DEBENHAMS RETAIL LIMITED

RULING ON THE FORM OF ORDER FOR EXPEDITION – THE ISSUE 5/6 POINT

RULING

This short ruling deals with the question that has arisen in the finalisation of the order I made for an expedited trial of this matter. That issue is the extent to which what is now Issue 5, formerly issue 6, should be open to the applicant insofar as it seeks to raise the question of whether the prior security was vulnerable to being set aside under sections 239 and 245 of the Insolvency Act 1986.

In my ruling on the expedited trial, I determined that it would be proper and appropriate (and possible) to have a sensible expedited trial provided that the old Issue 5 was left out. That was because it was accepted that it would in substance involve the trial of a potentially complicated preference claim in a context in which the claim was not being brought by insolvency practitioners and in which a great deal of evidence and disclosure would be likely to be required. I decided that that was simply not possible or practicable in the context of the sort of speedy trial that the applicants sought. The Issue (then Issue 5) would have to be removed from the scope of the speedy trial (and therefore of the application).

It was no part of my intention at the time that Issue 6 should be removed or modified even though that Issue raised the question of the arguability of the preference claim. I considered (whether or not I said so) that questions as to whether the prospect was sufficiently arguable that it ought to have been mentioned in the CVA documentation did not involve a full-blown trial of the issue and could be dealt with within the speedy trial. If matters had rested there, I would have expected the Issue as formulated in the original Position Statement of the applicants to remain. So far as the present dispute is a dispute as to what I intended, that means that the dispute falls to be decided in favour of the applicants.

However, the other parties have raised the question as to whether that really works. They have considered the revised Position Statement of the applicants which reproduces much of the material which was deployed in relation to old Issue 5 in support of the claim under old Issue 6 (new Issue 5). They seem to consider that the present terms of the Position Statement involve the same sort of material, and the same sort of arguments, as I have already rejected as being appropriate to the speedy trial.

I do not agree with them. The question which seems to arise in relation to new Issue 5 is whether or not it was sufficiently arguable that the possibility of an administration ought to have been raised in the CVA documents. The applicants have set out shortly what the material is from which they will invite the Court to infer that there was such a possibility. The applicants will not be seeking to

establish that the preference was actually a fact. How the respondents seek to deal with that is a matter for them. They may argue that that material, by itself, is insufficient (I would not expect them to do that). They may seek to put in explanations which counteract the suggested inferences. Quite how far they go in that respect will be a matter for them, but in my view it would be neither necessary nor appropriate for them to deploy the full sort of case that would have been necessary if they were fighting an actual challenge based on preference. If they have material on which they can say that there was no reason to mention the possibility of a preference then they can, and doubtless will, deploy that material. The trial judge will give that material whatever weight he or she thinks fit. I do not envisage the material being tested as it would be if the matter were a full-blown preference claim, and that will be taken into account by the trial judge.

For my part I do not envisage anything like a full-blown trial of the preference claim, though ultimately how the matter is to be handled will be one for the trial judge. No doubt the position will become clearer when the respondents put in their respective Position Papers. If it turns out that the issue develops in such a way as makes it untriable at the expedited hearing, then no doubt steps can be taken to make sure that that position is resolved. That is not to be taken as any form of acknowledgement that if the respondents put in a huge amount of material apparently in an attempt to derail the speedy trial then they will succeed in doing so. The purpose of my ruling was to produce a trial which, on the present material, seems to me can be properly conducted, with proper regard to fairness to all parties, within the time constraints. If my perception about that turns out to be wrong, then adjustments may have to be made. Having said that, my present belief is that they will not have to be.

So far as evidence is concerned, the first respondents invite me to make an order that the applicants indicate which parts of their evidence they still rely on, or, putting the other way round, which parts of their evidence they no longer rely on. I am content to do that, in the form of an order that they should indicate whether any and if so which, parts of the evidence filed hitherto they will no longer be relying on at a trial. It may be that there will be little or no reduction in that material, but there is no harm, and possibly some good, in requiring that that be done.

I therefore rule that my order should not exclude what is now intended to be Issue 5 from the scope of the speedy trial. I have not considered the precise wording which achieves that. I assume the parties can work it out with the benefit of this ruling. I also rule that the applicants shall, by close of business on Monday, indicate to the other parties which parts of Ms Teal's evidence are no longer relied on.

Mr Justice Mann