

## Nero CVA challenge – part one: The pre-emptive strike (out)

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CVA challenges have been in the spotlight recently and the story continues with *Nero Holdings Ltd v Young* in which the court considered an application to strike out a CVA challenge claim. Although there is nothing ground-breaking in the court's reasoning to dismiss the strike out/summary judgment application, its detailed reasoning will offer some helpful guidance and assistance to those involved in these applications. It will also be helpful to know, following the hearing of the challenge application, how the Court tackles the position where a modification and/or material development occurs following the circulation of the CVA proposal, in particular where substantial votes have already been cast.

### Background

EG Group Ltd ("EG"), led by the billionaire Issa brothers, made an 11<sup>th</sup> hour offer to buy the shares of the Nero Group Limited; the parent company of Nero Holdings Limited ("NHL"), who was the subject of a proposed CVA.

Part of that offer allowed for the repayment of rent arrears to the landlord group instead of the 30p in the £ offered to most landlords under the CVA. EG still wanted the CVA to proceed on the other terms agreed but suggested an adjournment of the meetings for the offer to be considered and put to creditors.

The offer was rejected outright. The then nominees noted on the CVA website that an offer had been received for the shares in Nero Group Limited which did involve the payment of rent arrears to landlords of NGL, but that it had been rejected and the CVA timetable would continue. Later that day, a modification to the CVA was proposed by NHL / the nominee that NHL would use its "best endeavours" to procure a sale on terms that protected the creditors' position, although this information was only uploaded 4 hours before the voting deadline and creditors were unlikely to have seen it beforehand.

The votes were counted and the CVA proposal was approved.

A group of landlords issued a challenge application pursuant to s6 Insolvency Act 1986 citing that the CVA was unfairly prejudicial to the landlords and that there were material irregularities in relation to the proposal or its approval. This is scheduled to be heard in late July. The contention was that the CVA meetings should have been adjourned to consider the offer. It was also noted that at the point

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the modification was proposed, over two thirds of creditors had already voted by electronic voting. They were treated as having voted for the modification; the court noting that it was unlikely that most even saw it (or the information regarding the offer) before the voting deadline.

## **Application for strike out/summary judgment**

NHL sought to stop the challenge by applying to strike it out and/or summary judgment.

The court considered that for the purpose of the summary judgment/ strike out application, they had to examine whether NHL could show that the challenge application was bound to fail. Key to this was whether Young had a legitimate interest in the relief he was seeking.

Young was one of a group of landlords being financially backed by EG to mount the challenge application. Whilst compromises have been reached with other landlords, only Young was left standing by time of the strike out application. Note that, EG had no standing to challenge the CVA itself, so Young's support was and remains critical. EG had offered assistance to Young not just in terms of costs, but also offered £100,000 (an amount well in excess of rent arrears owed to Young) for Young to decline any offer made by NHL to settle without EG's consent.

NHL argued that Young had no legitimate interest in the outcome of the challenge application and that the case was been run for EG's benefit.

## **The court's view**

Whilst it was clear that EG had its own agenda and was offering financial incentives for Young, the court had to consider Young's own evidence. It concluded that Young was *"apparently making all decisions in relation to the Challenge Application and even though he would have been unable to accept the Company's settlement offer without the consent of EG, his evidence is that he would have rejected it anyway as he wants to be in a position to consider his options to secure his future rental income after the current CVA has been revoked."*

The Court also found Young had a legitimate interest in the relief sought stating that he was seeking to achieve a *"better position than he is now and able to dictate his future in an uncertain market"*.

NHL's application from strike out and/or summary judgment was dismissed, and the challenge application is scheduled to be heard in the next few weeks.

## **Conclusion**

As noted above, there was nothing ground-breaking in the court's reasoning to dismiss the application, however it was interesting to see an example of the court rejecting an attempt to block a challenge where clear financial support and incentives were being offered by a third party with no direct interest in the CVA.

We now await with anticipation the court's view on the challenge application, as it may give some judicial insight regarding last minute offers and modifications, in an age where electronic voting is so popular, and creditors may have already voted before the modification is proposed.

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