Neutral Citation Number: [2021] EWHC 2892 (Ch)

Case No: **CR-2019-LDS-000907**

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

Leeds Combined Court Centre
1 Oxford Row
Leeds LS1 3BG
Date: Monday 1 November 2021

Before :

HH JUDGE DAVIS-WHITE QC

(SITTING AS A JUDGE OF THE HIGH COURT)

- -

IN THE MATTER OF DEALMASTER LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

RICHMONDSHIRE DISTRICT COUNCIL **Applicant**

- and -

(1) DEALMASTER LIMITED

(2) STEPHEN PENN **Respondents**

- -

- -

Mr James Woolrich (instructed by **ASW Legal Limited)** for the **Applicant**

Mr Simon Perhar instructed under the Direct Access scheme by the **1st Respondent**

Mr Matthew Maddison (instructed by **Walker Morris LLP)** for the **2nd Respondent**

Hearing date: 7 October 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.

.....

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

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HH Judge Davis-White QC:

Introduction

1. I have before me a notice of application issued on 27 September 2019 pursuant to section 6 of the Insolvency Act 1986 (the " IA 1986") and/or rule 15.35 of the Insolvency (England and Wales) Rules 2016) (the "IR 2016"), seeking orders revoking, alternatively suspending, approval of a company voluntary arrangement in relation to the first respondent, Dealmaster Limited (the "CVA").

2. The grounds for the application under s.6 IA 1986 are that the CVA unfairly prejudices the interests of the applicant, a creditor of Dealmaster Limited ("Dealmaster" or the "Company"), alternatively that there has been a material irregularity at, or in relation to, the relevant qualifying decision procedure. The latter ground refers to the approval procedure for the CVA by creditors. The application under r. 15.35 IR 2016 relates to a decision of the then nominee, the second respondent ("Mr Penn"), at the meeting of creditors convened to consider the CVA, to admit to voting the vote of a company called Hightide Estates Limited ("Hightide"). Without that vote the CVA would not have been approved. Hightide was admitted to voting on the basis that it has a debt of £372,158.34.

3. There are time limits within which applications under s6 IA 1986 and r15.35 IR 2016 must be brought. It was common ground before me that the applications are in time. It was also common ground before me that the applicant has standing as creditor to bring the applications.

4. In summary, the position of the applicant, Richmondshire District Council ("RDC") before me is as follows:

   (1) Hightide should not have been permitted to vote in respect of the consideration of the CVA by creditors. The decision to permit it to vote gives rise to unfair prejudice or material irregularity such that the court has the power to, and should, declare the vote as invalid and make other orders as provided for by r.15.35(3) IR 2016.

   (2) The CVA is unfairly prejudicial to RDC, alternatively there was a material irregularity at, or in relation to, the creditors meeting approving the CVA for the following reasons relating to a valuation of Dealmaster's properties as shown in the proposals for the CVA. The proposals were based on an illustration showing that the position of creditors to be bound by the CVA would be better in the CVA than on a liquidation. On a liquidation the illustration showed that creditors would receive a dividend of 4.6p in the pound rather than, in the CVA, an estimated 9.4p in the pound (over a 5 year period). The properties in question were not included within the CVA. RDC says that the valuation shown as being placed on the properties was too low and that (a) on a liquidation, the dividend would have been increased from that shown in the illustration and (b) would have exceeded the anticipated dividend to creditors bound by the anticipated CVA.

   (3) The CVA is unfairly prejudicial to RDC, alternatively there was a material irregularity at, or in relation to, the creditors' meeting approving the CVA for the

following reasons relating to a debt said to be owed by Dealmaster to its parent company, a company called Sterling Outcomes Limited ("Sterling"). Sterling was not a creditor that was to be bound by the CVA. RDC says:

(a) The quantum of the debt owed to Sterling was incorrectly inflated in the illustrations provided with the proposals for the CVA. The result was that the illustrated dividend position for creditors on a liquidation was incorrectly reduced from the true or fairly shown position. If the correct position had been shown, a liquidation would be more attractive to creditors within the proposed CVA than the anticipated position within the CVA.

(b) Alternatively, it is unfair that Stirling is left outside the CVA and this unfairly prejudices RDC.

5. I deal with the test for "unfair prejudice" below. As a generality though, it seems to me that unfair prejudice is directed at the effect of the scheme on the relevant creditor(s) whereas material irregularity is directed at some problem in the procedure by which the CVA becomes in force, usually connected with the process of the creditors' meeting. Examples of material irregularity might include misleading or incomplete information to those voting at the meeting, and other defects in procedure at or about the meeting (such as a person being admitted to vote who should not have been or in the correct amount).

6. The Company, through Mr Shepherd, its managing director, resists the applications.

7. Mr Penn remains neutral. At earlier stages of the proceedings his removal from the proceedings as a party was canvassed before the court, but not ordered.

8. In a letter dated 14 November 2019, ASW Legal Limited ("ASW") confirmed that:

> *"no criticism is made of Mr Penn's conduct save for a failure to reply substantively to correspondence"*

That alleged failure was then expanded upon in the letter.

9. By letter dated 11 June 2020, Mr Penn's solicitor, Walker Morris LLP, asked:

> *"Should your client intend to make any allegations or criticisms in respect of the conduct of Mr Penn, we request that you forthwith put us on notice of such allegations so that our client has an adequate opportunity to respond."*

No allegations or criticisms were raised in response.

10. By letter dated 24 September 2021, ASW confirmed that RDC would not be seeking any costs order against Mr Penn.

11. Hightide, though sent a copy of the application notice, has not been made a party. In my view, it should have been. I refer to this further below.

12. The application notice was also sent to Stoneforth Estates Limited ("Stoneforth") and Sterling. Neither has applied to be joined or been joined as a party. Stoneforth was a creditor voting in favour of the CVA with a debt of £2,470.65.

The course of the proceedings

13. The applications first came before the court on 30 June 2019. A timetable was set for the filing and service of factual and expert evidence and the matter adjourned for further directions on 12 February 2020.

14. On 12 February 2020, the applications came before DJ Pema for further directions. A timetable was set for a request for further information pursuant to CPR Part 18, a reply thereto and for further written evidence. Directions for trial were given, the listing to be the first available date after 8 April 2020. The case was later listed for a day in June 2020.

15. Sadly, the covid pandemic intervened. In response to an order of the court the parties made representations as to how the hearing should be conducted. Taking these into account, by order dated 12 June 2020 the hearing was adjourned (to be re-listed on the request of any party) until face to face hearings were again possible, the parties being at liberty to apply.

16. During the latter part of 2020, attempts were made to find a suitable date but the medical position of Mr Penn, as well as the changing covid position, made that difficult. By order dated 4 January 2021, it was noted that a hearing could not be listed in January due to short notice and the trial window was extended.

17. By application notice dated 29 January 2021, RDC sought an order for further information pursuant to CPR Part 18. By order dated 12 April 2021, the first respondent was ordered to provide certain further information. An order for what I understand to be a proportion of Dealmaster's costs was made in its favour which, as I understand it, reflects its success in resisting an order in respect of a number of the requests put forward.

18. In August 2021, a hearing notice was sent out for the hearing to take place on 17 October 2021, which it has done, before me.

Representation

19. The applicant was represented before me by Mr Woolrich, the first respondent by Mr Perhar and the second respondent by Mr Maddison. I am grateful to each of them for their written and oral submissions.

The Evidence

20. By Order of DJ Pema dated 12 February 2020, all witnesses of fact were to attend at the final hearing and submit to cross-examination, in default of which their evidence was not to be read without permission of the court. All witnesses of fact duly attended for cross-examination and adopted their written evidence.

21. Before me, I had three witness statements of Mr Matthew Whyatt ("Mr Whyatt") in support of the application. They were made on 27 September 2019, 31 January 2020 and 3 March 2020. Mr Whyatt is a solicitor and the managing director of ASW. As I have said, ASW acts as the solicitor for RDC in these proceedings. Mr Whyatt has conduct of the proceedings.

22. On behalf of the first respondent, I had four witness statements of Mr Shepherd resisting the application. They were made on 29 October 2019, 11 November 2019, 3 March 2020 and 24 September 2021. The latter was admitted into evidence as to part only at the start of the hearing before me for the reasons that I gave at the time. On the same occasion, and again for reasons given at the time, part of a further witness statement from Mr Whyatt was allowed into evidence.

23. In addition, I had a witness statement from Mr Shepherd dated 26 April 2021 which answers a request for further information as ordered by DJ Pema.

24. Mr Penn, the second respondent, filed a witness statement. That was made on 29 October 2019. Mr Penn is a licensed insolvency practitioner and the owner and co-founder of Absolute Recovery Limited. He acted as nominee in relation to, and is currently the supervisor of, the CVA. Again, I found his evidence to be accurate and truthful. Like Mr Whyatt, his position was that the relevant material was in the documents before the court and he could not remember all the detail. Just as Mr Whyatt had not been at the coal face at the time but his deputy, Mr Seasman had been dealing with things, Mr Penn had not been at the coal face (other than at the CVA meetings, which he chaired) and it had been his deputy, Mr Hines, who had had day to day conduct of the process of and leading up the CVA.

25. I also had separate expert reports. One, on behalf of the applicant, is dated 25 November 2019 and is the report of Ms Hattie Snook, MRICS and director of Pantera Property Limited. The other, on behalf of Dealmaster, is dated 29 November 2019 and is the report of Mr Joe Fraser MSc MRICS. Both experts then signed a joint memorandum of their agreed position, following a consideration of each other's reports, as ordered by the court. The expert witnesses did not give oral evidence before me.

26. Each of Mr Whyatt, Mr Penn and Mr Shepherd gave oral evidence and were cross-examined. As regards the witnesses I should record the following. I make further comments on specific parts of the oral evidence later in this judgment.

27. First, I found Mr Whyatt to give honest and accurate evidence. However, the relevant evidence that he could give was necessarily limited. Further, he quite candidly said, and I accept, that he could not remember anything very much and that any answers to questions could be found in the written material (primarily correspondence) before the court.

28. Secondly, I found Mr Penn to give honest and accurate evidence. He had little recollection of the detail of what had happened at the time. This was not surprising because the detail had been handled by a manager at his firm, a Mr Hines. To some extent therefore, his evidence was based upon probabilities based on usual practice.

29. Thirdly, as regards Mr Shepherd, I found him to give honest evidence and to be doing his best to assist the court. To some extent, as I explain below, I consider that he overstated his case and/or that over time he had persuaded himself of certain things which went beyond the actual factual position as it occurred at the relevant time.

Outline facts

30. Dealmaster has been the registered proprietor of a property at Oaktree Business Park, Gatherley Road, Brompton-on-Swale, Richmond North Yorkshire since May 2003 (the "Property"). The Property is approximately 1.6 miles from Catterick and close to the A1(M). The Property comprises an industrial building (of steel framed construction, with a combination of brick, steel cladding and plate glass at a low level with metal sheet cladding above and to the roof) situated within a plot of approximately 2 acres.

31. The building on the Property was, as I understood matters, originally used as one unit. Dealmaster ran a business there of a motor car sales franchise. More recently, however, the building has been divided into three units. One unit is used as workshop and associated premises, one unit is used as a bathroom showroom and the third unit has been used by a business operating it as a children's play centre.

Mr Shepherd purchases Dealmaster

32. Mr Shepherd agreed to purchase Dealmaster in 2017 through his family company, Sterling. A copy of a counterpart of the relevant share purchase agreement dated 16 November 2017 (the "Share Purchase Agreement") is in evidence. The purchaser is Sterling. The vendor is Hightide.

33. Mr Shepherd explained to me that although completion took place on 16 November 2017, in practice he did not really take over the business of the company until January 2018. I accept that evidence. I note that Mr Shepherd is recorded as having been appointed as a director of Dealmaster on 30 October 2017 and the shares are recorded at Companies House as having been transferred from Hightide to Sterling on 24 October 2017.

34. The Share Purchase Agreement records the Property as being occupied by Simple Structures, Bathroom World Darlington Ltd and RCS & 2K's Limited (as to part by each).

35. As regards Sterling, at the time of the Sale Purchase Agreement the shares in Sterling were held as to 50% each by Mr Shepherd and his wife. In about April 2018, Mrs Shepherd became the 100% shareholder. Other members of the Shepherd family were involved in the company as directors and secretary prior to the Summer of 2017 but by the time of the Share Purchase Agreement, Mr Shepherd and his wife were the only two directors.

36. As regards Hightide, at the time of the Share Purchase Agreement the two directors were Mrs F Plummer and Ms J Plummer. From about October 2018 the sole director has been Mr Plummer. Mr John Donnelly is recorded at Companies House as the person with significant control in relation to Hightide from July 2018. The nature of control appears to be control over the trustees of a trust.

The Liability Orders

37. On 31 May 2019 Harrogate Magistrates Court granted two Liability Orders to RDC in respect of unpaid National Non-Domestic Rates in respect of two of the three business units (units 2 and 3) at the Property, plus costs. The orders relates to the period 23 April 2014 to 13 October 2016, and thus long before Mr Shepherd, through his company, acquired Dealmaster.

38. The proceedings were apparently protracted and were originally commenced in the Northallerton Magistrates Court. No actual order has been produced clearly setting out either the liability orders nor the sum (if any) in which costs were assessed. According to Mr Shepherd, the liability orders amount to about £38,000. He says that the costs claimed (about £25,000) were never assessed and never the subject of any order in that amount.

39. Other than witness evidence, the only actual evidence of the liability orders appears to be an unsigned undated document with no official court seal which is said to have been the reasons handed down by the magistrates on 31 May 2019. According to that document, the evidence about the alleged tenancy given by way of statements of Mr Plummer (speaking for Dealmaster as the person involved at the time, back in 2013/14) and Mr Creighton (speaking for the alleged tenant) was afforded little weight/not accepted.

40. According to Mr Shepherd, Dealmaster appealed one of the liability orders which had been made in the sum of about £19,000. However, Dealmaster received advice that although the liability order would be set aside on appeal the costs would be significant and there was no guarantee they would be recovered. Accordingly, the CVA route was taken on advice.

The CVA

41. RDC presented a winding up petition against Dealmaster in the Liverpool Business and Property Courts on 28 June 2019. It relied upon the debt of £38,609.36 arising under the Liability Orders as well as the costs of the Magistrates Courts Proceedings, then due to be determined on the first available date after 12 August 2019.

42. On 13 August 2019, the winding up petition was adjourned to the next available date after 35 days to permit a CVA to progress in relation to Dealmaster.

43. On 4 August 2019 Mr Snook of Pantera Property provided Mr Seasman by email giving an apparent desktop valuation of the Property at £750,000 to £850,000. Apparently, this was based on information that he had that there was a lease of one unit at £24,000 per annum. He assumed the rest of the site would command a similar rent and then

capitalised the value at a yield of 7.5 to 8 per cent assuming a market rent of £60,000. A more accurate figure would, he said, depend upon obtaining internal access.

44. Under cover of a letter dated 14 August 2019, Mr Penn sent out a number of documents to creditors regarding a proposed CVA by Dealmaster. These included a formal notice, a copy of the Directors' proposal, a summary statement of affairs, a copy of the Nominee's comments on the Proposal, a voting form and proof of debt for the creditor in question, a schedule of Absolute Recovery Limited's charge out rate and policy regarding re-charge of disbursements. The relevant meeting was to be a virtual meeting to be held on 2 September 2019.

45. By email dated 20 August 2019, sent to ABS Recovery, Mr Seasman, described as "Head of Revenues and Local Authority Investigations", wrote on behalf of ASW seeking an up to date professional valuation of the Property and a number of questions and further information about the debt to Hightide and to any debt to Cambridge County Bank. Among other things, in what was to become a constant theme, he sought "Full substantiating evidence of the debt between the Company and Hightide".

46. By email dated 23 August 2019, Mr Hines of ABS replied to the email of 20 August from Mr Seasman. He set out an explanation why the director did not consider an up to date professional valuation of the business units was required. He also enclosed a letter dated 22 August 2019 from Mr Plummer of Hightide, explaining the debt owed by Dealmaster to Hightide.

47. The creditors' meeting in relation to the CVA took place on 2 September 2019. RDC did not attend. It had however lodged a proxy to vote against the CVA.

48. The voting at the creditors' meeting was as follows:

Creditor Name	Vote	Value	**Percentage**
Hightide Estates Limited	For the CVA	372,158.34	83.87%
Stoneforth Limited	For the CVA	£2,470.65	0.56%
Richmondshire District Council	Against	£69,108.23 (inclusive of costs that have yet to be determined, agreed or assessed)	15.57%
	TOTAL	£443,737.22	100%

49. According to Mr Penn, the known creditors at the date of the meeting to vote on the CVA were as follows:

Creditor	Value	Did they vote?
ASW Legal	£30,000	***Yes (included within Richmondshire District Council***

		debt}
Hightide Estates Limited	£372,158.00	***Yes***
HMRC	£581	***No***
Richmondshire District Council	£38,609.63	***Yes***
Sterling Outcomes Limited	£588,850.00	***No***
Stoneforth Limited	£2,470.65	***Yes***
Paul Graham Shepherd	£7,717.00	***No***
Uniglobal Limited	£734.00	***No***
TOTAL	£1,041,732.78	

50. By letter dated 4 September 2019, addressed to all creditors, Mr Penn confirmed that the CVA had been approved and that he had been appointed supervisor. In each case he enclosed a copy of his report as chairman of the creditors' meeting and a proof of debt to enable the relevant creditor to register its claim in the CVA. He explained various things about the operation of the CVA.

The terms of the CVA

51. Only certain creditors are brought within and bound by the CVA. In particular, Mr Shepherd as a creditor for £7, 717 (director's loan account) and Sterling Outcomes Limited (the holding company, shown as secured creditor for £588,850) were excluded from the CVA.

52. The CVA involves the company paying sums into the CVA from its trading. The relevant key provisions are as follows:

> "3.2 The company proposes to make two different payments to repay the creditors.
> - The first Is an initial lump sum of £3,000 as a gesture of intent.
> - The second is a periodic monthly contribution to the CVA Supervisor, this will be paid by the company immediately upon the CVA approval.
>
> 3.3 The summary of the regular minimum monthly contributions is as follows:

Months	**For year** £'000	Cumulative £'000
Initial Lump Sum	3,000	3,000
Months 1-12@ £200 / month	2,400	5 400
Months 13-24@ £500 *I* month	6,000	11,400

Months 25-36@ £800 / month	9,600	21,000
Months 37-48@ £1,100 / month	13,200	34,200
Months 49-60 @ £1,400 / month	16,800	51,000
Total		51.000

3.4 Over the agreed period the total contribution (as detailed in Appendix D) is £51,000, Including the CVA contributions and lump sum payment.
…
3.7 The Supervisor will conduct an annual review of the Company's accounts to determine if profits allow for an increase in monthly contributions. This will be calculated at 50% of any increase in the profit above that disclosed in Appendix E, allowing a 5% increase in the level of profits year on year. In order to assess such sum, the Company will provide the Supervisor with management accounts within 3 months of each year end. The assessed sum under this review clause must then be paid in full within 9 months of the year end. The CVA may be extended to accommodate this clause at the Supervisor's discretion."

Hightide Debt

53. So far as concerns the debt owed to Hightide by Dealmaster the evidence and course of events is as set out below.

54. The Proposals showed Hightide as a creditor of Dealmaster in the sum of £372,158 in the Statement of Affairs and Estimated outcome statements scheduled to the Proposals as Appendices.

55. In the body of the CVA proposals it was stated:

> "2.5 Sterling Outcomes Limited bought Dealmaster Ltd with the balance sheet as shown at the end of 2017. i.e. Debt owed to Hightide Estates Limited of approximately £372K with an agreement to make repayments of that debt when the company could secure more rent by the developments the director had planned; namely potentially rent out the spare car park spaces to the neighbouring business.
>
> 2.6 With that agreement to defer payment to Hightide Estates Limited in place, Sterling Outcomes Limited bought the issued share capital and so owned Dealmaster Ltd."

56. In its letter of 20 August 2019, ASW made the following points and raised the following issues:

> "In section 2.5 of the proposals it states that Sterling Outcomes Limited bought *Dealmaster with the balance sheet as at 2017 i.e with a debt shown as owed to*

> *Hightide Estates of £372K.* However, the balance sheet as at 2017 shows the Company to be solvent to the tune of £226,547. The Company had outstanding charges with Abbey National (now Santander} which were satisfied on 5 December 2017 with Cambridge Counties Bank Limited registering a charge. Therefore, if the creditors who are owed amounts falling due after more than 1 year total £989,415, how much of this debt is with Cambridge Counties Bank Limited? The creditors due within 1 year only total £3,070.
>
> Can you therefore please advise on where Hightide sits in the accounts if it is a "normal" debt?
>
> In addition, Our Client also requests the following;
>
> 1…….
> 2. Full substantiating evidence of the debt between the Company and Hightide Estates Limited
> 3. Any and all full substantiating evidence of the steps Hightide had taken to recover this debt in the last 2 years (given that the Company was solvent when Sterling Outcomes bought the Company).

57. The letter dated 22 August 2019 from Mr David Plummer, director of Hightide, to Mr Penn (and which the latter copied back to ASW, under cover of an email dated 23 August 2019, and to which I have referred to above), is so far as relevant, in the following terms:

> "I understand you also wish me to provide a statement detailing the history of the liability owed to Hightide Estates Limited from Dealmaster Limited.
>
> In this regard, I can confirm the following statement to be true and accurately records the liability owed to Hightide Estates Limited from Dealmaster Limited.
>
> Dealmaster Limited was purchased by Hightide Estates Limited on 1st April 2011. The property owned by Dealmaster Limited at that time consisted of two retail showrooms together with parts department and workshop area.
>
> …
>
> The purchase cost of the acquisition of Dealmaster Limited was completed using funds provided by Hightide Estates Limited.
>
> Hightide Estates Limited required the liability to be recorded in the annual accounts and from copies of Dealmaster Limited submitted accounts.
>
> I am able to evidence a debt owed to Hightide Estates Limited From the balance sheet records of Hightide Estates Limited, I can confirm the balances owed by Dealmaster Limited to Hightide Estates Limited at each year end were as follows:-
>
> Balance as at April 2011 -£131,967.00
> Balance as at Dec 2011 - £186,792.00

Balance as at Dec 2012 - £274,212.00
Balance as at Dec 2013 -£374,158.00
Balance as at Dec 2014 - £439,258.00
Balance as at Dec 2015 - £507,189.00
Balance as at Dec 2016 - £538,172.00
Balance as at Dec 2017 -£372,138.00

As a significant creditor, Hightide Estates Limited was aware that subsequent to the purchase of Dealmaster Limited that the original Citroen showroom, together with parts and workshop areas were no longer viable as a franchised motor dealership. Accordingly, Dealmaster had to commit to further spending on the site which was funded by additional loans from Hightide Estates Limited as per the above balance sheet entries.

Hightide Estates Limited continued to support Dealmaster Limited by allowing them to affect a change to the buildings. Hightide Estates Limited provided funds to pay for the construction and associated costs relating to the provision of three business units to rent on a commercial basis. The resulting liability which was an amalgam of loans to cover expenses including legal costs, management fees, renovation, and associated construction related expenses.

The development of the site by Dealmaster Limited resulted in a liability owed to Hightide Estates Limited at its highest of £538,172. At the end of December 2017, the liability owed to Hightide Estates Limited from Dealmaster Limited as recorded in the statutory and submitted accounts is: £372, 158.

Hightide's Estates Limited arrangement for settlement of the debt remains unchanged. The debt albeit unsecured is due for settlement as per the agreement made with Sterling Outcomes Limited.

For clarity I can confirm Hightide Estates limited waived any claim to interest on the outstanding debt so the liability of £372,158 is the total liability outstanding. Hightide Estates Limited required Dealmaster Limited to evidence the debt in the submitted accounts and to provide full accounts which I am able to provide should this be required.

Hightide Estates Limited made an agreement with the current owners of Dealmaster Limited ensuring the liability for £372,158 remained an obligation to settle as and when the site (Oaktree Business Park) had been developed and /or sold.

This statement is a true account of the facts."

58. The covering email from Mr Hines to ASW enclosed a spreadsheet enclosing the "analysis requested".

59. The CVA was then approved at the start of September 2019.

60. By letter dated 20 September 2019, ASW wrote to Mr Shepherd as director confirming the intention of RDC shortly to file an application to oppose the CVA. In that letter a series of questions were posed. So far as the debt owed by Dealmaster to Hightide is concerned, the questions included:

> "Given our client's intention to oppose the CVA, we now require you to provide us with the following information/documents (the majority of which Dealmaster should already have provided to the Nominee in the process of preparing the CVA) as a matter of priority:
>
> 1. Evidence of the debt allegedly owed by Dealmaster to Hightide Estates Limited ("Hightide"). In particular, we request copies of: (a) any loan agreement between Dealmaster and Hightide;(b) records (for example, bank statements) to substantiate the 'balances owed' set out in Mr Plummer's letter to Mr Penn of Absolute Recovery Limited (currently the Supervisor of the CVA) dated 22 August 2019 - i.e. records of monies received by Dealmaster from Hightide and of repayments made by Dealmaster to Hightide; and (c) any correspondence between Dealmaster and third parties, including Hightide, regarding the existence and/or terms of any Dealmaster/Hightide debt;
> 2. Please clarify whether from Dealmaster's perspective, the agreement referred to on the second page of Mr Plummer's 22 August letter (see 1. above) between Dealmaster and Hightide – to postpone repayment by Dealmaster of an alleged £372,158 liability - has been superseded by the CVA;

61. By letter dated 4 October 2019, ASW wrote to Hightide (attention Mr David Plummer). Again, a number of questions were asked about the Hightide debt:

> "1. Evidence of the debt allegedly owed by Dealmaster to Hightide. In particular, we request copies of:
>
> (a) Any loan agreement between Dealmaster and Hightide;
> (b) Records (for example, bank statements) to substantiate the 'balances owed' set out in your letter to Mr Penn of Absolute Recovery Limited (currently the Supervisor of the CVA) dated 22 August 2019 – i.e. records of monies received by Dealmaster from Hightide and of repayments made by Dealmaster to Hightide; and
> (c) Any correspondence between Dealmaster and third parties, including Hightide, regarding the existence and/or terms of any Dealmaster/Hightide debt;
>
> 2. Please clarify whether from Hightide's perspective, the agreement referred to on the second page of your 22 August letter (see 1. above) between Dealmaster and Hightide - to postpone repayment by Dealmaster of an alleged £372,158 liability - has been superseded by the CVA;"

62. In his first witness statement dated 27 September 2019, Mr Whyatt referred to the above correspondence which had taken place up and until 27 September and said that the appeal against the decision of Mr Penn to admit the Hightide debt to voting was something that had been done "in the circumstances…pending receipt of any substantiating evidence which clarified the position."

63. In his first witness statement made on 28 October 2019, Mr Shepherd referred to the company accounts of Dealmaster, filed at Companies House for the years 2011 onwards and which show the debt owed by Dealmaster to Hightide. As he pointed out the debt could not "as has been inferred be a ruse to defeat the liability orders". He also made the point that there was no connection between Hightide and Dealmaster after the sale by the former of the latter to his, Mr Shepherd's, company.

64. Mr Penn, in his witness statement dated 29 October 2019, identified his understanding of the evidence of Mr Whyatt with regard to the challenge to the Hightide debt as involving Hightide in some way being connected with Dealmaster, its directors and/or shareholders, an alleged lack of clarity regarding evidencing that the debt is owed and a procedural irregularity that prejudiced the creditor' position.

65. On the first point, the inferred connection between Hightide and Dealmaster, he pointed out that Mr Plummer had been company secretary of Dealmaster between February 2012 and September 2013 but had never had control over or been a director of Dealmaster. Mr Plummer had been appointed a director of Hightide since March 2018. There was no connection between Mr Donnelly, said to have ultimate control over Hightide, and Mr Shepherd. There was no commonality between directors or shareholders of, or anyone else with control over, Dealmaster and Hightide.

66. As regards evidence of the debt, Mr Penn referred again to Dealmaster accounts and exhibited the same for the years between 2011 and 2018 which he regarded as "good evidence of the debt due". It had been explained to him that there was no formal loan agreement that could be located. Sums had originally been provided as a loan and then further funds had been lent to Dealmaster. He also enclosed a detailed breakdown of the fluctuations of the ledger account between Dealmaster and Hightide over the relevant years, showing the relevant debits and credits to the same.

67. In his second witness statement made on 11 November 2019, Mr Shepherd, among other things, described his acquisition of Dealmaster. He stated:

> "8. This acquisition was completed after a process of a due diligence to determine all known liabilities and verification of assets. The financial records and statutory accounts from 2014 to Dec 2018 confirms the existence of liabilities due to outstanding creditors which the applicant suggests neither existed prior to the CV A or is a debt from an associated creditor which under legal definition of associated persons and companies comes from section 435 of the Insolvency act I 986 and the section 993 income Tax Act 2007, is not an associated creditor. See exhibit PS 1. which

> evidences the Statutory Accounts and supporting documentation as submitted to the CV A supervisor in direct response to ASW's request of the 20th September 2019, to evidence the debt within Dealmaster which is owed to Hightide Estates Limited.
>
> 9. At the time of completing the due diligence the bank reconciliation were verified with the previous year's accounts supporting the carried forward balances which ultimately resulted in the Dec 2017 accounts to be accepted as a true reflection of the trading position of Dealmaster Limited."

68. In his second witness statement dated 31 January 2020, Mr Whyatt said that the balance sheets provided were "no substitute for bank statements in evidencing payments in/out pursuant to the loans". In light of this, he said, a request by letter had been made for relevant bank statements by letter dated 13 January 2020. In particular, what he now sought was:

> "evidence of payments from Hightide to Dealmaster or repayments from Dealmaster to Hightide in the form of bank statements (redacted as appropriate). These should be contained within the company's books and records. As for the bank statements, Dealmaster is entitled to request them from their former bank (or former owner of the business)".

69. Exhibited to Mr Shepherd's witness statement dated 6 April 2021 were a number of copies of bank documents recording movements on Dealmaster's bank account. These were provided in CSV format rather than as printed bank statements, but this was the form in which the information was obtained from the bank. Mr Shepherd later stated, pursuant to a court order, that he could not be sure when these documents had been requested from the bank, due to a "catastrophic computer failure" but was able to confirm he had provided them to the CVA supervisor's firm on 18 October 2019 and that he therefore thought the request to the bank had been made at about that time.

70. Despite all this material, RDC remained unsatisfied of the Hightide debt. In his skeleton argument Mr Woolrich asserted that the alleged liability to Hightide:

> "arose in peculiar circumstances, is inadequately evidenced, question-begging, and the manner in which material has been released to RDC excites suspicion. Hightide should not have been permitted to vote in respect of the CVA".

71. Building on that assertion he went on to submit:

(1) The debt was inadequately evidenced and recorded (despite the ledger sheets, the bank statements, the trial balance statements and the filed accounts);

(2) The CVA contained little information regarding the circumstances in which the debt arose (essentially that Sterling bought the company with the debt then being a liability of the Company).

(3) There had been a drip feed of information which "excites suspicion".

72. In cross examination of Mr Shepherd, Mr Woolrich sought to ask for an explanation of individual payments referenced in the bank accounts with a view to Mr Shepherd demonstrating (or failing to demonstrate) that they were legitimate payments by or for the benefit of Dealmaster and properly attributable to the loan account between Hightide and Dealmaster. Mr Shepherd was unable to assist much. This was hardly surprising.

73. I came to the conclusion that RDC would only be satisfied that the debt existed and in the quantum admitted to voting to the extent that it had chapter and verse on every single payment credited to or debited to the loan account. Even then, without confirmatory evidence from each of the parties involved (some involved payments to third parties) in any such payment or debit, I am far from confident that RDC would have been content. However, this is not the basis upon which challenges to admission to proof should be made. Mr Woolrich suggested that the challenge had been made at an early stage when the facts were not known because of the time limit on bringing such claims. I do not accept this. If the admission to proof or to voting of a debt is to be challenged then the challenger must have grounds to do so. In my judgment there was more than adequate evidence of the debt and its quantum before me (and indeed before the nominee, when acting as chairman of the relevant meeting). Attempts to delve deeper and find more to show that the debt was not owed or that the quantum was wrong had yielded nothing and are correctly described as a "fishing expedition". Furthermore, despite Mr Whyatt having asserted that the bank statements were key and despite the court having been told on an application for further information that "if Dealmaster can demonstrate the Hightide debt exists by reference to bank statements and corroborating correspondence with the bank, RDC will be able to take advice on whether to proceed with the third ground of its challenge." and notwithstanding the provision of such bank statements, RDC remained unsatisfied.

74. It is not the function of the court to carry out a detailed audit to satisfy itself beyond any doubt at all that a debt put forward for voting purposes is properly owed in the quantum put forward. The court (and a chairman of a meeting) is entitled to rely on the balance of probabilities and the evidence put before it. A person challenging the admission to proof is not entitled to assert, like Mr Micawber, that "something may turn up" and suggest that the burden of proof has shifted to those relying upon the vote.

75. For completeness, I should also record that in the course of the evidence various suggestions were made at a connection between Hightide and Dealmaster/Mr Shepherd after the purchase of the latter by Mr Shepherd's company. I find on the evidence before me there was no such connection, which I understand was raised as a reason to doubt the reality of the debt owed to Hightide by Dealmaster and/or its quantum.

76. Finally, I repeat that I consider that Hightide itself should have been made a party to the application. There is no equivalent procedure to CPR 19.8A. Even if CPR r19.8A is capable of applying, no attempt to invoke it was made. If a party's rights are legal rights are being challenged (in this case the right to vote) then in most circumstances it should be joined rather than putting on it the onus to apply to be joined.

Valuation of the Dealmaster Property

77. As I have identified, the valuation placed on the Property for the purposes of the CVA was a book value of £1,213,326 with an estimated to realise figure of £627,890. That this was a valuation by the directors was made clear in the relevant documentation containing the proposals for the CVA and indeed was set out in Note 1 (of 5) to Appendix D (Comparison between Liquidation and Company Voluntary Arrangement and Estimated Dividend Payments) and Note 1 (of 3) to the Estimated Statement of Affairs as at 8 August 2019 (Appendix C).

78. Note 3 to the Estimated Statement of Affairs records:

> "*The calculation of the Units at Oaktree Business Park is based upon a professional valuation dated July 2017 which indicated that the value equated to £10,588.24 per £1,000 of rent paid).*"

79. Paragraph 2.7 of the CVA proposal records:

> "*2.7 Dealmaster Ltd subsequently [that is, subsequently to its acquisition by Sterling Outcomes Limited at the end of 2017] agreed with its tenant Simple Structures to allow a rent-free period of 3 years whilst it established itself as a manufacturer of modular frames for housing".*

80. Paragraph 4.4 of the CVA proposal notes:

> 4.4 *"During the course of the CVA the rent-free period afforded to a tenant will expire and facilitate Increased contributions into the scheme*."

81. I do not accept the apparent evidence of Mr Shepherd so far as it might be taken to suggest that the valuation put on the Property in the CVA was not his valuation or that in some way it was imposed upon him by Mr Hines. Whilst Mr Hines may well have discussed the valuation with him, at the end of the day the documents show the valuation to be his and this seems in line with the probabilities.

82. In the email of Mr Seasman of ASW dated 20 August 2019 that I have referred to and which responds to the CVA proposals, Mr Seasman asked for an up to date professional valuation of the Units at Oaktree Business Park on the following basis:

> "*We note that the asset value for the Units at Oaktree Business Park have a BV of £1,213,238 with an ETR of £627,980. This is based this on a calculation from 2017, which is now over 2 years ago.*
>
> *As the petitioning Creditor, our Client would want to see a professional valuation of the Property as it is a material asset within the company and there is nearly a 50% reduction in the value on this ETR."*

83. The response of Mr Hines by email dated 23 August 2019 was as follows:

"*The value of the assets at circa £1.2m has been the same for 3 years running in Accounts at Companies House and it is not considered necessary to have them professionally valued again for the CVA Statement of Affairs.*

The ETR value of £627,980 is based upon the calculation of 2 or the 3 units being let as noted in the Statement of Affairs. Clearly if all 3 units were let then the ETR value would be significantly higher however as at the date of the Statement of Affairs this was not the case.

The valuation of £ 1.2m is reflective of the written down initial purchase price of over £2m which was the value of the business when it was a successful motor dealership, (well before the current director got involved).

The valuation in the accounts has not be written down further as it is a fair reflection of the valuation if the business is sold as a going concern. The value reflects the value when and if the site is developed further. The site has unused land which underpins the book value.

The book value is not a RICS valuation of the asset.

The valuation was confirmed to the director as being determined by 2 elements - The "passing" rent and the quality of the "covenant".

Meaning the actual rent received determines the valuation and the quality of the tenant and lease time to run.

Meaning if Marks and Spencer's retail were the tenant under a long lease the valuation would be higher. However, that is not the case

In this situation:

> *The tenant - Simple Structures Limited has a very poor credit score as a newly launched business and is struggling to survive in business and is likely not to survive if the current indebtedness cannot be traded through.*
>
> *The tenant- Wackadays has only 4 years left on the lease and has already given verbal notice to leave as the business is currently up for sale.*

Passing rent (rent received) used for valuation purposes was confirmed to the director as being limited by the market rate of rent that could be expected in the area reflective of the properties position and usability. The rate of rent used by the valuer to determine the valuation was therefore set at a maximum based on Market rate of rent for comparable properties in the area.

The passing rent although has a maximum based on Market rents, it is determined by actual rent received. Further information can be found in RICS guidance notes relating to the analysis of commercial lease transactions.

> *As a consequence of the poor covenants and the actual contracted rent being much less than the rent received at the time of the valuation. It could be argued that the valuation is overstated based on all 3 tenants paying rent.*
>
> *Nevertheless, a workable and perhaps justified increase in the valuation would be to consider the projected rent over the next 5 years and base the valuation on the annual average rent. This deemed annual average rent expectation could be used to determine the expected valuation.*
>
> *Such a calculation would be:*
>
> *Next 3 years rent: Total rent: £177.927*
>
> *The remaining 2 years at full passing rent of £85,000 per year: Total rent: £170.000.*
>
> *Total rent received over next 5 years: £348,000.*
>
> *Average rent per year for valuation purposes: £69,600.*
>
> *Using this average rent to determine sale value: £69,600 x £10,588.24p = £736,941.50.*
>
> *In this scenario the estimated dividend for unsecured creditors in a liquidation would obviously increase.*
>
> *The asset has not increased in valuation since 2017 as the situation has gotten worse for the landlord and nothing has changed to warrant an uplift in valuations. Conversely there is justification for the valuation being less than already stated as one tenant is potentially going under and the other is leaving in 4 years*."

84. On 4 August 2019, ASW received an email from Mr Tom Snook MRICS of Pantera Property giving a value to the Property of between £750,000 to £850,000 but saying that internal access would be needed to provide a more accurate figure. The valuation appears to have been based upon the assumption that the rent of £24,000 for one of the units would be let at the same rent or slightly more. At an assumed market rent of £60,000 Mr Snook then capitalised the value at a yield of 7.5 to 8 per cent to reach his valuation.

85. That valuation or the issues arising were not raised by RDC at the creditors' meeting held to consider approval of the CVA. RDC voted at that meeting by way of a chairman's proxy.

86. In his first witness statement Mr Whyatt complained about the valuation position, effectively saying that the Property was undervalued in the proposals and that in truth they were worth far more. In that respect he relied upon the email from Mr Hines that I have referred to and to the valuation of Mr Snook.

87. In his first witness statement, Mr Shepherd did not accept that the valuation figure for the Property set out in the CVA proposals was an undervalue and re-iterated that it was

"based on the quality of covenants and the current rent levels. The current rent receipts are 1 /3 lower than the time of purchase and therefore impacts on the asset valuation." He repeated this point in his second witness statement.

88. There then followed the experts reports in the proceedings.

89. The initial market valuation of the Property by Ms Snooks was £742,750, that of Mr Fraser was £620,000 (normal marketing and sale within 12-18 month period) and £550,000 (special assumption of restricted marketing period and to achieve exchange within 90 days).

90. Ms Snooks in her expert report applies a yield of 10% to what she considers to be an achievable rent of £72,275 (based on £5 per square foot) but accepts that if Simple Structures has a right to a rent waiver until 2023 and the property was marketed for sale with this unit being charged no rent until February 2023 and no option for the Landlord to break the lease, the property would present a much less desirable investment resulting in a lower value.

91. In their joint memorandum, the market value of the Property was put at £660,000 on the basis that there was a legally binding agreement with one of the tenants for a rent free period until March 2023 and otherwise £720,000 on the basis that there was no legally binding agreement to defer rent.

92. I was not taken through the expert reports and the joint memorandum in any detail to explain to me the process by which (including whether factual assumptions had changed) the two experts had changed their opinions as to value from those set out in their initial reports.

93. As regards Ms Snooks, I note however that in the joint memorandum she applied different yields to the different tenancies, relied on the passing rent rather than an achievable rent as the income for the Property and accepted that there is a tenant's break clause in one of the leases which in her original report she said did not exist. The methodology in the joint memorandum seems to follow more closely that adopted by Mr Fraser in his earlier report but I cannot identify the factors leading to a difference in valuation of £40,000 from his earlier valuation.

94. RDC relies upon what has been described as a "vertical comparison" with what it would have attained on a liquidation compared with what it would obtain on the proposed CVA. In this respect, it submits that of the realisable value of the Property was, as the joint memorandum suggests, £720,000 or £660,000 rather than the value estimated in the proposals of £627,980, then the estimated dividend would have been not 4.6p in the pound but 24.9p or 11.6p in the pound which is more than the 9.4p in the pound estimated as payable to relevant creditors within the CVA.

95. In this respect, as I understood it, RDC say that they are anticipated to receive less in a CVA than they would in a liquidation and that automatically the CVA therefore unfairly prejudices them. Alternatively, they say that there has been a material irregularity because the voting creditors were not made aware of the true effect of the CVA.

96. RDC rely upon the helpful summary of Henderson J (as he then was) in *Mourant & Co Trustees Limited v Sixty UK Limited (In administration)* [2010] EWHC 1890 (Ch); [2010] BCC 882. In that case, speaking of the earlier decision of Etherton J (as he then was) in *Prudential Assurance Co Limited v PRG Powerhouse Limited* [2007] EWHC 1002 (Ch); [2007] BCC 500, Henderson J went on:

> "[**67]** Having decided that the release of the guarantees could in principle be effected through a CVA, Etherton J. then had to consider whether the proposed arrangement was unfairly prejudicial to the interests of the guaranteed landlords. He reviewed the authorities on unfair prejudice, and in [71]–[96] of his judgment distilled from them a number of principles which may be summarised as follows:
>
> (a) Any CVA which leaves a creditor in a less advantageous position than before the CVA will be prejudicial to the creditor. The real issue is generally whether the prejudice is "unfair".
>
> (b) There is no single and universal test for judging unfairness in this context, and the question must depend on all the circumstances of the case, including in particular the alternatives available and the practical consequences of a decision to confirm or reject the arrangement
>
> (c) In assessing the question of unfairness, a number of techniques may be used, including what may be described as "vertical" and "horizontal" comparisons. A vertical comparison is a comparison between the position that a creditor would occupy and the benefits it would enjoy in a hypothetical liquidation, as compared with its position under the CVA. The importance of this comparison is that it generally identifies the irreducible minimum below which the return in the CVA cannot go. As David Richards J. said in *Re T&N Ltd* [2004] EWHC 2361 (Ch); [2005] 2 B.C.L.C. 488 at [82] of his judgment:
>
> > "I find it very difficult to envisage a case where the court would sanction a scheme of arrangement, or not interfere with a CVA, which was an alternative to a winding up but which was likely to result in creditors, or some of them, receiving less than they would in a winding up of the company, assuming that the return in a winding up would in reality be achieved and within an acceptable time-scale: see *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385."
>
> (c) A horizontal comparison, on the other hand, is a comparison between the position of the applicant and the position of other creditors, or classes of creditors. The fact that a CVA involves differential treatment of creditors is a relevant factor which calls for careful scrutiny, although it will not automatically render a CVA unfairly prejudicial: see *Re a Debtor (No.101 of 1999)* [2001] 1 B.C.L.C. 54 (Ferris J.). In considering the question of differential treatment, it is necessary to ask whether the imbalance in treatment is disproportionate, and also whether the differential treatment may be justified, for example by the need to secure the continuation of the company's business by paying essential suppliers or service providers.
>
> **[68]** Applying these principles, Etherton J. held that the CVA was clearly unfairly prejudicial to the guaranteed landlords. On a vertical comparison, the landlords

were left in a much worse position than in a liquidation, because they no longer had the benefit of guarantees which the parent company was apparently in a financial position to honour. On a horizontal comparison, the non-scheme creditors were to be paid in full under the CVA, while the present and future claims of the guaranteed landlords were to be discharged at a fraction of their value. There was no justification for this difference in treatment.

[69] Etherton J. summed the matter up as follows, in [106]–[108] of his judgment:

> "[106]. … The unusual feature of the present case, however, is that on a winding up the guaranteed landlords would still have had the benefit of the valuable guarantees, whereas all the other unsecured creditors (of this apparently substantially insolvent company) would receive nothing.
>
> [107] In summary, the guaranteed landlords are the class or group of unsecured creditors that would suffer least, if at all, on an insolvent liquidation of Powerhouse, but they are the class or group that is most prejudiced by the CVA, under which their claims against Powerhouse and PRG, as surety, are to be compromised by payment of a dividend that places no value on the very rights (i.e. the guarantees) which improved their position over all other unsecured creditors and which were intended to and would benefit the guaranteed landlords on the insolvent liquidation of Powerhouse.
>
> [108] Such an illogical and seemingly unfair result could not have been achieved if there had been a formal scheme of arrangement under [s.425 of the Companies Act 1985, now s.899 of the Companies Act 2006]. It is common ground that, under such a scheme, the guaranteed landlords would have been in a class of their own, separate from other unsecured creditors. Moreover, the scheme would not have needed to include, and would not have included, creditors who were to be paid in full. Accordingly, as was accepted by [counsel for the company], the guaranteed landlords could and would have vetoed any such scheme. The only reason a different result has been achievable with the CVA is that all creditors form a single class for the purposes of a CVA, and that class includes every creditor entitled to a notice of the meeting to approve the CVA, including creditors who would be paid in full. In effect, the votes of those unsecured creditors who stood to lose nothing from the CVA, and everything to gain from it, inevitably swamped those of the guaranteed landlords who were significantly disadvantaged by it."

97. I also have in mind the broad test of judging the position from that of the reasonable and honest person and whether they would or could vote in favour of the scheme (see discussion in *SISU Capital Fund Limited v Tucker* [2005] EWHC 2170 (Ch) at [75] to [78]). In my judgment this is not a different test or approach to that discussed in the *Mourant & Co Trustees Ltd* case. It is a helpful tool in considering whether there has been "unfairness".

Findings and discussion

98. The first question is that relating to the rent free period granted to Simple Structures, the tenant of Unit 3. The evidence of such agreement is contained in two letters dated respectively 19 March (from Mr Wilkinson described as "Managing Director" of Simple Structures Limited) and a reply from Dealmaster dated 27 March 2018 from Mr Shepherd as director of Dealmaster.

99. The letter from Mr Wilkinson refers to a meeting and recent conversations and thanks Mr Shepherd for is agreement to provide help "to our business needs". The material part of the letter is as follows:

> "*Many thanks for agreeing that Simple Structures Limited can occupy Unit 3 at Oaktree Business Park until the end of February 2023 rent free notwithstanding the current lease providing that the non-domestic business rates are paid in a timely manner*."

100. The response (so far as immediately material) is as follows:

> "*I am writing to confirm the following terms are now contractual amendments to the lease dated 7 October 2016 and will be deemed to take effect from 1 March 2018.*
>
> *The amendment to the lease are as follows:*
>
> - *Rent will be waived and will now be charged at £ nil/month until Feb 2021*
> - *This rent-free period will cease on the 1 March 2023 at which time the rent will be payable at a level higher than market rent and will be determined by negotiations during the last quarter of 2022*
> - *The rent-free period will apply providing Simple Structures Limited continues to pay the business rates raised by Richmond District Council on Unit* 3"

The response went on to say that both letters would be kept with the lease as an appendix. Mr Shepherd was seeking legal advice as to whether a formal amendment to the lease was required.

101. In oral evidence Mr Shepherd asserted that the agreement was that the rent to be agreed under the lease would be at least 50% more than the current rent. I do not accept this evidence. It is not referred to in the letters evidencing the agreement, is in fact inconsistent with them, is not mentioned anywhere in the correspondence with ASW, is not mentioned in the written evidence, and is not mentioned in the experts' respective reports as information that they had received. This was the one respect in which I considered Mr Shepherd's natural enthusiasm carried him away and caused him to overstate the position. It does not however cause me to consider that as a generality his evidence was unreliable. Further, I do not consider that Mr Shepherd was seeking to mislead the court. At the time he gave the oral evidence I consider that he had

persuaded himself that it reflected the truth. Nevertheless, as a generality I have considered his evidence with care and not accepted it where it is not at the least consistent with the other evidence in the case.

102. Four points are taken as to the validity and effect of this exchange of letters. First, their authenticity and the genuineness of the transaction are challenged. Secondly, it is said that Mr Shepherd was a director of both Dealmaster and Simple Structures Limited at the time and that he could have signed both letters. Thirdly, it is said that the letters do not match in terms of offer and acceptance so that no agreement has been reached. Fourthly, it is said that the agreement, if otherwise valid, is prima facie challengeable on the grounds that it amounts to a transaction defrauding creditors.

103. I reject all these points.

104. First, it is true that the CVA proposals talk in terms of the rent free period being 3 years whereas it was either 5 years (originally) or, at the time of the CVA, had some 3 years 6 months to run. However, the explanation for the use of the number "3" in the proposals was not really explored in cross-examination and it is quite possible that it was no more than a mistake or a typo. Secondly, it is true that the letters are not in terms mentioned in the email from Mr Hines of 23 August 2019 setting out the explanation for the valuation of the Property contained in the proposals. However, that letter does refer to there being a rent free arrangement in place. This is not enough to begin to challenge the authenticity of the letters or the genuineness of the underlying agreement which those letters are said to evidence.

105. As regards the fact that Mr Shepherd could have signed both letters that may be true. He is recorded at Companies House as being a director of Simple Structures Limited from 1 July 2016 to 13 September 2018 and from 12 January 2019 to 1 August 2019. However, this was not really explored in cross-examination. On the face of things Mr Shepherd was negotiating with the managing director of Simple Structures Limited and there was therefore every reason for the letters to be signed off by different individuals. Indeed, there would be a question of Mr Shepherd's respective directorial duties if he was negotiating with himself.

106. A point was made by RDC that the person listed as having significant control of Simple Structures Limited is Uniglobal Limited. The sole director of Uniglobal Limited was, at the relevant time, recorded at Companies House as being a Mr Christopher Whyatt. This gentleman assisted Dealmaster in its defence to the RDC rates liability order application. Mr Shepherd explained this on the basis that Mr Whyatt gave assistance but was not connected with Dealmaster. I accept this evidence. Some form of connection between Dealmaster and Simple Structures Limited was sought to be raised by RDC on these facts. Mr Shepherd denied that he was the beneficial owner of Simple Structures Limited at the relevant time. I note that the proposals for the CVA make clear in the relevant history that Mr Shepherd was at the time of his acquisition of Dealmaster, a director of Simple Structures Limited and refers to him as "the tenant" being keen to own the Property. It is unclear from this whether the reference to him being a tenant was simply a reference to his position as director or connoted some wider interest in Simple Structures Limited. I am also unclear as to whether there may have

been a change in ownership reflected by the different periods in which Mr Shepherd was a director. At the end of the day, the evidence as unclear and there was no detailed cross-examination on the point. I am unable to reach any conclusion that Mr Shepherd was the beneficial owner of Simple Structures at the time of the rent free agreement. In any event, I was unclear what point was being made by RDC regarding Mr Christopher Whyatt and Uniglobal. Some form of connection was being suggested but the alleged significance of this was unclear to me. Whatever the position, it did not seem to me to bear upon the issues of material irregularity, unfair prejudice or a suggested s423 challenge to the rent free agreement (if otherwise valid).

107. As regards the submission that the terms of the letters do not match, so there is no binding agreement, they only purport to evidence the agreement that was reached orally. I do not consider that there is anything in this point.

108. As regards the submission that the transaction might be liable to attack under s423 Insolvency Act 1985, in my judgment again this is simply not made out.

109. The suggestion is that by the time of the agreement, Mr Shepherd was on notice that RDC were claiming historic business rates. It is said that this was clear from a letter dated 7 February 2018 and that the proposals are misleading in referring to the RDC claims being intimated in April 2018. In fact, the letter of February 2018 asks for information about an alleged tenant and unpaid rates by that tenant. It does not make or intimate a claim against Dealmaster. The only correspondence before me shows that demands for rates were emailed to Mr Shepherd on 28 March 2018. That is after the first letter regarding agreement of a rent free period for Simple Structures Limited. Further, it is not so heinous that the Proposals referred to notification in April given that the notification appears to have been a mere matter of a few days before 1 April.

110. Furthermore, and in any event, as at March/April 2018 Mr Shepherd denied any liability of Dealmaster regarding the alleged rates liability. Ultimately, he lost on this issue (which depended on evidence from those involved some years before he had had an involvement with Dealmaster) but there is no evidence that he did not genuinely believe in the defence that he raised (or that he still believes in the same). The CVA proposals were made over a year later. The suggestion that the arrangement was put in place with a view to prejudicing the position of creditors is, in my judgment, one for which there is simply no evidential foundation on the facts before me. The most that was suggested in the skeleton argument for RDC was that this transaction was something a liquidator might want to look into.

111. There is a further point in any event. There is no suggestion that the original expert valuation of Mr Fraser was in any way improper or one that could not have been relied upon had it been produced at the time of the CVA proposals being promulgated. He is of the view that the letters are valuation significant whether or not strictly legally binding because they reflect the fact that rent was not being paid. His original valuation was premised on that basis. In those circumstances, I am not satisfied that it is clear that the issue of the validity of the agreement would in any event have been considered further by a valuer at the time.

112. In these circumstances., the valuation reached by the two expert valuers is one of £660,000 which suggests a dividend of 11.6p in the pound on liquidation. Although this may place RDC (and the other creditors within the CVA) in a marginally worse position than on a liquidation, it seems to me that in this particular case that does not give rise to unfair prejudice.

113. The reasons for my conclusion are as follows. First, I am satisfied that the valuation contained in the proposals was genuinely put forward and was one that was not simply plucked form the air nor put forward dishonestly. Although as the email from Mr Hines in August 2019 did acknowledge a higher valuation was possibly justifiable, read in context it is quite clear that the email was also saying that a lower valuation than that was justified. Mr Shepherd did not resile from the valuation put forward. Secondly, that valuation was in fact higher than the one that Mr Foster originally reached. It is not suggested that that valuation was in any sense improper or negligent. The variations in the valuations on all sides shows how much valuation is an art not a science in this case. Thirdly, it was perfectly clear to all the creditors to be bound into the CVA that the valuation was a directors' valuation. If they wished to rely upon that valuation without seeking a further professional valuation it was open to them to do so and a perfectly reasonable course to take. Fourthly, even if the final (lower of the two) valuations of the joint experts is applied, the difference in dividend is not significant. Further, the illustrations and estimates are just that. There was always the possibility that the market would change or that the market would not meet what is now the joint valuation figure or the figure in the estimated outcome/statement of affairs would be lower or higher than what the market would show to be the actual value of the Property. These were all risks that were open to the creditors to vote upon and decide. Finally, the creditors were all in one class in terms of their respective interests. This was not a case (such as the Sixty case) where some creditors were being disadvantaged by the votes of other creditors where, under the then Companies Act scheme of arrangement regime, it would not have been possible for the arrangement to have gone through because of the need for separate class meetings in such circumstances.

114. Accordingly, on a vertical comparison, I am not satisfied that RDC has been unfairly prejudiced, even if it has been prejudiced. I am not persuaded that RDC would necessarily have been in a significantly better position in a liquidation or that the higher value of the Joint Memorandum would in reality be achieved and within a reasonable timescale, but, even if it would have been, I consider that the decision of the creditors' meeting was one that a reasonable and honest person in the same position as the applicant might reasonably have approved (see the test propounded in *SISU Capital Fund Ltd v Tucker* [2005] EWHC 2170 (Ch) at [75]-[78]).

115. I also do not consider that there was any material irregularity arising from the figures put forward in the proposals for a valuation of the Property. That figure was, as I have held, genuinely put forward, was justifiable and it was transparent that it was a directors' valuation. Creditors must have known that there was a possibility that a professional valuation would have been different (though a professional valuation by Mr Ford in fact came out at a slightly lower figure). They took the decision not to vote against the proposals without a further professional valuation. It seems to me that this

was a decision which a reasonable and honest person in the position of a creditor at that meeting could properly have voted for.

Sterling Outcomes Limited ("Sterling")

116. As I have said, two matters are relied upon as demonstrating unfair prejudice/material irregularity. The first is said to be that the debt in fact owed to Sterling was less than stated in the estimated outcome statement and statement of affairs circulated as part of the proposals for a CVA. As with the valuation of the Property issue it is said that this artificially deflated the estimated dividend on liquidation. The second suggestion is that there has been unfair prejudice to RDC arising from Sterling being left out of the CVA and being able to recoup its debt in full.

117. The position explained in the CVA was that Cambridge & Counties Bank Ltd (the "Bank") had a registered charge against Dealmaster's assets. This was in relation to lending to Sterling. Paragraph 3.17 of the proposals made clear that it was anticipated that the floating charge held by the Bank would realise nothing for creditors in a liquidation because it was expected that the Bank would be paid entirely under its fixed charge following the sale of the secured assets (the Property). The estimated outcome statement showed, on a liquidation, a debt to Sterling of £588,850 being met from the Property. Both the Bank and Sterling were excluded from the CVA as was the Property.

118. In the correspondence between ASW and Mr Hines in August 2019, Mr Hines explained that no debt was currently owing to the Bank. Rather sums were owed to Sterling by Dealmaster. Nevertheless, the Bank had a charge over the Company's property. As at 31 December 2018 the balance sheet of Dealmaster, sent by Mr Hines to ASW showed a debt owed to Sterling of £609,757.

119. It appears from the available documents that Sterling is the borrower vis a vis the Bank. The Bank however has a cross-guarantee from Dealmaster in relation to that indebtedness and also a charge over Dealmaster's assets (both fixed and floating and including over the Property). As explained by Mr Shepherd, the ultimate liability of Dealmaster to the Bank is met by Dealmaster. This is effected by Sterling invoicing Dealmaster for sums that it pays to the Bank in terms of interest and/or capital repayments.

120. As a generality, in oral submissions, and despite the evidence of the accounts, ledgers and bank statements, and as with the Hightide debt, Mr Woolrich submitted that the court could not be satisfied that there was any debt owed by Dealmaster to the alleged creditor, Sterling, because, in effect RDC had not been provided with a copy (I doubt a copy would suffice, I suspect RDC would require the original, as they did not accept the counterpart copy of the shareholder agreement between Hightide and Sterling regarding the shares in Dealmaster as properly evidencing the agreement) of a loan agreement and precise details of every aspect of the loans and the payments between Sterling and the Bank and between Sterling and Dealmaster. Again, this seems to me to miss the point. The court acts on the balance of probabilities and the evidence before it. A creditor in this context challenging a debt said to be owed to another is not entitled to require the production of every single piece of paper that relates to that debt and

expect the court to conduct some sort of forensic full audit into each and every relevant aspect of the debt over time. I turn from the general to the particular.

121. The first issue is the amount of the relevant indebtedness of Dealmaster to Sterling and Sterling to the Bank. As I have said the CVA proposals show some £588,850 as owing by Dealmaster to Sterling. However, as at 26 July 2019 the account balance between the Bank and Sterling was that Sterling owed the Bank £554,158.89. It is said by RDC that therefore the CVA proposals overstated the debt owed to Sterling such that the estimated position on a liquidation should have taken the lower figure into account which results in an estimated dividend of 11p per pound rather than the 9.4p in the pound estimated dividend in the CVA. Either creditors were misled and there is a material irregularity and/or the effect of the CVA is to unfairly prejudice RDC because it is estimated to get less in the CVA than it would in a liquidation. The information about this apparent discrepancy arose from Mr Shepherd's second witness statement where he was justifying the fact that there were relevant debts in question and what would happen were the Bank not to be paid. This reflected the fact that the then case being put was that the CVA resulted in an unjustified differential treatment of creditors.

122. In subsequent evidence, (backed by applicable bank statements) Mr Shepherd confirmed that the reason for the apparent discrepancy was that at the relevant time Sterling had discharged more of the Bank's debt than it had had repaid to it by Dealmaster. I accept that evidence. It also follows that no question of material irregularity arises.

123. The second issue is whether there is an unjustified differential treatment of Sterling, who is not within the CVA, compared with other creditors who are within the CVA. In my judgment, the short answer to this point is that the so-called differential treatment is entirely justified. Sterling is dependent on Dealmaster to re-imburse payments made to reduce the debt to the Bank which it, Sterling, discharges first. The Bank is totally secured as regards its lending. If Sterling does not repay the money, then the Bank can simply enforce its security. Further, if the debt is fully paid off by Sterling but there is no re-imbursement by Dealmaster then Sterling would be subrogated to the Bank's security. In effect, the debt to Sterling represents a debt ultimately indirectly due to the Bank which is fully secured against Dealmaster's assets. The so-called differential treatment is justified by this.

124. Further, and in any event, the retention of the Property and the servicing of the bank debt (indirectly) by Dealmaster were necessarily matters that were required to enable Dealmaster to continue trading, avoid liquidation, and pay funds into the CVA. It seems to me that the question of any so-called differential treatment was clear from the terms of the CVA proposal and that it was a matter that the creditors could take a view on. I consider that the decision of relevant creditors to vote through the CVA was one that a reasonable and honest person in the same position as the applicant might reasonably have approved. Accordingly, I do not consider that the CVA gives rise to either any prejudice nor any unfair prejudice as regards RDC. No question of material irregularity arises in this respect.

Disposition

125. It follows that the application is dismissed. I invite the parties to agree a form of order, so far as they are able. To the extent that any matters cannot be agreed there will have to be a further short hearing.