Possession

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

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Introduction

- Recent cases in relation to CVAs and RPs appear to go against landlord's interests

- No longer in the exceptional world of coronavirus but the feeling of increased difficulty for landlords to obtain possession persists – rent reduction imposed, arrears compromised for little value

- The new insolvency procedures especially Restructuring Plans not seen as balanced in relation to those with 'property rights'

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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

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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
- 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)*

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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 – two conditions :-
  - 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

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Key principles

- Same 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

- Monetary claims are capable of compromise in both. 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

- court sanction for RPs/schemes require exercise of discretion and intense scrutiny
- CVAs – challenges also has a discretion to exercise and consider position of creditors - unfair prejudice of scheme and material irregularity

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Insolvency powers – all about pushing limits

- Development of ‘retail’ CVAs and use of RPs to restructure ailing businesses viewed as key tools in the rescue culture
- the lobbying power of distressed debt market and insolvency practitioners is significant

- Frightened the government into the temporary COVID legislation which created and extended the relevant period but also introduced RPSs and moratoriums

- Landlords do not appear to have the same lobbying power – the rescue culture politics is all about saving jobs and businesses

- Preventing possession for a limited period – not seen as significantly detrimental
- Varying the rental obligation in monetary terms is acceptable providing ‘fair’ – valuation evidence – this alters possession rights

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Recent trends- unfairness and discretion

- *Re Virgin Active [2021]EWNC 1246(Ch)* – case of landlord cross class cram down – need to consider the evidence in the case – the alternative, valuation and economic interest –'out of the money'(no economic interest) and new moneys

- Challenges can be successful and court is not likely to be fooled – salutary case – *Re Nasmyth Group Ltd [2023] EWHC 988(Ch)* - RP refused – unfair to cram down HMRC

- To be able to challenge – need to have the information to test alternative and also to test valuation evidence or be able to attack the expert evidence presented to the court- *Great Annual Savings Company [2023] EWJC 1141(Ch)* - evidence not demonstrate HMRC would not be worse off

- Court is not impressed when the information is not provided early on

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Approach

- Insolvency event clause in leases 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 – is the RP fair?
- CVAs – be prepared to act fast if contemplating a challenge – sometimes worth issuing challenge as a safeguard

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Conclusions

- No easy route to possession or to protecting property rights when faced with insolvency powers
- Need to ensure that a CVA is not attempting to push the parameters further – if no challenge, it is valid !
- 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 – get HMRC on board?

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Thank you

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