Neutral citation: [2019] EWHC 3073 (Ch)

Case No: 8276 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
INSOLVENCY AND COMPANIES COURT (ChD)

IN THE MATTER OF REGIS UK LIMITED (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Birmingham Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 14th November 2019

Before :

MR JAMES MORGAN QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

(1) Edward Williams	**Applicants**
(2) Christine Mary Laverty	
- and -	
(1) Carraway Guildford (Nominee A) Limited	**Respondents**
(2) Carraway Guildford (Nominee B) Limited	
(3) Hammerson (Brent Cross) Limited	
(4) Bull Ring No. 1 Limited	
(5) Bull Ring No. 2 Limited	
(6) Croydon (GP2) Limited	
(7) Oracle Nominees (No. 1) Limited	
(8) Oracle Nominees (No. 2) Limited	
(9) JTC Fund Solutions (Jersey) Limited	
(10) Kleinwort Benson Hambros Trust (CI)	

Limited

(11) British Overseas Bank Nominees Limited

(12) WGTC Nominees Limited

(13) CTCL (BUKP) Fund Nominee No. 1 Limited

(14) CTCL (BUKP) Fund Nominee No. 2 Limited

(15) Maizelands Limited

(16) Arringford Limited

(17) Meadowhall Nominee 1 Limited

(18) Meadowhall Nominee 2 Limited

(19) BL CW Holdings Limited

(20) Regis UK Limited (in administration)

Mr Matthew Weaver (instructed by **Pinsent Masons LLP**) for the **Applicants**
Mr Patrick Harty (instructed by **Hogan Lovells International LLP**) for the **1st to 19th Respondents**

Hearing dates: 11th and 14th November 2019

JUDGMENT

Mr James Morgan QC sitting as a Deputy High Court Judge:

INTRODUCTION

1. On 27th November 2018, the 1st to 19th Respondents (**"the Landlords"**) applied for an order revoking or suspending the decision of the creditors of the 20th Respondent (**"the Company"**) on 26th October 2018 to approve a company voluntary arrangement (**"the CVA"**) (**"the CVA Challenge Application"**). The respondents to that application are the Company and the Applicants as supervisors of the CVA (**"the Supervisors"**).

2. By an application dated 5th November 2019, the Supervisors apply for an abridgement of time for service and to strike out the CVA Challenge Application against them, or for summary judgment pursuant to CPR Part 24 (**"the Application"**).

3. For the reasons explained below, the Application has been issued on an urgent basis and requires speedy determination. Accordingly, oral submissions were limited to just over half a day. I am grateful to both counsel for their clear and economical presentation of their respective cases.

THE FACTS

4. The Company operates hair and beauty salons. The Landlords are commercial landlords, all of whom have let properties to the Company and are creditors of it. As a result of financial difficulties, on 8th October 2018, the directors of the Company issued proposals for the CVA in respect of which the Supervisors were then the Nominees. On 26th October 2018, just over 79% of the Company's creditors approved the proposals, the CVA came into force and the Supervisors were appointed.

5. The Landlords responded by issuing the CVA Challenge Application pursuant to section 6, ***Insolvency Act 1986*** **("IA 1986")** alleging that the CVA unfairly prejudiced their interests and/or that there were material irregularities at or in relation to the meeting approving it. Following directions, the Landlords served Points of Claim setting out 14 broad grounds of complaint. A flavour may be gained from the following summary:

   (1) Failure to provide the Company's creditors with adequate information regarding antecedent transactions entered into by the Company;

   (2) The debenture purportedly executed by the Company in favour of Regis Corp on 2nd August 2018 (**"the Debenture"**) and the purported undertaking of the debt (**"the IBL Debt"**) to International Beauty Limited (**"IBL"**) were unlawful and void and therefore should not have been admitted to vote at the creditors' meeting to approve the CVA, the result of which would have been that the CVA would not have been approved by the requisite 75% majority;

   (3) Regis Corp and IBL should not have been included as "*Critical Creditors*" and as a result the CVA is unfair;

   (4) The Statement of Affairs and Estimated Outcome Statement were materially inaccurate and incomplete;

   (5) The discounting of the Landlords' claims for voting purposes was materially irregular and unfair;

   (6) The impairments to the Landlords' leases and other changes in the terms were unfair;

   (7) The purported modification of the CVA by the Company was ineffective; and

   (8) The CVA did not meet the statutory definition of a CVA and therefore was not a CVA at all.

6. In respect of two of the grounds (summarised in (1) and (4) above) it was alleged that the Supervisors were in breach of their duties as Nominees. There was also a catch-all allegation that they were in breach of their duties by reporting to creditors that "*there is no material unfairness*" in the proposed terms of the CVA.

7. The pleaded claim for relief, which on the face of it was claimed against the Company and the Supervisors, was for revocation or suspension of the CVA or for a further meeting of creditors pursuant to s.6(4), ***IA 1986***. Ancillary relief was sought in the prayer as follows:

> "*(3) further or alternatively, an order under s 6(6)...that the Nominees repay to the Company the fees and remuneration received by them (whether as nominees or supervisors in relation to the CVA);*
>
> *(4) further or alternatively, such other orders and directions under s 6(4)(b), (c) and/or 6(6) as the Court may consider appropriate;*
>
> *(5) ...*
>
> *(6) further or other relief;*
>
> *(7) costs.*"

8. The Company filed detailed Points of Defence denying the claim. So too did the Supervisors: they specifically denied that the CVA was unfairly prejudicial to the Landlords or that there were any material irregularities. They further denied that the Landlords were entitled to the relief claimed in paragraph (3) of the prayer including on the basis that they acted entirely appropriately and consistent with their duties. It is clear that s.6(6) is parasitic on s.6(4) and the Supervisors challenge the entitlement to any relief under s.6(4) as well as consequential relief under s.6(6).

9. By virtue of an order of HHJ Judge Simon Barker QC on 4th July 2019, the CVA Challenge Application is listed for a 12-day trial commencing on 2nd December 2019, probably to be heard by Sir Alistair Norris. Each party has served substantial lay and expert evidence.

10. However, on 23rd October 2019, Messrs Hardy and Cowlishaw of Deloitte LLP (**"the Administrators"**) were purportedly appointed as administrators of the Company by Regis Corp pursuant to a power contained in the Debenture. The Landlords took issue with the validity of the appointment, but matters were resolved on 1st November 2019 with an order effectively by consent that (1) the Administrators' purported appointed be terminated (if valid) and (2) they be retrospectively appointed from 23rd October 2019 on an application for an administration order that the Landlords had made on 27th September 2019.

11. By virtue of the appointment(s) of the Administrators, there was an automatic moratorium in respect the CVA Challenge Application as against the Company pursuant to paragraph 43(6), Schedule B1, ***IA 1986***. Further, pursuant to clause 35.6 of the CVA, a valid appointment of the Administrators resulted in the CVA

automatically terminating. The Supervisors have drawn fees and remuneration as Nominees of £15,000 and as Supervisors of £30,000 (£45,000 total).

12. On 24th October 2019, solicitors then acting for the Administrators, Shoosmiths LLP, sent an email to the other parties' solicitors stating that "*The Administrators have confirmed to us that they will not be seeking to continue to defend the CVA challenge proceedings…*".

13. In following correspondence the Supervisors' solicitors (**"Pinsent"**), wrote to the Landlords' solicitors (**"Hogan Lovells"**) suggesting an indefinite stay of the CVA Challenge Application failing which they would apply to strike out the claim as against the Supervisors. Hogan Lovells' response to the suggestion of a stay was in terms that preparation for trial should continue but with extended deadlines.

14. On 1st November 2019, Pinsent sent Hogan Lovells a draft of the Application. As already noted, it was issued on 5th November 2019 and was supported by a witness statement from Mr Williams dated 1st November 2019. At 5.20pm on Friday 8th November 2018, Hogan Lovells served evidence in answer from Mr Ditchburn, a solicitor at that firm. The Landlords opposed the Application and, as something of a *volte face* from their previous position, sought (without issuing or serving an application) an adjournment of the trial principally on the putative basis that the Administrators needed more time to consider their position.

15. On the same day, new solicitors for the Administrators, Addleshaw Goddard LLP (**"Addleshaw"**) wrote to Pinsent stating that they did not intend to appear on the Application and had not had not been requested to (and had not) granted permission to lift the moratorium in respect of the CVA Challenge Application. There is no evidence that the Administrators' position has changed from that set out by Shoosmiths on 23rd October 2019, or that they would not grant permission if requested. In any event, it is open to the court to grant permission on the application of either the Landlords or the Supervisors if it sees fit.

16. Although there is not yet a joint report from the experts because the Landlords have "*stood down*" their expert and have failed to deal with the trial bundle as directed, subject to the moratorium, it was not submitted to me that the trial could not otherwise proceed as listed between the Landlords and the Supervisors. The imminence of the trial and the preparation necessary for it is the reason for the Application being made on an urgent basis.

17. Pursuant to clause 28.13 of the CVA, the Supervisors have had the benefit of an indemnity from the Company for their legal costs in relation to the CVA Challenge Application. To date their costs are around £500,000, of which they have been paid around £300,000 by the Company. There is no reason to consider that the Landlords' legal costs are any lower. The parties were not in a position to provide me with an estimate of the future costs through to the end of trial but I very much doubt that they will be less than £200,000 on each side.

18. For the reasons given in my oral judgment during the hearing on 11th November 2019, in the absence of an issued application served on the Supervisors and the

Administrators / the Company, I refused to hear any application by the Landlords for an adjournment of the trial.

SECTION 6, IA 1986

19. It is convenient to set out here the key provisions of s.6, ***IA 1986***, which is headed "*Challenge of decisions*":

"*(1) Subject to this section, an application to the court may be made, by any of the persons specified below, on one or both of the following grounds, namely—*

(a) that a voluntary arrangement which has effect under section 4A unfairly prejudices the interests of a creditor, member or contributory of the company;

(b) that there has been some material irregularity at or in relation to the meeting of the company, or in relation to the relevant qualifying decision procedure.

...

(4) Where on such an application the court is satisfied as to either of the grounds mentioned in subsection (1) ... it may do any of the following, namely—

(a) revoke or suspend any decision approving the voluntary arrangement which has effect under section 2A or, in a case falling within subsection (1)(b), any decision taken by the meeting of the company, or in the relevant qualifying decision procedure, which has effect under that section;

(b) give a direction to any person for the summoning of a further company meeting to consider any revised proposal the person who made the original proposal may make or, in the case falling within subsection (1)(b), and relating to the company meeting, a further company meeting to reconsider the original proposal...

(6) In a case where the court, on an application under this section with respect to any meeting or relevant qualifying decision procedure —

(a) gives a direction under subsection (4)(b) or (c), or

(b) revokes or suspends an approval under subsection (4)(a) or (5),

the court may give such supplemental directions as it thinks fit and, in particular, directions with respect to things done under the voluntary arrangement since it took effect."

THE APPLICATION

20. In broad terms, the Application is made on the basis that:

    (1) The court has no power to revoke the CVA under s.6(4) once it has terminated (**"Ground 1"**);

    (2) There is no real prospect of an order being made under s.6(6) requiring the Supervisors to repay fees and remuneration because (i) there is no legal basis for such an order and (ii) it would be wrong to do so particularly as no such order should be made without the court also ordering creditors to repay monies they have received under the CVA (**"Ground 2"**);

    (3) There is no real prospect of such orders being made under s.6(4) and/or s.6(6) because the practical implications are nil and the Landlords have no legitimate interest in the same as against the Supervisors (**"Ground 3"**);

    (4) Pursuit of a claim for repayment of fees and remuneration of £45,000 is out of all proportion to the benefit to be achieved and constitutes an abuse of process (**"Ground 4"**).

21. The Landlords dispute each of those points and argue that there are important clauses in the CVA that survive termination, but which would not continue to apply in the event that it was revoked and therefore they have a legitimate interest in pursuing matters to trial. The Landlords also argue that, in any event, there remains a significant issue as to which party (if any) should pay the very substantial costs of the CVA Challenge Application and there needs to be a procedure (which might include a trial) to determine the same.

22. The principles in relation to a strike out application under CPR 3.4(1)(a) and (b) were not in dispute and may be summarised as follows:

    (1) It must be assumed that the facts alleged in the statement of case are true: ***Price Meats Limited v Barclays Bank Plc*** [2002] 2 All ER (Comm) 346 at 347; ***Bridgeman v McAlpine-Brown*** (Unreported, 19 January 2000) at [21];

    (2) A claim or defence may be struck out as not being a valid claim or defence as a matter of law: ***Price Meats Ltd*** (*supra*). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact: ***Farah v British Airways***, The Times, 26 January 2000, CA referring to ***Barrett v Enfield BC*** [1989] 3 W.L.R. 83, HL;

    (3) An application to strike out should not be granted unless the court is certain that the claim is bound to fail: ***Hughes v Colin Richards & Co*** [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA. I may add that where, as here, the application is made on short notice, preparation time is limited and submissions are necessarily curtailed it may be that it is more difficult for the court to be certain.

(4) Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend: ***Soo Kim v Youg*** [2011] EWHC 1781 (QB));

(5) An abuse of process may be found where it can be demonstrated that the benefit attainable by the claimant in the action is of such limited value that "*the game is not worth the candle*" and the costs of the litigation will be out of all proportion to the benefit to be achieved: ***Jameel v Dow Jones and Co*** [2005] EWCA Civ 75; [2005] Q.B. 946. This includes considering whether the value to the litigant of a successful outcome is so small as to make the exercise pointless, viewed against the expenditure of court time and the parties' time and money engaged by the undertaking: ***Public Joint Stock Company Vseukrainskyi Aktsionernyi Bank v Maksimov*** [2014] EWHC 4370 (Comm) at [21];

(6) But as Lewison LJ held in ***Sullivan v Bristol Film Studios Limited*** [2012] EWCA Civ 570 at [29]: "*The mere fact that a claim is small should not automatically result in the court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process.*"

23. To the extent that the application under CPR Part 24 adds anything to the application under CPR 3.4, the principles were summarised by Lewison J in ***Easyair Limited (Trading As Openair) v Opal Telecom Limited*** [2009] EWHC 339 (Ch).

GROUND 1

24. Mr Weaver argued that a purposive approach to the construction of s.6(4) led to the conclusion that, once the CVA had terminated, the court had no power to revoke or suspend it, or to direct a further meeting of creditors to consider the proposal or a revised proposal. It is easy to see the difficulties with suspending a CVA that has already terminated or in directing a further meeting of creditors, but the issue in this case is now the existence or otherwise of the power to revoke.

25. Mr Weaver was not able to find any authority in support of the proposition that there is no longer a power to revoke, but very properly drew my attention to ***Golstein v Bishop*** [2016] EWHC 2804 (Ch) in which Warren J concluded that he should revoke an individual voluntary arrangement which had already expired by effluxion of time. Warren J acknowledged that there was no prior authority on the jurisdictional issue, but was sufficiently untroubled by it to address it further in his judgment. The facts of that case are very different from the present, but Mr Weaver's argument would apply to all company voluntary arrangements (and possibly individual voluntary arrangements) as a matter of principle, regardless of their precise terms.

26. In my judgment, this is not an issue of law that is suitable for strike out or for summary judgment in favour of the Supervisors for at least the following reasons:

(1) The wording of s.6(4) affords the court a discretion to revoke that is not expressly limited by reference to whether or not the CVA has terminated;

(2) There is no authority that counsel have been able to identify in the time available in support of the proposition that there is no power to revoke after termination;

(3) As discussed in more detail below, the terms of the CVA demonstrate the general point that there are likely to be cases where revocation may have a significant practical effect notwithstanding termination of the CVA. It is therefore not at all clear that a purposive approach should lead to the conclusion suggested by Mr Weaver;

(4) The present case and the recent decision of Norris J in ***Discovery (Northampton) Ltd & others v Debenhams Retail Limited & others*** [2019] EWHC 2441 (Ch) demonstrate that landlords are focusing on retail company voluntary arrangements with the consequent result that the law in this area is developing. The law on this point should therefore be determined after full argument and in light of the facts as found by the trial judge;

(5) There is uncertainty as to the effect of any final decision that I might make as to the law on the Company. Although it is a party to the CVA Challenge Application and has been made a party to the Application, the former has been stayed as a result of the statutory moratorium and the latter constituted a breach of the same (I am not criticising the Supervisors for this *per se*). In the time available, counsel were not able to provide a clear answer to the question whether the Company (let alone the Administrators) would be bound by a cause of action or issue estoppel. Therefore there would be the risk of inconsistent judgments.

GROUND 2

No legal basis

27. Mr Weaver's submission was that s.6(6) is not intended to allow the court to order reimbursement of fees from supervisors and there is no legal basis for the making of such an order. He referred to ***Fender v IRC*** [2003] EWHC 3543 (Ch) as an example case where the court was extremely critical of the supervisor, revoked an individual voluntary arrangement and ordered the supervisors to pay costs, but did not order him to reimburse fees under the equivalent provision.

28. In my judgment, the construction of s.6(6) is open to proper argument at trial and it is not appropriate to summarily determine this point. In particular:

(1) Although contingent on s.6(4) being engaged, it is expressed as a broad discretionary power;

(2) The payment of fees to the Supervisors as such (and possibly as Nominees as well) are arguably "*things done*" under the CVA;

(3) It is possible to posit factual situations in which it may be desirable for the court to be able to order supervisors to repay fees (particularly if very high and/or where no benefit was afforded to creditors) that they would not have been able to draw if the voluntary arrangement was not (or would not have been) approved by creditors;

(4) An analogy may be drawn here with the established principle in liquidation and administration that the office-holder may be deprived of his right of recoupment from the estate of fees and expenses if he has been guilty of misconduct, where he has made a "blunder" or a serious mistake or where it would be unjust for other reasons to permit such recoupment (which may include the situation where the work has been of no benefit to creditors): ***Re Capitol Films*** [2010] EWHC 3223 (Ch) at [100] to [104]

(5) The points I have already made in paragraphs 26(4) and 26(5) above also apply equally here.

Mutual repayment

29. Mr Weaver argued, as a separate point on the facts, that the prospects of the court making such a repayment order were negligible. He supported that argument by submitting that to order the return of fees but to allow creditors (including the Landlords) to retain the sums paid to them under the CVA would not achieve a complete reversal of the CVA and would allow creditors to benefit from the services rendered by the Supervisors without paying for them.

30. I recognise that there is some force in these submissions, but in my judgment they are insufficient to lead me to strike out this head of claim or to grant summary judgment in favour of the Supervisors. In particular:

(1) For the purpose of the Application it must be assumed that the detailed and serious allegations of unfair prejudice and material irregularity, including those made directly against the Supervisors (which are of course vigorously contested), are true;

(2) On that assumption and subject to the further arguments of the Supervisors dealt with below, there is a real prospect of the court concluding that the CVA would not have been approved and/or should be revoked;

(3) It is then an open question for the trial judge whether the CVA has produced a net overall benefit for creditors, whether the conduct of the Supervisors is such that they should be required to repay their fees and remuneration and/or whether creditors should be required to repay sums to the Company. On that latter point, I note that the Supervisors have cross-claimed for such relief against the Landlords alone. I am not in any sensible position to judge these point on the Application and it seems to me that these give rise to triable issues that I should properly leave to the trial judge;

(4) I am reinforced in that conclusion by the fact that, if Mr Weaver's points are good ones, then they have been open to the Supervisors to take at any point during the CVA Challenge Application. Recent events have not altered the landscape in relation to this issue although no doubt they have caused greater focus upon it. Whilst recognising that the court can summarily determine matters even at trial (***Evans v James*** [1999] EWCA Civ 1759) I conclude that, as a matter of discretion, it would not be appropriate at this late stage in proceedings to summarily determine the point.

GROUND 3

31. The arguments in relation to this ground focused on the practical effect (if any) of the CVA being revoked as opposed to it simply remaining terminated.

32. I proceed on the basis of Mr Weaver's submission that the question is whether the Landlords continue to have a legitimate interest in the relief sought: ***Deloitte & Touche A.G. v Johnson*** [1999] 1 WLR 1605 at 1611D, per Lord Millett, as applied in ***Walker Morris (a firm) v Khalastchi*** [2001] 1 BCLC 1. As he put it in his skeleton argument, the court should consider whether the order sought can be said to serve "*any meaningful purpose*".

33. Clauses 35.9 and 35.10 of the CVA set out the effect of termination and respectively provide:

> "*Upon the termination of the CVA under this Clause 35, subject to Clause 35.10 below, the compromises and releases only (excluding any variations to the terms of the Leases) effected under the terms of the CVA shall be deemed never to have happened, such that the Compromised Creditors shall have the claims against the Company that they would have had if the Proposal had never been approved (less any payments made during the Course of the CVA).*
>
> *Save for the provisions of Clause 28 (Functions, Powers and Intentions of the Supervisors), Clause 35 (Completion or Termination of the CVA), Clause 36 (Notices), Clause 37 (No Personal Liability), and Clause 39 (Governing Law and Jurisdiction), all of which survive termination, the obligations under the CVA shall terminate on the date on which the Supervisors send a Notice of Termination in accordance with Clause 35 (Completion or Termination of the CVA).*"

34. Mr Harty argued that there were five relevant provisions that would be (or arguably would be) affected by revocation as opposed to termination as follows.

Leases

35. I have set out clause 35.9 which purports to carve out "*variations to the terms of the Leases*" from the compromises and releases which are "*deemed never to have happened*" on termination.

36. Mr Harty argued that "*the Compromised Creditors*" therefore remained bound by the variations to the Leases effected by the CVA, but they would not do if the CVA was revoked. I was not taken in detail through the effects of the CVA on the Leases but have seen that the Leases were divided into five categories and there were different impairments (including as to rent reductions and termination rights) depending on categorisation. The definition of "Compromised Creditors" included landlords in categories 2 to 5, but did not include those in category 1.

37. With one caveat to which I shall return below, Mr Weaver sensibly did not seek to argue that the effects of the CVA on the Leases were not significant. His submission was that the Leases were by way of deed and, as the CVA was not itself a deed, it could not affect a binding variation of the Leases post-termination. He argued that in relation to the changes to the terms of the Leases the parties were bound as a matter of contract during the term of the CVA, but not thereafter.

38. It is correct that a lease longer than three years must be by way of deed (s.52, ***Law of Property Act 1925***). There is not in fact any evidence before me on the Application that the Leases fall into that category, although Mr Weaver submitted that such evidence was part of the CVA Challenge Application. Mr Harty, who was parachuted in to deal with the Application, was not able to assist either way on this evidential point. But, even assuming that Mr Weaver's submission is correct as a matter of fact, there are at least six significant reasons why the effect of clause 35.9 on the Compromised Creditors requires fuller argument and consideration at trial:

(1) Whilst the common law rule was that a deed could only be varied by another deed, it seems that in equity a deed can be varied by a mere contract under hand: ***Berry v Berry*** [1929] 2 KB 316. The CVA is a particular form of statutory contract and does not necessarily have all the characteristics of an ordinary contract (see for example, ***Re Britannia Heat Ltd*** [2007] BCC 470), but it is properly arguable that it could affect such a variation in equity;

(2) It is properly arguable that clause 35.9 could give rise to a contractual estoppel preventing the parties from arguing to the contrary in relation to the Leases;

(3) On one possible construction of clause 35.9 it had the effect of continuing to bind the parties as a matter of contract even if not affecting a variation of the Leases properly so called. I refer briefly to clauses 4.3, 12.3 and 26.1 of the CVA which refer to the Leases "*as varied*" by the CVA, which may indicate that the word "*variations*" in clause 35.9 was being used in the same context and with the same meaning. It was not suggested to me that a CVA could not continue to bind the parties as a matter of contract post-termination if that is what, on a proper construction, they had agreed;

(4) On Mr Weaver's interpretation the words in parenthesis in clause 35.9 would be of no effect and it is a well known principle of construction that there is a presumption against redundant words: ***The Interpretation of Contracts*** (6th ed) at 7.03;

(5) Right at the end of the hearing the point emerged that the definition of "the Compromised Creditors" did not include category 1 landlords. Not only did this

underline the dangers inherent in compressed argument, but it gave rise to a further argument that those landlords are excluded entirely from the deeming provision in clause 35.9 and therefore remain bound by the variations to their leases. I should note that Mr Weaver rightly pointed out that the Landlords' pleaded case in relation to category 1 leases is that the only change is to a monthly rent payment cycle and argued that this was insignificant, but as matters were continuing to emerge even as the hearing concluded it would be dangerous for me to proceed on that basis;

(6) If a determination is to be made as to these issues it needs to be one that the court can be sure will bind the Company: the terms of the Leases post-termination are matters between the Landlords and the Company.

39. In my judgment, the Landlords have a properly arguable case that the effect of the CVA being revoked is that any "variations" to the Leases are undone. In those circumstances, it follows that the Landlords continue to have a legitimate interest in the relief sought under s.6(4). Further, in support of that claim for relief, the Landlords make a number of serious allegations against the Supervisors, which they defend. Accordingly, the Landlords have a properly arguable case that an order under s.6(4) would serve a meaningful purpose and the Supervisors are proper parties to the claim in this respect.

No personal liability

40. Two clauses which are expressed to survive termination are:

> "*28.8 No Supervisors shall incur any personal Liability in connection with the preparation, adoption, agreement, implementation operation and/or administration of the CVA and/or the Compromised Creditors' Payment Fund or in connection with any ancillary arrangement.*";

and

> "*37.1 Neither the Directors, the Nominees, the Supervisors, their firm, their staff, their advisers nor any agents employed by them shall incur any personal Liability*"

41. It appears that clause 37.1 has been cut off in the CVA and the definition of "Liability" is not without its difficulties, but these are not matters for this hearing.

42. Mr Harty submitted that, given the serious allegations made against the directors and the Supervisors, the Landlords have a real interest in these clauses falling away and thereby allowing the Company or the Administrators to bring such claims (if any) as they may consider appropriate in the future. Mr Weaver argued that (a) all the pleaded allegations by the Landlords relate to the Supervisors' conduct as Nominees, (b) the Company did not engage the Nominees as individuals but rather it engaged their firm, Grant Thornton, and claims against it are not barred by the CVA and (c) the mere possibility of future claims by the Company against the Supervisors in that capacity is insufficient.

43. In my judgment, whilst Mr Weaver's point (a) is correct, his point (b) is far from clear. I have not seen the retainer between the Company and Grant Thornton. In any event, as was identified during the course of oral submissions (1) clause 37.1 of the CVA could be read as referring to Grant Thornton ("*their firm*"), (2) clause 28.11 expressly provides that the references to "the Supervisors" may include Grant Thornton, (3) the definitions of "Supervisors" and "Nominees" are somewhat circular and (4) it is quite possible that the Supervisors could relevantly have acted (i) in their personal capacity as "Supervisors", (ii) in their personal capacity as "Nominees" and/or (iii) as agents for Grant Thornton.

44. In relation to Mr Weaver's point (c), I cannot sensibly quantify the precise prospects of the Company bringing a claim against the Supervisors in any of the above capacities, but equally I cannot say that there is not a real prospect. At this early stage in the administration, it is unrealistic to expect the Administrators to be in a position to state their intentions one way or the other. Much may turn on what the trial judge determines on the CVA Challenge Application.

45. A successful claim by the Company against the Supervisors or Grant Thornton may result in sums being paid into the estate. The outcome of the administration is not yet known and the figures with which I have been provided in the Statement of Affairs (**"SoA"**) annexed to the CVA are historic and do not include potential significant changes that may result from various matters including (1) challenges to antecedent transactions, (2) challenges to the Debenture and the IBL Debt and (3) credit for any sums paid to creditors under the CVA. I accept Mr Harty's point that if the Landlords had had full notice of the Application they might well have put in more evidence as to the likely outcome of the administration for creditors (I should note that it was Mr Ditchburn that put in evidence the CVA to which the SoA was annexed). On limited evidence before me, I conclude that it is a realistic possibility that sums paid into the estate will result in enhanced recoveries for unsecured creditors. The Landlords plainly have a legitimate interest in that and an analogy may be drawn with the rights of creditors to pursue claims under s.212, ***IA 1986*** even though the immediate benefit of a judgment will accrue to the company.

46. Even if sums paid into the estate were in fact exhausted by the payment of the Administrators' fees and expenses, it is properly arguable that the Landlords would still have a legitimate interest in that taking place. An analogy may be drawn here with the position when a trustee in bankruptcy applies for an income payment order. As Newey J said in ***Official Receiver v Negus*** [2011] EWHC 3719 (Ch); [2012] 1 WLR 1598 at [10]:

> *"It is noteworthy, moreover, that, in the context of section 336, the interests of creditors have been held to include their interest in having the expenses of the bankruptcy discharged so far as possible out of the assets of the bankrupt, even where there is no question of after-acquired property to be brought into account: see Trustee of the Estate of Eric Bowe (A Bankrupt) v Bowe [1997] BPIR 747, 754."*

47. In my judgment, the Landlords have a properly arguable case that the effect of the CVA being revoked is that the exclusions of liability will be removed to meaningful effect. In those circumstances, it follows that the Landlords continue to have a

legitimate interest in the relief sought under s.6(4). Further, in support of that claim for relief, the Landlords make a number of serious allegations against the Supervisors, which they defend. The Supervisors are therefore proper parties to the claim in this respect.

48. It is neither necessary nor desirable for me to go further in this judgment and deal with the less than fully developed arguments as to the effect (if any) of the above provisions in relation to possible claims against directors of the Company.

Indemnity

49. Clause 28.13 of the CVA provides that:

> "*The Company shall indemnify the Supervisor on demand for any Liability incurred by them in defending the relevant Proposal or any challenge to the relevant Proposal, without prejudice to the Court's power to order any person to pay the costs of, and occasioned by, such proceedings*"

50. It is pursuant to this provision that the Supervisors have received around £300,000 in respect of their legal costs of around £500,000 as set out above. Mr Harty argued that revocation would (a) engage the power in s.6(6) to require the Supervisors to repay the sums already received from the Company and (b) prevent them from seeking to prove in the administration (or any subsequent liquidation) for a dividend in respect of the balance that would otherwise be owed by the Company.

51. Dealing with point (b) first, Mr Weaver's response was that any dividend was likely to be of little or no value and therefore the Landlords had no legitimate interest in pursuing revocation in order to achieve this end. For the reasons already discussed in paragraph 45 above, this cannot safely be assumed. I do not consider it productive here to speculate further on the basis of the figures in the SoA given the limitations of that document as already identified. A claim for £200,000 is not insignificant and, as Mr Weaver acknowledged in response to questions from the Bench, it is simply not possible to say what level of dividend may end up being paid. In my judgment, the Landlords have a legitimate interest as creditors in reducing other claims in the administration. I conclude in like terms as set out in paragraph 47 above.

52. I should note that Mr Weaver argued that point (a) was not open to the Landlords because such relief was not, unlike in respect of fees and remuneration, claimed in the prayer to the Landlords' Points of Claim. There is much force in that argument but, given the conclusions that I have reached in relation to other issues above and below, I do not need to resolve the point. Indeed, it is better that I do not and instead leave it for the trial judge to determine as part of his overall decision-making process.

Remuneration

53. Clause 29.1 of the CVA provides that:

> "*The Supervisors shall be remunerated in respect of their work in preparing, implementing and operating the Proposal and the CVA and all acts reasonably incidental thereto*"

54. It is pursuant to this provision that the fees of £15,000 and £30,000 have been drawn. As already noted, the Landlords have pleaded a claim for repayment of these fees under s.6(6). I understand Mr Weaver's submissions to be that, even if I am against the Supervisors on the matters above, I should strike out this element of the claim.

55. As already held above, as a matter of general principle, the Landlords have a legitimate interest as creditors in increasing recoveries for the estate. However, Mr Weaver argued that the Landlords had no legitimate interest in the claim for £45,000 because the sum claimed was insignificant compared to the likely effect on the estate.

56. On the basis of the SoA, the estimated amount for unsecured creditors (by way of the prescribed part) is £69,184 as against claims of £15,074,576. Those figures could change significantly but, taken at face value, an additional £45,000 would increase the (prescribed part) amount by only £9,000 (20% of £45,000). That is not a significant increase and the overall dividend would still be very small (less than 1p/£). But if the Debenture is successfully challenged, the full £45,000 may be available for unsecured creditors. I am not persuaded that the Landlords cannot succeed in obtaining this relief and that, at this late stage in the proceedings, I should strike out the claim under s.6(6). The point I have already made in paragraph 30(4) above applies equally here.

Summary

57. I agree with the majority of the points made by Mr Harty in relation to Ground 3. In my judgment, the Landlords' pleaded claim discloses reasonable grounds for obtaining the relief that they seek and it has a real prospect of success. As a matter of discretion, given the proximity of trial, it would not be appropriate to summarily determine issues that have been live on the statements of case for many months and which have not been fundamentally altered by recent events.

GROUND 4

58. In light of my conclusions above, the argument that a claim solely about £45,000 is an abuse of process, falls away and I do not need to address it in any detail. In my judgment, notwithstanding recent events, if the claim is successful then there is a real prospect of it having significant financial consequences in relation to at least the following matters:

(1) The terms of the Leases post-termination;

(2) The liability of the Supervisors in different possible capacities;

(3) The ability of the Supervisors to prove for the balance unpaid under the contractual indemnity;

(4) Whether the £45,000 should be restored to the estate.

59. As already noted, the Supervisors defend the claim under s.6(4) and s.6(6) and have expended significant legal costs in so doing. I am not criticising them for this, but it is clear that there have been wider issues between the parties than just the £45,000. In my judgment there continue to be.

60. If the claim was solely about the £45,000 then, in my judgment, it would probably be a matter of reducing the length of the trial and limiting the scope of oral evidence and submissions so as arrive at a "proportionate procedure". The submissions on how this might be achieved were inevitably not fully developed and I say nothing more about how such a procedure might be fashioned.

COSTS

61. I also do not need to lengthen this judgment by addressing the alternative argument advanced by Mr Harty that, if the only issue was costs, then the correct course of action would not be to strike out the claim but to determine the appropriate form of procedure to resolve which party (if any) should bear the costs of the CVA Challenge Application: ***Hanspaul v Ward*** [2016] EWHC 1358 (Ch).

THE RESULT

62. Having formed the view that the Landlords have been able fairly to respond to the majority of the points raised by the Application, I make an order abridging time as sought by the Supervisors. But, for the reasons given, I dismiss the Application. I will hear oral submissions from the parties as to costs and any other consequential matters.