

Landlords, CVAs and Insolvency

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Insolvency powers and landlords

- When will insolvency law powers turn the scales in your client's favour over CVAs and other restructuring vehicles and what are the associated risks ?
- Developments in CVAs, restructuring plans (scheme of arrangements), moratoriums
- Long running campaigns to increase restructuring tools in insolvency – **'rescue culture'** plus threatened recession, covid and covid effects

Where are we – CVAs

- *Debenhams* and the approach to property rights endorsed in *New Look/Regis*
- Appeal settled day before CA hearing
- Unfair prejudice challenge – factor if approval obtained by those whose claims are unimpaired voting in favour (*New Look*)
- Still need to act quickly ! 28 days for challenge issue !

Current position - landlords and CVAs

- Property rights – not pecuniary obligations- right to re-entry, surrender under property leases – what else?
- So reduce future rent to zero, but not interfere with rights of re-entry, etc
- But – will interfere- the rent payable is altered – so rights of re-entry in the future may change – if seek to enforce those rights, do so early on in CVA process
- Still ability to challenge – vertical/horizontal comparators – discretion
- Is there a better outcome in a different insolvency process ?

Future risks – retaining protection for property rights

- Emboldened insolvency profession pushing for property rights to go – some logic here
- Difficult to see how direct and indirect interference with property rights is a real distinction
- Should it all be left to the unfair prejudice test ?
- *Prudential Assurance v Powerhouse* – in principle, can prevent a landlord from enforcing a guarantee provided by a third party – BUT subject to challenge to unfair prejudice

Prudential v Powerhouse arguments

- Restricting landlords to unfair prejudice as a means of challenge effectively will reduce their rights – comparators and discretion
- Need to be alert to seek to argue against this
- Also – CVAs – no requirement to be ‘insolvent’, but the comparators are insolvency based
- Lack of compensation for loss in value of guarantee is a reason why challenge succeeded in *Powerhouse* and *Miss Sixty*

Restructuring Plans

- Court sanction – provides certainty- similar considerations to ‘unfair prejudice’
- ‘insolvency’ test – encounter or likely to encounter financial difficulties
- Secured debt and other debt can be crammed down
- Slow growth in landlord cases – cram down of landlords will depend on classes and where a majority of those ‘in the money’ vote in favour
- If can place landlords in same class, may decide to use RP – *Re MAB Leasing Ltd*

Concluding thoughts

- No good news for landlords from either developments in CVAs or RPs !
- need to be alert to the push to seek to modify the concept of property rights
- RPs will be used where companies consider can obtain the classes of creditors which assist
- Need to be aware of the insolvency comparator and what else can be a property right

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Raquel Agnello QC is a sought-after specialist in insolvency, company and commercial litigation.

She is also a highly-regarded expert in the area of pensions and insolvency, in particular the 'moral hazard' provisions. She has led on many high profile cases on behalf of the Pensions Regulator, including on Nortel and Lehman in the Supreme Court.

Her practice involves both advisory as well as litigation, including in many CVA cases. She advised the company and supervisors on the first New Look company voluntary arrangement, the supervisors in Arcadia CVA and the company in the Clarks CVA. Recent advisory risk assessment work includes include advising on the Johnston Press restructuring and acting for the trustees in Cobham PLC.

Since 2001, she has sat as a Deputy Insolvency and Companies Court Judge (formerly Registrars) hearing both corporate and insolvency matters.

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