



The potential for landlords to challenge CVAs – where are we now ?

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What is happening in the CVAs/insolvency market?

- CVAs – hot topic – ‘the retail CVA’
- Limited successful challenge – Debenhams – but not resolved the issue of the reduced rents
- What challenges remain open to landlords?
- Have these types of CVAs reached their peak?

CVAs- brief guide

- An out of court procedure – little recent case law
- All unsecured creditors to be treated equally
- Growth of CVAs treating different classes of creditors in different ways – landlords, but at the same time paying in full other unsecured creditors
- A recent litigation bubble ? Debenhams, Regis ?

Challenging CVAs – basics - s6 IA 86

- Unfairly prejudices the interests of one or more creditors – inequality of treatment – vertical and horizontal comparisons
- Material irregularity at or in relation to the meeting – includes appeal against decisions to admit creditors for voting purposes
- Discretion – even if exist – Court may not revoke/suspend CVA

Other types of challenges

- A term in a CVA which goes beyond the jurisdiction conferred on the CVA by s1 IA 86 – when a CVA term is not capable of being part of the CVA – a proprietary right
- No secret deals – Cadbury Schweppes v Somji [2001] 1 WLR 615
- What about creditors being paid in full voting to ‘cram’ down other creditors ?

Landlords

- Growth in some 'standard treatment' in retail cases involves:
 - Dividing landlords claims into categories – A, B, C, D
 - Proposing to pay category A landlords entire rent (save monthly)
 - Proposing 'haircuts' of various percentages in relation to others

Landlords (cont)

- Restricting right of re-entry/forfeiture by either replacing it with terms in the CVA or preventing the exercise after a period of time
- Category D landlords 'invited' to take back properties – compelled to take back
- Increased use of these types of terms – no real challenges until now – why ?
- Cost, discretion and vertical comparator

Discovery (Northampton) Ltd v Debenhams Retail Ltd [2019] EWHC 2441

- CVA challenges were dismissed, save....
- Court (Norris J) upheld the excess of jurisdiction point in relation to the 'forfeiture restraint clauses'
- No variation of a right of re-entry – property belonging to the landlord (not a security)
- CVAs can modify pecuniary obligations, upon breach of which right of re-entry may be exercised, but no modification of right of re-entry itself - rents as well as dilapidations claims etc can be compromised.

What can landlords now expect ?

- CVAs without the ability to modify the right of re-entry provide much less flexibility for the company- a decrease in use ?
- Inability to hand back the category D leases !
- Liability for rates will remain with the company
- Debenhams will be appealed

What challenges are still out there ?

- The 'contagion risk' – how to justify those creditors paid in full (including HMRC and the pensions scheme?) and those not paid in full (landlords....)- on evidence challenge in Debenhams failed – s6 challenge
- Those who will be paid in full vote to approve a CVA which does not affect them! – the 'cram down'/vote buying – not yet tested – beyond s 6 challenge?

Don't forget 'classic' challenges !

- Misleading proposal – material irregularity – the failure to deal with avoidable transactions – Regis – not going ahead !
- Voting values – another example of 'industry practice' – value placed on landlords claims
- Always check details of proposal – is it presenting an accurate picture ?

Increase in challenges? What does the future hold?

- Horizontal and vertical challenges plus discretion discourages challenges
- How to get round the striking down of 'forfeiture restraint clauses' – expect almost total reductions of rents etc payable under a CVA in category D – they want leases to be taken back ! Would that be challengeable?
- Waiting for a case.....

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Raquel 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. She was retained to advise the company and supervisors on the New Look company voluntary arrangement. She acted for the bondholders in Johnston Press restructuring.

In 2015 she was named Legal 500's Insolvency Silk of the Year. In October 2012 and October 2016, she was named 'Barrister of the Year' at the TRI Insolvency and Rescue Awards. In January 2012, she was selected as one of the 'Hot 100' by 'The Lawyer'.

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