

Welcome to Landmark Chambers'

Property In Quarantine:

Liquidation Foundation: The Basics of Property Insolvency

Part 2: Landlords with insolvent corporate tenants

The recording may be accessed [here](#).

Your speakers today are...



Camilla Lamont



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Restructuring Commercial Leases under CVAs



Camilla Lamont

What is a Company Voluntary Arrangement (“CVA”)?

- S.1 of the Insolvency Act 1986 - directors make a proposal to the company and its creditors for a “*composition in satisfaction of its debts or scheme of arrangement of its affairs*”.
- CVA takes effect if at least 75% of creditors by value approve and binds all creditors, including the minority who voted against or did not vote
- Time limited right to challenge under s.6 on grounds of unfair prejudice or material irregularity.

The Rise of the “Standard Retail CVA”



Can CVAs be used to reduce future rents?

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

Ground 1 – Future rent and other contingent liabilities under a lease (such as a future dilapidations claim) can be included in a CVA.

Ground 2 – Not automatically unfairly prejudicial for a CVA to reduce future rents even where the company continues to use the demised premises

Can CVAs abrogate landlords' proprietary rights?

Debenhams Retail Ltd [2019] EWHC 2441 (Ch)

- Ground 3 - CVA cannot modify the right of re-entry or prevent a landlord from exercising a right to forfeit for breach of an insolvency condition

Re Instant Cash Loans Ltd [2019] EWHC 2795 (Ch)

- A CVA cannot be used to force a landlord to accept a surrender of a lease

How can landlords prevent or challenge CVAs?

- Calculation of Landlords' Votes
- Challenge under s.6 of the IA 1986 – on grounds of unfair prejudice or material irregularity
- Use of “vertical” and “horizontal” comparators in assessing unfair prejudice

Disclaimer



Nick Grant

Disclaimer: Outline

- What is it?
- What is its effect?
- Vesting orders

- Key sources
 - S. 178-182 insolvency Act 1986 (s. 315-321 for bankrupts)
 - Part 19 Insolvency (England and Wales) Rules 2016
 - ***Hindcastle Ltd v Barbara Attenborough Associates Ltd*** [1997] A.C. 70

Disclaimer: what is it?

- General power to disclaim: s. 178(2)
(2) Subject as follows, the liquidator may, by the giving of the prescribed notice, disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavoured to sell it, or otherwise exercised rights of ownership in relation to it.
- All or not at all: ***In Re Fussel*** (1882) 20 Ch. D. 341 (unless s. 21(2) Landlord and Tenant (Covenants) Act 1995 applies)
- No leave of the court required: ***Re Hans Place*** [1992] BCC 737

Disclaimer: onerous property

- “Onerous Property” - s. 178(3)
 - (3) The following is onerous property for the purposes of this section—*
 - (a) any unprofitable contract, and*
 - (b) any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.*

- **Re SSSL Realisations (2002) Ltd** [2006] EWCA Civ 7
 - “Property” involves some element of benefit or entitlement
 - Five principles for determining an onerous contract

- E.g.s include a lease which had prohibition on assignment and limitation on use (**Eyre v Hall** [1986] 2 EGLR 95).

Disclaimer: restrictions

- S. 178 (5) – liquidator has not disclaimed 28 days after being asked by person “interested in” the Property
 - (interest means recognised in law – ***Frosdick v Fox*** [2018] 1 WLR 38)
- S. 179 (for leases) – copy must be served on all underlessees and mortgagees, and either
 - No application under s. 181 (vesting order) made within 14 days, or
 - If made, court directs disclaimer takes effect

Disclaimer: effect

- S. 178(4)
 - (4) A disclaimer under this section—*
 - (a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed; but*
 - (b) does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person.*
- **Hindcastle**
 - Only L&T?
 - Others with liabilities (e.g. guarantors)?
 - Sub-tenants?

Disclaimer: effect

- Right to loss and damage: s. 178(6)
- Calculation
 - ***Christopher Moran Holdings v Bairstow*** [2000] 2 AC 172
 - General exercise
 - Normal measure
 - Discount
 - Take into account effect of vesting order: s. 181(5)

Disclaimer: vesting orders

- Per s. 181, though note statutory machinery in s. 182
- Who may apply? S. 181(2)
 - (2) *An application under this section may be made to the court by—*
 - (a) *any person who claims an interest in the disclaimed property, or*
 - (b) *any person who is under any liability in respect of the disclaimed property, not being a liability discharged by the disclaimer .*
- “interest” must be proprietary: ***Lloyds Bank SF Nominees v Aladdin Ltd (in liq)*** [1996] 1 BCLC 720; ***Leon v AG*** [2018] EWHC 3026 (Ch)
- S. 2(b) can include guarantor of lease, or former tenant still under liability (***Hindcastle***)

Disclaimer: vesting orders

- Court's discretion: s. 181(3)
 - (3) Subject as follows, the court may on the application make an order, on such terms as it thinks fit, for the vesting of the disclaimed property in, or for its delivery to—*
 - (a) a person entitled to it or a trustee for such a person, or*
 - (b) a person subject to such a liability as is mentioned in subsection (2)(b) or a trustee for such a person.*
 - (4) The court shall not make an order under subsection (3)(b) except where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer.*
- **Hunt v Conway CBC** [2014] 1 WLR 254
- Cannot grant in leasehold cases until all other interests cleared under s. 182 (**Re ITM Corp (in liq)** [1997] BCC 554, 558)

Disclaimer: vesting orders

- Leasehold provisions. S 182(2)
 - (1) *The court shall not make an order under [section 181](#) vesting property of a leasehold nature in any person claiming under the company as underlessee or mortgagee except on terms making that person—*
 - (a) *subject to the same liabilities and obligations as the company was subject to under the lease at the commencement of the winding up, or*
 - (b) *if the court thinks fit, subject to the same liabilities and obligations as that person would be subject to if the lease had been assigned to him at the commencement of the winding up.*
- Guidance? **Carter & Ellis ex p. Savill Bros** [1905] 1 KB 735, **Hanbury v Hogan** [2016] EWHC 3330 (ch)
- Time limit? **Baker ex p Lupton** [1901] 2 KB 628

Disclaimer: vesting orders

- Consequences of not accepting vesting order?
- S. 182 (4) – underlessee or mortgagee excluded from all interest
- S. 182 (3) – court may vest in person liable to perform lessee's covenants, may vest free and discharged from all estates, incumbrances and interests created by co.

Thank you for listening

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