PROPERTY LAW: NUTS & BOLTS II

INSOLVENCY ISSUES ARISING IN POSSESSION ACTIONS

Jacqueline Lean

Landmark Chambers

Introduction

1. In the current economic climate, it will come as no surprise that the number of individuals and companies becoming insolvent has increased dramatically over the past few years – although more recent figures indicate a drop in bankruptcies in 2011 and 2012,[1] tempered by a rise in other forms of insolvency.[2] Nor is it surprising that 'insolvency issues' are appearing more and more frequently in the property litigator's case load.

2. This paper seeks to set out an overview of the various insolvency regimes as they may impact on possession proceedings, residential and commercial, and to set out a few issues which merit consideration if there is a concern that the tenant or borrower is, or might be about to become, insolvent.

Personal Insolvency

Bankruptcy

3. There are 4 circumstances in which an individual may become bankrupt:

    - Presentation of a petition by the debtor himself;

[1] In 2010, the number of bankruptcies alone totalled 135,089. This fell to 119,850 in 2011 (http://www.bbc.co.uk/news/business-16868567) , and newspaper reports indicate that the bankruptcies in 2012 were at the lowest level since 2003 (http://www.guardian.co.uk/money/2012/aug/03/bankruptcy-falls-lowest-level).

[2] Specifically, Debt Relief Orders (DROs) – see again http://www.guardian.co.uk/money/2012/aug/03/bankruptcy-falls-lowest-level

- Presentation of a petition by a creditor who is owed more than £750 and does not hold security for the entirety of his debt (following service of a statutory demand);
- Presentation of a petition by the supervisor of a voluntary arrangement, in event of non-compliance with the terms of an IVA; or
- Presentation of a petition by a person who is bound, for the time being, by the term s of an IVA in the event of non-compliance with the terms of the same.

4. Bankruptcy is governed by Part IX of the Insolvency Act 1986.

5. The most important provisions, in the context of an existing or pending possession action, are s.283, and s.285.

6. S.283(3A) of the Act excludes the following from the bankrupt's estate:

- An assured tenancy or assured agricultural occupancy within the meaning of Part 1 of the Housing Act 1988, the terms of which inhibit an assignment as mentioned in s.127(5) of the Rent Act 1977;
- A protected tenancy within the meaning of the Rent Act 1977 in respect of which, by virtue of any provision of Part IX of that Act, no premium can lawfully be required as a condition or assignment;
- A tenancy of a dwelling house by virtue of which the bankrupt is, within the meaning of the Rent (Agriculture) Act 1976, a protected occupier of the dwelling-house, and the terms of which inhibit an assignment as mentioned in s.127(5) of the Rent Act 1977; or
- A secure tenancy, within the meaning of Part IV of the Housing Act 1985, which is not capable of being assigned, except in the cases mentioned in s.91(3) of that Act.

7. However, this must be read subject to s.308A, which provides that such a tenancy may be made part of the bankrupt's estate, upon notice of the same being given by the trustee in bankruptcy:

> **308A. Vesting in trustee of certain tenancies.**
>
> Upon the service on the bankrupt by the trustee of a notice in writing under this section, any tenancy—
>
> (a) which is excluded by virtue of section 283(3A) from the bankrupt's estate, and

(b) to which the notice relates,

vests in the trustee as part of the bankrupt's estate; and, except against a purchaser in good faith, for value and without notice of the bankruptcy, the trustee's title to that tenancy has relation back to the commencement of the bankruptcy.

8. Of more general practical impact is s.285 of the Act, which provides for a moratorium on legal proceedings against a bankrupt or his estate whilst a bankruptcy is pending or extant:

285.— Restriction on proceedings and remedies.

(1) At any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt.

(2) Any court in which proceedings are pending against any individual may, on proof that a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit.

(3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall—

(a) have any remedy against the property or person of the bankrupt in respect of that debt, or

(b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.

This is subject to section 346 (enforcement procedures) and 347 (limited right to distress).

(4) Subject as follows, subsection (3) does not affect the right of a secured creditor of the bankrupt to enforce his security.

(5) Where any goods of an undischarged bankrupt are held by any person by way of pledge, pawn or other security, the official receiver may, after giving notice in writing of his intention to do so, inspect the goods.

Where such a notice has been given to any person, that person is not entitled, without leave of the court, to realise his security unless he has given the trustee of the bankrupt's estate a reasonable opportunity of inspecting the goods and of exercising the bankrupt's right of redemption.

(6) References in this section to the property or goods of the bankrupt are to any of his property or goods, whether or not comprised in his estate.

9. "The court" for the purpose of s.285(3)(b) means the court seized of the bankruptcy proceedings. Any court may exercise the staying power in s.285(2) on proof that a bankruptcy petition is pending : *Re Eileen Davies* [1997] BPIR 619.

10. There is some conflict of authority regarding the prohibition on commencing proceedings without the permission of the court contained in s.285(3). One view which has been adopted is that the provision should be construed purposively, and that permission can be granted after proceedings are commenced, thus making good the failure to do so prior to issue : this was the approach adopted in *Bristol & West Building Society v. Saunders* [1997] BCC 83.

11. This approach was not, however, followed in *Re Taylor*[3] [2007] Ch 50, H.H.J Kershaw considering that the grant of permission was a condition precedent to the court's jurisdiction to determine the substantive matter before it, and thus proceedings instituted without leave were void as against the bankrupt individual. This approach was thought o be consistent with the majority approach in *Seal v.Chief Constable of South Wales Police* [2007] UKHL 31, considering the issue in civil proceedings in general.

12. *Re Taylor* was not, however, followed in *Bank of Ireland v Colliers International UK Plc (In Administration)* [2012] EWHC 2942 (Ch) [2013] 2 WLR 895 which considered a number of the formerly conflicting authorities, including *Saunders* and *Re Taylor*, concluding that *Saunders* approach was correct.[4] This would now seem to be the preferred approach - at least unless and until there is higher judicial consideration to the contrary.

Residential Possession Proceedings – ASTs, secure tenancies, and protected tenancies

13. In terms of possession proceedings of a property let under an AST, secure tenancy or protected tenancy (or otherwise falling within s.283(3A) of the Act) it seems that the s.285(3) moratorium does not bite:

[3] Also known as *Davenham Trust Plc v. CV Distribution (UK) Ltd*

[4] David Richards J also considered, in his detailed judgment, *Seal v Chief Constable*, noting that it was clear that particular factors arising in the mental health context led to the conclusion in that case, and that "*There is no suggestion in Seal that Re Saunders was wrongly decided; quite the reverse. It is to be noted that Re Taylor was cited in argument*" (Paragraph 19). Reliance was also placed on the general approach to provisions requiring prior permission restated by the Court of Appeal in *Adorian v Commissioner of Police of the Metropolis [2009] EWCA Civ 18, [2009] 1 WLR 1859.*

14. In *Harlow District Council v. Hall* [2006] EWCA Civ 156, the Council obtained an order for possession on grounds of rent arrears, requiring the defendant secure tenant to give up possession on or before 9 February 2005. Enforcement of the order was suspended on terms that the defendant paid the current rent together with the arrears and costs in instalments of £10 per week. On 10 February 2005, the Defendant become a bankrupt on his own petition, which petition included those rent arrears. The Defendant then applied to have the possession order set aside on the grounds that the arrears and costs were debts proveable in the bankruptcy and the order was therefore in breach of s.285(3), in that it was a remedy against his property in terms of those debts. That argument was rejected by the district judge, on appeal by the circuit judge, and on further appeal by the Court of Appeal, who held that:

    - The secure tenancy had been brought to an end on 9 February 2005, and thus the maintenance of the order did not constitute a remedy against the defendant's property precluded by s.285(3). While it subsisted, the benefit of the secure tenancy was the defendant's property, but it had ceased by the time the bankruptcy order was made. (Paras 13-14 of the judgement)
    - Such consequences were entirely consistent with the purpose of s.285 of the Act, being to preserve the estate of the bankrupt for the benefit of his unsecured creditors. *"The benefit of a secure tenancy does not best in the trustee in bankruptcy so there is no property to preserve in that respect"* (Para 17 of the judgment – my emphasis)

15. Sir Andrew Morritt C continued, at para 17:

    "The court will fix the sum to be paid in respect of the arrears and current use and occupation in a sum the bankrupt can pay out of current income which, in the absence of a notice under section 307 or an order under section 310 of the 1986 Act, does not vest in the trustee either. As the judge pointed out in his judgment, provided the cost of the accommodation is not too high and is within the bankrupt's current income the trustee may be expected to facilitate the continued occupation by the bankrupt."

16. Although not strictly necessary to do so, Sir Andrew Morritt C went on to consider whether the position might have been different if the bankruptcy order had been made before the date on which the defendant had been ordered to give possession of the property to the claimant:

"19 In my view the change in the order of events would have made no difference in the outcome. In Ezekiel v Orakpo [1977] QB 260 the court was concerned with a lease which had been forfeited for non-payment of rent. The lessor then took proceedings for possession. The tenant claimed that the action was invalid because a receiving order had been made against him between those two events. The relevant legislation was then contained in section 7 of the Bankruptcy Act 1914 in materially the same terms as section 285(1) and (3) of the 1986 Act. The Court of Appeal rejected the tenant's contention on the ground that the claim for possession was not a remedy against the tenant's property. Shaw LJ said, at pp 267–268:

> *"It is clear that the section intends to inhibit any form of remedy or action which is directly designed to enforce payment of the debt which is owed. What has first to be considered is whether an action in which an order for possession is sought where a lease has been forfeited for default in payment of rent, comes within the terms of section 7(1) at all. If it does not, it is not necessary to get the leave of the court under section 7 before commencing such an action. In our view, an action for possession following the forfeiture of a lease is not within the terms of the section, and this is so whatever the ground of forfeiture to which the lessor has recourse under the covenants in the lease. The nature of the action is the same in every case, namely, that the right and interest of the lessee to possession has been terminated before its natural expiry in pursuance of a contractual provision in his lease so that he become a trespasser if he continues in occupation of the premises. The obverse of this situation is that the lessor becomes entitled to possession on forfeiture of the lessee's interest. The action for re-entry is in the nature of an action in trespass. It is not a remedy against the property of the debtor in respect of a debt, notwithstanding that the occasion of the forfeiture is default in payment of the rent reserved by the lease. The consequence of forfeiture (subject to the power of the court to grant relief) is to determine the lessee's interest. It is not a remedy enforcing payment of the rent due and it is not within the ambit of section 7(1)."*

20 Plainly there are differences in the case of a secure tenancy because an order of the court is necessary to terminate it. But assuming an order to have been made sufficient to terminate the secure tenancy for the purposes of section 82(2) of the 1985 Act, then, as it seems to me, the subsequent continuance or enforcement of the order is to the same effect as a possession action following forfeiture of a lease, and, as in Ezekiel v Orakpo, does not constitute a remedy enforcing the payment of the arrears of rent. And that is so, in my view, whether the bankruptcy order is made before or after the date on which possession of the dwelling house is to be given pursuant to the order"

17. Chadwick LJ concurred (and perhaps went, expressly, a little further) in his judgment:

"27 ... I share his view that the outcome would have been the same if the bankruptcy order had been made, say, on 8 February 2005. And I would take the same view if the possession order had been made in the Thompson form-so that the secure tenancy was to be treated as continuing under the possession order at the date when the bankruptcy order was in fact made (on 10 February 2005). The basis for that view is the decision of this court in Ezekiel v Orakpo [1977] QB 260 that proceedings for forfeiture on the grounds of non-payment of rent are not to be treated as "a remedy against the property of the debtor in respect of a debt" for the purposes of the provisions for the protection of

the bankrupt and his estate now enacted in section 285 of the Insolvency Act 1986. Although the analogy between proceedings for forfeiture under the general law and proceedings for possession under Part IV of the Housing Act 1985 is not exact, the reasoning in Ezekiel v Orakpo is, to my mind, equally applicable to a case where possession of premises held under a secure tenancy is sought under the statute.

28 It would, I think, be unfortunate if the outcome in cases of this nature turned on whether the bankruptcy order was made just before or just after the possession order; and equally unfortunate if the outcome turned on whether the possession order was made in the Thompson form or in the form in the present case. I am satisfied that that is not the position."[5]

18. In *Sharples v Places for People Homes Ltd* [2011] EWCA Civ 813, the Court of Appeal had to consider 2 appeals which raised "*common issues about the effect of a person's insolvency on the right of a landlord to obtain an order for possession of a dwelling let on an assured tenancy on the ground of rent arrears*." In the first appeal, the tenant was made bankrupt on 14 May 2009 and the order for possession made on 19 May 2009. No order for money judgment was made in respect of the rent arrears, the district judge considering they were debts proveable in the bankruptcy. In the second, a debt relief order was made on 27 April 2009(which included the rent arrears), and a conditional suspended order for possession made on 12 August 2009, together with a money judgment for the rent arrears.

19. The Court of Appeal reviewed the cases of *Ezekiel v. Orakpo* [1977] QB 260, *Razzaq v. Pala* [1997] 1 WLR 1336, and *Hall*, and further considered whether s.285(3)(b) should be read subject to the limitation express in s.285(3)(a), namely that it only applied in proceedings in respect of provable debts. Etherton LJ summarised the principal points made in his judgment at para 95 of his judgment:

1)an order for possession of property subject to a tenancy, including an assured tenancy, on the ground of arrears of rent, which are provable in the bankruptcy of the tenant, is not a "remedy ... in respect of that debt" within IA s. 285(3)(a);

2) that is so, whether the order is an outright order for possession or is a conditional suspended possession order;

[5] The reference to "the Thomson form" is a reference to the order of the form made in the case of *Thompson v. Elmbridge Borough Council* [1987] 1 WLR 1425, as considered by Millett LJ in *Greenwich London Borough Council v. Regan* (1996) 28 HLR 469, providing that judgment for possession "*shall not be enforced for 28 days in any event and for so long thereafter as the defendant punctually pays to the plaintiff or his agent [arrears of rent etc] by [weekly] instalments [of a specified amount]",* and not at all once all the arrears were paid off.

3) IA s.285 (3)(b) is implicitly limited to legal proceedings against the bankrupt "in respect of that debt"; that is to say, it is qualified in the same way as IA s.285(3)(a);

4)accordingly, proceedings for an order for possession of property subject to a tenancy, including an assured tenancy, on the ground of rent arrears, in which no claim is made for arrears provable in the tenant's bankruptcy, are not subject to the automatic stay in IA s.285(3)(b);

5) an order for possession of property subject to a tenancy, including an assured tenancy, on the ground of arrears of rent, which are the subject of the tenant's DRO, is not a "remedy in respect of the debt" within IA s. 251G(2)(a), whether the order is an outright order for possession or is a conditional suspended possession order;

6)proceedings for possession of property subject to an assured tenancy on the ground of rent arrears, which are provable in the tenant's bankruptcy or are the subject of the tenant's DRO, should not normally be stayed under IA s. 285(1) or (2) or IA s. 251G(3);

7)on the hearing of such proceedings, no order can be made for payment of such arrears; nor should a suspended order for possession be made conditional on payment of such arrears, but it should be made conditional on payment of any other arrears (i.e. those not provable in the bankruptcy or subject to the DRO) and current rent.

20. The effect of a bankrupt tenant on residential possession proceedings in respect of tenancies subject to the Housing Act 1988, Rent Act 1997 and Housing Act 1985 would therefore seem to be relatively clear:

- Bankruptcy or a DRO (pending or extant) does not interfere with the Court's jurisdiction to make a possession order, suspended possession order, or possession order whose enforcement is suspended, on grounds of rent arrears – even if those arrears are, or would otherwise be, debts provable in the bankruptcy or subject to the DRO;

- The Court should not, however, suspend a possession order, or enforcement of the order, on terms of payment of the arrears.

- A money judgment for the arrears should not be pursued – or awarded.

- It seems that an order for possession (or its enforcement) may be ordered on the grounds that the tenant continues to meet its current rental obligations. The same would seem to apply in respect of mesne profits.

- Such possession proceedings are not caught by the stay in s.285(3)(b) – in the absence of a claim for money judgment for the arrears.

Forfeiture

21. In respect of forfeiture, it seems that both residential long leases and business tenancies will be caught by the s.285(3) requirement for permission – at least, where the landlord seeks to forfeit by service of proceedings.

22. In *Razzaq v. Pala* [1997] 1 WLR 1336, the landlord had forfeited a lease of business premises by peaceable re-entry on grounds of rent arrears after the making of a bankruptcy order against the tenant. Following annulment of the bankruptcy, the tenant challenged the validity of the forfeiture on the grounds that it was in breach of s.285(3) since it had been effected without prior leave of the court. Dismissing the appeal, Lightman J concluded that the right of re-entry was not a remedy for the purposes of s.285(3)(a), but acknowledged the anomalous position of the landlord requiring permission to forfeit by service of proceedings:

> *"The right of re-entry is often colloquially referred to as a remedy of the landlord: see, e.g., In re A Debtor (No. 13A-IO-1995) [1995] 1 W.L.R. 1127, 1133. But the Court of Appeal in Ezekiel v. Orakpo [1977] Q.B. 260 held, with reference to a provision to like effect in section 7(1) of the Bankruptcy Act 1914, that the right of re-entry, whether exercised by service of a writ claiming possession or by peaceable entry, does not constitute a remedy against the property or person of the bankrupt. The reasoning is that the exercise of the right of forfeiture does not remedy any preceding breach of covenant: it merely prevents its recurrence and affords relief to the landlord from being saddled with a defaulting tenant. If this is so, it is anomalous that under section 285(3) a landlord requires the leave of the court before he can commence proceedings for*

forfeiture, but is immune from any restraint on exercising his right of peaceable re-entry. This is the more so when regard is had to the disfavour with which the law looks upon peaceable re-entry: see Billson v. Residential Apartments Ltd. [1992] 1 A.C. 494, 536E. But that is not a sufficient basis on which I am free to give the word "remedy" a wider meaning than afforded in Ezekiel v. Orakpo [1977] Q.B. 260."

23. Query, however, whether the requirement of permission for forfeiture by service of proceedings may be open to debate, in light of Etherton LJ's construction of s.285(3) in *Sharples.*

24. In the residential context, the requirement of permission would seem also to attach to proceedings for a determination that service charges were due prior to forfeiture of a long lease of a dwelling. It may also, arguably, apply to proceedings for determination of a breach of covenant or condition prior to service of s.146 notice (s.168 CLRA 200), although this would seem to be open argument following the construction of s.285(3)(b) in *Sharples* that it is limited to actions or proceedings against the bankrupt in respect of a 'proveable debt'.

25. In the context of business premises, where the landlord is intending to forfeit the lease or tenancy of a bankrupt individual, it is also worth having regard to the following:

    - If the lease provides for a right of re-entry in the case of the tenant's insolvency, and that is the ground on which the landlord wishes to rely, it is important to check that the re-entry provision covers the insolvency regime which applies to the tenant. If it only permits for re-entry in the event of the tenant's bankruptcy, then construing the clause strictly, it would not seem to cover the situation when the tenant had entered into a DRO, for example.

    - The need to serve a s.146 notice prior to re-entry, unless the exceptions in s.146(9) or (10) LPA 1925 apply.

Debt Relief Orders ("DROs")

26. DROs were introduced by the Tribunals, Courts and Enforcement Act 2007, which inserted a new Part 7A and Schedule 4ZA into the Insolvency Act 1986 with effect from 6 April 2009.

The policy behind them was summarised as follows by Mummery L.J. in *Secretary of State for Work and Pensions v. Payne & Cooper* [2010] EWCA Civ 1431:

> *"14. DROs made their appearance as a new form of personal insolvency procedure when they were introduced by amendments to the 1986 Act with effect from 24 February 2009: see section 108 of and Schedule 17 to the 2007 Act and the Insolvency (Amendment) Rules 2009 (SI 2009/642). They sit beside and complement bankruptcy. They form part of a legislative programme of debt-solution procedures, such as debt repayment plans, administration orders and individual voluntary arrangements, which provide a flexible choice of paths for the relief of those who are unable to pay their debts. The Consultation Paper produced by the Department for Constitutional Affairs in July 2004,* A Choice of Paths-Better options to manage over-indebtedness and multiple debt *(CP23/04), estimated that in 2002 net lending rose by almost £10bn per month and that adults in this country owed an average of £18,000 each. The paper predicted that if, in the context of "the historically high levels of borrowing", there should be "an economic downturn … a far greater number of people would be at risk of financial difficulties".*
>
> *15. The scheme, structure and purpose of DROs broadly reflect the regime of bankruptcy orders: the effect of the order is to stay enforcement of the debts by creditors and the debts are discharged after a specified period (one year in the case of DRO). While the order is in force the debtor is subject to similar restrictions and obligations as in bankruptcy. The main differences are that the DRO process does not require the intervention of the court and it is accessible to people who do not have the financial means to pay the higher fee for access to the bankruptcy procedure, ie debtors who cannot afford to make themselves bankrupt. It is less elaborate, being initiated administratively by the official receiver on the application of the individual debtor via a debt adviser who is an "approved intermediary" and on the basis of specified criteria as to assets, income and liabilities. Unlike bankruptcy there is no trustee in whom the assets of the debtor are vested for distribution to creditors. DROs are thus meant for those overburdened with debt who have relatively low levels of liabilities, no assets in excess of £300 in value and no monthly surplus income over £50 with which to come to an arrangement with creditors. The applicant must not have been the subject of a DRO within the previous six years."*

27. The main elements of the DRO regime are, in summary:

- An individual who is unable to pay his debts may apply for a DRO in respect of his qualifying debts (s.251A(1));
- To qualify as a qualifying debt, the debt must be for a liquidated sum (s.251A(2);
- The applicant must not have been the subject of a DRO in the previous 6 years (Sch 4ZA para 5)
- The applicant's debt must not exceed the prescribed amount (Sch 4ZA para 6) – currently £15,000
- The applicant's monthly surplus income must not exceed the prescribed amount (Sch 4ZA para 7) – currently £50;

- The value of the applicant's property must not exceed the prescribed amount (Sch 4ZA para 8) – currently £300.
- The application is made, via an "approved intermediary", to the official receiver (s.251B(1)), and must include a list of the debts to which the applicant is subject at the date of the application (s.251B(2)).
- When the DRO is made, it must include a list of the debts which the official receiver is satisfied were qualifying debts at the date of the application date, specifying the amount of the debt at that time and the creditor to whom it was owed (s.251E(3));
- A creditor specified in a DRO may object to the making of the order or the inclusion of the debt in the list of qualifying debts (s.251K).

28. When a DRO is made, a moratorium is imposed by virtue of s.251G which provides as follows:

"**251G Moratorium from qualifying debts**

(1) A moratorium commences on the effective date for a debt relief order in relation to each qualifying debt specified in the order ("a specified qualifying debt").

(2) During the moratorium, the creditor to whom a specified qualifying debt is owed–

(a) has no remedy in respect of the debt, and

(b) may not–

(i) commence a creditor's petition in respect of the debt, or

(ii) otherwise commence any action or other legal proceedings against the debtor for the debt,

except with the permission of the court and on such terms as the court may impose.

(3) If on the effective date a creditor to whom a specified qualifying debt is owed has any such petition, action or other proceeding as mentioned in subsection (2)(b) pending in any court, the court may–

(a) stay the proceedings on the petition, action or other proceedings (as the case may be), or

(b) allow them to continue on such terms as the court thinks fit.

(4) In subsection (2)(a) and (b) references to the debt include a reference to any interest, penalty or other sum that becomes payable in relation to that debt after the application date.

(5) Nothing in this section affects the right of a secured creditor of the debtor to enforce his security."

29. It is clear from the CA decision in ***Sharples*** that the same principles apply to possession proceedings in respect of secured or assured tenancies where the tenant is subject to a DRO as when he is bankrupt, or bankruptcy is pending. Similarly, there seems no reason to believe that the position would be different in respect of any forfeiture, or as to the consequences of commencing proceedings without permission of the court as required by s.251G(2)(b).

Individual voluntary arrangements

30. Individual voluntary arrangements are governed by Part VIII of the Insolvency Act 1986 and are, in effect, a statutory compromise between a debtor and his creditors.

31. For the purposes of this seminar, the most pertinent provisions are s.252, which provides for a moratorium on proceedings against the debtor on the making of an interim order, and s.254 which makes provision for the period between an application for an interim order being made, and being granted.

32. As mentioned above, s.252 provides for a moratorium on legal proceedings against the debtor where an interim order is made by the Court, in the following terms:

"**252.— Interim order of court.**

(1) In the circumstances specified below, the court may in the case of a debtor (being an individual) make an interim order under this section.

(2) An interim order has the effect that, during the period for which it is in force—

(a) no bankruptcy petition relating to the debtor may be presented or proceeded with,

(aa) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises, except with the leave of the court, and

(b) no other proceedings, and no execution or other legal process, may be commenced or continued and no distress may be levied against the debtor or his property except with the leave of the court"

33. Prior to the implementation of the Insolvency Act 2000, it was a pre-requisite that the debtor obtain an interim order before putting a proposal to his creditors. Instead, there is a now an option to apply for an interim order, and the court will only grant the same if it is satisfied that:

    - The debtor intends to make a proposal to his creditors for an IVA;
    - On the day of making the application the debtor was an undischarged bankrupt or was able to petition for his own bankruptcy;
    - No previous application had been made by the debtor for an interim order in the period of 12 months ending with that day; and
    - The nominee under the debtor's proposal (ie the individual nominated to supervise the IVA) is willing to act in relation to that proposal.

    s.255(1) IA 1986

34. S.254 makes provision for a court to take steps to protect the debtor's assets from legal action where an application for an interim order is pending:

> "**254.— Effect of application.**
>
> (1) At any time when an application under section 253 for an interim order is pending,
>
> (a) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises, except with the leave of the court, and
>
> (b) the court may forbid the levying of any distress on the debtor's property or its subsequent sale, or both, and stay any action, execution or other legal process against the property or person of the debtor.
>
> (2) Any court in which proceedings are pending against an individual may, on proof that an application under that section has been made in respect of that individual, either stay the proceedings or allow them to continue on such terms as it thinks fit"

35. There seems no reason to believe that the moratorium under Part VIII would be construed any differently to that in Part IX, such that if leave were not sought before commencing proceedings, those proceedings would be invalid. It is also notable that Part VIII expressly prohibits forfeiture by peaceable re-entry, without the leave of the court. There is no express moratorium which applies once the IVA has been approved, although the creditors will be bound by its terms.

Insolvency and the Company

Administration

36. The administration regime was comprehensively overhauled by the Enterprise Act 2002, which reforms are set out in Sch B1 to the Insolvency Act 1986.

37. There are three routes by which a company may be put into administration. A company enters administration on the appointment of an administrator::

- By an administration order of the court under para 10 of Sch B1;
- By the holder of a floating charge under para 14 of Sch B1;
- By the company or its directors under para 22 of Sch B1

38. Whatever route is adopted, the administrator is required to perform his functions with the aim of achieving one of the objectives set out in para 3 of Sch B1, which objectives are hierarchical:

- Rescuing the company as a going concern; or
- Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or
- Realising property in order to make a distribution to one or more secured creditors.

39. The moratorium on legal process whilst a company is in administration is set out in para 43 of Sch B1 of the Act:

> "(1) This paragraph applies to a company in administration.
>
> (2) No step may be taken to enforce security over the company's property except—
>
> (a) with the consent of the administrator, or
>
> (b) with the permission of the court.
>
> (3) No step may be taken to repossess goods in the company's possession under a hire-purchase agreement except—
>
> (a) with the consent of the administrator, or
>
> (b) with the permission of the court.

(4) A landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except—

(a) with the consent of the administrator, or

(b) with the permission of the court.

(5) In Scotland, a landlord may not exercise a right of irritancy in relation to premises let to the company except—

(a) with the consent of the administrator, or

(b) with the permission of the court.

(6) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except—

(a) with the consent of the administrator, or

(b) with the permission of the court.

(6A) An administrative receiver of the company may not be appointed.

(7) Where the court gives permission for a transaction under this paragraph it may impose a condition on or a requirement in connection with the transaction.

(8) In this paragraph "landlord" includes a person to whom rent is payable"

40. Para 44 makes provision for an interim moratorium, applying the moratorium on insolvency proceedings (in para 42) and other legal proceedings (in para 43) to the period where the process to put the company into administration has been commenced but not yet completed or taken effect. It is somewhat controversial.

41. It is fair to say that the para 43 moratorium is more far-reaching than that in the individual insolvency regimes set out above.

42. A full consideration of the moratorium –and how it may impact a landlord, or mortgagee – is somewhat beyond the text of this seminar. However, the following principles are useful starting point for the landlord/mortgagee/other creditor trying to enforce its rights through possession proceedings.

43. In terms of when the court's permission will be granted for proceedings caught by para 43, the seminal guidance is that set out in the judgment of Nicholls LJ in *Re Atlantic Computer*

Systems plc [1992] Ch 505, namely that the court is required to carry out a balancing act taking into account the following

- The company's financial position and ability to pay ongoing rent
- The administrator's proposals, including whether ongoing debts, such as the rent, would be paid as an expense of the administration;
- The effect on the administration if permission were to be granted ;
- The effect on the creditor and on the debtor if permission were to be refused;
- The prospect of a successful outcome in the administration if permission were refused;
- The conduct of the parties;
- That the initial burden of satisfying the court that permission ought to be granted rests with the creditor.

44. Further, issues may arise, particularly in 'pre-pack' administrations, where the administrator has granted a licence to occupy to a proposed purchaser without the landlord's consent and in breach of the non-alienation clauses of the lease. Whilst not without its risks as a course of action by the administrator – see *Metro Nominees (Wandsworth) (No 1) v.K Rayment* [2008] B.C.C. 40[6] – such situations still require the court to conduct the balancing exercise set out in *Re Atlantic Computer Systems*, even where the pre-pack sale may have already gone through – *Innovate Logistics Ltd v. Sunberry Properties Ltd* [2008] EWCA Civ 1321.

Liquidation

45. Liquidation, or "winding up", is governed by Parts IV and V of the Insolvency Act 1986.

46. There are three types of liquidation:

- Compulsory liquidation – the company is wound-up pursuant to a court order following a petition being presented by the directors, members, creditors or contributors of the company;

[6] Permission granted for the landlord to forfeit the lease by proceedings, but not to enter by peaceable re-entry

- Creditors' Voluntary Liquidation - the members of an insolvent company resolve the wind up the company, following which a meeting of the company's creditors is called pursuant to s.9 of the Act;
- Members' Voluntary Liquidation -

47. In the case of compulsory liquidation, between the presentation of a winding-up petition and the making of the winding-up order there is no restriction on the right of a landlord to forfeit the tenant's lease, although creditors of the debtor could apply for a stay of those proceedings under s.126 of the Act, which provides:

> "(1) At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may—
>
> (a) Where any action or proceeding against the company is pending in the High Court or Court of Appeal in England and Wales or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein, and
>
> (b) Where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;
>
> and the court to which application is so made may (as the case may be) stay, sist or restrain the proceedings accordingly on such terms as it thinks fit.
>
> (2) In the case of a company registered but not formed under the Companies Act 2006, where the application to stay, sist or restrain is by a creditor, this section extends to actions and proceedings against any contributory of the company."

48. After the winding up order has been made, further proceedings are restrained by s.130(2) of the Act, which provides:

> "(2) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose."

49. In respect of a voluntary liquidation, there is no statutory moratorium on legal process. However, this must be read subject to s.112 of the Act which provide for the liquidator to make an application to court in respect of the winding-up, following which the court may exercise any power which could have been exercised in a compulsory winding-up – such as that under s.126. s.112 provides as follows:

> "1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.
>
> (2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.
>
> (3) A copy of an order made by virtue of this section staying the proceedings in the winding up shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar of companies, who shall enter it in his records relating to the company."

50. There are no statutory guidelines on how an application under s.126 should be approached, it is a matter for the court's general discretion. It seems likely, however, that in the case of forfeiture at least, relevant considerations will include the strength of the landlord's grounds for forfeiture, and whether the tenant/liquidator has a defence to the same, as well as consideration of 'what is right and fair in all the circumstances'.[7] In a case where there is no real defence to the action, the court may give permission to forfeit, and make a summary order for possession at the same time: see, for example, *Re Blue Jeans Sales Ltd* [1979] 1 WLR 362. It is unclear whether the prohibition in s.130(2) applies to forfeiture by peaceable re-entry.

Company Voluntary Arrangements (CVAs)

51. CVAs are governed by Part 1 of the Insolvency Act 1986. The regime broadly mirrors that for IVAs.
52. S.1A provides for the directors of a company who propose to make a proposal for a voluntary arrangement to apply for a moratorium in respect of the company's assets. The conditions, procedure, and procedure following grant of the same are set out in Sch 1A to the Act. The Schedule is not short, and its provisions are not therefore set out in full in his paper. The effect of a moratorium being granted are set out in paras 12-14 of the Schedule, the pertinent provisions of which for the purposes of this paper are paras 12 and 14 (para 13 concerns uncrystallised floating charges). Para 12 provides, so far as is relevant, as follows:

> "(1) During the period for which a moratorium is in force for a company—

[7] *New Cap Reinsurance Corp Ltd v. HIH Casualty and General Insurance Ltd* [2002] EWCA Civ 300

(a) no petition may be presented for the winding up of the company,

(b) no meeting of the company may be called or requisitioned except with the consent of the nominee or the leave of the court and subject (where the court gives leave) to such terms as the court may impose,

(c) no resolution may be passed or order made for the winding up of the company,

(d) no administration application may be made in respect of the company,

(da) no administrator of the company may be appointed under paragraph 14 or 22 of Schedule B1,

(e) no administrative receiver of the company may be appointed,

(f) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the company in respect of a failure by the company to comply with any term or condition of its tenancy of such premises, except with the leave of the court and subject to such terms as the court may impose,

(g) no other steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the leave of the court and subject to such terms as the court may impose, and

(h) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the court and subject to such terms as the court may impose.

(2) Where a petition, other than an excepted petition, for the winding up of the company has been presented before the beginning of the moratorium, section 127 shall not apply in relation to any disposition of property, transfer of shares or alteration in status made during the moratorium or at a time mentioned in paragraph 37(5)(a).

...

Charges and Mortgages

53. The preceding sections of the paper have focused, largely, on proceedings for possession by landlords. The considerations are somewhat different in respect of the creditor whose interest is secured by either a mortgage or other charge over the property.

54. Save for those which apply in respect of administration and compulsory liquidation, none of the moratoriums directly affect the rights of secured creditors to enforce their security.

55. In respect of IVAs, and CVAs, at the meeting of the debtor's creditors, those creditors may not approve any proposal, or modification to the proposal, which "affects the right of a secured creditor of [the debtor] to enforce his security, except with the concurrence of the creditor concerned'. (CVA s.4(3), IVA s.258). A secured creditor is not therefore affected by an IVA or CVA unless he expressly agrees to be so bound: see *Khan v. Permayer* [2001] BPIR 95 (CA).

56. In practice, this appears to mean that the bank may bring proceedings for possession of the mortgaged property, but not sue on the personal obligation to pay the mortgage debt. Whilst there may be some scope for argument as to whether proceedings for vacant possession of the property should properly be regarded as enforcing the mortgagee's security,[8] there would seem to be not insignificant weight in the argument that recovery of possession of the mortgaged property would fall within the spirit of the secured creditor exceptions. This would seem to be further strengthened by the reasoning in *Ezekiel* and *Sharples* that an action for possession of a property to which the claimant is entitled is not a remedy or action in respect of a proveable debt, but a recovery of possession.

57. One final situation which is worth noting is that where a creditor has an interim charging order over a property, but a bankruptcy order (for example) is made prior to the charging order being made final. In *Nationwide Building Society v. Wright* [2010] Ch 318, a petition for the defendant's bankruptcy had been presented after the making of an interim charging order over the property, which order was made final before the bankruptcy order was made. It was common ground that neither the building society nor the judge who made the final order was aware of the pending bankruptcy petition as at the date the charging order was made final.

58. The situation the CA had to consider was whether the charging orders ought to have been discharged due to the bankruptcy order. It concluded they should not, having regard to s.346 of the Insolvency Act. However, the following should be noted, as a word of warning from the judgement:

> *"An application to discharge both the interim charging order of 5 May 2006 and the final charging order of 26 June 2006 was made by the trustee in bankruptcy by notice*

[8] There is some conflicting authority on whether proceedings for possession constitute enforcing the mortgage. The prevailing view appears to be that it is merely a claim for the recovery of land. See Fisher and Lightwood para 19.9

dated 6 November 2007. It came before Deputy District Judge Jolly on 16 May 2008. He made the order sought. He held, correctly in my view, (i) ***that the final order would not have been made if the district judge had known, at the time, that there was a pending bankruptcy petition;*** *(ii) that, in the circumstances that the district judge did not know of the pending bankruptcy petition, the final charging order was properly made; and (iii) that the existence of the pending bankruptcy petition, and the bankruptcy order subsequently made on that petition, were not, of themselves, sufficient to establish a right to have the charging orders set aside. It was a matter of discretion whether or not to accede to the application"* (Emphasis added)

59. This is therefore something to bear in mind when notice is received of a pending bankruptcy when considering an application for an interim charging order, or to make a charging order final.

Conclusion

60. In the absence of any immediate shift in the economic climate, it seems likely that insolvency issues will continue to crop up in possession proceedings. It would therefore be advisable for clients to be alive to the possibility of their tenant / debtor / mortgagor slipping into the Insolvency Act, and for advisors and property litigators to be alive to the potential consequences of the different regimes, and action which can or cannot be taken to minimise the impact of the same.

JACQUELINE LEAN