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Case No: CR-2020-004188

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

IN THE MATTER OF NERO HOLDINGS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC2A 1NL

Date: 29/09/2021

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

RONALD YOUNG	**Applicant**
- and -	
(1) NERO HOLDINGS LIMITED **(2) WILLIAM JAMES WRIGHT** **(3) DAVID JAMES COSTLEY-WOOD**	**Respondents**

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- -

Robin Dicker QC and Adam Al-Attar (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Applicant**
Tom Smith QC and Henry Phillips (instructed by **Linklaters LLP**) for the **First Respondent**
Richard Fisher QC and Georgina Peters (instructed by Travers Smith LLP) for the Second and Third Respondents

Hearing dates: 21, 22, 23, 26, 28, 29 July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Michael Green :

A. INTRODUCTION

1. This is the trial of a challenge under s.6 of the Insolvency Act 1986 (the **Act**) to the company voluntary arrangement (**CVA**) proposed by the directors of the First Respondent, Nero Holdings Limited (the **Company**) and approved by a creditors' electronic decision procedure that was deemed to take effect at 23:59 on 30 November 2020 (the **Challenge Application**). The Company is the principal UK operating company in the Caffe Nero Group, the well-known international coffee shop retailer.

2. The Applicant, Mr Ronald Young (**Mr Young**) is a landlord of premises let to the Company. Under the CVA, he would be paid 30p/£ in respect of the rent arrears owed to him up to 30 November 2020. He voted, reluctantly, in favour of the CVA on or around 27 November 2020 before the major development described below that has been the focus of his challenge to the CVA.

3. On the evening of Sunday 29 November 2020, at around 21:00, EG Group Limited (**EG**) owned by the brothers Mohsin and Zuber Issa, who have in recent months acquired the Asda supermarket group and the Leon restaurant chain, through its lawyers, Kirkland & Ellis International LLP (**K&E**) made an offer for the shares in Nero Group Limited (**NGL**) including an offer to pay all the Company's landlords' rent arrears in full (the **EG Offer**). EG said that it wanted the CVA to go through but with those enhanced terms to the landlords included and it asked for the CVA vote to be postponed while its Offer could be properly explored and negotiated. It indicated that it would be able to sign definitive documentation within 10 business days and that all third party debt would be settled in cash at closing.

4. However the EG Offer was rejected and the CVA vote was not postponed. The directors of the Company now say that it was the nominees' decision not to postpone the vote, although this was clearly also the directors' decision at the time. The directors of the Company and/or the ultimate shareholders of NGL did not seek to make any contact with EG or K&E in relation to the EG Offer at any time prior to the close of the CVA vote, save to confirm the shareholders' rejection of the EG Offer which was sent at about 23.30 on 30 November 2020.

5. The Second and Third Respondents, Mr William Wright and Mr David Costley-Wood, both then partners of KPMG LLP, were the nominees of the proposed CVA, becoming the supervisors of the CVA when it was approved. Mr Wright gave evidence and confirmed that he and Mr Costley-Wood took the decision not to postpone the CVA vote as it was their decision to make. He too did not seek to discuss with EG or any of their advisors in relation to the terms or deliverability of the EG Offer.

6. Having made the decision not to postpone, there are two further events on 30 November 2020 that are the subject of complaint in the Challenge Application:

   (1) An announcement to creditors was posted on the CVA portal hosted by KPMG at around 14:30 (the **Announcement**); it informed creditors that the EG Offer had been made but that for various reasons the vote would not be postponed; Mr Young says that the Announcement was misleading and it failed to disclose material information about the EG Offer;

   (2) A modification to the CVA Proposal was put forward by the directors on the advice of the nominees that was said to preserve the benefits of the EG Offer should the CVA be passed and a deal later concluded with EG (the **Modification**); the Modification was only notified to creditors at around 22.20 when the vast majority of creditors had already voted and the CVA had effectively been approved; Mr Young says that the timing of the Modification rendered the voting on the CVA irregular and invalid.

7. The Challenge Application therefore turns on the events of 29 and 30 November 2020 and the various decisions that were made by the directors of the Company and the nominees on those days.

8. I say at the outset that it seems to me that the issues that have arisen in this case have been as a result of the inflexibility of the electronic voting procedure that is prescribed for in the Insolvency Rules 2016 (the **Rules**) and which is now the normal method used in relation to CVA creditor voting, even before the Covid-19 pandemic struck. The Rules specifically do not allow creditors to change their vote after they have voted and the Rules do not really cater for a situation such as in this case when a major development occurs so late in the process. I do not criticise at all the nominees for choosing the electronic voting procedure – indeed they were bound to use it by the Rules unless there was a good reason not to – but having so used that procedure, it is by no means easy to see what should have happened under the Rules to deal with the EG Offer. If there had been an actual creditors' meeting, whether in-person or virtual, the relevant decisions could have effectively been made by the creditors at the meeting. They could have decided to adjourn the vote, for example, to allow time to explore the EG Offer. But the Rules in relation to an electronic voting procedure do not provide for an adjournment or postponement and it is in any event unclear what would be postponed. The parties were, in the end, agreed that the only option would have been an application to the court. I will have to consider whether that was a feasible option on 30 November 2020 and whether that step should have been taken.

9. I should add that it is clear that EG and K&E had assumed on 29 November 2020, shortly before they sent the EG Offer, that there would be a physical creditors' meeting the next day. The request to postpone the vote makes much more sense if that was going to happen. In any event, the EG Offer was designed to place the directors of the Company in a difficult position, as Mr Mohsin Issa admitted in his oral evidence, but whether the position under the Rules in respect of an electronic voting procedure was fully appreciated is another matter. I will explore these issues in detail below.

B. BROAD OUTLINE OF THE ISSUES TO BE DECIDED

10. By s.6(1) of the Act, there are only two grounds upon which a challenge to a CVA can be brought: (a) that it "*unfairly prejudices a creditor, member or contributory of the company*"; and/or (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*." Mr Young relies on both grounds, although the principal focus has been on (b), that there were material irregularities.

11. The alleged material irregularities relied on by Mr Young can be summarised as follows:

    (1) The failure to adjourn or postpone the creditors' voting procedure;

    (2) The failure to engage with or seek further information from EG or its advisors in relation to the EG Offer;

    (3) The misleading content of the Announcement, in particular that it did not fully explain and set out the terms of the EG Offer;

    (4) The terms of the Modification and the effect of the creditors' votes already cast by the time the Modification was proposed;

    (5) The failure to update the nominees' report.

12. Underpinning all of Mr Young's complaints in this regard is the allegation that two of the three directors of the Company, namely Dr Gerry Ford and Mr Ben Price, had a conflict of interest in that they are the ultimate majority shareholders of the Nero Group and they did not want to sell NGL to EG. They considered, so it is alleged, that the EG Offer had been put forward in bad faith so as to disrupt the CVA process and to force the Company into administration, from which EG could buy it or its assets at well below their post-CVA value. Mr Young says that this immediate reaction to the EG Offer shaped their actions during the course of 30 November 2020 and led to the impugned decisions that were taken and the misleading Announcement and Modification that ensured that the creditors did vote for the proposal. Mr Young's case is that these were all breaches of their duties as directors which constituted material irregularities.

13. The unfair prejudice challenge is based on Mr Young's assertion that the relevant counterfactual to the CVA was not an administration with a minimal return to unsecured creditors; rather it is a transaction with EG (a number of different alternatives were put forward) in which the arrears owing to landlords would be paid in full. It is fair to say that there was not much focus on unfair prejudice in either the evidence or the submissions and it seems to form a subsidiary role in Mr Young's Challenge Application.

14. There are two further points raised by the Company that may have to be considered:

    (1) The Company alleges that Mr Young does not have a legitimate interest in the relief sought in his Challenge Application because of the arrangements in place between him and EG for the funding of the challenge. The Company had earlier

applied to strike out the Challenge Application on this basis but I rejected that application and my judgment is reported at [2021] EWHC 1453 (the **Strike Out Judgment**). I decided that it was premature to consider legitimate interest at that stage but that it may be necessary to consider it at trial in the context of the Court's discretion as to remedy under s.6(4) of the Act.

(2) The Company also says that, even if the court finds material irregularity and/or unfair prejudice, it should not exercise its discretion to revoke or suspend the approval of the CVA or direct a further meeting, having regard to the circumstances of the case.

15. Accordingly this judgment is structured as set out on the Contents page above.

C. GENERAL COMMENTS ON THE WITNESSES

16. Mr Young called the following witnesses:

(1) Himself;

(2) Mr Mohsin Issa;

(3) Mr Majid Ishaq, a Global Partner of the UK arm of the financial advisory group Rothschild & Co. and who was advising EG in relation to the EG Offer.

17. The Company called the following witnesses:

(1) Dr Ford, the Founder and Group Chief Executive Officer of the Company;

(2) Mr Price, the Chief Financial Officer of the Company;

(3) Mr Glyn House, the Managing Director of the Company.

The Company also put in witness statements from the following (and Mr Young did not challenge their evidence or require them to be cross-examined):

(4) Mr Michael Ford-Deegan, a director of The Nero Company S.à.r.l, one of the ultimate holding companies of the Caffe Nero group and the brother of Dr Ford;

(5) Mr Richard Hodgson, a partner of Linklaters LLP, the Company's solicitors both at the time of the CVA approval and now in respect of this litigation.

18. The Second and Third Respondents called one witness: Mr Wright.

19. The core facts are not really in dispute and they are contained in the documents: the EG Offer, the Announcement, the Modification and the minutes of a board meeting of the Company on 2 December 2020 recording the decisions taken on 30 November 2020 (and which were admittedly inaccurate in a number of respects). It seems to me that not much turns on the witness evidence and certainly there is little evidence that is contested as between witnesses on each side.

20. It was therefore surprising to find that Mr Young and the Company mounted a full-scale attack on each other's witnesses. This seemed to me to be wholly unnecessary and unfortunate and it had a somewhat confected air to it, to try to achieve some forensic advantage and justify the cross-examination. In Mr Young's closing submissions, he describes Dr Ford's evidence as "*woefully inadequate*" and "*nonsensical*" and Mr Price's evidence on one particular matter as having "*the appearance of a conceit contrived by a witness*". He also does not hold back against Mr Wright who he accuses of displaying "*some of the self-reinforcing character of the Directors' evidence, each witness sitting in court and being prepared to say what they have heard another say, if they think it should help the legal case*."

21. The Company responded to this (having seen Mr Young's written closings before filing its own) by labelling Mr Issa's evidence as untruthful, misleading, evasive, exaggerated, false and even dishonest. As I will come on to describe, Mr Issa was giving evidence under very difficult circumstances. But what is odd about this attack is that it is in relation to evidence that has marginal if any relevance to the issues in the case which are concentrated on what the directors and nominees decided to do on 30 November 2020 in response to the EG Offer. What was going on at EG's end or in Mr Issa's mind cannot have affected the directors' and nominees' reactions to the EG Offer as they themselves have admitted no engagement with Mr Issa and EG.

22. While I understand the tit-for-tat desire to castigate the other side's witnesses, in my view there really was little need for it and it has not progressed either side's case. I certainly did not get the impression that any of the witnesses were trying to mislead the Court and even though they might on occasion have exaggerated their position or been overly defensive, I do not think that that means that their evidence should be discarded as wholly unreliable.

23. I now turn to some more specific comments on those witnesses (in the order in which they were called).

<u>*Mr Young's Witnesses*</u>

(a) Mr Young

24. Mr Young gave evidence remotely as he is unwell and recovering from surgery. He is the landlord of premises at 6 Henley Street, Stratford-Upon-Avon, Warwickshire, CV37 6PT (the **Property**). He is semi-retired and owns two properties, including the Property, which provides the main source of his income. He has let the Property to the Company since 2008.

25. He is the last remaining landlord who is challenging the CVA, with the financial support of EG, but could not give any relevant evidence about the Company's response to the EG Offer or the events of 30 November 2020. He had already voted on the CVA by then and he could not remember seeing the Announcement or the Modification on 30 November 2020. He claimed never to have been happy with the Company's treatment of him as a landlord but there may have been an element of retrospective justification of the actions he has since taken in bringing this challenge to trial.

26. The bulk of the cross-examination was directed at the conduct of the Challenge Application, the control by EG, and whether Mr Young truly has a legitimate interest. I found Mr Young's answers to these questions frank and patently honest. He did not pretend that he understood all the ins and outs of the litigation; nor that EG was not involved. In his situation, it is perfectly credible that he basically left the Challenge Application to be managed by his lawyers. He was clear that he personally had rejected a settlement offer from the Company and there was no evidence that EG had vetoed or otherwise interfered in his decision to reject the offer. Having said that I did find his answer in relation to why he did not accept the offer to pay his arrears in full to be unconvincing. He said that he did not agree the figures for his rent arrears but he did not go back to Linklaters to clarify the correct figure. That may be relevant to legitimate interest considered below. But overall it does not detract from my assessment of him as a reliable witness.

(b) Mr Mohsin Issa CBE

27. Mr Issa, together with his brother Zuber, founded the EG Group and they are the co-Chief Executive Officers of it. They own 50% of the equity in the EG Group; the other 50% is owned by a private equity fund manager, TDR Capital. Their story is a remarkable one, growing the business from one derelict petrol station in Bury, Greater Manchester in 2001 to a group that is now one of the world's largest independent fuel station and convenience retail operators with more than 6,200 sites across the UK, Continental Europe, North America and Australia. They have developed franchise partnerships with brands such as Subway, Starbucks, KFC and Greggs but have recently decided that they wished to acquire and develop their own brands. For instance in 2019, they acquired Cumberland Farms, a US petrol station and food production and food service business for more than $2 billion and in April 2021 they acquired the Leon chain of fast-food restaurants out of its CVA for £100 million. Their desire to acquire the Caffe Nero brand is a further example of this strategy. In 2020, the EG Group had revenues of some $20.69 billion.

28. During the course of his evidence, Mr Issa's father sadly died. Mr Issa was giving evidence in person on the first day of the trial. It was known at the time that his father was dangerously ill. Despite sitting late, we were unable to complete his evidence on that day and because of the condition of his father I agreed to allow Mr Issa to complete his evidence remotely from his home in Blackburn. However that evening, his father died. Mr Issa was able to complete his evidence a few days later, after the Respondents had adduced their evidence. I am grateful to Mr Issa for agreeing to complete his evidence at what was a very difficult time for him and his family.

29. Those circumstances must be borne in mind in assessing Mr Issa's evidence. Although he slipped into a slightly dismissive and arrogant tone on occasion, I do not accept the Company's submission that he was deliberately giving false evidence or intending to mislead the Court. Rather he was trying to explain the unique way that he and his brother go about their business and in particular their approach to acquiring brands and other businesses. This has been highly successful and I think it is quite difficult to get across and can appear to be founded on an undue level of self-belief.

30. Thus much of the cross-examination was aimed at undermining Mr Issa's evidence as to prior approaches he alleges were made to Dr Ford and the Nero Group. While Mr Issa portrayed EG as the "*bigger*" company, implying that Dr Ford should have been

more willing to talk, and suggested that a number of approaches were made through third party bankers, this is really peripheral to the issues in dispute. It is undeniable that the EG Offer came very late in the day and the fact that there may have been some attempts to approach Dr Ford earlier than that does not help in understanding the Company's reaction to the EG Offer.

31. Similarly, the cross-examination on whether there was board approval for the EG Offer, as stated in the EG Offer itself, cannot be relevant to the directors' and nominees' decisions on 30 November 2020, as they could not have known this and they did not ask any questions about whether there had indeed been board approval. In any event, there is no reason to disbelieve Mr Issa's evidence that he had a very wide mandate from the board of EG in relation to acquisitions. It was also an unfruitful line of cross-examination in relation to whether EG could fund the purchase of NGL at a price of £400 million. It seems to me that, one way or another, this was easily affordable by EG, based on its then cash position. Again, the point does not get the Company anywhere.

32. It is perfectly clear that Mr Issa remains intent on acquiring Caffe Nero. He said a number of times that he could pay the £400 million into Court immediately pending the conclusion of negotiations. Such intent is also demonstrated by EG's subsequent acquisition of the majority of the Company's mezzanine debt. Mr Issa explained that this was not done to engineer a default, as suggested by the Company, but rather to forward his desire to purchase the business. Again I have no reason to disbelieve Mr Issa's evidence and the funding of Mr Young's challenge shows a commitment to the original terms of the EG Offer and the desire to put enhanced terms to the Company's creditors rather than force it into administration.

33. There is one aspect of Mr Issa's evidence that the Company liked and adopted, namely what he meant in the EG Offer by saying that it was "*presented on a cash-free and debt-free basis*" and that "*all third party debt would be settled in cash at closing*". Mr Issa had said that it was for the Company to settle all third party debt and to deliver a debt-free Company to EG on closing. Dr Ford and Mr Price later said in their evidence that that was their understanding of the EG Offer. The point that I would make at this stage is that the Company cannot cherry-pick the bits of Mr Issa's evidence that it likes and dismiss the rest as untruthful and misleading. I think that his evidence was honestly and truthfully given and the Company's criticisms of it to be largely unfounded and unfair.

(c) Mr Majid Ishaq

34. As noted above, Mr Ishaq was from Rothschild & Co and he was principally called to give evidence as to a very short conversation that he had with Mr Wright on 17 November 2020 regarding Caffe Nero. It is accepted that EG, or Mr Ishaq's client, was not mentioned in the call and Mr Wright did not ask on whose behalf Mr Ishaq was calling.

35. I found Mr Ishaq to be an impressive, confident witness, with clearly great experience in this area, including acting for EG on other acquisitions. As before, his evidence was largely irrelevant to the issues I have to decide, but it is significant, in my view, for the credibility of the EG Offer that he and Rothschild & Co were involved and

prepared to put their names to it. Without hesitation, I feel I can rely on his evidence and that it was honestly and truthfully given.

The Company's Witnesses

(d) Dr Ford

36. Dr Ford founded the Caffe Nero business in around 1997 and it has continued to be a privately owned and operated business since then. Before the pandemic struck, the Nero Group had some 1,100 coffee houses across 11 countries. The pandemic however posed a great threat to the business and by October/November 2020 the Company was insolvent and looking to avoid a damaging administration by proposing the CVA. Just at the moment when it was almost over the line, the EG Offer came in and the Company's directors and the nominees had to deal with a very difficult situation.

37. I have little doubt that Dr Ford was incredibly worried on 30 November 2020 that any postponement of the creditors' vote could have led to the collapse of the CVA and the Company being forced into administration. He certainly saw the EG Offer as intentionally disruptive and even now he is not prepared to engage with Mr Issa and EG and contemplate any sort of deal with them. He distrusts them and came across as antagonistic towards them.

38. That attitude did shape the events of the day and I believe his evidence before me. The cross-examination was concentrated on the minutes of the Company's board meeting held on 2 December 2020 which the Company, Dr Ford and Linklaters are all now saying contain errors as to the timing of decisions and as to who was making those decisions. As I have said above, the Company and the nominees have now altered their case as to who made the decision not to postpone the vote, but that new position is clearly inconsistent with the minutes as drafted by Linklaters. I will come on to consider the impact of that to the case, but in relation to Dr Ford's credibility, I do not think it substantively affects it. In fact I think the order of decision making on 30 November 2020 is fairly clear and the minutes must contain some errors in timing. Dr Ford was bound to accept that, even though there was the palpable embarrassment in Dr Ford having to admit that he did not read the EG Offer until the morning of 30 November 2020, despite having been sent it by email the evening before and clearly having read and sent emails after it was received.

39. I do have certain reservations about Dr Ford's evidence based on the evolvement of the Company's case and the need to ensure the evidence fits that changed case. In particular, there is an element of opportunism about both Dr Ford's and Mr Price's evidence that latched on to what Mr Issa had said on day 1 of the trial as to what the EG Offer meant in relation to "*debt free*". This was done to bolster their case as to the credibility of the EG Offer but to my mind this stemmed from an over-enthusiastic and perhaps rather clumsy attempt to support the Company's defence. It was always part of the Company's case that the EG Offer was not credible and not put forward in good faith and that was one of the reasons for not taking the risk of postponing the vote.

40. The other unsatisfactory aspect of Dr Ford's evidence were his explanations for not contacting EG or its advisors on 30 November 2020 to find out more about the EG

Offer. The fact that no one on the Company's side or from the nominees engaged with EG indicates very clearly their mindset as to the EG Offer, but it is difficult to justify.

41. I will deal with Dr Ford's evidence as to how and when the decisions were taken and whether he was in breach of his duties as a director. At this stage, the fact that he may have given certain unsatisfactory explanations for the actions he did or did not take on the day, does not lead me to the conclusion that he was trying to mislead the Court. On the whole his evidence was credible and I reject Mr Young's characterisation of it.

(e) Mr Price

42. Mr Price is a chartered accountant and he has worked in the Caffe Nero group since almost the beginning in 1997. From 2001, he has been the Chief Financial Officer.

43. I thought that Mr Price started his oral evidence uncomfortably but that after a while he settled in and became more assured in his answers. He can rightly be subject to the same criticism as is made above in relation to Dr Ford on the issues of adjusting their evidence to meet the Company's changing case. He also gave unsatisfactory explanations as to the lack of engagement with EG on 30 November 2020.

44. Mr Young's principal criticism of Mr Price's evidence concerned his dealings with the Company's secured lenders on 30 November 2020 and what was said about their position in the Announcement. Mr Sean Longsdale of Banco Santander, S.A., which is the lead bank in the senior lending syndicate, wrote to the Company on 2 December 2020 complaining about the reference in the Announcement to the external lenders' support for the CVA proceeding. However that is a strange letter and I do not consider that Mr Price's evidence in this respect was contrived or a "*conceit*". There is no doubt he spoke to Mr Longsdale on 30 November 2020 before the Announcement went out and he had a confirmation by email from Mr Longsdale that the Announcement could refer to the "*external lenders*", though not by name.

45. Accordingly, subject to the same reservations that I have about Dr Ford's evidence, I think that Mr Price was also credible and I reject the exaggerated characterisation that Mr Young gave it.

(f) Mr Glyn House

46. Mr House was not really involved in the decision making on the day but he agreed that the CVA vote should not be postponed. He was also apparently at the board meeting on 2 December 2020 and he confirmed that Linklaters had drawn up the board minutes which they went through. No one pointed out the errors in the minutes that have now become apparent.

47. I have no reason to disbelieve Mr House's evidence but I do not think it really adds much of substance to the case.

<u>*The Nominees' witness*</u>

(g) Mr Wright

48. Mr Wright is a very experienced licensed insolvency practitioner. At the relevant time he was a partner and Head of Regional Restructuring at KPMG. (KPMG's

restructuring arm has recently been the subject of a management buyout and he is now Head of Restructuring at Interpath Limited.) He is well aware of his obligations as a nominee of a CVA and in particular his duties to the Company's creditors. He gave his evidence with authority and clarity, and demonstrated, as one might expect, his professionalism and reliability. I accept his evidence as truthful and credible.

49. As he accepted, this was relatively new territory in the sense that the electronic voting procedure and the Rules in relation to it had not been tested in this way before. He did not attack the contents of the EG Offer though he did question its timing. He frankly accepted that if the EG Offer had come in some days before, then there may have been something that they could have done about it. But on the night before the voting was due to close, he felt that he really had no option but to proceed with the CVA; the risks of not doing so were, in his view, too great and much better to go with the "*bird in hand*".

50. Like with the directors I have my misgivings about the lack of engagement with EG on 30 November 2020, but I can see that from Mr Wright's perspective, he had to decide what was best to do about the CVA in the light of the rejection by the shareholders of NGL of the EG Offer and the irreversibility of the votes already cast by the creditors. His actions will be analysed below but, in general terms, I accept his evidence and regard it as independent of the directors' evidence, not as merely "*self-reinforcing*", as Mr Young suggested.

D. DETAILED FACTS

(a) The Company

51. The Company was incorporated in England and Wales in 1997. As stated above, at all material times, Dr Ford, Mr Price and Mr House have been its directors.

52. The Company is the principal operating company and main employer in the UK for the Caffe Nero Group. It is also the tenant of the majority of the Group's UK coffee houses, that is some 650 out of 800 operated under the "Caffe Nero", "Coffee #1" and "Harris + Hoole" brands. While the Company is therefore a significant part of the Group, there are a number of key assets that sit elsewhere in the structure, including: the intellectual property rights in the "Caffe Nero" and "Coffee #1" brands (the **Brand Rights**); the coffee bean "**Roastery**"; and the international operations.

53. NGL sits higher up the structure and is an indirect parent of the Company (as it is for those companies owning the other key assets such as the Brand Rights and the Roastery). NGL's shareholders are Rome Intermediate Holdings S.à.r.l (**RIH**) holding 98% of the shares and Rome Intermediate Co Limited (**RIC**), holding 2%. The latter is a wholly owned subsidiary of the former.

54. Approximately 6.6% of the shares in RIH are held by Mayfield Trustees as trustees of the Group's employment benefit trust. Around 0.6% of the shares in RIH are held by Dr Ford. The remaining shares in RIH (approx. 93%) are held by the The Nero Company S.à.r.l (**NC**).

55. The three shareholders in NC, who are the ultimate shareholders of the Group are as follows:

    (1) 51% held by Dr Ford;

    (2) 42% held by Paladin Partners 1 (**PP1**) which is a limited partnership incorporated in the Isle of Man. Dr Ford has approximately 15.5% of the shares in PP1. Mr Price also holds a small proportion with the balance held by some 20 independent investors. Mr Ford-Deegan is the sole director of the general partner of PP1;

    (3) 7% held by MC Coffco (Cayman) Limited, the principal investor in which is an independent third party.

(b) Background to the CVA

56. Prior to the Covid 19 pandemic, the Company and the Nero Group had had some 24 years of profitable growth. However the pandemic hit the business hard as it did to many other businesses in the hospitality sector. The Company had no income at all in April 2020, and almost none in May 2020. Its trading was significantly impaired throughout the rest of 2020 and into 2021. In the seven months to September 2020, the Group's revenue was over £109.2 million lower than the equivalent period in 2019.

57. Prior to proposing the CVA, the Company took a number of steps to mitigate the effect of the pandemic. It furloughed 90% of head office staff as well as store workers and cut head office costs by £7 million pa through pay cuts, staff redeployment and supplier contract renegotiation. It also deferred payments to HMRC and in respect of business rates. It suspended all non-emergency capital expenditure.

58. The Nero Group had two levels of secured debt: a Senior Facilities Agreement which was drawn at approximately £155.5 million as at 30 September 2020 (**SFA**); and a Mezzanine Facility Agreement, drawn at approximately £210.9 million at the same date (**MFA**). After the onset of the pandemic, the Nero Group negotiated a £30 million emergency liquidity facility from the SFA lenders and a deferral of cash interest payments under the MFA. According to Mr Price, this had been "*extremely challenging to negotiate*." In addition, the lenders under the SFA and MFA signed waiver letters dated 29 April 2020 in relation to the various financial covenants that were tested by reference to quarterly test dates.

59. However these mitigating steps were not sufficient to return the Company and the Group to financial viability. It was thought at the time that the moratorium on landlord enforcement might have come to an end in September 2020 and the future scope of government support was unclear. The Company's directors therefore thought they should explore other options and on 10 August 2020, they engaged KPMG to explore and advise on the options available to the Group, in particular as to restructuring, including a CVA. As well as Mr Wright and Mr Costley-Wood, KPMG had a large experienced team involved.

60. On 18 August 2020, KPMG produced an "*Options Assessment Paper*" which considered various solvent and insolvent solutions. One of the solvent solutions was

to seek further bank funding but this seems to have been quickly rejected on the basis that the £30 million of emergency liquidity funding had been challenging to negotiate and any further funding would only likely have been on commercially unacceptable terms. Under the waiver letters from the SFA and MFA lenders, there remained a test date for the financial covenants on 30 November 2020, and KPMG's forecast showed that there would be a breach of the EBITDA (earnings before interest, taxes, depreciation and amortisation) covenant at that date and that that situation would continue through to May 2021. That default was thought likely to result in the SFA and MFA borrowing becoming repayable on demand. Hence, KPMG's view was that a restructuring was necessary to avoid the real possibility of the Company entering administration.

61. KPMG also raised the possibility of a sale to a third party. However, right from the outset, Dr Ford and Mr Price had been against pursuing a sales process. This was on the basis that any sale on an accelerated timescale would be unlikely to realise a price that exceeded the value of the Group's bank debt. Because of the forecast covenant breach and liquidity crisis, it would not be possible to have a leisurely sales process to achieve a full market value and perhaps a return to shareholders. Mr Young has suggested that the real reason no sales process was pursued was because Dr Ford did not want to relinquish control and he knew that there was no value in the equity at that time. However, Mr Wright clearly supported the directors' decision not to pursue a sales process and it was his view, based on his extensive experience, that there was no requirement to pursue a sales process prior to or in conjunction with a CVA proposal. He was also of the view that it was "*fairly typical…for shareholders to want to retain control of a business if that is possible*."

62. On 24 August 2020, KPMG was specifically instructed to advise the Group on its restructuring options and to prepare contingency plans for a potential CVA of one or more companies in the Group. On or around 1 September 2020, Mr Wright and his team began their preparatory work in relation to the potential CVA.

63. It was critical to have the secured lenders supportive of any CVA and negotiations with them began almost immediately. The lenders would be required to waive any defaults arising as a result of any CVA proposal, as well as in respect of the other breaches of covenant that were forecast to arise on the 30 November 2020 test date. According to the Company, the negotiations were complex and difficult, involving many lenders under both the SFA and MFA and there being much uncertainty about future trading in the light of the worsening pandemic and the fear of what might happen if the moratorium on landlord enforcement (then due to end on 31 December 2020) was not extended. If it was not extended, the Company would have approximately £45 million of rent arrears which it would not have been able to pay.

64. Following two presentations and numerous calls and negotiations with lenders on a bilateral and collective basis, both the SFA and MFA lenders entered into waiver letters dated 12 November 2020 (the **Waivers**), that were essential for the CVA Proposal that was also published on that day. The Waivers were conditional on the approval of the CVA and extended to those inevitable defaults that arose from the promotion of the CVA and to the forecast defaults of the financial covenants on 30 November 2020. The Company agreed to certain undertakings, including in relation to the further utilisation of the emergency liquidity facility, and to a number of new financial and non-financial covenants.

65. The Waivers were conditional on there being no "*CVA Failure*" as defined therein. One of the definitions of "*CVA Failure*" was that the CVA "*is not approved by the requisite majorities of the creditors and members of the CVA Company on or before 15 December 2020 (or such later date as is agreed by the Majority Lenders)*". That date features large in both the Company's and the nominees' reasoning in relation to postponing the creditors' vote on 30 November 2020. They say that this was an effective "*cliff edge*" date and that, if it was not met, there would likely have been an "*uncontrolled*" administration. This was based on the notion that the lender consensus was "*fragile*", it having been difficult to extract the Waivers from them in support of the CVA and a strong reluctance on the part of the directors of the Company to test the patience of the lenders by seeking to renegotiate with them in the event of a postponement of the vote to explore the EG Offer.

66. These assumptions about the lenders' potential reaction to allowing time to examine the EG Offer are challenged by Mr Young. He says that there is no evidence to support the Company's assertions and in fact the evidence, such as it is, points to the lenders being generally supportive of the Company and the CVA and there being no good reason why they would not want to give time to explore the EG Offer, particularly if it meant that they would be paid in full on the closing of any such deal. Furthermore, Mr Young submits that there is no evidence that if there had been a postponement, the lenders would seek a damaging administration.

67. As well as engaging with the lenders, the Company also consulted with other significant stakeholders such as the landlords, suppliers and representative bodies such as the British Property Federation.

(c) The Terms of the CVA Proposal

68. On 11 and 12 November 2020, there were board meetings of the Company's directors at which it was resolved that the CVA Proposal would be put to the Company's creditors. The Company engaged Mr Wright and Mr Costley-Wood to act as the joint nominees in relation to the CVA Proposal and on 12 November 2020 they consented so to act. On the same day they filed their nominees' report in accordance with s.2 of the Act (see below).

69. The principal part of the CVA Proposal was a compromise with the Company's landlords of accrued rent arrears, future rent, service charges and insurance. The leases were placed into four different categories reflecting their performance and value to the Company. Category A landlords were largely unaffected by the CVA Proposal, save for a switch to monthly rather than quarterly payments in respect of rent and other charges. Categories B, C and D were however impacted with all being offered 30p/£ in respect of rent arrears but with different terms in respect of future rent and charges.

70. Mr Young is a Category B landlord and the main effects of the CVA Proposal on him and the other 290 Category B landlords are as follows:

    (1) Rent arrears compromised at 30p/£ and payable out of a designated "*Compromised CVA Creditors Fund*";

(2) All rent moved to a monthly payment cycle during a 3 year "*Rent Concession Period*";

(3) The leases moved to a variable rent model based on a percentage of the store's turnover for the duration of the Rent Concession Period (there are five sub-categories with different turnover bands depending on the performance of each store);

(4) New termination rights granted to the landlords, such that they have a break right exercisable within 90 days of the approval of the CVA.

71. The CVA Proposal also compromised the claims of some 170 "*non-critical Creditors*" at approximately 30% of their value, together with intragroup liabilities at the same value.

72. Unlike some recent challenges, for instance in *Lazari Properties 2 Ltd v New Look Retailers Limited* [2021] EWHC 1209 (Ch), Zacaroli J (***New Look***), this is not a case where the contents of the CVA Proposal are being challenged by landlords for unfairness.

73. The CVA Proposal claims that the relevant alternative to a CVA was a sale of the business and assets of the Company in an administration and that this would yield a return to the compromised CVA creditors of 0.3p/£. The assumptions underpinning the relevant alternative were set out in the CVA Proposal, including the likely treatment of the various landlord Categories in that eventuality. Mr Young does not challenge those assumptions but he does say that after the EG Offer was made, the relevant alternative changed to a deal with EG along the lines of the EG Offer and with the landlords being paid their rent arrears in full.

(d) The Nominees' Appointment and Role

74. By s.1(2) of the Act:

> "A proposal under this part is one which provides for some person (the "nominee") to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation; and the nominee must be a person who is qualified to act as an insolvency practitioner in relation to the voluntary arrangement."

75. While the Proposal itself is that of the directors of the Company – see s.1(1) of the Act – the nominee clearly has an important role to play in independently scrutinising, promoting and supervising the implementation of the CVA Proposal. By s.2 of the Act he has to submit a report to the court and that has to state as follows:

> "(a) whether, in his opinion, the proposed voluntary arrangement has a reasonable prospect of being approved and implemented,
>
> (b) whether, in his opinion, the proposal should be considered by a meeting of the company's creditors, and
>
> (c) if in his opinion it should, the date on which, and time and place at which, he proposes a meeting of the company should be held."

76. The nominees' report was filed on 12 November 2020 and it contained their opinion in accordance with the requirements of s.2(2) of the Act. The report enclosed a copy of the CVA Proposal and a summary of the Company's Statement of Affairs. The nominees' report referred to the "*likely alternative*" being an administration or liquidation in which the creditors were estimated to receive 0.3p/£ on the basis that the secured creditors would not be repaid in full and so the unsecured creditors would be limited to the prescribed part (under s.176A of the Act).

77. It is the nominees' duty, under s.3(1) of the Act to "*seek a decision from the company's creditors as to whether they approve the proposal*." By s.3(3) of the Act that decision "*is to be made by a qualifying decision procedure*".

78. The electronic voting procedure was introduced in April 2016 by amendments to the Act brought in by the Small Business, Enterprise and Employment Act 2015. Prior to April 2016, creditors' decisions were typically taken at a physical meeting. However under the new s.246ZE of the Act, a decision may not be made at a physical creditors' meeting unless a prescribed proportion of the creditors request in writing that the decision be made at such a meeting.

79. The nominee is the "*convener*" of the chosen decision procedure – see r.2.25(2) and (4) of the Rules. By r.15.3, the nominee can choose an electronic voting procedure. If he does so, the notice to creditors must contain "*a description of the decision procedure which the convener is issuing, and arrangements, including the venue for the decision procedure*" and a "*statement of the decision date*". That "*decision date is to be set at the discretion of the convener, but must be not less than 14 days from the date of delivery of the notice…*" (see r.15.2(2) of the Rules). The decision date also had to be within 28 days of the filing of the nominees' report (r.2.37 of the Rules).

80. The Nominees accordingly set 23.59 on 30 November 2020 as the decision date. 28 days from 12 November 2020 was 10 December 2020 which was the last date for the decision date. As explained above, the secured lenders' Waivers required the CVA to be approved by 15 December 2020.

81. The use of an electronic voting procedure is KPMG's standard practice for CVAs, as was explained by Mr Wright. There can be no criticism of the use of such a procedure in this case.

82. The required notice was issued to creditors on 12 November 2020. This was sent by email and it informed creditors of the launch of the CVA Proposal and how they could view and download the documents such as the CVA Proposal and nominees' report from the KPMG website set up for that purpose. The creditors were told about the electronic voting procedure and how to lodge their votes. They were able to vote electronically from 12 November 2020 until it closed at 23.59 on 30 November 2020.

83. Creditors were specifically informed that once they had voted, they were not able to change their votes. This warning was made twice in the CVA Proposal itself and in the explanatory email. This is provided for in r.15.31(8) of the Rules: "*A vote cast in a decision procedure which is not a meeting may not be changed*."

84. On 17 November 2020 there was a Webex session led by Mr Wright with the Company's creditors. This was attended by about 175 creditors who were able to

participate by asking questions about the CVA. They were told that the Company was not pursuing a sales process.

(e) EG's prior approaches

85. Although it is not particularly relevant to the issues I have to decide, it was part of Mr Issa's evidence that he, or others on his behalf, had made a number of prior approaches to Dr Ford and the Caffe Nero Group to express an interest in EG acquiring it. On closer analysis during his cross-examination it appears that the "*approaches*" were not quite what Mr Issa had made them out to be and most probably did not even come to the attention of Dr Ford. Oddly, if this was part of Mr Young's case, there was no cross-examination of Dr Ford in relation to these alleged approaches.

86. The first approach did actually happen. It was on 6 February 2020 and it was a meeting between Mr Issa, Dr Ford and Mr Price together with Mr Nick Bishop of Morgan Stanley who was one of EG's investment bank advisers and who had arranged the meeting. Mr Issa had claimed that he had been trying to get to see Dr Ford for a year or so but that he was "*apparently unable to fit me into his schedule*". That was not a fair characterisation of what followed from Mr Bishop's introductory email of 6 February 2019. It seems to me that it was no one's fault that the meeting took so long to arrange.

87. At the meeting, Mr Issa admitted in cross-examination that he did not say to Dr Ford that he wanted to buy the Caffe Nero business. There was a discussion about the ownership of brands, with Mr Issa saying that EG preferred to own brands but that was probably said in response to Dr Ford's suggestion of a possible franchising deal in relation to the Aroma brand. It was a relatively short meeting and there is something in Mr Issa's suggestion that Dr Ford and Mr Price should have inferred what the meeting was about, having been arranged through Mr Bishop. It is a curious feature of the approaches that there is never an explicit statement as to EG's interest in acquiring the business; nor is there any inquiry in the later approaches as to who was interested in purchasing the business.

88. The second alleged approach was later in the year after the pandemic had taken its toll on Caffe Nero and it was apparent from press reports that it was in financial difficulty. Mr Issa says that he approached Ms Elena Paitra of Lloyds Bank plc which was one of the senior secured lenders to the Caffe Nero Group to see if she could speak to Dr Ford. Mr Issa said that he knew that Ms Paitra knew Dr Ford well and thought it better that she spoke to him rather than Mr Issa. Mr Issa's evidence was that Dr Ford had told Ms Paitra that he would come and speak to Mr Issa after the CVA process was completed. Dr Ford denied saying any such thing. Furthermore he claimed that he did not even know that Ms Paitra was making the approach on behalf of EG. This was unchallenged evidence and therefore I accept it. I do not see that any reliance can be placed on this alleged approach.

89. After the CVA Proposal was announced on 12 November 2020, Mr Issa claimed to have spoken to contacts of his at Lloyds Bank, Rabobank and HSBC to see if there was a possibility of speaking to Dr Ford. This evidence was designed to give the impression that EG was trying to communicate with Dr Ford so that he would "*finally come to the table*". This is so as to suggest that the EG Offer was the only way to get

Dr Ford's attention. However, it is clear that, even if Mr Issa did ask the bankers to approach Dr Ford at that time, none of them did so. Again there is nothing in this evidence that assists Mr Young's case.

90. The final approach did take place and that was between Mr Ishaq and Mr Wright in a two minute telephone conversation on 17 November 2020. Mr Ishaq and Mr Wright are professional acquaintances and immediately after the launch of the CVA Proposal Mr Ishaq emailed Mr Wright asking to speak. That was on 13 November 2020 and Mr Ishaq repeated the request by an email on Sunday 15 November 2020. Mr Wright responded to the latter agreeing to speak but stating that "*there is no sale process on this one*", clearly indicating that he knew why Mr Ishaq wanted to speak. They eventually spoke on 17 November 2020 and in the short conversation Mr Ishaq informed Mr Wright that he had a client who may be interested in buying Caffe Nero. There was no disclosure of who the client was and Mr Wright did not ask. Mr Wright said that he told Mr Ishaq that, if the strategy changed from pursuing the CVA, he would get back in touch.

91. There is little dispute about this conversation, in particular that the identity of Mr Ishaq's client was not disclosed. It shows a remarkable lack of curiosity on Mr Wright's part not to ask for details of Mr Ishaq's client and I accept Mr Ishaq's evidence that he would have provided such details if Mr Wright had asked for them. Similarly it is strange that, if EG was so keen to pursue a purchase of Caffe Nero, Mr Ishaq did not follow up the call with an email or any other form of communication in order to progress that interest. Mr Ishaq said that this was because he received the clear message that they were not interested in a sale but the lack of engagement on both sides has a sense of unreality about it, as though both sides were reluctant to find out anything of use from the other.

92. In any event, these approaches, if that is what they can properly be called, did not get anywhere and I think it is fair to conclude that Dr Ford and Mr Price had no idea that EG was interested in purchasing Caffe Nero in November 2020. Accordingly, the EG Offer did come out of the blue and their reaction to it has to be judged by reference to that context.

(f) The EG Offer

93. Mr Issa apparently decided, on or around 27 November 2020, that EG would make an offer to acquire Caffe Nero. He knew that the timing of this would put the directors and nominees in a difficult position but he thought that it was "*now or never*" and that this was the only way to get Dr Ford to the negotiating table. I have found above that there were no real approaches by EG in November 2020 and, while Mr Issa may have thought that Dr Ford was not interested in engaging in discussions with them, I think that the timing of the EG Offer was purely tactical. Mr Issa and his advisors knew that this was a vulnerable time for the Nero Group and they decided to take advantage by putting in the EG Offer.

94. However they were under the misapprehension that the creditor vote would be by way of a physical meeting on 30 November 2020. If such a meeting was going to take place, its adjournment would be a matter ultimately for the creditors to decide if it was put to them by the chairman of the meeting, as it would be bound to. EG's strategy

was, it seems to me, dependent on this and it was undermined by the fact that there was an electronic voting procedure that could not obviously be postponed.

95. Mr Issa said in his witness statement that over the course of the weekend of 28 to 29 November 2020, his team and their advisors including Rothschild & Co prepared the offer based on what they knew about the Caffe Nero business from previous analyses. He said that on 29 November 2020, he "*sought and obtained approval of EG's board to make the offer.*"

96. Much was made in Mr Issa's cross-examination and the Company's submissions of the alleged board approval and a so-called Approval Request that had been disclosed by EG. This was because the EG Offer had referred to the fact it had been approved unanimously by the EG board and that it could complete quickly because it was not subject to any further approvals. In cross-examination, Mr Issa maintained that he did not actually need board approval because he had an unlimited mandate from the board to negotiate and enter into these sorts of acquisitions. He claimed that EG was "*not like normal businesses*".

97. The Company also sought to rely on an email from Mr Paul Altschwager timed at 06:08 on 30 November 2020 (ie after the EG Offer had been sent, but this was because Mr Altschwager was in Australia at the time) concerning the viability of the offer from a financial perspective. Mr Altschwager was later to become Group Chief Financial Officer but Mr Issa was quite dismissive of this email saying that it did not reflect his and the board's views. In any event, it did not influence the decision as to whether to send the EG Offer as it came after it had been sent.

98. The Company submitted that these events show that Mr Issa was giving misleading evidence and that the EG Offer itself was misleading both in terms of whether board approval had already been given and also as to whether it really was a credible offer that could realistically be completed in the very short time frame that there was.

99. In my view this is irrelevant to the issues I have to decide. The Company had no idea what was going on behind the scenes at EG. The directors and nominees received the EG Offer and it is their reaction to it based on what they knew at the time and the context that is relevant. The Company said that it could be relevant to the counterfactual, or likely alternative, if EG was not really in a position to complete such a deal, but that is, in my view, stretching the purported relevance of this evidence.

100. At around 15:00 on Sunday 29 November 2020 Mr Hodgson, a partner of Linklaters, received an email from Mr David Holdsworth, a corporate partner of K&E, asking if he would be available for a telephone call that evening at 18:00 with him and a restructuring partner, Ms Elaine Nolan. The email did not state what the call related to and did not mention the Company or the Nero Group.

101. At around 18:15 that evening the call took place. Mr Holdsworth explained that K&E had a client, EG, which was interested in acquiring the Caffe Nero Group. No further details were provided but Mr Holdsworth stated that a letter would shortly be sent with details of the proposal and he told them that it would have implications for the landlords' position under the CVA. Ms Nolan said that she anticipated that the creditors' meeting the next day would need to be adjourned. Mr Hodgson therefore

clarified that there was no physical meeting and that an electronic voting procedure had been used and that the deadline was 23:59 on 30 November 2020. This probably gave EG and K&E pause for thought about their strategy and was maybe the reason for the further two hour delay before the EG Offer was actually sent.

102. At 19:05, Mr Hodgson sent an email to Dr Ford and Mr Price, copying in Mr Wright. He told them about the telephone conversation he had just had with K&E and that an offer would be coming in that evening for the Nero Group from EG.

103. Mr Price, in his witness statement, said that he was surprised by this turn of events, in particular as to the timing of it. He said: "*this led me to think that the timing was deliberately calculated and was likely designed to be disruptive – I could think of no other likely explanation for the bizarre timing of the approach.*" Dr Ford was of a similar view. Their initial reaction therefore, before even seeing the EG Offer, was one of deep suspicion.

104. The EG Offer was eventually sent by email at 20:48 from Ms Nolan to Mr Hodgson, copied to Mr Wright. She asked for it to be shared with Linklaters' client "*the Caffe Nero Group*". She also said that they were "*available this evening and tomorrow morning to discuss when convenient*."

105. Even though the EG Offer was addressed to "*the Board of Directors, The Nero Group Limited, Nero Holdings Limited*", it was an offer to purchase the shares in NGL. It was not sent to NGL's shareholders or asked to be brought to their attention.

106. The EG Offer contained the following material passages (underlining added):

> "We are writing on behalf of our client, EG Group Limited ("**EG**"). EG is pleased to present a proposal to acquire The Nero Group Limited ("**Caffe Nero**" or the "**Company**"). The following proposal ("**Proposal**") is for the acquisition of 100% of the authorised and issued shares of the Company ("**Transaction**"). Caffe Nero is a high quality and attractive business to EG and EG believes it is in a unique position to deliver you a transaction with a very high degree of certainty and a unique ability to close quickly.
>
> 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 <u>would intend to sign definitive documentation within 10 business days.</u>
>
> **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' [sic] 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 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.

Rationale for the acquisition of Caffe Nero

...

High Degree of Certainty on Completing a Transaction Quickly

EG can provide speed, certainty and simplicity of execution…

Please find below the details of the Proposal:

1. **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 [sic] 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.

2. **Sources and Certainty of Financing**

   EG proposes to fund the Transaction from a combination of cash on balance sheet and other existing banking facilities. EG Finco Limited will be the guarantor of the acquisition vehicle for the Transaction. Beyond that, EG Group has cash balances and available facilities across a broader network of banks and lenders that EG is able to access. Should it be necessary, EG is happy to accept a buyer's covenant that the acquisition vehicle will have sufficient funds at the time of closing to consummate the Transaction.

3. **Internal Review and Required Approvals**

This Proposal has been approved unanimously by the board of directors of EG and by EG's shareholders and is not subject to any further approvals. EG is confident in its ability to move quickly and believes it has a solid understanding of the regulatory issues around this Transaction. EG has done extensive work around this topic and we are available to further discuss EG's perspectives at your convenience. EG's prior two large acquisitions, which were Cumberland Farms and Kroger's convenience store business, were closed in less than 90 days.

4. **Due Diligence**

EG has completed diligence of publicly available information and knows the coffee segment well. EG anticipates conducting confirmatory due diligence swiftly upon receipt of the information. EG will provide a full list of the confirmatory information required on confirmation that the Proposal has been accepted. Please refer to Appendix A for a preliminary list of key information required.

5. **Timing**

EG believes it is in your and their collective best interests to reach resolution quickly. In that spirit, EG requests a response to this Proposal as soon as possible and prior to finalisation of the CVA creditors' decision procedure, which we understand is 23.59 on Monday 30th November 2020. Upon agreeing to the Proposal, EG would request that Caffe Nero commit to work exclusively with EG to finalize the definitive documentation so that EG and you can jointly work to announce the signing of the definitive agreement as soon as possible.

6. **Contact Information**

Please do not hesitate to reach out to the below contacts if there are questions or comments relating to this Proposal.

[the details of Glen Cronin and Majid Ishaq of Rothschild & Co and Elaine Nolan and David Holdsworth of K&E were then provided]

7. Additional Information

The content of this letter (and the identities of TDR Capital and their managed funds, and EG, and each of their affiliates, and advisers, involved in the formulation of this offer) are strictly confidential and should not be disclosed to any other party other than your financial and legal advisers. We ask you to treat the existence and contents of this letter as strictly private and confidential.

For the avoidance of doubt, no contract or agreement providing for any transaction involving the Company or EG affiliates will be deemed to exist between the parties and/or any of their respective affiliates unless and until final definitive documents have been executed and delivered.

Please do not hesitate to contact us if there are questions or comments relating to this letter."

107. The Appendix contained the following list of due diligence information required

- "Latest detailed group financial statements, including income statement, cash flow statement and balance sheet.

- Latest group capital structure, including cash and cash equivalents, financial debt position and other debt-like liabilities.

- Details of government support received to date.

- Detailed site by site P&L, including pre and post rental contribution.

- Details of rental arrears to date.

- Details of any arrangements already agreed with any of the group's landlords.

- Full CVA proposal under discussion with the group's landlords."

108. The underlined passages were the subject of much of the cross-examination in relation to the EG Offer. In particular the references to the offer being on "*a cash-free and debt-free basis*" with "*All third party debt [being] settled in cash at closing*" gave rise to evidence on both sides as to what this meant. However, if there was any doubt in the directors' or nominees' minds as to what it did mean, no one thought fit to check with EG or K&E as to what they intended it to mean. The Company also took issue with the statements as to board approval and no further approvals being required; and it queried whether the offer was truly "*fully financed*".

109. Later in the evening Mr Wright emailed Dr Ford and Mr Hodgson to say that he would be reviewing the EG Offer overnight. And Mr Price emailed Dr Ford at 22:09, simply asking for Dr Ford's "*thoughts*".

110. Dr Ford's evidence was however that he did not read the EG Offer until the next morning, after he had dropped his sons off at school and had gone into the office. While this may seem remarkable, particularly given how critical it was for Dr Ford that the CVA was passed the following day, there seems to me to be no coherent explanation for why Dr Ford would not be telling the truth about this. Dr Ford's oral evidence was to the effect that he had deliberately decided not to work that Sunday evening and to spend time with his sons to help them with their schoolwork and Oxford interview. His email records show that he sent three emails to Linklaters that evening (including one after the EG Offer had been sent to him) and he received seven. Nevertheless, his phone records show no calls made and there is simply no evidence to contradict his evidence that he did not read the EG Offer on 29 November 2020. Mr Price confirmed that he had no response from Dr Ford to his email of 22:09 and did not speak to him that night.

111. I therefore accept Dr Ford's evidence. It is inconsistent with the board minutes of 2 December 2020, which I will deal with shortly, but it is consistent with his email to Mr Wright at 14:04 on 30 November 2020 in which he said: "*Regarding this discussion about the letter read this morning but dated last night (29 November)…*"

(g) The Response to the EG Offer

112. As indicated above, there was some cross-examination about the true course of events on 30 November 2020 but there is little real doubt as to what happened. After various meetings and discussions between the directors, the nominees and Linklaters (privilege in relation to the latter has not been waived), the decision was taken around midday not to postpone or adjourn the creditor vote. There then followed the drafting and posting of the Announcement. And later in the evening the Modification was proposed.

(i) The decision not to postpone

113. Dr Ford got into the office at around 9:00 and it was then that he thinks he first read the EG Offer. He said in his witness statement that his "*initial reaction to the letter was that it could not be relied upon*". There was a weekly meeting of the UK management board of the Company scheduled for 9:15 but Dr Ford only joined it at around 9:40 as he was in discussions with Linklaters and KPMG as to the EG Offer. The EG Offer was mentioned at the management meeting but, as the directors were still taking advice on it, nothing could be decided at that stage.

114. At around that time, Sky News and other major media outlets reported on the fact that the EG Offer had been made. It is a bit of a mystery as to who leaked this to them but in any event that certainly increased the pressure on the Company and the nominees.

115. Between 10:00 and 10:30, Dr Ford presented a twice weekly zoom broadcast to hundreds of the Group's key employees to keep their morale up during the difficult pandemic times. After that, Dr Ford and Mr Price were engaged in a meeting room having discussions with their advisors about the EG Offer.

116. At around 11:00 Dr Ford spoke to his brother, Mr Ford-Deegan in Boston, USA. The EG Offer was principally to acquire the shares in NGL and it was therefore for the shareholders of NGL to decide what they wanted to do as well. The two ultimate principal shareholders are Dr Ford, owning 51% of the shares in NC which owned 93% of RIH, the holding company of NGL, and PP1 owning 42% of NC. Mr Ford-Deegan is a director of RIH, NC and the general partner of PP1. Having had described to him the terms of the EG Offer and having discussed it, Mr Ford-Deegan was against any sale of NGL and considered that the CVA as proposed gave the Group the greatest chance of surviving the difficulties caused by the pandemic.

117. At around noon, Mr Wright was told that the shareholders did not want to sell their shares in the Group. Mr Wright asked for Dr Ford to confirm this in an email. At 14:04, Dr Ford sent an email to Mr Wright that said simply as follows:

> "Regarding the discussion about the letter read this morning but dated last night (29th November), my position is that I do not wish to sell and see the offer as disruptive and speculative."

118. In a minute of a board meeting of RIC apparently held by conference call on 2 December 2020 with Dr Ford and Mr Price in attendance together with Mr Ford-Deegan and solicitors from Linklaters, it was recorded that both RIC and RIH had determined in the evening of 29 November 2020 that they were not willing to sell

their shares in NGL. These minutes were drafted by Linklaters and I do not see that they could be accurate in this respect. Mr Ford-Deegan certainly did not know about the EG Offer until he spoke to his brother on 30 November 2020 and I do not believe it was feasible to suggest that the shareholders could have made that decision on 29 November 2020.

119. The same error appears in the minutes of the Company's board meeting also held on 2 December 2020. Again Dr Ford and Mr Price attended but this time with the third director, Mr House. Mr Ford-Deegan was in attendance together with Mr Hodgson and others from Linklaters. No one picked up on the timing errors in the minutes. These minutes referred to the fact that NGL's shareholders had indicated on the evening of 29 November 2020 their unwillingness to sell their shares. They then went on to suggest that "*throughout the evening of 29 November 2020 and 30 November 2020 [Dr Ford and Mr Price] …engaged in intensive discussions with the Nominees and the Company's legal advisors as regards the options open to the Company and the appropriate course of action that the directors should be considering in the light of their duties to creditors*." Dr Ford said that this was a typo.

120. I do not think it was a typo. In the overall scheme of things, it does not make any difference whether the shareholders decided on the evening of 29 November 2020 or during the morning of 30 November 2020 that they did not wish to sell their shares in NGL to EG. All that matters is that that decision was taken before the decision not to postpone the creditors' vote on the CVA Proposal and before the Announcement. There is reference to the shareholders' decision in the Announcement so it must have happened before that was published. That was confirmed in Dr Ford's email to Mr Wright at 14:04.

121. The errors in the minutes do however highlight the dangers of using board minutes in this way and allowing third parties to draw them up without a detailed knowledge of the actual course of events. Of course the errors should have been noticed by those that did know when the minutes were gone through, apparently carefully at the meeting on 2 December 2020. I question whether minutes should be drafted and used in this way. They purport to be minutes of what happened at the meeting, whereas in this case, the minutes are drafted before the meeting takes place and purport to record decisions and reasons for such decisions that took place two days earlier. I understand the desire to have a written record of important decisions taken in the heat of the moment but this shows the importance of that record being carefully scrutinised by those who actually made those decisions and understood the reasons for them. Linklaters rightly held their hands up for the mistakes that were made but I consider that it is more of a collective mistake brought about by the process chosen to record the chronology of events on the crucial days.

122. The more substantial point of contention on the minutes is the clear reference to the directors themselves making the decision not to adjourn the CVA voting deadline. This was cast as a resolution of the directors *"(in conjunction with the Nominees)*". As I have said above, this appeared to be the Company's position until shortly before the trial, since when its case has firmly been that the decision was made, and could only be made, by the nominees. I will consider below whether this is correct as a matter of law and the effect on the case. But as a matter of fact, Mr Young is correct to say that minutes of directors' meetings are evidence of what took place and are required by statute for that reason – see ss.248 and 249 of the Companies Act 2006.

They were professionally drawn up and purported to record what the directors had decided together with the reasons for those decisions. These were therefore decisions of the directors, whether effective in law or not, and whether the nominees also made their own decisions in such respect. I do not accept that these were errors in the minutes. Indeed they were the very point of the minutes.

123. Before making their decision and issuing the Announcement, the directors and nominees were keen to ensure that the lenders would be supportive. At around midday, Mr Price spoke to Mr Longsdale of Santander, the lead lender and agent of the SFA syndicate. Mr Price said that he explained broadly the EG Offer and that the directors were of the view that it was too uncertain to take the risk of postponing the creditors' vote. Mr Price said that Mr Longsdale confirmed that Santander were supportive of continuing the CVA process. In his oral evidence, Dr Ford suggested for the first time that he overheard the conversation that Mr Price had with Mr Longsdale but he could not remember any of the details of what Mr Price had said. Mr Young suggested that Mr Price did not make clear to Mr Longsdale that the EG Offer included the payment in cash on completion of all the secured debt and that, if he had known this, Mr Longsdale would have been likely to want to pursue it. The Company denies that this was being offered in the EG Offer.

124. Following the conversation, there was an exchange of emails between Mr Price and Mr Longsdale. At 12:35, Mr Price asked: "*Are you ok if we say in our comms that the lenders remain supportive of the company and the CVA?*". A minute later, Mr Longsdale responded to say: "*Yes, so long as you leave as lenders, rather than making it more specific.*" The Announcement that went out included reference to the "*Group's external lenders' support for the CVA*" and that they were "*aware of the approach ... and have not requested a change in strategy*". Mr Longsdale took objection to this and wrote on behalf of the SFA syndicate on 2 December 2020 in strong terms to NGL referring to the EG Offer as the "Third Party Offer":

> "We write on behalf of the senior lender group to express concern that the Third Party Offer was not disclosed to the senior lender group in full when received. While we appreciate that matters would have been moving at pace, we expect that any material developments which potentially affect the success of the CVA, or the senior lender group's position more generally, should be communicated to the senior lender group promptly and directly. The Third Party Offer appears to be a material development and, as such, your failure to inform us of the Third Party Offer promptly, and for it be learnt of from public channels, is not in the spirit of our relationship. Please ensure this does not happen again in the future.
>
> In addition, we were also concerned to see that Monday's Press Announcement referred to the "Group's external lenders' support for the CVA", and stated that "The lenders are aware of the approach referred to above and have not requested a change in strategy....". Whilst we have consented to the CVA as proposed, we do not condone the implication that, as a senior lender group, we have endorsed the Company's decision to reject the Third Party Offer. As you are aware, we have not been informed of any substantive details of such Third Party Offer and there were no meaningful discussions between the senior lender group and the Company or its shareholders on which to base any such endorsement. Further, apart from these statements not being approved by us, they were also not

contextualised and as such have the potential to be misleading and could be relied on by third parties."

125. I do not understand the basis for this letter. It seems to have come about because of a disagreement within the SFA syndicate in respect of which there is no evidence. In my view there is no substance to Mr Young's suggestion that this was because the SFA syndicate had not been made aware of the fact that the EG Offer included an offer to pay their debt in full in cash on closing. I believe that Mr Price and the Company's directors were entitled to assume on 30 November 2020 that the lenders were content with their decision to proceed with the CVA and not to postpone it to explore the EG Offer further.

126. Mr Wright also spoke to the representatives of the MFA syndicate, FTI Consulting (Mr Matt Callaghan) at around midday about the EG Offer and their proposed course of action. No objections were raised by them. This was confirmed later in the day when Dr Ford and Mr Price spoke to Mr Chris Bone of Partners Group which was the lead and controlling stakeholder in the MFA syndicate.

127. So the decision not to postpone had been taken by both the nominees and the directors. Mr Wright said that he had considered how an electronic vote could be postponed and had concluded that the only way would have been to make an application to the Court. This only added to the complications and risks of taking such a course. Having decided not to postpone, the priority was then to disclose to creditors that decision and the reasons for it.

(ii) The Announcement

128. The Announcement was prepared collectively by the nominees, the directors and Linklaters. It was posted on the CVA portal hosted by KPMG at about 14:30. At around 14:40 an email was sent to all creditors alerting them to the existence of the Announcement.

129. The Announcement was signed by Mr Price on behalf of the Company and by Mr Wright on behalf of the nominees. It stated as follows:

> "We refer to the Proposal which was filed at Court and circulated to all CVA Creditors of the Company on 12 November 2020 (as modified by letters dated 19 November 2020 and 27 November 2020 from the Company to all CVA Creditors).
>
> This letter should be read in conjunction with the Proposal. Capitalised terms contained in this letter shall have the meaning ascribed to them in the Proposal.
>
> At 8.48pm on 29 November 2020, without any prior approach to or engagement with the Company or the Group, the Group's advisors received an unsolicited non-binding offer for the shares of The Nero Group Limited (an indirect holding company of the Company). The offer is not for Nero Holdings Limited or any of its business or assets, and purports to provide for payment in full of landlord rent arrears, but otherwise the terms of the CVA would remain as originally proposed.

The Directors are aware of their responsibility to maximise recovery to creditors and have considered carefully whether progressing with this unsolicited approach has the potential to achieve a better result for creditors than the CVA as currently proposed. The Directors note that the offeror has not engaged in any way with the Group prior to the evening of 29 November 2020 despite the publicity around the Group's position over recent months. As a consequence, the offer has been made without a full understanding of the Group's current financial and trading position. No explanation for this delayed engagement has been provided. Any transaction would be subject to due diligence and agreement on the terms of any sale, and would require the consent of the Group's external lenders. There is therefore clearly very significant risk that any transaction could at any point become undeliverable, or be withdrawn or varied, resulting in an outcome for creditors that is potentially worse than the current CVA proposal.

As outlined in the Proposal, the Group's external lenders have indicated their support for the CVA process. The lenders are aware of the approach referred to above and have not requested a change in strategy.

In any event, the Directors understand that the offer has been rejected by the shareholders of The Nero Group Limited, to whom the offer is addressed.

The Directors and the Nominees have carefully considered this development and their duties, and in particular the risk and cost implications of any adjournment and the uncertainty associated with any alternative potential transaction, and in the circumstances consider that it is appropriate for the CVA to proceed on its present timetable.

If CVA Creditors have any queries, they are requested to contact the Nominees at nerocva@kpnng.co.uk."

130. Mr Young's case is that this was inadequate disclosure to creditors and it omitted important parts of the EG Offer. He accepts that there is mention of the offer to pay landlords' rent arrears in full but says that this was the only thing that was disclosed. The Announcement did not refer, for example, to the offer having been approved by EG's directors or that EG could sign definitive documentation within 10 business days. Nor did it set out the enterprise value that EG had ascribed to NGL and that all third party debt "*would be settled in cash at closing*".

131. Dr Ford and Mr Price said that the Announcement contained a fair and balanced summary of the EG Offer and the decision not to postpone. They both said that they were bound by the confidentiality restrictions in the EG Offer itself, although they made no attempt to ask EG or K&E to relax those restrictions and they had disclosed some details and knew that the EG Offer had been made public by being leaked to the press. They also said that some of the statements in the EG Offer could not be verified and they would not want to put their names to such statements. However, it was fairly obvious that the Announcement was not endorsing the contents of the EG Offer, just explaining what its contents were.

132. I will explore below whether there is any substance to the criticisms of the Announcement and whether in any event such a lack of disclosure was material.

(iii) The Modification

133. Following the issue of the Announcement, Mr Wright suggested to the directors that the Modification should be made to the CVA Proposal so as to provide a degree of further protection to creditors in the event that a sale did eventually take place to EG within six months of the implementation of the CVA. KPMG drafted the Modification and it took the form of a new introduction to clause 45 in section 3 of the CVA Proposal. It was in the following terms:

> "45. Sale
>
> Subject to the proposal being approved by the requisite percentage of CVA creditors on the Creditors' Decision Date, if 100% of the authorised and issued shares in The Nero Group Limited are sold to [EG] within the period of 6 months from the Effective Date, on terms that result in all outstanding third party debt financing of the Group being repaid in full, Nero Holdings shall use best endeavours to procure that the terms of such sale shall provide 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".

134. The Modification was notified to the CVA creditors by way of a letter published on the KPMG portal at 20:00 on 30 November 2020. An email to creditors alerting them to the Modification was only sent at 22:20. That email explained that the Modification was being proposed "*to improve the terms to creditors in the event that the unsolicited offer received on 29 November 2020 results in a sale.*"

135. During the course of the day, Mr Wright's team had been monitoring the creditor voting on an hourly basis and reporting this to the directors. By the time the Modification was proposed at 20:00, the required voting threshold in favour of the CVA had been passed. 93% of those that had voted at that time had voted in favour; and 99% of the total votes had been received by then. There was no groundswell of opinion amongst the creditors asking for the vote to be postponed; out of 621 creditors who voted, only nine creditors got in touch with Mr Wright's team on 30 November 2020 in relation to delaying the vote, affording them more time or allowing them to change their votes; only one creditor indicated that they would like to change their vote; and one other creditor stated that they should be invited to "revote" if the CVA Proposal was not postponed.

136. Mr Young's case is that as no creditors voted in favour of the modified CVA Proposal, the Modification was ineffective and the creditors had voted on a different Proposal to that which was deemed to take effect at 23:59. Mr Wright however considered that the Modification was a "*non-material variation*" of the CVA Proposal and would be within clause 34.1 if it had come after the approval of the CVA; in any event as it worked only in favour of the Company's creditors it did not alter the effect or economic substance of the CVA Proposal and was in the creditors' interests.

137. Mr Young also says that it is implicit in the Modification that the directors considered that the shareholders intended to negotiate a possible sale to EG after the CVA had come into effect. That might have encouraged creditors not to challenge the CVA in

the hope that they would benefit from a sale to EG. As neither the directors nor the shareholders had any real intention to negotiate with EG, post-CVA, Mr Young says that the Modification was misleading.

138. After the creditor voting procedure closed at 23:59 on 30 November 2020, the Company's sole shareholder approved the CVA at a meeting held on 1 December 2020.

(h) The Challenge Application

139. In paragraphs [27] – [33] of the Strike Out Judgment, I set out how this Challenge Application came about and why Mr Young is the only remaining applicant. For convenience I repeat the relevant paragraphs here:

> "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.…
>
> 31.…
>
> 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."

(i) The Agreements between EG and Mr Young

140. Similarly I dealt with the contractual arrangements between Mr Young and EG in paragraphs [34] – [42] of the Strike Out Judgment. This is only relevant to the Company's renewed arguments on legitimate interest and/or collateral purpose. Again for convenience I repeat the relevant paragraphs from the Strike Out Judgment:

"(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 and any Subsequent Offer;

(2) Not take any further step or action whatsoever to progress negotiations or discussions with respect to the CNG Offer or any Subsequent Offer;
(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, 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 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."

E. LEGAL FRAMEWORK

(a) CVA Challenges

141. As referred to above, Mr Young's Challenge Application is brought under both s.6(1)(a) and (b) of the Act. While the unfair prejudice ground focuses on the effect of the CVA on the substantive rights of creditors, the material irregularity ground concentrates on the procedure and circumstances around the approval of the CVA. The burden is on the applicant to prove one or other ground – see *Re T&N Ltd [2006]* 1 WLR 1728 at [81].

142. In relation to the unfair prejudice ground the Courts have developed two tests that look at "*vertical*" and "*horizontal*" comparators – see *New Look* at [107]. The "*horizontal*" comparator concerns the relative treatment of creditors under the CVA and is not in issue in this case. The "*vertical*" comparator looks at the position of creditors under the CVA and their position in the counterfactual world in which the CVA had not been approved. The returns to creditors in the counterfactual, or "*relevant alternative*", have been termed the "*irreducible minimum*" below which the return in the CVA cannot go – see *Mourant & Co Trustees Ltd v Sixty UK Ltd* [2010] BCC 882, at [67]. The assessment of the "*relevant alternative*" in most forms of restructuring (such as schemes of arrangement) is largely one of commercial judgment and as such the Courts tend to defer to the directors' views, coupled with those of the nominees in a CVA, as to what would be likely to happen if the restructuring did not go ahead.

143. By contrast, the "*material irregularity*" ground looks at the procedure leading up to the approval of the CVA. The term "*material irregularity*" is not itself defined but s.6(1)(b) of the Act specifies that it must be "*in relation to the relevant qualifying decision procedure*". While that may look limited to the procedure itself, it has been interpreted broadly so as to include for instance the provision of information to creditors – see *Fender v Inland Revenue Commissioners* [2003] BPRI 1304 at [11].

144. The irregularity must be "*material*". As Norris J said in *Discovery (Northampton) Limited v Debenhams* [2020] BCC 9 at [128] (***Debenhams***):

> "an irregularity under s.6(1)(b) of the Act will be considered "material" if (and only if) objectively assessed, there is a substantial chance that if the irregularity had not occurred it would have made a material difference to the way in which creditors would have considered and assessed the terms of the CVA."

145. The test of "*materiality*" is objective. The subjective approach of actual creditors is not the touchstone for assessing materiality, and the question is whether an objective creditor would have considered and assessed the terms of the CVA differently: *Golstein v Bishop* [2017] BPIR 51 at [66]; *New Look* at [304].

146. The contents of a CVA proposal must contain sufficient information to enable creditors to reach an informed decision on the proposal: r.2.3 of the Rules. Whether it does so is highly fact specific: *New Look* at [301]. If a company fails to provide sufficient disclosure in a proposal for a CVA, it will only constitute a material irregularity if "*...had the truth been told, it would be likely to have made a material difference to the way in which the creditors would have considered and assessed the terms of the proposal"*: *Somji v Cadbury Schweppes plc* [2001] 1 BCLC 498 *per* Robert Walker LJ (as he then was) at [35]; and *New Look* at [302]. There is a margin of appreciation allowed as to the information put before creditors. As explained by Lewison J (as he then was) in *Trident Fashions (No.2)* [2004] 2 BCLC 35 at 39 (***Trident Fashions***):

> "The rules clearly give…a measure of judgment about what to place before the creditors or, as we have now learned to call it, a margin of appreciation…It seems to me that the court should only interfere if a judgment made by the administrator about the material to be placed before the creditors was a judgment to which no reasonable insolvency practitioner could come. That judgment should I think be

made on the basis of the material available to the administrator at the time and not with the benefit of hindsight."

147. Those principles must also guide the later provision of information to creditors before the voting procedure has closed. Even though it is a feature of the electronic voting procedure under the Rules that a creditor who decides to submit its vote early on in the process is not entitled to change it, it remains important that creditors are given full and accurate information while the process is ongoing.

(b) Decision making during a CVA process

148. A contentious issue between the parties is whether the directors or the nominees had the power to postpone the creditors' vote. Both the Company and the nominees were adamant that it was only the nominees who had such a power and therefore in law can decide to exercise that power. (It is also their case that there was no power to postpone an electronic voting procedure, as to which see below.) Further they submitted that, as a matter of fact, the nominees did decide not to postpone the vote and it would have been "*wrong*" for the directors to purport to make such a decision and/or to override the nominees in this respect.

149. Mr Robin Dicker QC, appearing with Mr Adam Al-Attar for Mr Young, fundamentally disagreed with this. He submitted that, both as a matter of fact and of law, the directors decided not to postpone the vote and that this was a breach of their duties to the Company. Such a breach of duty would necessarily constitute a "*material irregularity*" within s.6(1)(b) of the Act.

150. The reason why Mr Tom Smith QC, appearing with Mr Henry Phillips for the Company, was so keen to establish that the decision not to postpone was solely that of the nominees is because of the different standard to be applied by the Court in assessing the decisions of nominees, rather than directors. As is clear from the *Trident Fashions* case quoted from above, insolvency practitioners such as nominees in a CVA are judged by reference to whether they acted in good faith and rationally, particularly where they have to make quick commercial decisions. As the Court of Appeal in *Re Edennote Ltd* [1996] BCC 718 said, in the absence of fraud, the court "*will only interfere…if [they have] done something so utterly unreasonable and absurd that no reasonable man would have done it.*"

151. That test was recently endorsed by Zacaroli J in *Carraway Guildford (Nominee A) Limited and ors v Regis UK Limited and ors* [2021] EWHC 1294 (***Regis UK***) at [211]:

> "It is common ground that, if a power exists, no order could be made unless the Nominees were found to have acted as no reasonable nominee would have done in the circumstances of this case. This is the same test that the court applied in *Re Trident Fashions plc (in administration) (No.2)* [2004] EWHC 293 (Ch), when asked to determine whether a nominee's conduct in failing to place material before a creditors' meeting amounted to a material irregularity: it would do so only if the nominee made a judgment to which no reasonable insolvency practitioner could come."

It is fair to say that Mr Dicker QC accepted that that was the appropriate test in relation to decisions of the nominees. (See also ICC Judge Prentis' recent decision in *Huntley v Collier and anor* [2021] EWHC 1091 (Ch) at [47].)

152. Mr Dicker QC points to the fact that where a company is not in any form of insolvency process, the directors continue to manage the business and affairs of the company and it is they, under s.1(1) of the Act, who propose the CVA. When a CVA is proposed by the directors and the nominees become involved in "*supervising its implementation*" (s.1(2) of the Act), the directors' duties are not suspended or excluded. Mr Dicker QC also referred to the interaction between ss.1(2), 4(2) and 7(2) of the Act as showing that the nominees' role is predominantly in the post-approval implementation of the CVA and pre-approval it is limited to that specified in ss.2(2), 3(1) and 3(4) of the Act, in particular the requirement to file the nominees' report.

153. I do not think that Mr Smith QC was suggesting that directors' duties were suspended in relation to the CVA Proposal. Rather he focused attention on the fact, as described above, that the nominees were the "*conveners*" of the electronic voting procedure under the Rules and they delivered the notice to creditors, as they were required to do, and that explained why they were using that voting method rather than holding a physical meeting and the mechanics for creditors to exercise their vote before the deadline of 23:59 on 30 November 2020. If there had been a physical meeting, the nominee would be the chair of that meeting and he would have the power to adjourn (see rr.15.21 and 15.23 of the Rules). If there is a power to adjourn an electronic voting procedure (there is nothing in the Rules to such effect) then it must follow, so Mr Smith QC submitted, that that must be vested in the nominees.

154. Mr Richard Fisher QC, appearing with Ms Georgina Peters on behalf of the nominees accepted that, insofar as there was a power to postpone the vote, then the nominees had a decision to make on 30 November 2020 as to whether they should take steps to delay/adjourn/postpone the vote. He did not submit that the directors' duties were in any way suspended in relation to that period.

155. In my view this only becomes relevant in the unlikely scenario that the nominees and directors disagreed about whether there should have been a postponement, which is not the case here. I do not believe that the directors' duties were in any way suspended during the currency of the CVA Proposal. On the contrary, it was the directors' proposal (see s.1(1) of the Act) and they had the power, which I do not think is disputed, to withdraw the CVA Proposal. They could do that without the nominees' consent, although realistically it is difficult to see such a situation arising. Conceivably, the directors could also apply to the court for an adjournment or other directions and that could be done if there was a disagreement between them and the nominees as to the correct way forward. Again it is hard to imagine such a falling out between the directors and nominees that it would get to that stage.

156. The nominees do not owe the full panoply of directors' fiduciary duties to the Company. Mr Wright was very clear in his evidence that his paramount duty was to the creditors and to ensure that there was a fair and transparent decision making process through which creditors could make a fully-informed vote. There is no doubt that the nominees decided that it was not in the best interests of creditors for there to be any postponement of the vote as a result of the EG Offer. That decision must be judged by reference to the principles set out above.

157. But it is also reasonably clear that the directors themselves came to that decision too, after discussing and receiving advice throughout the morning of 30 November 2020. Whether or not the directors actually had the power to make such a decision or to postpone the vote is not particularly material as they themselves considered at the time that they had made that decision and from the board minutes of 2 December 2020 they purported to do so. That decision will have to be judged in the context of the nominees also coming to the same decision but if the directors' decision constituted a breach of their duties to the Company, it is possible that that would amount to a "*material irregularity*". It is therefore necessary to examine the directors' conduct in relation to the decision not to postpone.

(c) Relevant directors' duties

158. There was no dispute that, because the Company was insolvent in the latter part of 2020, the directors had a duty to act in the interests of the Company's creditors. Section 172(3) of the Companies Act 2006 subjects the duty to act in good faith and to promote the success of the company for the benefit of its members as a whole to any "*rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company*". Such a rule of law was established in cases such as *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250. More recent authority has concentrated on when the duty is triggered, rather than the content of the duty – see *BAT Industries plc v Sequana SA* [2019] Bus LR 2178 (currently awaiting judgment on an appeal to the Supreme Court).

159. Mr Dicker QC submitted that Dr Ford and Mr Price breached their duties as directors in failing to postpone the CVA process because they were affected by their conflicting self-interest as majority shareholders and long serving directors who would lose their company and likely be removed as directors upon a takeover by EG. In such regard, Mr Dicker QC relied on the well known authorities in relation to takeovers and whether directors were acting for proper purposes in seeking to defeat a takeover bid. Thus he referred to: *Hogg v Cramphorn* [1967] Ch 254, Buckley J; *Howard Smith Limited v Ampol Petroleum Limited* [1974] AC 821, Privy Council; and *Eclairs Group Limited v JKX Oil and Gas plc* [2015] UKSC 71, Supreme Court.

160. Mr Dicker QC submitted that based on a number of factors Dr Ford and Mr Price were intent on retaining control of the Nero Group and all the steps that they took on 30 November 2020, including deciding not to postpone the process, not engaging with EG or its advisors, issuing the Announcement and putting forward the Modification, were designed to prevent proper consideration by the creditors of the EG Offer and for Dr Ford to retain control of a restructured and deleveraged Group.

161. I will deal with whether this, or any part of it, has been established on the facts. But in relation to the law, I do not accept that the "*proper purposes*" duty as examined in the authorities referred to above has any real application to the duty to act in the interests of creditors in an insolvency situation. I agree with Mr Smith QC's submission that the relevant test in this case in relation to the directors' decision not to postpone is whether they acted in good faith in what they believed were the best interests of the creditors. It is the duty in s.172 of the Companies Act 2006 (not s.171) that becomes transposed to creditors when the company is insolvent and so what Jonathan Parker J (as he then was) said in *Regentcrest plc v Cohen* [2001] 2 BCLC 80 at [120] is apposite:

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see *Palmer's Company Law* para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind."

162. The duty remains one owed to the Company. There is little authority as to the content of the duty to act in the best interests of creditors but I consider that it is of a subjective nature. Where a decision involves issues of commercial judgment and particularly where such decision is made under some pressure and in difficult circumstances, the Court will be unlikely to interfere in the directors' decision unless the directors did not honestly and genuinely believe that they were acting in the best interests of creditors.

F. MATERIAL IRREGULARITY

163. Mr Young's pleadings make various disparate allegations of material irregularities that occurred during the CVA decision process. Strangely, Mr Young's skeleton argument and written closing submissions deal with the allegations he makes in relation to the Announcement and Modification before turning to the allegations in respect of the decision not to postpone. Both chronologically and logically, it seems to me that that order should be reversed and the decision not to postpone, together with the failure to engage with EG or its advisors should be dealt with prior to the Announcement and the Modification.

164. Therefore I will deal with the allegations of material irregularities in the following order:

    (1) The failure to postpone or adjourn the CVA voting;

    (2) The failure to seek further information in respect of the EG Offer;

    (3) The failures in relation to the Announcement;

    (4) The validity and effect of the Modification;

    (5) The failure to update the nominees' report.

(1) Failure to adjourn/postpone the CVA process

(a) Is there power to postpone or adjourn an electronic voting procedure

165. Mr Smith QC submitted that there was no power to postpone or adjourn an electronic voting procedure. Therefore the failure to do so cannot be a material irregularity. He based this submission on there being no express power to postpone or adjourn, by

contrast to the chair of a physical creditors' meeting having such an express power in r.15.23 of the Rules. Furthermore he submitted that where creditors are entitled to vote over a period up to a specific date set by the nominees (see r.15.2(2) of the Rules), there is nothing that can sensibly be adjourned. Any vote that has already been cast in an electronic voting procedure cannot be changed (see r.15.31(8) of the Rules), so creditors would not be able to reconsider their vote in the light of new information or significant events. Mr Smith QC said that Parliament must have intended that creditors who voted early should be taken to have accepted the risk of further information coming out that might have affected the way they would have liked to vote.

166. Mr Dicker QC submitted that, even though there was no express power in the Rules to postpone or adjourn an electronic decision procedure, there must be such a power. The notion that because a creditor cannot change their vote in an electronic voting procedure there can be no power to adjourn or postpone the time for voting does not make sense and is a surprising one, particularly as the Company also used it to justify not disclosing relevant information to creditors who had already voted.

167. Mr Dicker QC suggested three ways that the CVA process could be postponed:

(i) the directors in this case (and the officeholder, if the company is in liquidation or administration) could have decided to withdraw the CVA Proposal completely and so end the then current electronic voting procedure in respect of it; a new CVA Proposal, incorporating the modified terms put forward by EG, could then be put afresh to the creditors;

(ii) pursuant to the Court's power in s.246ZE(5) of the Act and/or pursuant to the Court's general supervisory jurisdiction over CVAs, an application could have been made for some form of postponement and possibly to direct a physical meeting;

(iii) as a CVA only takes effect after it has been approved by the members of the Company at a meeting (see s.4A(2) of the Act), the chair of the Company's meeting could have adjourned that meeting for a short time to postpone the CVA coming into effect.

168. None of the above suggestions are particularly attractive or practical and that is relevant to considering the directors' and nominees' decisions on the day. The trouble is really defining what is being postponed or adjourned. Where there is a physical meeting and where votes would not be counted until the meeting actually takes place (including proxy votes which can always be changed up to the time of the vote at the meeting) there is no difficulty in adjourning the meeting to another date when the creditors can vote based on their assessment of the new development. But with an electronic decision process, it could be possible to extend the end date for voting, but that will not in itself affect those creditors who have already voted who cannot change their votes. This is probably why no express power to adjourn or postpone was provided for in the Act or the Rules.

169. It would be possible to adopt Mr Dicker QC's suggestion (i) but this would not be a postponement or adjournment of anything. It would require the directors to end the existing CVA process at the last minute and start a new one in the hope that a deal

will have been done with EG that secured those better rights for creditors. There would be no way round starting the whole process afresh, with a new Proposal and nominees' report and, even if a deal was done with EG, it would have necessarily extended the timetable until well into 2021. There also could have been problems with the SFA and MFA lenders in that the termination of the CVA in those circumstances would probably amount to a breach of the Waivers putting the Group in default of the SFA and MFA. This would have been a very risky route to take.

170. As for suggestion (iii), it seems to me that this does not really solve anything at all. Under the Rules, the CVA had to take effect by 10 December 2020 at the latest which meant that the Company meeting had to have taken place by then. It may have bought everyone a little bit of time to take stock but it would not enable the creditors to change their vote; nor for a modified CVA Proposal taking into account the EG Offer to be put.

171. As to suggestion (ii) of applying to the Court, it became common ground by the end of the trial, that an application could be made. Mr Wright said in his oral evidence in answer to a question of mine that they had considered how the process might be adjourned. He said:

> "Yes, the mechanics of how an adjournment would work were briefly discussed. I think we concluded that likely a court application would be required, and again, back to the timing considerations, how would one get to court and prepare that application; what would you be asking the court for, how would you do all of that in the time available? All practical challenges of the day."

172. I accept that an application could be made to the Court. I find it difficult to see however what the application would be for and what relief the Court could have granted that would be consistent with the statutory framework and processes. For example it is not obvious to me that the court could bypass the Rules by permitting those creditors who had already voted to change their votes. But there would be no point postponing the process unless creditors could change their votes. I do not think that s.246ZE(5) of the Act was intended to apply in this situation, effectively to terminate an almost complete electronic decision procedure and to replace it with a new decision process where creditors can vote again.

173. Any such application would certainly be novel and would carry risks. I think the difficulties highlighted above have to be taken into account in assessing the practicalities and reasonableness of both the directors' and nominees' decision not to make such an application. In fact the allegation that such an application ought to have been made on 30 November 2020 was not pleaded by Mr Young; it only emerged in the discussion as to how an adjournment or postponement of the creditor vote could be effected, if at all.

174. In the circumstances, I am prepared to accept that it may be possible to adjourn or postpone an electronic voting procedure in some way but that it could not be done without a court order. In other words, neither the directors nor the nominees have the power themselves to adjourn or postpone an electronic voting procedure. I remain uncertain however whether the court could have done anything meaningful in relation to this CVA if an application had been made at some point during the day on 30 November 2020.

175. Accordingly the relevant decision under scrutiny is in reality the implicit decision not to apply to the court on 30 November 2020 for a postponement or adjournment of the electronic decision procedure.

(b) Was the decision one for the nominees only?

176. I have touched on this above. On the facts of this case, it does not seem to me to be an important question as both the directors and nominees were agreed that the CVA process should not be postponed in any way. As to whether the nominees had sole power to postpone the CVA process, from the analysis above, I have concluded that the only real power to do so lies with the Court. Even Mr Young does not suggest otherwise, as his other two methods are not actually postponements of an existing CVA process.

177. There is a distinction between having the power to do something and deciding not to do it. If the directors and nominees had concluded that the creditor vote should be postponed, they would then have had to apply to the Court for that to be effected. There is a complete lacuna in the Rules as to what is to happen in this situation during the course of an electronic voting procedure, and I daresay that it was not contemplated. This may need to be looked at by the Insolvency Rules Committee. Not only is there no provision dealing with postponements or adjournments of an electronic voting procedure but also there appears to be no statutory power to apply to the Court for any relief prior to the CVA being approved.

178. On the basis that the Court may have some residuary power by virtue of its supervisory role, I think it is reasonable to assume that either or both of the directors and nominees would have standing to apply to the court. I am therefore prepared to accept that the directors or the nominees could have applied to the Court for directions in this respect. They both therefore could be said to have decided not to make any such application. As I have indicated above, the evidence shows that both did decide that the CVA process should not be postponed. Those decisions both need to be assessed by reference to their respective duties and whether they were "*material irregularities*" within the meaning of s.6(1)(b) of the Act.

179. Both the directors and the nominees assumed that they did have the power to adjourn or postpone the process. They both said in evidence that they considered it was in the best interests of creditors to continue with the CVA process. So far as the nominees are concerned, Mr Young has to establish that the nominees made a perverse decision in the circumstances that no reasonable nominee could have made. So far as the directors are concerned, Mr Young has to show that they did not honestly or genuinely believe that they were acting in the best interests of the Company's creditors and were instead acting in their own self-interest to avoid EG taking over the Nero Group and ousting them.

(c) The reasons relied on for continuing with the CVA

180. A number of reasons were relied on by the nominees and the directors, some more by the nominees, others more by the directors. Even though there was clearly a lot of discussion between them and with Linklaters, Mr Wright explained in his evidence that there were extensive discussions within KPMG, including with Mr Costley-Wood and Ms Libby Elliott, an internal Risk Management Partner who was previously an

Insolvency Partner at Stephenson Harwood (and before that at SNR Denton). Those discussions were separate from the directors and Mr Wright said that "*we formed our own independent view on the way forward*" and that "*a decision was made by us in good faith taking into account all the circumstances as we understood them to be, including what we perceived to be the best interests of creditors*." In making their own decision, the directors would be bound to consider and pay full regard to the nominees' decision separately arrived at.

181. In support of their contention that the nominees were the only ones who could and did make the decision, Mr Wright said in oral evidence that he had explained to the directors that it was the nominees' decision to make and not the directors' and that his "*role was ultimately to make decisions on behalf of all the creditors and be prepared to be held accountable for it*." Dr Ford and Mr Price supported this in their evidence, saying that they had been told by the nominees that "*it is not your call*" and that it was the nominees' decision. That is obviously inconsistent with the board minutes of 2 December 2020 but it shows that it is important to consider the basis upon which the nominees did come to their own conclusion.

182. There were a number of factors in play and I will look at them each in turn.

(i) The timing of the EG Offer

183. On any view, the EG Offer came in very late, at 20:48 on Sunday 29 November 2020, putting extreme pressure on the directors and nominees. There were two important dates that were described as "*cliff edges*": under r.2.27 of the Rules the CVA decision procedure had to be completed within 28 days of the filing of the nominees' report, which meant by 10 December 2020 (there is no statutory power to extend that date); and the SFA and MFA Waivers signed on 12 November 2020 were conditional on the CVA being approved by 15 December 2020.

184. Mr Wright was frank in his evidence that he saw the timing of the EG Offer as "*disruptive*" and the main reason why he felt that there was simply no time to explore it further without risking the "*downside scenario*" of an administration. He said that if the EG Offer had come in a week or so earlier, or if EG had sought to engage with them or the Company at an early stage of the CVA process, there would have been time to investigate it and negotiate with EG without putting the CVA in jeopardy. But because it came in so late, just 27 hours before the voting was due to close, any sort of delay to the CVA process risked the CVA failing without a deal and almost certainly being forced into administration.

185. The EG Offer had stated that EG intended to be in a position to sign "*definitive documentation*" within "*10 business days*" but that would have taken it beyond the 10 December 2020 deadline for approval of the CVA. There were in reality only 9 business days to conclude a deal (including in relation to assets held elsewhere in the Group and involving multiple stakeholders) and for creditors to vote on a modified CVA proposal. The nominees considered that this was wholly unrealistic and that it put the Company at significant risk.

186. Despite Mr Issa's optimism and his track record of completing deals in short order, it would have been extremely unlikely that a deal could have been concluded with EG by 10 December 2020. The EG Offer was conditional on due diligence and it enclosed

a "*preliminary*" list of key information that it required immediately. That included some basic information, such as the latest financial statements, the latest Group debt position, details of rent arrears and a copy of the CVA Proposal. The fact that EG was asking for this information indicated that the EG Offer had been put forward on very incomplete information. For example, EG was offering to pay all the landlords' rent arrears yet it did not know how much that was (Mr Issa said that he was aware of the "*ballpark worth*" of those rent arrears). And this was only "*preliminary*" due diligence information, indicating that more detailed information would need to be forthcoming before a deal could be done.

187. It is not for me to judge whether a deal could have been negotiated in that timeframe. I have to consider how it would have looked to the nominees and the directors from the face of the EG Offer and I can see that it may well have seemed as though there was insufficient time to get to a position where a deal could be concluded with EG while there was little or no risk of the Company falling into administration.

188. There was furthermore no agreement, or even offer on price. The EG Offer ascribed an "*Enterprise Value*" of £350m to £400m. The acquisition was also to be on a "*cash free, debt free*" basis, which Dr Ford and Mr Price said they considered meant that EG would expect to receive the Group without any debt. Therefore it would have necessitated agreeing a price which at least cleared all of the net debt in the Group together with other items that would need to be deducted such as working capital adjustments, transaction costs and deferred tax. Dr Ford's evidence was that the Group's net debt plus other deductions was likely to have been in excess of the £400m top end of the Enterprise Value range. Mr Issa accepted that if £400m was not enough to discharge the debt and other liabilities, it would either not work or there would have to be a compromise with the lenders. Negotiations with the lenders would not have been possible in the time available.

189. The timing of the EG Offer, together with its leaking to the press and the uncertainties around it, made Dr Ford and Mr Price intensely suspicious of it. Mr Wright did not look at it that way. He thought that it was disruptive but his main concern was as to whether it was practically feasible in the time available and whether postponing the CVA, even for a short time, ran too great a risk of the Company being forced into administration.

190. Dr Ford's and Mr Price's suspicions as to the honesty and genuineness of the EG Offer were strongly criticised by Mr Dicker QC. He said that their immediate belief that EG was acting in bad faith, without even picking up the phone to speak to EG or K&E or Rothschild & Co, was completely unjustified and irrational but it shaped their response to the EG Offer. In an email in the evening of 30 November 2020 Dr Ford described the EG Offer as follows:

> "Totally unwelcome, destructive offer with the sole purpose of derailing the CVA which is finishing today and totally on track."

In a further email that evening he said:

> "In short they are trying to bribe the landlords to reject the CVA, have us go into administration and buy us for the debt value."

And further:

> "Landlords have accepted the CVA, but these guys are now trying to bribe them to give it up. We are in an emergency process to get them to leave us alone."

191. It will be recalled that the EG Offer was itself conditional on the CVA proceeding, albeit with enhanced terms for the landlords. Furthermore there was no justification for describing the offer to the landlords as a "*bribe*". These emails came after the decision by both the nominees and the directors not to postpone the CVA but they do indicate the mindset of Dr Ford, probably from before such decisions were made. But did that mindset affect those decisions and mean that the directors were abusing their power, such as it was, for their own interests rather than the creditors'?

192. Mr Dicker QC submitted that the directors' duties included duties of disclosure to creditors of significant matters that might affect whether a creditor votes in favour of the CVA or not. I do not think this was disputed by the Company. Mr Dicker QC also submitted that the nominees were under a similar duty and as the convener of an electronic voting procedure they should be treated as though they were the chair of a physical creditors' meeting when an important new development arises shortly before that meeting. Relying on *Cadbury Schweppes plc v Somji* (supra) at [25] and *Rowbury v The Official Receiver* [2016] BPIR 477, Registrar Briggs (as he then was) at [40] – [41], he submitted that there should have been a postponement if only to give full disclosure of the EG Offer to creditors. This submission is bound up with Mr Young's case as to the inadequacy of the Announcement.

193. In my view, this alleged failure ignores the events of the day and is unrealistic. If the nominees and directors had concluded that they were not going to postpone the CVA process in order to see if a deal could be done with EG in time to put a modified proposal to creditors before the deadline of 10 December 2020, I do not see that there was any point postponing the CVA (with all the procedural difficulties of an application to court etc. explained above) for the purpose of providing a fuller explanation of the EG Offer. It may have given the directors and shareholders more time to engage with EG and its advisors but if that was not going to lead to this CVA being approved on a modified basis within the statutory time limit, even a short postponement carried with it the very great risk that the CVA would fail and for the Company to go into administration.

194. I consider therefore that the timing of the EG Offer was a strong and rational reason for not postponing the CVA. I can understand that if EG and K&E thought that there was a physical meeting of creditors on 30 November 2020, there would have been a lot of pressure and good reason for the chair of that meeting to adjourn it so that creditors had a full opportunity to consider the EG Offer and for there to be negotiations with EG in the time up to the adjourned meeting taking place. But the fact that there was an electronic voting procedure that was virtually complete by the time the EG Offer was made changed the dynamics completely and it was no longer the relatively simple question of adjournment but the much more complex one of what to do about that electronic voting procedure and the votes already cast.

(ii) The shareholders' rejection of the EG Offer

195. Even though the chronology, as set out in the minutes of both the Company's and RIC's board meetings, was confused and inaccurate, it is clear that the directors and nominees made their decisions not to postpone after the shareholders of NGL had decided that they did not wish to sell to EG. As is recognised by Mr Young, Dr Ford, as the ultimate majority shareholder of the Nero Group, was entitled to decide not to sell his shareholding. That is his prerogative. But what he could not do, says Mr Young, is allow his interests as ultimate majority shareholder to affect his decision as a director of the Company with his paramount duty then being to act in the best interests of the Company's creditors. Mr Dicker QC submitted that everything that was done and decided by the directors was conditioned by Dr Ford's unwillingness to sell and lose control of the Nero Group to EG. They treated it as a hostile takeover that had to be rebuffed by all means available to them.

196. However the shareholders' rejection of the EG Offer was undoubtedly a relevant factor for both the directors and the nominees to take into account in deciding whether to postpone the CVA process. The EG Offer was to acquire the shares in NGL, and so not something that the Company itself could deliver. It involved a large number of other stakeholders who were not part of or subject to the CVA. If they were not prepared to engage in discussions with EG as to a possible takeover, then plainly a delay in the approval of the CVA so as to enable discussions to take place with EG that were very unlikely to get anywhere given the shareholders' immediate rejection of the EG Offer, would not benefit the Company's creditors and only imperil the CVA itself.

197. Even with the caution that should be exercised in relation to the 2 December 2020 board minutes, one of the reasons given for not postponing the CVA seems to me to be credible:

> "5.4.1 in circumstances where the Shareholders were not willing to sell their shares in [NGL], it was difficult to see what could be gained by extending the CVA Voting Deadline and potentially giving creditors an opportunity to re-cast their votes – without the Shareholders being willing to sell their shares in [NGL], there was no alternative transaction – administration remained the likely alternative;"

<u>(iii) Certainty v Uncertainty</u>

198. Mr Wright focused on the certainty of the CVA Proposal with its well-understood advantages for creditors and with, at that stage, a high degree of confidence that it would be approved, against the uncertainty of the EG Offer which had potential upsides for creditors but very little (if any) confidence or certainty that it could be delivered in the very short amount of time they had. He used the "*bird in hand*" metaphor on a number of occasions.

199. I found Mr Wright's explanations of this in his oral evidence thoughtful and convincing, being made on the back of much experience in this area. By way of example, he said as follows:

> "I suppose it is helpful to give you again a bit more context. As insolvency practitioners, we like to deal with certainty over uncertainty. While that offer may have given a better outcome to creditors in certain, in my view, very difficult

circumstances, it also may not have done. The risks of doing -- as insolvency practitioners we are very risk-focused want certainty as [sic] uncertainty and we want to protect the position of creditors as much as we can. We do not make commercial decisions. We are there to try and deliver outcomes that are certain, that as many stakeholders as possible have agreed to. So the EG offer and its uncertainty was clearly a key factor in our judgment on that day."

…

"My reasoning on the 30th was, do we adjourn this meeting or not, what are the benefits to adjourn, what are the risks to adjourn, wrapped in a context of what is right for the creditors as a whole. As I said earlier, at that point the company had a bird in the hand which would have preserved the business and the other stakeholders involved and had we gone down a different route, potentially, there would have been a much worse outcome."

200. This was the effect of the timing of the EG Offer, which, as I have said above, Mr Wright considered affected the decision greatly because more could have been done in relation to such an Offer if it had been made earlier in the process without prejudicing the existing CVA Proposal. It could have been discussed with EG "*in a safe environment without necessarily needing to disrupt the other process that was running*." But the proximity of the EG Offer to the close of the CVA process meant that the EG Offer could not be pursued without making administration a much greater risk than it otherwise was.

201. This therefore seems to me to be also a compelling reason for the nominees to have had at the time in considering the best interests of creditors.

<u>(iv) Position of lenders and other stakeholders</u>

202. As to the position of the SFA and MFA lenders, I have explained above that the Waivers were required from them in order for the CVA Proposal to proceed. Those Waivers required the CVA to be approved on or before 15 December 2020. Paragraph 12 of the Waivers required the parties to enter into good faith discussions for a period of 20 business days after a CVA Failure. So an administration could not be forced on the Company immediately but a CVA Failure would certainly put the Company in a precarious position.

203. Dr Ford, Mr Price and Mr Wright all said that there was a "*fragile*" consensus among the lenders which they feared would collapse if they had to renegotiate the Waivers to pursue the EG Offer and postpone the CVA Proposal. In his witness statement, Mr Wright said that:

"Proposing an adjournment at the eleventh hour would have required us to revisit our discussions with the lenders, and in view of the internal credit approval processes that would have been required for them to consent to a change in strategy of this nature, it would have created a material risk that even a short-term delay would have resulted in one or more lenders refusing to consent to this or to renegotiate the waivers. I considered that there was a real possibility that the stakeholders would have taken a different position, with the result that the CVA

> Proposal would no longer be viable. In short, there was a real concern that the fragile and carefully negotiated lender consensus would fall apart."

I have no reason to doubt that that was Mr Wright's considered professional view at the time. When challenged in cross-examination as to whether the consensus really was so fragile, Mr Wright explained the tortuous route to getting their agreement to the CVA:

> "To provide some colour to you, we had numerous telephone conversations with lenders, both collectively and individually, with the company's agreement, the lenders had different positions and in order to try and co-ordinate that along a time line that was workable was extremely complicated indeed. Each lender had its own internal credit process. They had to get comfortable with what was being proposed. They had to agree what they would be comfortable -- what position they were going to take in the CVA with the company and that process took from, as I recall from around 9th September right the way up to 12th November, and in fact the position got so fragile at one point that in fact Dr. Ford intervened and negotiated the position himself. I think I heard Mr. Price say earlier that he was up until two o'clock in the morning finalising discussions on certain aspects. So to suggest that that process was in anyway straightforward is, in my view, entirely wrong, and if we had gone down a different route then we would have had to effectively have started that process all over again."

204. Mr Dicker QC disputed that there was such a fragile consensus among the lenders and submitted, relying on Mr Longsdale's letter of 2 December 2020, that if the lenders had known that the EG Offer contained an offer to pay the third party debt in full on closing, it would have been relatively easy to persuade the lenders that there should be some time given to explore the EG Offer. The Company does not agree that this was what the EG Offer said; nor that the lenders were not told the material terms of the EG Offer.

205. In my view the 2 December 2020 letter rather demonstrates that there may well have been difficult negotiations with the lenders in relation to extending the Waivers further. As I have said above, the directors were entitled to have assumed on 30 November 2020 that they had the SFA lenders' support for continuing the CVA despite the EG Offer. That was from Mr Price's conversation and exchange of emails with Mr Longsdale. The letter of 2 December 2020 indicates that there was dissatisfaction within the SFA lenders as to what Mr Longsdale had agreed to and this was said to have come about because they had not been made aware of the details of the EG Offer.

206. As of 30 November 2020, it was reasonable for both the directors and the nominees to have thought they had the support of the lenders but that renegotiating the Waivers would not have been straightforward and posed a significant risk to embark on that. Mr Wright was of the view that if the CVA did not proceed and the Waivers were not successfully renegotiated, the Company would inevitably have gone into administration. The directors were entitled to rely on that.

(v) Crown Preference Issue

207. There was a very specific reason relied on by the directors and the nominees for not deferring the CVA by even one day. That was because there was a change to the Crown preference rules that was taking effect from 1 December 2020. There is no dispute that, by the operation of s.98 of the Finance Act 2020, approximately £1 million of the amount owed to HMRC would have become preferential and could not therefore be compromised by the CVA (see s.4(4) of the Act). Accordingly there would have been an "*immediate cash impact*" of £1 million if the CVA had been postponed for just one day.

208. This was considered by Mr Wright on 30 November 2020. In his witness statement he said that:

> "67. …However, extending the deadline for the approval of the CVA Proposal would have resulted in a higher amount being payable to HMRC because of the need to reflect its preferential creditor status. We assessed the cash impact of this change as £1 million in the short time we had available on 30 November 2020, on the basis that we expected HMRC to try to recover the VAT element of the claim from other Group companies which were jointly liable for the VAT, and it was only the PAYE element of the claim that would be required to be paid in full by [the Company].
>
> 68. The payment of an additional £1 million was material in the context of [the Company's] cashflow forecast. Furthermore the arrangements which had been negotiated in the period since August 2020 with the senior lenders as a condition of the lender waivers had resulted in a minimum liquidity covenant being in place, which had limited liquidity headroom. If [the Company] had been required to pay an additional £1 million to HMRC during the CVA period (ie without making any adjustments to the terms of the CVA Proposal, and in particular in order to ensure that the distributions to be made to creditors would not be reduced), then this would have had a significant impact on [the Company's] liquidity headroom throughout the CVA period, and it would have placed [the Company] at risk of being in breach of its liquidity covenant. It was my assessment that an adjournment would materially increase the risk to implementation of the CVA as a result of the additional £1 million payment."

209. Mr Price put the point succinctly in his oral evidence when being cross-examined as to the significance of the Crown preference issue:

> "The Crown preference only came into the thinking to the extent that why delay 24 hours if you do not believe that delay is going to be helpful and it is going to cost you a million pounds."

210. Mr Dicker QC took issue with the alleged cash flow impact of having to pay the £1 million to HMRC, referring to: the cashflow forecasts prepared in the event that the CVA failed; the fact that it was only a £700,000 extra debt as the Company had to pay 30p/£ to HMRC under the CVA; and also the fact that there was then a moratorium on the presentation of winding up petitions which would delay HMRC's enforcement against the Company. But his main attack during cross-examination was as to why neither the directors nor the nominees had considered asking EG for a non-returnable deposit that would not only cover the £1 million Crown preference issue but also

show EG's commitment to see its offer through. A creditor had suggested on 30 November 2020 that the Company might resolve any critical timing issue by asking for a non-refundable deposit.

211. It is clear that neither the directors nor the nominees considered asking for such a deposit. Mr Dicker QC said that the directors did not consider a deposit because they had already closed their minds to any sort of postponement and were not thinking about the best interests of the creditors. But as regards Mr Wright, even though it did not cross his mind on the day to ask for a deposit, as he explained, it would have been quite unrealistic to negotiate a deposit in the short time available:

> "First, as I said earlier, I have never in my career seen any party prepare and execute a seven figure non-refundable deposit agreement in less than six working hours, and the way that I would think about that is, let us say I had that conversation at ten o'clock in the morning and then at seven o'clock in the evening, or eight o'clock in the evening they then decided they did not want to do it, for whatever reason. Then we would be in a position where we had not had the time to consider the adjournment and we had not made appropriate disclosures to creditors and the situation had become much more difficult. Even worse, what would have happened if they had said they were going to do that at ten o'clock in the morning and then at two o'clock in the morning they decided against it, at which point the company has then incurred additional costs because of the Crown Preference change and there is a real risk at that point because it is too late to seek court directions for an adjournment, but the CVA then starts to fall away."

212. The Crown preference issue was not a decisive factor but it was taken into account by the nominees and the directors in coming to their decisions. I do not think it was unreasonable for them to do so.

(vi) The mechanics of postponing

213. I have set out above my conclusions as to whether and if so how an electronic voting process could be adjourned. And I quoted from Mr Wright's evidence that he had considered and discussed the mechanics of adjourning and had concluded that an application to the Court would have been necessary. Mr Wright's conclusion that such a novel application with no certainty of outcome or timing would be practically unworkable was an entirely reasonable one. This was then another factor that the nominees and directors were entitled to take account of in deciding not to postpone.

(vii)The Directors' views

214. The nominees also took into account the views of the directors that the EG Offer was "*speculative and disruptive*" and that pursuing the EG Offer with a postponement of the CVA might lead to a failure of the CVA and the Company being forced into administration which would be highly detrimental to its creditors. I do not think the nominees can be criticised for listening to the directors' views on this, so long as they came to their own conclusions as to what was in the best interests of the Company's creditors. By reference to the factors identified above, plainly the nominees did come to their own independent view that a postponement was not in the best interests of creditors and that it carried with it too great a risk of administration.

215. In any event Mr Wright's recollection of the morning of 30 November 2020 was that Dr Ford and Mr Price "*just did not know what to do on that day. They were looking to me and my colleagues and their legal advisers to help them navigate through what was relatively unprecedented events*."

216. Mr Dicker QC tried to paint a picture of the directors having come to a pre-baked decision to reject the EG Offer and to take all steps necessary to see it off and to get the CVA passed. While they were certainly opposed to any sort of takeover and regarded the EG Offer as highly suspicious, deliberately disruptive and possibly dishonest, I believe their oral evidence, corroborated by Mr Wright, that all were anxiously considering what best to do in the interests of creditors given the wholly unexpected development that had arisen just before the close of the CVA process.

217. Thus Dr Ford said as follows:

> "I can understand why you would put that perspective forward for EG. I can tell you at the time we, (i), really did think about it; (ii), focussed on things that have nothing do with shareholding but actually, these are creditor issues; and, (iii), measured out what the downside would be on risking going forward with administration; and, (iv), on an adjournment or not, we were told specifically, categorically, "It is not your call"."

And Mr Price said in answer to Mr Dicker QC's question:

> "Q. So far as your own reaction to the letter was concerned, it was fair for me to say that you regarded it as a hostile takeover to be rebuffed, but you have added, subject to the advice and views of KPMG and Linklaters so far as the CVA is concerned?
> A. I certainly did not say at that stage that I felt it had to be rebuffed. It is a critical difference in the approach. Yes, there were plenty of things in that letter that concerned me and, you know, I had an overriding concern about the company arriving in administration very shortly if the CVA was not passed, and the letter seemed to me to put a lot of that at risk, but I was not, on the morning of the 30th, in an [im]mediate "we must rebuff and repel" because I think we had to consider the benefit of creditors, consider the best way forward, with advice from people who actually knew about CVAs."

218. Mr Wright perceived that the directors were acting on the day on the basis of what would be in the best interests of the creditors:

> "…all the conversations that I had with Dr. Ford and Mr. Price and various others on that day were focused on what the most appropriate course of action was for the creditors. So if you ask me the question, did I think that the directors acted on that day in the best interests of the creditors, based on the events, I was not there to form a view on that at the time and I -- and my responsibilities were limited in that respect, but my view would be, yes, that they did."

219. Even though the directors seemed more preoccupied than the nominees with the motives of Mr Issa and EG in putting forward the EG Offer at the time they did, I can understand why they might have had concerns in that regard. I do not think that this

overrode the other factors that they took into account in deciding not to postpone. Perhaps most importantly they were entitled to rely on the fact that the nominees had apparently come to their own independent decision based on the reasons discussed above and that was a clear indication that the interests of creditors were best served by continuing with the existing CVA Proposal.

(d) Can the nominees' decision be impugned?

220. As is apparent from my consideration of the reasons relied upon by the nominees for not postponing the CVA Process, I have concluded that they acted in good faith, in accordance with their professional duties and reached a perfectly reasonable decision that it was not in the best interests of the creditors to postpone the CVA Process. They had the certainty of the CVA which was about to conclude as against the uncertainty of the EG Offer which had come in very late and even though some creditors may have been better off if a deal with EG had been successfully negotiated and a modified CVA Proposal approved, nevertheless it carried with it the very great risk that the CVA might be lost and the Company falling into administration. Balancing all the relevant factors and the risks involved, under considerable time pressure and without any clear route for postponing an electronic voting procedure, the conclusion that the nominees came to was well within the range of what a reasonable nominee could have come to in those circumstances.

221. Accordingly, in my judgment, Mr Young has not established that the nominees' decision not to postpone could amount to a material irregularity. I would go further and hold that, in the context of an electronic voting procedure with all the legal uncertainties around the ability and power to postpone the CVA process, I do not think that the nominees could have sensibly decided otherwise. Mr Issa knew that he was putting them on the spot by the late service of the EG Offer but it would only really have worked if there had been a physical creditors' meeting taking place on 30 November 2020 and no votes already irrevocably cast. The electronic voting procedure left the nominees with no real options other than to continue and the EG Offer could not have its desired impact.

(e) Were the directors in breach of their duties in not postponing?

222. Given that I have concluded that the nominees made a reasonable, and possibly the only reasonable decision in the circumstances, not to postpone, I do not see that the directors can be criticised for making the same decision. Even if they took a far more sceptical view of the EG Offer and were determined not to give it any chance of success, it is clear that they followed the nominees and they separately considered what would be in the best interests of the Company's creditors. As shareholders, Dr Ford and Mr Price had rejected the EG Offer, as they were entitled to, but they still went on to make a decision as directors of the Company, albeit taking into account the fact that as shareholders they had rejected the offer. But that was only one of the factors and it appears that the others were also relied on in their decision.

223. Much of Mr Young's case rested on the proposition that Dr Ford and Mr Price were effectively disqualified because of their conflict of interest from deciding on behalf of the Company what they should do about the CVA. Their response to this was to say that they did not actually decide anything in relation to the postponement of the CVA because they were told by Mr Wright that this was the sole decision of the nominees. I

have held that the directors did actually make their own decision in relation to this. But that decision was properly made and took into account factors that were relevant and reasonable as regards protecting the interests of the Company's creditors. I do not think it can sensibly be said that Dr Ford and Mr Price were disabled from participating in that decision-making process, and in any event, I have concluded that it was a reasonable and perhaps the only decision that could have been made in the circumstances.

224. Accordingly I reject Mr Young's case that the directors acted in breach of their duties to the Company.

(f) Were there any material irregularities in relation to the decision not to postpone?

225. By reason of my conclusions on the decisions made by the nominees and the directors, there were no irregularities, let alone material irregularities in relation to the decision not to postpone or take steps to postpone the CVA process on 30 November 2020.

226. The Company had also argued that if the failure to postpone was an "*irregularity*" Mr Young could not have shown that it was "*material*". This was based on the fact that the threshold for approving the CVA had actually been reached by the evening of Friday 27 November 2020 and as votes could not be recast under r.15.31(8) of the Rules, there could have been no different outcome. Mr Smith QC also submitted that Mr Young could not show that there would be a "*substantial chance*" of creditors approving a modified CVA incorporating a deal reached with EG. I do not need to come to any conclusion on this and will only say that I find it difficult to see that I could have concluded that there was an irregularity in failing to adjourn the CVA without also concluding that there would be a "*substantial chance*" of the EG deal being agreed and a modified CVA Proposal approved by the creditors.

(2) The failure to seek further information in respect of the EG Offer

227. This was not really a separate allegation but it became a central part of Mr Young's case at trial. Mr Dicker QC's cross-examination of Dr Ford and Mr Price, in particular, but also of Mr Wright, was dominated by questions as to why they did not make contact with EG or K&E or Rothschild & Co on 30 November 2020 before they decided not to postpone the CVA process. As they seemed to have come to the view that the EG Offer had been put forward in bad faith and that it was "*untrustworthy*", they should have tested that assumption by speaking to EG or its reputable advisers. Mr Dicker QC submitted that the reason they did not do so was nothing to do with timing (as they had suggested) but rather was because they were all pursuing a strategy (he presumably includes Mr Wright in this) designed "*to get them to leave us alone*", as Dr Ford had said in an email that day.

228. Dr Ford's position was that there was so much going on on 30 November 2020 including in particular that they had to decide what to do about the CVA process and to make disclosures to the creditors that there was just no time to start engaging with EG or its advisers in relation to the EG Offer. He thought that there were so many uncertainties around the EG Offer that it would be impossible to imagine that any

form of engagement with EG would get them to a position where they might consider it was worth pursuing and therefore to take steps to postpone the CVA. He said this:

> "On the letter itself, when we spent time on it, there were opaque things -- many, many things and I am willing to go through and cite them -- and then there were things that were just, you could not get certainty on, no matter if you called them or not. Would we get any certainty out of the price range? We are not going to get a price. Would they give us certainty on due diligence and withdraw it? No, they would not. Would we be able to know the contract and the terms of it? No, we would not on that. So there were a whole series of things that I think we could have tried to get clarification, but there are a whole series of things it did not matter if we called them on it."

229. Mr Price was of the same view. He described the EG Offer as "*untrustworthy*" and when I questioned him on that he said:

> "from a legal and banking point of view there was nothing in the letter that was untrue but its output was untrustworthy…I did not necessarily believe that the offer it was purporting to put out was genuine or achievable, but that would not necessarily be a matter that K&E would be responsible for."

Mr Price had earlier explained why he did not think there was much point seeking further information from EG:

> "I think the pressure was very tight to make a decision and move on and I think fundamentally you had to decide whether the answers that you were likely to get were going to be helpful, and I think the truth is that in going back to K&E or whoever, we would not have got an answer about the price and we could not have got an answer about the timing either, because those things were just not real in those circumstances. They simply did not know enough about the business and so there was no benefit in going back at that stage, because the practicalities of it meant that we were going to be timed out from getting the deal done."

230. That lack of trust in the EG Offer led Mr Price to the conclusion that there would be no point engaging with EG or its advisers because there would be no way of testing whether the answers they gave were truthful or honest. Mr Dicker QC therefore submitted that the directors' pre-baked assumption that EG had a mala fide intent meant that they deliberately decided not to engage with EG which would have been the rational and sensible thing to have done if they were acting with regard to the paramount interests of creditors. There was plenty of time, so Mr Dicker QC submitted, during the day on 30 November 2020 for any of them to have picked up the phone and sought answers to the questions they had, in particular whether a deal could realistically be done in the time they had without risking an administration. The fact that no one bothered to get in touch with EG or its advisers is indicative of the fact that they were not acting in accordance with their duties and were only interested in thwarting EG's attempted takeover.

231. I think that the directors or someone on their behalf should have reached out to EG on the day. I do not accept that there was no time to do so; nor do I think it would have

destabilised anything. Presentationally, it would have helped their case to have at least tried to engage with EG.

232. But while it would have been preferable for such engagement to have taken place, it should not be forgotten that EG had deliberately placed the directors and the Company in this very difficult position. Dr Ford described receiving the EG Offer as "*like someone throwing in a grenade into a crowded room*" and he said that "*we were absolutely paranoid on that day*". I can understand that that was how it might have seemed and their hard work at getting so close to a solution for their serious financial problems might have been scuppered in the final few hours. No one, including the professionals with many decades of experience, had had to deal with such a development in the final stages of an electronic voting procedure and they were all having to work hard and fast to figure out how they ought properly to act in the interests of creditors.

233. I do not believe that the directors were advised to speak to EG. Mr Wright said that he did not advise them to. He also took the view that it would not be helpful to speak to EG. Nor did he think that it was for him to speak to Mr Ishaq, for example, as the EG Offer was addressed to the directors of NGL and the Company. I did not find that a particularly convincing answer and given that he had had the conversation with Mr Ishaq two weeks earlier, he could have sought some clarification as to what this was all about. Mr Wright was sceptical as to whether there was any utility in obtaining any further information in the short time available. He said:

> "On the 30th we had a decision procedure that had to conclude at 23.59 and my focus in the morning was to consider the appropriateness or otherwise of being able to adjourn, and I was also very focused then on ensuring that there was some disclosure to creditors. So by entertaining discussions with EG on the morning of the 30th, if those conversations ultimately would not reach any form of sensible conclusion -- and I cannot see how practically that would have been the case, because what would we have said on that day and what would they have been able to do in the very short period of time? Even if I had spent three of the precious few hours that we had having those conversations, then I would have put the CVA at risk because I would have not been able to make disclosures as quickly as I possibly could."

As to whether further information might have affected the decision not to adjourn, he said:

> "The practical problem would have been that, what could they have done practically in the time that would have changed our view? And it is -- the focus is absolutely on what is actually deliverable at the time."

234. I have concluded that the decision not to adjourn was a proper and reasonable one to have made in the circumstances facing the nominees and directors on the day. Mr Young raised the issue as to whether they should have sought to engage with EG or its advisers and forensically it was a good point. But it does not in my view affect my conclusion on the actual decision under scrutiny. That decision was made separately by the nominees and the directors for sound reasons and the failure to engage does not undermine the basis for it. It does not indicate, as Mr Dicker QC submitted, that they were not acting in the best interests of creditors.

235. In itself, it cannot amount to a "*material irregularity*" and although I think that there should have been some engagement on the day, if only to satisfy themselves that their conclusions on the deliverability and trustworthiness of the EG Offer were correct, I do not think that the failure to do so affected the reasonableness of the decision not to adjourn. There were many other factors involved and I can understand their calculation that engagement with EG would not have changed anything.

(3) The failures in the Announcement

(a) The Allegations

236. I have set out the Announcement in full in paragraph [129] above. There is no dispute that the EG Offer was a material development that had to be disclosed to the creditors. The Announcement was in the form of a letter to "*The CVA Creditors*" posted on the KPMG portal at around 14:30 on 30 November 2020. It was signed by Mr Price on behalf of the Company and by Mr Wright on behalf of the nominees. Curiously, no allegation is made by Mr Young against the nominees in this respect. The wording of the Announcement was discussed between the directors, the nominees and their advisers (there was also PR input). Mr Wright approved the contents of the Announcement on the basis that they were "*full and fair*" and said that, if he had not approved the Announcement, he would have put out his own one in accordance with his paramount duty to the creditors.

237. Mr Young's case is that the Announcement failed to provide a fair and accurate summary of the EG Offer and instead put forward a slanted view of the EG Offer that he says was to align it with the decision of the shareholders not to sell and to try to avert any challenge to the CVA. Mr Young recognises that there is reference to the offer to pay the landlords' rent arrears in full but alleges that every other material matter in the EG Offer was omitted. This includes:

(1) That the EG Offer had been approved by the board of EG;

(2) That EG were prepared to sign "*definitive documentation within 10 business days*" and to complete within "*less than 90 days*";

(3) That the EG Offer was "*presented on a cash-free and debt-free basis*" and that "*all third party debt would be settled in cash at closing*"; and that EG had ascribed an enterprise value of £350m to £450m to NGL;

(4) That the EG Offer was "*fully-financed*", in particular "*by cash on balance sheet and other existing banking facilities*";

(5) That EG Finco Limited would be the guarantor of the acquisition vehicle and that EG was prepared to "*covenant that the acquisition vehicle will have sufficient funds at the time of closing to consummate the Transaction*";

(6) That the CVA should proceed along with the offer for the shares in NGL, such acquisition being "*conditional upon approval of the CVA*" on the modified terms of paying "*all landlord arrears in full*".

238. Mr Young also alleges that the Announcement was misleading in the following respects:

(1) That it said the EG Offer was "*without any prior approach to or engagement with the Company or the Group*" (although this was not really pursued at the trial as Mr Issa's evidence did not substantiate that there was any actual prior engagement between EG and the Nero Group in relation to a possible sale);

(2) In its reference to the external lenders: "*As outlined in the Proposal, the Group's external lenders have indicated their support for the CVA process. The lenders are aware of the approach referred to above and have not requested a change in strategy.*"; Mr Young refers to Mr Longsdale's letter of 2 December 2020.

239. Mr Young generally criticises the Announcement for the way it described the EG Offer and in particular for expressing the directors' view that "*any transaction could at any point become undeliverable, or be withdrawn or varied, resulting in an outcome for creditors that is potentially worse than the current CVA Proposal.*" Mr Young says that this was designed to minimise complaints by CVA creditors in respect of the decision that had already been taken by Dr Ford and Mr Price to reject the EG Offer and not to postpone the CVA process. He further alleges that they knew by the time the Announcement was released that the CVA was almost certainly going to pass by reference to the votes cast by then and so they did not want to provide any basis for creditors to object to the decisions taken by the directors to proceed with the CVA.

(b) Relevant Law

240. I gratefully adopt Zacaroli J's helpful summary in *New Look*, [299] – [304], as to the obligations of disclosure in a CVA Proposal and when insufficient disclosure may constitute a material irregularity:

> "299. The contents of a proposal for a CVA are prescribed by Rule 2.3(1) IR 2016. Among other things, it must state the nature and amount of the company's liabilities, how they will be met, modified, postponed or otherwise dealt with by means of the CVA. The overarching obligation of disclosure is reflected in the last item in the list set out in Rule 2.3:
>
> > "(x) any other matter that the proposer considers appropriate to enable members and creditors to reach an informed decision on the proposal".
>
> 300. Unsurprisingly, since CVAs and schemes of arrangement share in common the fact that creditors are invited to vote upon a compromise or arrangement affecting their rights, this overarching obligation is materially the same as that which exists in the scheme jurisdiction. In *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch), for example, Snowden J said (at [41]):
>
> > "it is well-established that the scheme company has a duty to place before members or creditors sufficient information for them to make a

> reasonable judgment as to whether the scheme is in their commercial interest or not."

> 301. What amounts to sufficient information to enable creditors to reach an informed decision on the proposal is highly fact specific and will differ from case to case.

> 302. If a company fails to provide sufficient disclosure in a proposal for a CVA, it is only if that failure constitutes a material irregularity that the court can grant relief under section 6 IA 1986. It will only constitute a material irregularity if, "…had the truth been told, it would be likely to have made a material difference to the way in which the creditors would have considered and assessed the terms of the proposed [CVA]": see *Somji v Cadbury Schweppes plc* [2001] 1 BCLC 498, per Robert Walker LJ at [35], approving a passage in the judgment of Rimer J in *Apton New Homes Ltd v Tack* (unreported, 19 June 1998).

> 303. In *Trident Fashions (No2)* [2004] 2 BCLC 35, Lewison LJ, at [46], considered what was meant by "likely" in this context, saying:

>> "The word "likely" is used in a variety of different ways. It does not necessarily mean that there is more than 50% chance. It seems to me, therefore, that the right test is whether there was a substantial chance that the creditors would not have approved the CVA in the form in which it was presented."

> 304. It is accepted that this raises an objective question. The subjective view of particular creditors may in some circumstances be relevant – if, for example, it is clear that particular creditors would not have voted differently even if the disclosure had been made: see *Golstein v Bishop* [2016] EWHC 2187 (Ch), per Warren J at [68]. That is not the case here."

241. I referred in paragraph [145] above to Lewison J's comments in *Trident Fashions* about the "*margin of appreciation*" allowed in relation to the provision of information to creditors.

242. Insofar as the duty of disclosure derives from the continuing obligations of the directors in r.2.3(1) of the Rules, particularly subpara. (x), it could be said that the obligations rested solely with the directors and the nominees were not subject to any equivalent obligation. Mr Fisher QC made that submission and it may be that that is why Mr Young did not make a separate allegation against the nominees in this regard. But it is unrealistic to assume that the directors were acting in a vacuum in relation to the Announcement and Mr Fisher QC accepted that the nominees wanted to ensure that creditors received updates on any significant development that could affect the way they might vote or whether later to challenge the CVA. Mr Wright signed the Announcement and was clearly heavily involved in deciding what should go into it and what should not. Furthermore, the directors were entitled to rely on his professional advice and assistance in determining what should be disclosed to the creditors.

243. There was also an issue as to confidentiality, relied on by both the Company and the nominees as a reason for not disclosing the EG Offer itself and not all its terms. The EG Offer was marked "*Strictly Private and Confidential*" and K&E in paragraph 7 asked the directors "*to treat the existence and contents of this letter as strictly private and confidential*". Accordingly the directors and the Company were subject to a duty of confidence and they had to decide what could be disclosed to creditors.

244. Mr Smith QC submitted that the authorities on the law of confidence show that a balance has to be struck between the competing obligations of disclosure and confidence. He referred to Lord Goff's classic speech in *Attorney General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109 and in particular the "*public interest*" or "*just cause or excuse*" defence (see *Fraser v Evans* [1969] 1 QB 349, 361 per Lord Denning MR): "*which may require the court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure*" (Lord Goff at p.282).

245. Mr Dicker QC submitted that the directors' fiduciary duties to act in the interests of the Company, or in this case the Company's creditors, requires them to make full and honest disclosure of a higher or better offer and that duty would override any duty of confidence owed to the counterparty. He referred to *John Crowther Group plc v Carpets International plc* [1990] BCLC 460, in which Vinelott J cited from the then unreported decision of Templeman J (as he then was) in *Rackham v Peek Foods Limited* (1977) [1990] BCLC 895. However, neither case concerned the duty of confidence and the balancing exercise that is required to be carried out. Similarly Hoffmann J's (as he then was) decision in *Re a Company* [1986] BCLC 382 concerned the directors' duty to provide sufficient information so that shareholders could weigh up competing takeover bids, but there was no issue of a conflicting duty of confidence.

246. The odd thing about these arguments is that the party to whom the duty of confidence is apparently owed is suggesting that that duty should not have prevented full disclosure to the creditors of the terms of the EG Offer. Furthermore, if the directors and nominees were so concerned about confidentiality, they simply needed to call EG or K&E and ask to be released from any such obligations. Dr Ford implausibly said that even though anxious consideration was given to the scope of the confidence obligation, no one thought at all about approaching EG for a release from that obligation. It was fairly clear from the terms of the EG Offer in particular the offer to pay landlords in full and the request for a postponement of the CVA that EG would have been expecting at least some disclosure would be required. Also the EG Offer had already been leaked to the press in the morning, so by the time of the Announcement it was in the public domain anyway.

247. In any event, as Mr Dicker QC pointed out, the Announcement included some of the confidential terms from the EG Offer. The directors and nominees were ultimately comfortable with overriding the duty of confidence to that extent but not seemingly any further. They all said in their evidence, as summarised by Mr Wright, that they attempted "*to strike a balance between bringing out the key features of the offer without breaching or potentially putting the company and myself personally at risk of breaching confidence*."

248. In my view, confidentiality was not a major issue on the day and would not in any event have provided a particularly compelling reason for a lack of disclosure, if that is what happened. Much more important is whether the Announcement was inadequate disclosure to the CVA creditors and whether it was misleading in any respect.

(c) The alleged omissions from the Announcement

(i) EG Board approval

249. There is nothing in this point. Any creditor would assume that EG would have board approval to make the EG Offer and that any necessary further approvals would be forthcoming. I do not think that just because the EG Offer stated that it had board approval, it had to be spelled out in the Announcement. It may be that Mr Dicker QC was not actually pursuing this point as he did not cross-examine any of the witnesses on it and he did not refer to it in his closing submissions.

250. The Company also says that it may not actually have been correct that the EG board had approved the EG Offer or that no further approvals would be required. Mr Smith QC relied on Mr Issa's somewhat inconsistent evidence as to whether he needed board approval because of his apparently unlimited mandate from the board and shareholders to do as he wished in relation to acquisitions. Obviously, neither the directors nor the nominees would know anything about what was going on behind the scenes at EG, and that could not have influenced what went into the Announcement and what was left out. I do not need to resolve what the position was within EG, particularly as I have come to the clear conclusion that this disclosure was not necessary and certainly was not material.

(ii) Definitive Documentation within 10 days

251. The Announcement could have said that the EG Offer stated that EG believed they could sign "*definitive documentation within 10 business days*" and by including such a statement I do not believe that it would amount to an endorsement of EG's position or its ability to achieve that. However, I do think that, if that would have been said in the Announcement, it would have to have been contextualised. It would have been necessary to explain the unlikelihood of this being possible given that it was subject to completion of due diligence, negotiation and agreement on price and all outstanding issues, agreement on the part of the selling shareholders and the relevant documentation being finalised. Because of the cliff edge dates and the need to put a modified CVA Proposal to creditors by 10 December 2020, the extreme unlikelihood of being able to sign definitive documentation within 10 business days would not have been apparent to creditors unless it was expressly stated in the Announcement.

252. The Announcement made clear that the directors and nominees had concluded that the risks and uncertainty around the EG Offer meant that it was appropriate to proceed with the CVA and for the vote to close that night. Implicit in that is their view that the EG Offer was not deliverable in the time available. I do not see that creditors being told that EG thought it could conclude a deal within 10 business days would affect their assessment of the decision not to postpone the CVA process or that creditors might possibly have come to a different conclusion as to the deliverability of the deal. Accordingly I do not consider that this was a material omission from the Announcement.

(iii) cash free/debt free and the £350m to £400m range

253. The EG Offer did not contain a purchase price offer. Instead it referred to an "*Enterprise Value*" to which EG ascribed a range of £350m to £400m. The parties were a long way from agreeing any sort of purchase price. It is not particularly relevant to the CVA creditors as to what EG was proposing to pay to NGL's shareholders to acquire the Nero Group, including assets outside of the Company. The only meaningful offer being made to creditors of the Company was to pay the landlords' rent arrears in full and that was referred to in the Announcement. To have included a range of enterprise values in the Announcement would have been potentially confusing and misleading to creditors as it may have given the impression that a purchase price was being offered. To get to a purchase price from an enterprise value would be subject to whatever the Group's net debt was as well as working capital adjustments, transaction costs and other matters such as deferred tax. Dr Ford's evidence was that the total deductions would have been around £400m, so putting it to the top of the enterprise value range as a minimum purchase price.

254. The meaning of the EG Offer in relation to cash free/debt free and "*all third party debt financing would be settled in cash at closing*" was the subject of much debate and comment during the trial. Mr Dicker QC maintained that it meant that the third party debt would be paid in full out of the purchase price. Building on that interpretation he said that it was of obvious interest to the secured lenders to know that they were going to be paid in full on the closing of the acquisition by EG. However that position was not in accordance with Mr Issa's evidence which was to the effect that EG would expect to receive the Nero Group "*cash free and debt free*" at completion and it would be for the sellers, that is the shareholders of NGL, to use the purchase price to settle the third party debt financing and other liabilities. As noted above, Mr Issa accepted that there would be a problem if the purchase price was insufficient to pay off the Group's debt.

255. As I have said above, I think there was an element of opportunism in Dr Ford's and Mr Price's evidence in latching on to Mr Issa's evidence as to how he understood the EG Offer. The obvious point to make is that if there was any uncertainty as to the meaning of the EG Offer, then the directors and/or the nominees should have asked EG or K&E what they meant.

256. As there appears to be some confusion between Mr Issa and Mr Young as to what the EG Offer meant, I think it likely that creditors might be somewhat confused too if the exact words were simply put into the Announcement. And if the directors had sought to clarify in the Announcement what they thought those words meant, they ran the risk that this was wrong and therefore potentially misleading. Ultimately, a purchase price would have had to be agreed with the shareholders, and no doubt if there had been a negotiation, those shareholders would be mindful of ensuring that such a purchase price had to at least cover the Group's net debt and other liabilities. If the shareholders had already concluded that they were going to reject the EG Offer, there seems to me little point in putting to the Company's creditors either the enterprise value that EG were ascribing to the Group or the detail as to who or how the debts and liabilities of the Group were going to be paid. There was nothing that creditors could sensibly do with such information and I do not think it would have had a material effect on the way they looked at the CVA Proposal and the decision of the directors and the nominees to proceed with it.

(iv) Fully financed

257. The EG Offer said that it was "*fully financed*" by "*cash on balance sheet and other existing banking facilities*". Again, if creditors had researched EG they would have seen that it had recently managed to buy Asda and Leon and various other companies and that it had been hugely successful. I think they would assume that, one way or the other, EG would have the finance to purchase Caffe Nero. I do not think they needed to be told that.

258. Mr Smith QC submitted that EG's ability to finance the acquisition from existing cash and banking facilities might not have been so straightforward by reference to certain internal documents but also to K&E's letter of 18 December 2020 which said three times that EG would need to arrange finance for the acquisition.

259. However, again, this could not have been a reason for not disclosing this matter to creditors as it was not and could not have been known by the directors and nominees on 30 November 2020. Nor would a disclosure that EG had said that the offer was "*fully financed*" amount to any sort of endorsement of that statement by the Company or the nominees. But I do not think that this was something that had to be disclosed or would have had any impact on the creditors.

(v) EG Finco as guarantor

260. This is a pure point of detail as to the mechanics of any completion and it was entirely understandable that it was not stated in the Announcement. It appeared that Mr Dicker QC was not really pursuing this criticism as, like with the Board approval point, he did not cross-examine anyone on it and did not refer to it in his closing submissions.

(vi) The CVA Proposal should proceed modified by the offer to pay landlords in full

261. This criticism is not understood because the Announcement actually said that the EG Offer: "*purports to provide for payment in full of landlord rent arrears, but otherwise the terms of the CVA would remain as originally proposed*." That is a reasonably clear statement of the position put forward in the EG Offer and was something that creditors needed to hear as it directly affected them.

262. There is therefore no substance to the alleged omissions from the Announcement and the way it disclosed the relevant terms of the EG Offer were well within the "*margin of appreciation*" that the Court allows in this respect.

(d) Alleged misleading statements

(i) No prior approach or engagement

263. This is another allegation that seems to have been abandoned by Mr Young following Mr Issa's evidence. In Mr Young's skeleton argument the allegation was made based on Mr Issa's evidence in his witness statement of the prior approaches that had been purportedly made on behalf of EG to the Nero Group. I have dealt in paragraphs [85] to [92] above with Mr Issa's evidence as to the alleged prior approaches and concluded that, apart from the short meeting in February 2020 at which an acquisition was not discussed, Dr Ford and Mr Price would have been totally unaware that EG

had any interest in making an offer for the Caffe Nero Group. In the conversation between Mr Wright and Mr Ishaq on 17 November 2020, EG was not even mentioned and there was no follow up by Mr Ishaq. Mr Dicker QC did not cross-examine Dr Ford, Mr Price or Mr Wright on these prior approaches.

264. Therefore, Dr Ford and Mr Price had no idea that EG was interested in purchasing Caffe Nero in November 2020 and the EG Offer could fairly be described as coming in without any "*prior approach to or engagement with the Company or the Group*".

(ii) The position of the Lenders

265. The statement in the Announcement that Mr Young says is misleading is the following:

> "As outlined in the Proposal, the Group's external lenders have indicated their support for the CVA process. The lenders are aware of the approach referred to above and have not requested a change in strategy."

266. I have dealt in paragraphs [123] to [126] above with the conversations and emails with the lenders on 30 November 2020 and Mr Longsdale of Santander's letter of complaint dated 2 December 2020. If Mr Longsdale was at all concerned on 30 November 2020 about whether he had enough information on the EG Offer so as to be able to say in his email that the SFA lenders remained "*supportive of the Company and the CVA*" he would no doubt have asked Mr Price some more questions. He would have been bound to ask as to the material elements of the EG Offer and there would have been no reason for Mr Price to refuse to tell him any such details. Mr Price said in his evidence that he had understood Mr Longsdale to have confirmed that the senior lenders were "*happy that we were going to continue with the vote that day"* and that they were happy with the rejection of the EG Offer.

267. Mr Dicker QC's principal point on this was whether the lenders were made aware that the EG Offer included that their debt would be settled in cash by EG on closing the transaction. This therefore goes back to the debate on what the words of the EG Offer actually meant. Mr Issa certainly did not believe that EG was offering to pay all the third party debt financing.

268. Furthermore as Mr Price said in cross-examination, the senior lenders would have assumed that they would be paid in full on a sale of the business. They had priority over every other creditor, including the MFA syndicate and the landlords who were being offered their rent arrears in full. If the SFA syndicate was not going to be repaid, it would have been able to prevent the acquisition from proceeding. Mr Price said:

> "I think the point is that the senior lender would have known that any transaction that was done for the Nero Group that involved paying back landlords would have involved paying back Santander.
>
> …

It was not necessary because it was absolutely clear to Mr. Longsdale, who was a senior executive in a bank, that he would have got his money back as part of any transaction."

269. Mr Longsdale complained that the SFA syndicate had not been informed of the details of the EG Offer and that the statements in the Announcement had not been approved and "*were also not contextualised and as such have the potential to be misleading and could be relied on by third parties*." Mr Dicker QC submitted that this showed that the SFA lenders understood that the statements in the Announcement could be construed as indicating that the SFA lenders were not interested in the EG Offer and that it was therefore not something that lower ranking creditors should be concerned about.

270. To my mind that is reading far too much into the statements regarding the lenders in the Announcement. From the email received from Mr Longsdale regarding what the Company could put into the Announcement, I believe that the directors and nominees were entitled to assume that the lenders were content with their decision to proceed with the CVA and not to postpone it to explore the EG Offer further. I do not think that creditors would interpret the Announcement as saying anything more than that the lenders remained supportive of the existing CVA process, did not want there to be a delay and were content with the Company's strategy.

271. Accordingly I think the directors were justified in including those statements in the Announcement and they were not misleading.

(e) Conclusion on the Announcement

272. For the reasons set out above, the Announcement was not misleading. I find that it was a fair and reasonable disclosure to have made to the creditors of the EG Offer and the decision not to postpone the CVA process. Furthermore, I do not think that the criticisms of the Announcement made by Mr Young were material in the sense that the CVA vote would have been different had the alleged omissions or inaccuracies not been made.

273. Therefore there was no material irregularity in relation to the Announcement.

<u>(4) The validity and effect of the Modification</u>

(a) Introduction

274. The Modification was to introduce a new clause 45 in the CVA Proposal. I have set out its terms in paragraph [133] above. The Modification sought to benefit creditors in the event that there was a sale of the shares in NGL to EG within six months of the approval of the CVA. The Company undertook to use best endeavours to procure that the creditors would receive from the deal what had been promised to them by the EG Offer (that is principally the landlords receiving their rent arrears in full). (It is interesting to note in passing that this was also conditional on "*all outstanding third party debt financing of the Group being repaid in full*", rather indicating that this may not necessarily have been thought to be part of the EG Offer.) Mr Wright had proposed the Modification so as to ensure that creditors would not be prejudiced by

the decision not to postpone the electronic voting procedure in the event that a sale did actually take place to EG post-approval of the CVA.

275. By the time the Modification was notified to creditors (20:00 on the portal and 22:20 by email) the CVA had already passed the voting threshold. This was at 18:37, so the directors and nominees knew that the CVA would be deemed to have taken effect at 23:59 when the voting formally closed. Mr Young says that the CVA Proposal was therefore changed before the time it would have been deemed to take effect but after almost all voting creditors had voted.

276. There appear to be two strands to Mr Young's challenge to the Modification:

(1) That it was misleading; and

(2) That it was ineffective in law because the creditors did not vote on it and the CVA Proposal as modified was not therefore passed with the requisite majority.

(b) Was the Modification misleading?

277. Mr Young's skeleton argument suggested that the Modification would only have benefitted creditors if the directors believed that the shareholders intended to negotiate in good faith with EG after the CVA had been approved. It was said to be implicit in the wording of the Modification that Dr Ford was prepared to discuss the EG Offer with EG. However, as was argued on behalf of Mr Young, Dr Ford had no such intention and from even before the launch of the Challenge Application he was not going to countenance the possibility of a sale of the Nero Group. Therefore the Modification was misleading in suggesting otherwise.

278. I do not accept this. On Mr Young's own case the Modification cannot have affected the way creditors voted because 99% had already voted by the time it was notified to them and the requisite majority had already been reached. In any event the Modification did not make any representation as to the willingness of the shareholders to countenance a sale and could not reasonably be read as containing any such representation. Creditors had already seen from the Announcement that the shareholders had rejected a sale of NGL. Furthermore, the evident purpose of the Modification was not only to benefit creditors in the event of a sale to EG but also to prevent shareholders from receiving a windfall to the detriment of creditors from such a sale.

279. This allegation was not clearly pleaded by Mr Young. What he did plead in the Re-Amended Particulars of Claim was that the Modified Proposal was "*intended by the Directors to deter*" the progress of the EG Offer, thereby manifesting the "*Directors' conflict of interest and duty*". Whether or not that allegation is being pursued, I do not think it is sustainable. The Modification was suggested by Mr Wright for perfectly proper reasons to benefit creditors. Once the decision not to adjourn the CVA process had been taken, there was obviously little scope for pursuing the EG Offer itself. I do not see how the Modification can have affected that position at all.

(c) Mr Young's case on the effectiveness of the Modification

280. Mr Young's other argument in relation to the Modification is essentially a legal one. It was put in a number of different ways both in the pleadings and in the submissions before me. In the Re-Amended Particulars of Claim, the case was that the votes received prior to the notification of the Modification (that is, nearly all of them) should not have been counted as votes in favour of the Proposal as modified.

281. That plea has been tweaked and modified and based on his analysis of the statutory framework as applied to an electronic voting procedure, Mr Dicker QC argued at trial that:

    (1) Neither the Modification nor the CVA Proposal as modified were duly approved; the argument seems to be that the creditors and the shareholders approved different versions of the CVA, which meant neither were validly approved;

    (2) It was irregular to propose the Modification when creditors had already voted without "*reopening*" the vote following due notice of the Modification; and

    (3) The failure to give creditors the opportunity to consider the Modification was material because they had a right to consider the Proposal as modified if it was to be binding on them and to assess whether the Modification was a satisfactory means to account for the potential benefits of the EG Offer.

282. It is unclear whether this way of putting the case was pleaded and so is open to Mr Young. But whether it is or not, I propose to deal with it as it seems to me to be flawed and to ignore the basic fact that the Modification could only have been of benefit to creditors.

283. Furthermore, in my view, it is important for there to be some clarity as to how modifications can properly and sensibly be dealt with in a voting procedure that is not a traditional physical creditors' meeting. As before in relation to an adjournment of an electronic voting procedure, the issue of modifications proposed prior to the end of the voting period is not dealt with in the Rules. But there is some help derived from authorities dealing with voting on proxies at a physical creditors' meeting.

(d) Relevant law on the effectiveness of modifications

284. By s.4(1A) of the Act:

> "The company and its creditors may approve the proposed voluntary arrangement with or without modifications."

Mr Dicker QC submitted that s.4(1A) requires both the company and the creditors to vote on any modification and if one or other body does not approve the modified proposal, it will not be validly approved.

285. This however ignores s.4A(2) and 3 of the Act which provides as follows:

> "(2) The decision has effect if, in accordance with the rules-
>
> (a) it has been taken by the meeting of the company summoned under section 3 and by the company's creditors pursuant to that section, or

(b) (subject to any order made under subsection (6) it has been taken by the company's creditors pursuant to that section.

(3) If the decision taken by the company's creditors differs from that taken by the company meeting, a member of the company may apply to the court."

286. The rest of s.4A deals with the application by such a member, such as the familiar 28-day time limit. By subsection (6), the court can order that the company's decision should have effect over the creditors' decision or make any other order. Mr Smith QC submitted that this shows that if there is any disconnect between the decision of the creditors and the decision of the company, the creditors' decision prevails unless and until that is changed on an application to the court. Of perhaps more significance it seems to me is that the Act specifically provides for what is to happen in the event of there being such a disconnect and it is clear that different decisions by the company and the creditors does not invalidate the CVA whether modified or not.

287. The complication in this case is because of the electronic voting procedure. As I have said above, r.15.31(8) of the Rules prevents a creditor from changing their vote once cast. Mr Smith QC submitted that it is an inherent feature of the electronic voting procedure that a creditor who casts their vote early is not entitled to change that vote, even if a modification is subsequently introduced prior to the deadline for voting. Mr Fisher QC supported that position, recognising the problems with accommodating modifications within an electronic voting procedure but saying that modifications should be permissible in that context "*where they can only operate to the benefit of creditors.*" Mr Fisher QC also relied on r.2.25(5)(b) which provides that a nominee must "*state how a creditor may propose a modification to the proposal, and how the nominee will deal with such a proposal for a modification.*" He said that this leaves it to the discretion of the nominees to decide how to deal with modifications, leaving open the possibility that modifications can be made during the voting process.

288. However Mr Dicker QC drew my attention to what was said in the Notice to creditors in this respect. Under paragraph 8.2, the nominees stated:

> "We will review any modifications with the Company and, if deemed appropriate, we will write to creditors to make them aware of the modifications and invite them to vote on the revised proposals which will include approval of the modifications put forward."

Mr Dicker QC also referred to r.15.34 of the Rules which relevantly provides:

> "(1) A decision is made by creditors when a majority (in value) of those voting have voted in favour of the proposed decision, except where this rule provides otherwise
>
> …
>
> (3) Each of the following decisions in a proposed CVA is made when three-quarters or more (in value) of those responding vote in favour of it -
>
> (a) a decision approving a proposal or a modification…"

289. Mr Dicker QC therefore submitted that a vote on a modification is a distinct decision from a decision on the proposal. The statutory scheme requires the modification or the proposal with the modification to be voted on and approved by the requisite majority of creditors. Mr Dicker QC submitted that there is therefore no discretion on the directors or nominees to propose a modification that will have effect even if creditors do not vote upon it. He said that such a discretion, if it existed, would be at odds with the entire statutory scheme by which a minority is bound by the statutory force of the requisite majority. He also said that this construction of the statutory scheme was not onerous or impractical in the context of an electronic voting procedure and the directors and nominees may have to postpone that procedure in order to accommodate a modification that they wished to propose.

290. I do not think that this extreme position is how the statutory scheme was intended to operate. As I have concluded that the directors and nominees have no power themselves to adjourn an electronic voting procedure, I do not see how it is possible for any modification to be effectively approved during such a procedure if Mr Dicker QC's construction is correct.

291. In my view it is possible for a modification to be introduced during the course of an electronic voting procedure after creditors have begun voting and, if the proposal is ultimately approved, that the modification should be treated as having been approved, so long as the company has also consented. That must particularly be the case where the modification is solely for the benefit of creditors. Any other approach would be both impractical, inconvenient and contrary to the interests of creditors and the clear Parliamentary intention that CVAs should provide a flexible tool responsive to the needs of insolvent debtors and their creditors.

292. If creditors (or members) are dissatisfied with the inclusion of a modification, then, as in this case, it can be challenged under s.6 of the Act (see further below). In such a challenge, it can be argued that the modification was irregular for want of approval by the requisite majority of creditors but it would also have to be shown that that was a material irregularity, which would be difficult if the modification was truly for the sole benefit of creditors.

293. The statutory provisions relied upon by Mr Dicker QC do not prescribe a particular way that modifications have to be approved when an electronic voting procedure is being used. Neither s.4(1A) of the Act nor rule 15.34(3)(a) state that any modification must be approved by the requisite majority of CVA creditors. And r.25(5)(b) deals with modifications proposed by a creditor and leaves it to the discretion of the nominees to decide how to deal with any such modification. It does not deal with a modification proposed by the directors or nominees themselves.

294. In this case there were two other modifications proposed during the course of the electronic voting procedure: one on 19 November 2020 which was relatively minor just correcting some definitions and figures in the CVA Proposal; but the other was on 27 November 2020, close to the end of voting, and this substantively changed the trigger levels for the Company's contributions to the Profit Share Fund. The latter improved the position of creditors and was made after the time it is now known the threshold for approving the CVA had been passed. This was achieved at 17:46 on 27 November 2020 when at least 75% by value of all creditors who voted had already approved the CVA Proposal.

295. Even though this was not alleged, by the logic of Mr Dicker QC's argument, this earlier modification was not properly approved; indeed I think he would say that the CVA Proposal was therefore not properly approved because the creditors did not vote on the CVA Proposal as modified, whereas the members did. In my judgment that cannot be the way the statutory scheme works both from a practical and a legal perspective. There must be a discretion for the directors and nominees to propose modifications during the course of an electronic voting procedure and, if the modification is for the benefit of creditors, then those creditors who voted before the modification was proposed can be counted for the purposes of approving the CVA Proposal as so modified.

296. This is strengthened by the fact that the creditors' decision is deemed to be valid unless and until a challenge is brought against that decision on the grounds of material irregularity or unfair prejudice under s.6 of the Act. A challenge under s. 6(1)(b) of the Act is if "*there has been some material irregularity at or in relation to…the relevant qualifying decision procedure*." Prima facie a failure to seek the approval of creditors to a proposed modification could be such an irregularity, although it would have to be shown that it was material.

297. But s.6(7) of the Act provides that any such irregularity does not itself invalidate the creditors' decision and the only way of establishing invalidity or the ineffectiveness of a modification is by way of a s.6 challenge. Section 6(7) states:

> "(7) Except in pursuance of the preceding provisions of this section,
>
> (a) …
>
> (b) a decision of the company's creditors made in the relevant qualifying decision procedure is not invalidated by any irregularity in relation to the relevant qualifying decision procedure."

298. The breadth of this section, or the equivalent for an Individual Voluntary Arrangement (**IVA**) in s.262(8) of the Act, was considered by the Court of Appeal in *Narandas-Girdhar and anor v Bradstock* [2016] 1 WLR 2366 (***Bradstock***). Briggs LJ (as he then was) gave the only substantive judgment (Black and Ryder LJJ agreed with it). One of the issues in *Bradstock* concerned the legal consequence of a proxy vote from HMRC that was exercised in excess of authority in relation to some modifications that were being proposed. It was a bold attempt by the debtor to have his IVA set aside some ten years after it had been approved. Briggs LJ decided that s.262(8) of the Act had a broad ambit and covered irregularities that might have rendered the IVA a nullity under common law principles. In other words, all alleged irregularities in relation to a creditors' decision procedure are subject to the statutory challenge process (for CVAs under s.6) and therefore the 28-day time limit, the requirement for such irregularities to be material and to the discretionary remedies available to the court.

299. Briggs LJ said as follows:

> "38. The obvious purpose of these two subsections, read together, is to ensure that all challenges to the validity of an IVA based upon an alleged irregularity at or in relation to a creditors' meeting are resolved within a

very tight time limit (subject to the court's power to extend) and dealt with by more flexible court powers than the blunt weapon of a declaration of invalidity. It both prevents such challenges being made long after the event, and avoids what would otherwise be the automatic consequence of invalidity, namely the debtor and the creditors always having to re-start the IVA process again, from scratch. In particular the court's powers under section 262 are discretionary, so that a minor irregularity which might at common law invalidate the process could none the less leave the statutory outcome intact, where for example the irregularity caused no sensible prejudice to a complainant creditor (or debtor) wishing to wreck the IVA for wholly collateral reasons."

300. Briggs LJ disapproved of the decision of Mr Registrar Baister (as he then was) in *In Re Plummer* [2004] BPIR 767 (***Plummer***) where a narrow view of the ambit of s.262 was taken in holding that the meaning of "*irregularity*" should be limited to non-compliance with the rules in relation to creditors' meetings. *Plummer* was criticised by HH Judge Purle QC's decision in *Smith-Evans v Smailes* [2014] 1 WLR 1548 and those criticisms were endorsed by Briggs LJ in *Bradstock*. HH Judge Purle QC had said that the statutory scheme had to be looked at as a whole and given a purposive construction and he criticised the "*distinction between nullities and irregularities*" that had gained credence in this area. In paragraphs [50] – [53] of *Bradstock* Briggs LJ explained why a broader purposive construction of s.262 was appropriate:

"50. To my mind the factors which point convincingly to the broader view as to the ambit of section 262 are two in number. The first is the steer to be derived from the clear language of section 262(8) which (as Lloyd J said, in *Fletcher v Vooght* [2000] BPIR 435) clearly assumes that a material irregularity might be serious enough to invalidate the IVA otherwise than in pursuance to an application under the section, but for the statutory ban which subsection (8) imposes, coupled with the time limit in subsection (3). This is in my view completely inconsistent with the notion that material irregularity means only some mere irregularity which does not have an invalidating effect.

51. The second factor is that the narrower view would deprive the court of the flexible jurisdiction under subsection (4) to make sensible provision in an appropriate case for suspending approval, or summoning a further meeting to consider a revised proposal. It would also remove the discretion given to the court as to how if at all to respond to the challenge, in every case where the irregularity was of the invalidating kind. All that the court could do would be to strike down the IVA as void, leaving the debtor and creditor to start all over again. This would be so even if (as here) the invalidity was raised by someone who had supported the approval of the IVA from start to finish, and adhered to it for many years, where the invalidating event has caused him no prejudice at all. This seems to me so greatly to emasculate the obvious purpose of section 262 in its context as to conflict with Parliament's intention, purposively viewed.

52. A third but less persuasive reason for preferring the broader view coincides with Judge Purle QC's analysis, namely that the narrower view would in every case require it to be determined whether the irregularity was or was

not of the invalidating kind, an exercise likely to be fraught with arcane and old fashioned distinctions derived from the common law about meetings.

53. That is not to say that section 262 is entirely at large as a basis for challenging the validity of an IVA. The qualifying requirements are that the irregularity should be material (which I suppose means more than de minimis or irrelevant) and that it should have occurred at or in connection with a creditors meeting summoned under section 257. Thus I mean to cast no doubt on the outcome of *Fletcher v Vooght* [2000] BPIR 435, *Vlieland-Boddy v Dexter Ltd* [2004] BPIR 235 or *Inland Revenue Comrs v Bland* [2003] BPIR 1274. In each of those cases the invalidity of the IVA arose because there never had been a meeting summoned under section 258, because there had been defects in compliance with the statutory scheme antecedent or extraneous to the summoning or conduct of the meeting. But I do consider that *In re Plummer* was wrongly decided."

301. *Bradstock* did not concern an electronic voting procedure. But it did concern a wrongly-exercised vote which was necessary for the IVA to pass. In my view it is clear that the Court of Appeal's broad and purposive construction of s.262, and consequently s.6 for a CVA, means that any alleged invalidity or even nullity in relation to a step taken during a creditor voting procedure can only be challenged through the statutory mechanism for doing so. Mr Dicker QC submitted that Briggs LJ had not been "*so categoric*" and it is correct to say that Briggs LJ did not state that conclusion expressly. But the way he construed the statutory scheme, or as he called it, the "*statutory magic (that is, binding a whole class to a contractual arrangement by the vote of only part of it)*" was necessarily based on that general overarching conclusion.

302. Mr Dicker QC also sought to argue that Briggs LJ had not disapproved of the other first instance decisions that he referred to in paragraph [53]: *Fletcher v Vooght*; *Vlieland-Boddy v Dexter Limited*; and *Inland Revenue Commissioners v Bland*. That is correct but Briggs LJ considered that *Fletcher v Vooght* supported the broader construction of s.262. All those cases were in any event dealing with a situation where a pre-condition for the calling of a creditors' meeting had not been met: in the first two there was no prior interim order; and in the latter the debtor had not provided for any payment to creditors in his proposal, meaning it was not a composition at all. In other words, there was no jurisdiction to summon the creditors' meeting in the first place. In this case, as in *Bradstock,* a creditors' decision procedure had been validly instigated and the issue is around the validity of the way that procedure was carried out. Such an issue can only be examined by way of a challenge brought under s.6 of the Act.

303. Accordingly, I think that *Bradstock* is fatal to the argument that the CVA Proposal as modified by the Modification was automatically ineffective and not binding because it was not approved by the requisite majority of creditors. The approval of the CVA through the electronic voting procedure was effective by s.6(7) of the Act and could only be challenged under s.6(1) on the basis that there was a material irregularity or that it was unfairly prejudicial.

(e) Was the Modification a material irregularity?

304. The Modification objectively improved the terms of the CVA Proposal for the creditors. By clause 45 the Company took on a new obligation to use best endeavours to procure that each Compromised Landlord and Category E Creditor would receive additional payments over and above those already provided for in the Proposal if there was a sale to EG within six months. In the Re-Amended Particulars of Claim Mr Young criticises the fact that it was only a "*mere*" best endeavours obligation, but that is unfounded and I do not think that the Company could reasonably have taken on a stronger obligation as it could not bind the ultimate shareholders of the Group. (For the strength of a best endeavours obligation see: *Prossight Global Inc v Randall & Quilter II Holdings Limited and ors* [2021] EWHC 228 at [105]; and *Rhodia International Holdings Limited v Huntsman International LLC* [2007] 1 CLC 59 at [33].)

305. Apart from imposing that obligation on the Company, the Modification did not alter the terms of the CVA Proposal. In particular it did not involve any further compromise on the part of any CVA creditor; nor did it impact on the payments that CVA creditors stood to receive under the Proposal. The Modification therefore comprised a unilateral obligation on the part of the Company for which the CVA creditors did not have to give anything in return.

306. By clause 34 of the CVA Proposal non-material variations to the CVA can be made by the Company with the approval of the Supervisors. Such variations can be made without the consent of creditors if they "*do not materially alter the effect or economic substance of the CVA*". If a proposed variation did have that effect, clause 35 of the CVA requires the Supervisors to seek the consent of creditors by using a Qualifying Decision Procedure. The nominees had concluded that the Modification was non-material in the sense set out in clause 34, so it could have been introduced post-CVA as a non-material variation. That is an indication that its introduction pre-CVA approval cannot have been material in any relevant sense. I do not believe that if the Modification had been notified earlier in the process (of course it could not have been as the EG Offer only came in after most creditors had already voted) that any creditor would have wanted to change their vote as a result of the Modification.

307. In any event, as Mr Fisher QC submitted, by the time of publication of the Modification at 20:00 on 30 November 2020, the unmodified CVA Proposal had already achieved sufficient support to become effective. Therefore at least in its unmodified form (that is, without clause 45) the CVA Proposal came into force and was validly approved by the creditors. The incorporation of the Modification cannot have had any effect on the validity of the CVA Proposal without the Modification.

308. Furthermore, the court has jurisdiction to make an order that clause 45 be deleted from the CVA such that the original unmodified CVA Proposal would stand. Norris J in *Debenhams,* at [138] – [139], appeared to contemplate that the court might have power to sever provisions of a CVA that were in excess of the jurisdiction conferred by Part 1 of the Act.

309. But this is not what Mr Young wants in relation to the Modification. He wants the whole CVA to be set aside as a result of the inclusion of the Modification at such a late stage and without the specific approval of the creditors, nearly all of whom had already voted by then. I cannot see that there is any basis for the court doing so, where the Modification is clearly for the benefit of creditors, without any concomitant

obligation on them to provide anything in return, and where it cannot constitute a material irregularity.

(5) The Nominees' Report

310. It is unclear whether Mr Young was actually pursuing this allegation and it is a curious one. In paragraph 39 of the Re-Amended Particulars of Claim, the allegation is put in this way:

> "Sixthly, having regard to their obligations particularised in paragraphs 9 to 11 above, the Nominees should have reviewed, re-assessed and updated the Nominee's Report to account for the fact that the Nominees had been approached the day after the Proposal launched by a potential acquirer for the business who may have been able to offer a better deal for creditors, and to account for the [EG Offer] and/or the Revised Proposal. The Nominees should have explained to creditors that the Directors and/or Nominees had decided not to discuss any sale or other transactions with Rothschild & Co's client and explained to creditors why the Directors and/or the Nominees had decided to proceed on that basis."

311. In the light of my findings above in relation to the decision not to postpone and the adequate disclosure provided to creditors by the Announcement, it does not seem to me that Mr Young can establish the necessary factual basis for this allegation in relation to the nominees' report. It is quite absurd to suggest that Mr Wright had to update the nominees' report with details of a two-minute conversation he had with Mr Ishaq in which EG was not mentioned and no terms of a potential offer indicated.

312. Furthermore, the contents of a nominee's report are prescribed by s.2(2) of the Act and all that is required is their opinion as to whether the CVA has a reasonable prospect of being approved and implemented and whether the Proposal should be considered by a meeting of the company and its creditors. The nominees filed their statutory report on 12 November 2020. There is no provision in the Act or the Rules requiring nominees to update their report and in this case there was no need for them to do so. As Mr Wright confirmed in his evidence, he remained of the same opinion as set out in their report even after the EG Offer was received.

313. The allegation has been adjusted in Mr Young's written closing submissions (which were not developed in Mr Dicker QC's oral closing submissions) but in my view not so as materially to improve his case. The allegation is made to relate it to Mr Young's unfair prejudice case, which is dealt with substantively below. The written closing submissions allege that the nominees "*ought to have concluded that there was a real risk of unfair prejudice in connection with the Proposal, specifically that the Proposal was about to fundamentally affect the rights of CVA Creditors in circumstances in which EG's Offer was on its face a realistic one. The Nominees should therefore have updated their opinion*". Basically Mr Young is saying that the relevant alternative of an administration was not now correct and instead it was the EG Offer which should have led to an updated nominees' report.

314. First of all, as I have said above, I do not think that there is any obligation on nominees to update their report.

315. Secondly, Mr Wright gave evidence that he decided that it was appropriate to disclose the EG Offer to creditors in the form of the Announcement. I have decided that that was a proper course to take and that the Announcement adequately and fairly disclosed the details of the EG Offer and the decision not to postpone.

316. Thirdly, Mr Wright was not cross-examined on the nominees' report and why he had not sought to update it. He gave evidence on the adequacy of the disclosure in the Announcement. He also made clear in his written evidence that his opinion in the nominees' report had not changed in the light of the EG Offer, including "*that there was no manifest, unavoidable prospective unfairness in relation to the CVA Proposal.*" That was not challenged in cross-examination. Accordingly I do not think it is open to Mr Young now to challenge that evidence by suggesting that the nominees' report should have been updated in that respect.

317. Finally, the allegation and evidence gets nowhere near establishing the *Trident Fashions* test of irrationality or perversity in relation to the actions and decisions of nominees.

318. I therefore reject this allegation of material irregularity.

319. With that and by way of conclusion, I reject all of Mr Young's claims under s.6(1)(b) of the Act and find that there were no material irregularities in relation to the creditor electronic voting procedure.

G. UNFAIR PREJUDICE

320. The allegation of unfair prejudice under s.6(1)(a) was half-heartedly pursued by Mr Young. It occupied 2 out of 140 paragraphs in his skeleton argument and 4 out of 217 paragraphs in his written closing submissions (and the latter was largely a repeat of the former). Mr Dicker QC did not make any oral submissions on unfair prejudice. In his written evidence, Mr Issa did not say what EG would have done if the CVA failed. None of the Respondents' witnesses were cross-examined on what they would have done had the CVA failed or how they would have responded to the EG Offer in those circumstances. There does not therefore seem to be any real evidential basis for the unfair prejudice allegation.

321. Mr Young's case on unfair prejudice is premised on the relevant alternative having changed following the receipt of the EG Offer. The CVA had proceeded on the basis that the likely alternative was an administration with a minimal return to unsecured creditors and Mr Wright had remained of that view even after the EG Offer had been received. Mr Young says however that the likely alternative to the CVA in the event of the CVA's failure was a counterfactual world in which commercial negotiations would have taken place between: on one side NGL's shareholders, the directors of the various Nero Group companies holding relevant assets and relevant stakeholders such as the SFA and MFA lenders; and on the other side EG. Those negotiations would have resulted in a transaction in which all of the Company's landlords' rent arrears would be paid in full.

322. Mr Young's case on unfair prejudice is dependent on vague and speculative scenarios of what might have happened. It also seems to me to be based on EG acting irrationally to honour the terms of the EG Offer rather than pursuing its commercial best interests by taking advantage of the Company's administration and picking up the parts of the Nero Group that it wanted at the lowest possible cost. It would make no sense for EG to pay all the landlords' rent arrears in full when it was under no obligation to do so. As such I do not see how I can conclude that the relevant alternative to the CVA was a transaction with EG in which the landlords' rent arrears were paid in full.

323. In relation to a potential share sale following the failure of the CVA, Mr Young's case is that the shareholders of NGL (that is predominantly Dr Ford, Mr Price and Mr Ford-Deegan on behalf of PP1) would have been likely to accept a modified form of the EG Offer, as the only alternative would have been a value-destroying administration in which they would have got nothing. However this was not put to Dr Ford, Mr Price or Mr Ford-Deegan and is therefore a case that Mr Young cannot properly run. In any event I cannot see that there is any logical or commercially rational basis for EG not allowing the Company and the Group to go into administration and to attempt to acquire those parts of the Company's leasehold portfolio that were considered financially viable and attractive together with other Group assets such as the Roastery and the Caffe Nero brand. Part of the rationale for the EG Offer being dependent on the CVA going ahead in modified form was so that EG could take advantage of the changes to the lease terms going forward under the CVA. A share sale without a CVA would not have those beneficial terms and Mr Issa's only response to that was to say that he would seek to negotiate bilateral deals with landlords on similar terms.

324. Therefore there is great uncertainty over the type of deal that could be done between EG and the shareholders of NGL and I do not believe that it can sensibly be regarded as a likely alternative.

325. As regards a potential asset and business sale, Mr Young's case in his written closing submissions is that, in the absence of a share sale, the relevant counterfactual "*was an administration but with a changed comparator being a sale on the terms that EG was willing to transact*". However there is no evidence as to what those terms were and in particular whether it would have included EG paying landlords' rent arrears in full. Mr Issa has said that EG would pay those arrears in full, even for unviable sites, and would have negotiated with individual landlords to obtain the beneficial terms that were part of the CVA (but which would otherwise be lost in an administration). I do not think that his evidence on this is credible and there is no sensible or rational reason for EG to agree to pay rent arrears on the non-viable Category D leases, for example, if the Company went into administration. Furthermore I do not see why EG would agree to pay rent arrears on the Category B leases which were only viable if they moved to turnover rents for the next three years as they would have done under the CVA Proposal. There was nothing in it for EG to agree in bilateral negotiations with such landlords in an administration of the Company to pay their rent arrears in full. (Snowden J rejected a similar argument in *Re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) at [195].)

326. There is no real evidential support for Mr Young's case on the relevant alternative. Nor is there any expert evidence. But I do have Mr Wright's evidence and he said that

it was his view that the relevant alternative to the CVA did not change after receipt of the EG Offer. That evidence was not challenged by Mr Young and I feel that I can safely rely on it.

327. In the premises, the CVA was not unfairly prejudicial to Mr Young's interests as a creditor. There is no basis to conclude that the EG Offer suddenly meant that if the CVA failed all the landlords' rent arrears would be paid in full. Such a conclusion would be contrary to the way the relevant parties would have acted in their own commercial interests and could not therefore be considered a likely, still less the relevant, alternative to the CVA. That remained an administration of not only the Company but other relevant asset holding companies in the Group, the administrators of which would seek to realise best value by marketing the business and assets of the Group including the Caffe Nero brand and its international operations. As set out in Schedule 7 of the CVA Proposal, that was thought likely to result in a return to unsecured creditors of only the prescribed part, being approximately 0.3p/£. That was why the directors and nominees were determined to avoid an administration.

328. I therefore reject Mr Young's case based on unfair prejudice under s.6(1)(a) of the Act.

H. LEGITIMATE INTEREST/COLLATERAL PURPOSE

329. I decided in the Strike Out Judgment that the issues of legitimate interest and collateral purpose may have to be reconsidered fully after the evidence at trial had been heard and in the context of the court deciding how to exercise its discretion to grant relief under s.6(4) of the Act. I have decided above that Mr Young has not established any relevant material irregularity or unfair prejudice. Therefore the question of relief does not arise. Consequently, I do not now need to consider the issues of legitimate purpose and collateral purpose that the Company has sought to rely on in the event that it had not succeeded in defending the Challenge Application.

330. Given that I am not exercising my discretion under s.6(4) of the Act, I probably should not say anything further about these issues in this judgment. But in case this matter goes further I will state my conclusions in short form on the contentious issues that were argued in writing in relation to Mr Young's legitimate interest and EG's alleged collateral purpose.

(a) EG's control of the Challenge Application

331. There is no evidence that EG was controlling the proceedings and making all relevant decisions. Mr Issa said that he had no real involvement in the proceedings and Mr Young said that he was in control of them although he obviously left it to his solicitors to advise on and do most of the running. There is also no evidence that EG's alleged collateral purpose was to force the Company into administration. Neither Mr Issa nor Mr Ishaq said that in evidence and it would be contrary to the continued pursuit of the Challenge Application which was intended to pave the way for the EG Offer to be agreed and a modified CVA Proposal put to creditors.

(b) Mr Young's interest in recovering rent arrears

332. Mr Smith QC said that Mr Young had no interest in recovering his rent arrears through the Challenge Application because of two matters: (i) the exercise of the break right by Mr Young on 27 January 2021 meant, under the terms of the CVA, that Mr Young released the Company from all obligations in relation to rent except for the 30p/£ for arrears due under the CVA; and (ii) the offer by the Company to pay Mr Young's rent arrears in full.

333. As to (i), even though Mr Young may have been unable to explain it in evidence, he is clearly entitled to rely on his lawyers to advise him and to pursue his actual legal rights. In this respect, the release under the CVA could well be undone in the event of him succeeding on the Challenge Application and the court suspending the approval of the CVA. He could therefore have recovered his full rent arrears if the EG Offer became a modified CVA Proposal.

334. As to (ii), I said above that his evidence in relation to this was perhaps his most unsatisfactory. But the simple fact of the matter is that he did not accept the offer and his evidence was that this was his decision because he wanted to proceed with the Challenge Application and that EG was not involved.

(c) Reinstatement of Mr Young's lease

335. Mr Smith QC's argument in this respect was that this was not one of the real purposes of the Challenge Application and that in any event the forfeiture of the lease cannot, as a matter of law, be undone. The latter point was based on two arguments: (i) that an unequivocal election to forfeit a lease is irrevocable and reliance was placed on: *G.S. Fashions Limited v B&Q plc* [1995] 1 WLR 1088 and *Central Estates (Belgravia) Limited v Woolgar (No. 2)* [1972] 1 WLR 1048; and (ii) that the court would not have power anyway under s.6(6) of the Act to give "*supplemental directions*" that would restore the lease in the event that the Challenge Application was successful.

336. As to (i), the cases relied upon are applications of the doctrine of election. In this case, Mr Young exercised a right under the CVA. If that CVA is revoked or suspended as a result of a successful Challenge Application, it seems to me that the statutory mechanism whereby the CVA was made binding on all creditors must enable actions to be undone and for the position to be restored to what it would have been if the CVA had not been approved.

337. That statutory power is to be found in s.6(6) of the Act. In answer to argument (ii), there is no authority that says that s.6(6) cannot be used in this way and it seems to me that the court should have discretion to restore the position to what it was but for the CVA whose approval has been suspended or revoked. Intervening third party rights would have to be protected but in principle I think it is possible that there would be power to restore Mr Young's original lease.

338. Mr Young has always sought to leave his options open. If his Challenge Application had been successful he would have been in the position of being able to decide what to do about his Property and whether he would want to continue to let it to the Company, albeit with EG as its ultimate shareholder. He may have preferred that. For the purposes of the Challenge Application I do not think that the Company has established that he has no legitimate interest in the relief that he was seeking or that EG is controlling the proceedings and acting for an illegitimate collateral purpose.

I. DISPOSITION

339. I have rejected all of Mr Young's allegations of material irregularity and unfair prejudice. Accordingly the Challenge Application is dismissed. The CVA remains in force.

340. I would hope that a suitable order could be agreed between Counsel but if a consequentials hearing is necessary that can be arranged through the usual channels.

341. It only remains for me to thank all Counsel and their legal teams for their clear and helpful submissions and presentations of their cases. This trial was heard on an expedited basis and that was only possible because of the efficiency and cooperation of the parties and lawyers in the preparation and conduct of this case.