

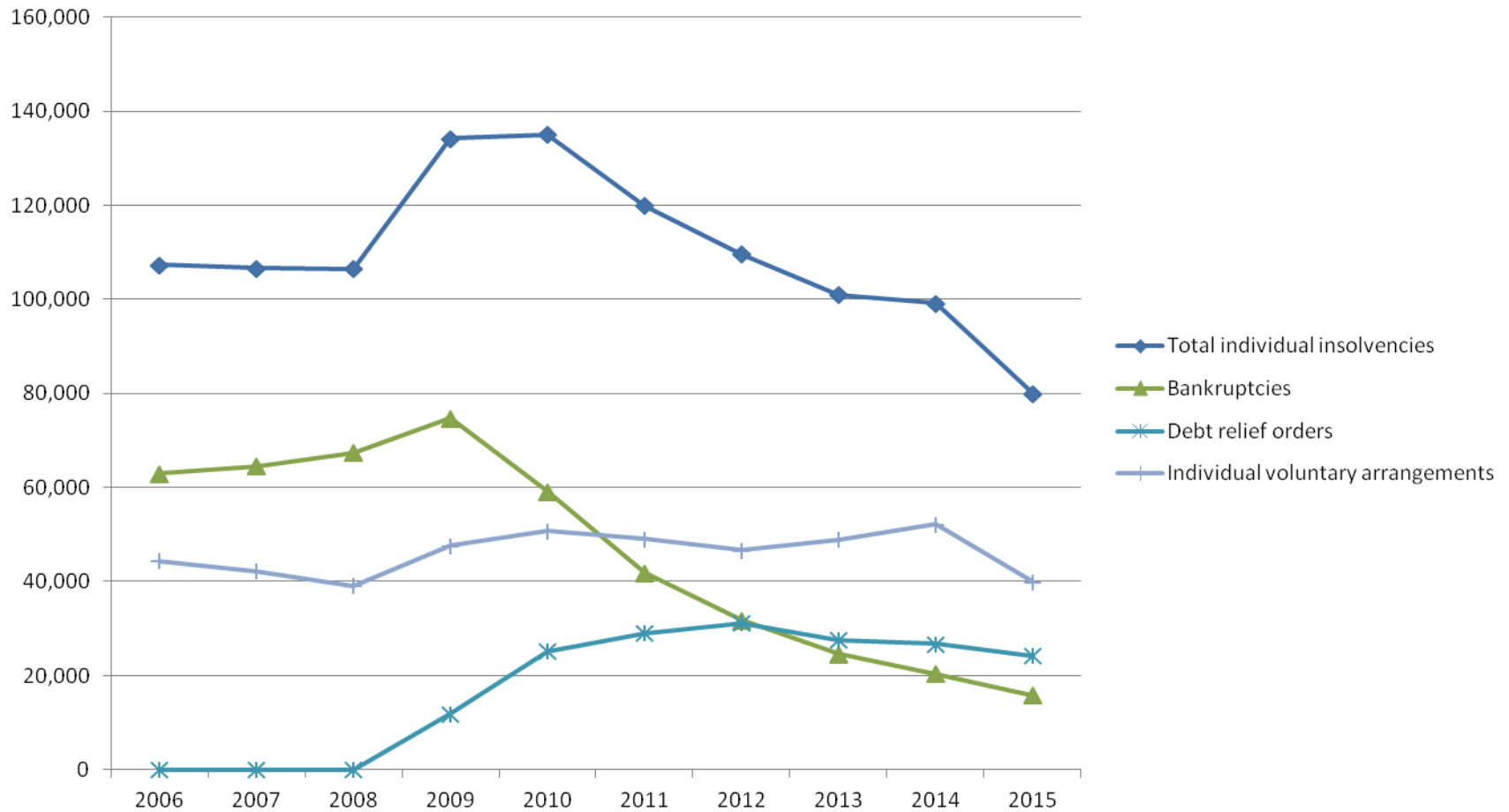
Landlord and tenant in an insolvency context

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Insolvency trends - corporate



Insolvency trends - personal



Key statistics

- Total annual company insolvencies at lowest level *since 1989*
- Lowest number of compulsory liquidations *since 1981*
- Individual insolvencies at lowest level *since 2005*

Topics for discussion

- Recoverability of rent
- Enforceability of covenants
- Disclaimer and its consequences

Recoverability of rent: the problem

- Statutory moratorium: **para. 43, Sch. B1, IA86**
- Rent payable in advance but unpaid
- T goes into administration but premises used by the administrators
- Salvage principle?
- Apportionment Act 1870?

Jervis v Pillar Denton [2015] Ch 87



- CoA decision – gives **clarity** to the law
- Salvage principle is *not* discretionary
- If it applies, it will **expand** the list of expenses set in IR86
- Commonsense and ordinary justice dictate that the landlord should be compensated for the rent on a **day to day** basis
- Therefore rent payable in advance falling due before administration commenced was **recoverable** as an expense for the period of use

Lewison LJ at *para. 77*



“... Whether the salvage principle applies is not a matter of discretion.

... It is a principle that informs the interpretation of the rules which contain the complete list of what could rank as expenses of the relevant insolvency process. Thus, in order to rank as an expense, a liability must fall within the rules as interpreted in light of the salvage principle.”

Lewison LJ at *para. 82-83*



“I cannot see why common sense or ordinary justice should be defeated by the happenstance that a rent day occurs immediately before the date of entry into administration if the rent falling due on that day covers a period during which the administrator retains possession of the property for the benefit of the administration. ... All that is necessary is to treat the rent as accruing from day to day.

“It may not be a maxim of equity but in simple terms: you can’t have the penny and the bun. Equally, I cannot see that common sense or ordinary justice requires a landlord to be paid rent in full for a period after the office holder has vacated the premises, leaving the landlord free to relet them.”

Conclusion at *para. 101*

- Rent must be paid by an office holder for the **duration of any period** during which the property is retained for the benefit of the liq / admin.
- Rent payable as an **expense** of the liq / admin
- **Duration is a question of fact**, not determined by reference to the day on which the rent fell due.

Enforceability of covenants

- Statutory moratorium on forfeiting a lease during an administration (para. 43) or liquidation (s.130(2))
- Court has discretion to permit a landlord to forfeit
- Principles are set out in Re: Atlantic Computer Systems plc [1992] Ch 505

Re: SSRL Realisations [2015] EWHC 2590 (Ch)

- Concerned the Brunswick Centre



Re: SSRL Realisations [2015] EWHC 2590 (Ch)

- Burden is on the landlord to establish that it would be **inequitable** for it to be prevented from forfeiting
- Grant permission where **unlikely** to impede purpose of administration
- In other cases, conduct a **balancing exercise** between the legitimate interests of the landlord and the legitimate interests of other creditors – including a **comparison of financial loss**
- Court should attach **great importance to the proprietary interests of the landlord**

Re: SSRL Realisations [2015] EWHC 2590 (Ch)

- No grounds to believe that administrators could achieve a premium by assigning the lease
- Therefore lease did not have value and the impact of forfeiture on the administration would be **limited**
- The fact that value could not be unlocked as a result of L's lawful reliance on other contractual rights is **irrelevant**

How does an insolvency process end?



Liquidation

- *Dissolution*
 - s.201 IA86 (voluntary)
 - s.205 IA86 (compulsory)
 - ss.202-204 IA86 (early dissolution)

Administration

- *Rescue*
 - If this is the purpose of the administration (para. 3)
 - Appointment of administrators ceases after one year (para. 76)
- *Dissolution*
 - Para. 84
- *Liquidation*
 - Move to CVL para. 83
 - Compulsory liquidation on application para. 79(3)

Effect of dissolution

- Company's property and rights are deemed *bona vacantia* and belong to the Crown (s.1012 CA06)
- Crown may **disclaim** any such property and rights within three years (s.1013)
- Effect of disclaimer is that the property did not vest in the Crown (s.1014)
 - Terminates company's rights, interests and liabilities in the property
 - Does not affect the interest of anyone else (s.1015)
- Court may make a vesting order (s.1017)

Effect of restoration

- Company deemed to have continued in existence as if not dissolved (s.1032)
- Court may give directions to give effect to this
- Court may also give directions in relation to any property that vested in the Crown
- Restoration does not affect any disposition of property that vested as bona vacantia but the consideration received by the Crown should be paid to the company (or an amount equal to the value of the property) (s.1034)

Re Fivestar Properties Limited [2015] EWHC 2782 (Ch)

- Company dissolved following administration
- Freehold property vested in Crown
- Crown disclaimed; escheat
- Bank sought restoration and winding up
- Court held that property would re-vest in the company as if never dissolved
- Disclaimer of freehold by Crown is not a disposition

Schroder v Birmingham City Council [2014] EWHC 2207 (Admin)

L
C

- T went into liquidation
- Liquidator disclaimed lease of premises
- L did not forfeit but called on guarantor to pay rent
- Local authority demanded business rates from L on the basis that L was the owner of an unoccupied property
- L said it was not 'entitled to possession' because the lease was preserved for the purposes of the guarantor's obligations and the guarantor could seek an overriding lease

Schroder v Birmingham City Council [2014] EWHC 2207 (Admin)

L
C

Held:

- Disclaimer determined a lease for all purposes
- After disclaimer, L had the right to immediate possession as freehold owner without the burden of any leasehold interests
- The rights and liabilities of guarantors were preserved as a matter of contract but not as property rights