other litigants should not have to wait until they are disposed of…But for the court to strike it out on this basis…it must be clear that this is the case".

(See also Lord Wilson JSC's judgment for the majority of the Board of the Privy Council in *Crawford Adjusters Ltd v Sagicor Insurance Ltd* [2014] AC 366 at [62] –[65].)

101. The category applies to the insolvency context, for example where a bankruptcy or winding up petition is being used for a purpose adverse to the class interest of creditors: see the discussion in Snowden J's judgment in *Aabar Block SARL v Maud and ors* [2016] EWHC 2175 at [83] – [90].

102. Mr Smith QC referred to the decision of Macrossan J in the Queensland Supreme Court in *QIW Retailers Ltd v Felview Pty Ltd* [1989] 2 QdR 245 (this was referred to by the Court of Appeal in *Land Securities* (supra)). In that case a director of a company was interested in taking it over. However the company was not prepared to negotiate with the director who then applied to wind up the company. The court concluded that the winding up application was an abuse of process because the director did not really want to wind up the company; rather he wanted to force the company to negotiate with him about his proposed takeover. Macrossan J said that it was sometimes difficult to identify and prove wrongful collateral purpose. But he held as follows:

> "In the present case, if the real object of [the defendant] in commencing proceedings was to force the directors of the plaintiff company to negotiate that was not an end which the court would enforce. If to achieve the collateral object [the defendant] launched the winding-up proceedings even if it be assumed that the winding up order might have been available in the circumstances, that order was nevertheless not something which fundamentally he sought. If his strategy was to bring pressure to bear or simply or predominantly to force the directors to negotiate with him over his demands, he would be abusing the process of the court.
>
> Accepting that a bona fide plaintiff may be forced to choose among a limited number of available remedies, it may be said that there will be no abuse involved when a plaintiff genuinely desires the objective which the law will grant if he sues and succeeds and if he genuinely wishes to use the proceedings to obtain that objective. But if a test is formulated along any such lines as these, the conduct of [the defendant] will inevitably be found wanting. His own evidence, including his answers in cross-examination, is not the least damaging aspect for him. The impression is also borne out by a consideration of the evidence of Sanderson."

As Mr Dicker QC pointed out, this conclusion was reached after a trial in which there was cross examination of the defendant director and others in which the defendant's suggestion that he genuinely desired to wind up the company could be properly tested.

103. I think that is basically the answer to the Company's abuse of process argument based on improper collateral purpose. I have already rejected the Company's case on EG's collateral purpose and Mr Young lacking a legitimate interest. If Mr Young is entitled to take this matter to trial because he has a real prospect of establishing a legitimate interest in the relief sought, I do not see that I can possibly conclude that his pursuit of the Challenge Application is an abuse of process.

104. Underlying the whole concept of abuse of process is the notion of bringing the administration of justice into disrepute among right thinking people: see Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536. While it might be said that Mr Young has bound himself to proceed with, and not to settle, the Challenge Application without the consent of EG, I cannot ignore his evidence that he himself wishes to see it through in order to achieve a better financial and commercial outcome for him, and possibly other creditors.

105. Accordingly Mr Young does not have an improper collateral purpose and the pursuit of the Challenge Application is not abusive.

(2) Pointless and wasteful litigation

106. This head of abuse, otherwise known as "*the game is not worth the candle*", is based on Lord Phillips MR's judgment in *Jameel v Down Jones & Co Inc* [2005] QB 946 at [54]. A useful summary of the principles was set out by Nicklin J in the defamation case of *Alsaifi v Trinity Mirror plc* [2019] EMLR 1. In [44] to [45], Nicklin J said as follows:

> "44. At the heart of any assessment of whether a claim is *Jameel* abusive is an assessment of two things: (1) what is the value of what is legitimately sought to be obtained by the proceedings; and (2) what is the likely cost of achieving it? …
>
> 45. But it is clear from *Sullivan*[6] that this cannot be a mechanical assessment. The Court cannot strike out a claim for £50 debt simply because, assessed against the costs of the claim, it is not 'worth' pursuing. Inherent in the value of any legitimate claim is the right to have a legal wrong redressed. The value of vindicating legal rights—as part of the rule of law—goes beyond the worth of the claim. The fair resolution of legal disputes benefits not only the individual litigants but society as a whole."

107. As I have said, Mr Smith QC did not pursue this point at the hearing. However Mr Dicker QC relied on this authority to make a general comment about the benefits of allowing Mr Young to pursue the Challenge Application. I have some sympathy with his submission that CVAs have little judicial oversight (as Zacaroli J observed in *New Look* (supra) at [199]) as such oversight is dependent on creditors challenging the CVA within the 28 day time limit and then resisting the inevitable offers of preferential settlement terms by the company. In this case, only Mr Young of the original challenging landlords, has refused to settle. Instead he has agreed with EG not to settle with the Company and take the Challenge Application all the way.

108. There are serious issues to be tried in the Challenge Application as to the duties of the directors and nominees in relation to postponing the creditor decision making procedure in the light of EG's Offer. But one aspect of the Challenge Application that it is particularly important for the court to hear is whether the statutory majority for approval of the modified CVA was actually met. As will be remembered, at least 67% of the Company's creditors had voted electronically by 9am on 30 November 2020. The modification proposed by the Company was only posted on the website at 8pm on 30 November 2020. Mr Dicker QC submitted that, if the court finds that the modified proposal was not approved by the requisite statutory majority, it would be bound to revoke the modified proposal and declare the CVA to be not binding. It would have no discretion to do otherwise as this is a question of jurisdiction and Lord Millett's principle of "*judicial restraint*" would not be engaged.

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[6] *Sullivan v Bristol Film Studios Ltd* [2012] EMLR 27

109. I therefore think that Mr Smith QC was right not to have pursued this point. The value of the court scrutinising whether the CVA is properly binding or not is not something that can be quantified. It is something that deserves to be aired and Mr Young is now the only person who can properly bring this to a trial.

Conclusion

110. For the reasons I have set out above, I dismiss the Company's strike out and/or summary judgment application. The Challenge Application should proceed to its expedited trial date by reference to the directions I made on 15 April 2021.

111. I am grateful to counsel and their teams for their helpful and thorough submissions, both oral and written. If there needs to be a consequentials hearing to deal with any issues arising out of this judgment, then that can be arranged through the usual channels.