

# Possession

*What are the root causes of the trouble with insolvency powers and commercial property and is there an easier way to secure possession?*

*Update*

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# INTRODUCTION

- Recent cases in relation to CVAs and RPs appear to go against landlord's interests BUT
- Recent CA decision in *Adler* provides some hope to those with with property rights in RP cases – the start of increased awareness of the 'cram down' of landlords – are they really justified ?
- CVAs – silent – calm before the storm or is the current rental property value at a level where no justification to seek to reduce?

# Insolvency law reform- a bit of history !

- Cork report ( 1982) questioned the traditional view of insolvency – bankruptcy and liquidation
- Schemes of arrangement existed but their use was more outside of insolvency
- Cork proposed alternatives to liquidation and bankruptcy – administrations and CVAs
- The seeds of the rescue culture – popular with successive governments seeking growth

# What is the law of insolvency all about ?

- The pari passu rule -when you are heading into insolvency, treat all creditors the same – unsecured creditors – confirmed in *Adler*
- rights of secured creditors may be impacted by re-organisation of the debt but otherwise not affected save temporary measures in administrations and moratoriums
- Those who have some sort of beneficial interests – not directly affected – *Re Lehman Brothers International ( Europe ) [2009] EWCA Civ 1161*
- Note emergence of ‘property rights’ – commercially like secured interests but lacks the fundamental characteristics of a security interest- *Re Debenhams [ 2019] EWHC 2441 ( Ch)*

# Recent reforms – RPs and moratoriums

- Restructuring plans – available to companies in financial difficulties – procedurally similar to schemes of arrangements but with a cross class cram down
- Court sanctioned – fundamental difference with CVAs
- All about comparisons – designed to improve the dividends available to creditors – need to identify the comparator
- RPs – creditors who have a genuine economic interest in the company
- Cross class cram down
  - None of the members of the dissenting class would be *worse off* that they would be in the event of the relevant alternative; and
  - The RP has been approved by at least one class of creditors or members who would receive payment or have a genuine economic interest in the company in the event of the relevant alternative ( 75%)

# Key principles

- The approach to CVAs and RPs and schemes of arrangements is the same – apply to creditors. Those with secured interests, beneficial interests or property rights are not affected in relation to those rights – *Instant Cash Loans [2019] EWHC (Ch) 2795* – surrender of leases
- The compromise of monetary claims are capable of compromise in both. Note that these will undoubtedly have an effect on property rights in that the amount of rent will inevitably be reduced thereby not allowing for possession/ forfeiture in relation to arrears of the original rent in the lease
- Note that court sanction for RPs/schemes require exercise of discretion and intense scrutiny – increased scrutiny since *Adler*?
- CVAs – challenges also has a discretion to exercise and consider position of creditors - unfair prejudice of scheme and material irregularity

# *Re AGPS Bondco plc [2024] EWCA Civ 24 (Adler)*

- RP which proposed a wind down of a German corporate rental property group. The RP varied the terms of the senior unsecured notes but left the maturity dates unchanged ( 2024-2029). This placed at risk the 2029 maturity date note holders in the event of non payment
- CA allowed appeal and held:-
  - (a) satisfaction of 'no worse off' not determinative – vertical comparison
  - (b) horizontal test- principal component – pari passu test- failed
  - (c) whether there is a fairer or better plan which might be available
  - (d) level of support in other classes for RP irrelevant

# Effect of Adler

- RPs subject to greater scrutiny – is there a fairer or better plan which might be available – not a race to obtain the RP most advantageous to bondholders ?
- Looking for a real negotiation ? But do you have a place at the table ?
- Approach is to enable creditors to have early access to documents – court made it clear that burning platforms are unacceptable
- Court will enquire, if no equality of treatment ( horizontal comparison) how value sought to be preserved or generated by the RP over and above the relevant alternative is to be allocated between the different creditor groups

# Effect for landlords – Virgin Active – a different outcome ?

- Depends on terms and type of RP – is it an attempt to create advantages to bond holders which cannot be justified ? If increased capital is being provided, those creditors may be entitled to a differential treatment
- Landlords will still need to be prepared to fund a costly challenge- be prepared – act as a group for cost of valuations etc
- Costs ? Costs order not necessarily to be made against unsuccessful challenger – depends on view of court – did challenge enable the court to really stress test the RP? Have amendments been proposed ?

# RPs post Adler

- *Re Plusholding GmbH* – amended plan sanctioned ( note this case pre dated CA in Adler
- *Re Project Lietzenburger Strasse Holdco SARL* – amended plan sanctioned – amendments as direct consequence of
- Concern about the level of professional fees (*Re CB&I UK Ltd*) – further negotiations took place and increased offers made to dissenting creditors during the RP sanction hearing process.
- *Re Tasty & TUALT*- Richards J granted permission to convene a meeting but questioned fairness - an issue for sanction hearing

# Suggestions

- Insolvency event clause in lease to cover RPs as well as traditional processes
- As a landlord, be proactive – know your tenant's finances and any change – keep an eye on secured debt being acquired by the distressed debt market participants
- Any CVA or RP proposal, push for early disclosure of the valuation evidence etc – don't take 'confidentiality' as an excuse – confidentiality rings sort that out.
- Be vigilant for burning platforms and make sure Court is aware of refusals to provide documentation, valuations etc – the court has a discretion to exercise
- CVAs – be prepared to act fast if contemplating a challenge – sometimes worth issuing challenge as a safeguard

# Conclusions

- No easy route to possession or to protecting property rights
- RPs – can still be crammed down but move to greater scrutiny and courts appear to be concentrating on what is the real alternative rather than what is the outcome desired by bondholders and others- Ra Tasty – fairness
- Real debate about RPs and purpose – a real alternative to insolvency rather than an attempt to present a scenario benefitting only a select few
- RPs – to advise need to understand what is being proposed and how the terms of the RP are ‘fair’ – find others in the same position
- Need to ensure that a CVA is not attempting to push the parameters further – if no challenge, it is valid !

# Thank you



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