

**Welcome to Landmark Chambers'**

**'Company Voluntary Arrangements: The Impact  
of CVAs on Landlords and Sureties' webinar**

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

# Your speakers today are...



**David Nicholls (Chair)**



**Topic:**  
CVAs &  
Landlords in the  
Second Wave

**Camilla Lamont**



**Topic:**  
Sureties: how do  
CVAs impact  
upon their  
obligations?

**Evie Barden**

## CVAs & Landlords in the Second Wave



**Camilla Lamont**

# CVAs – A New Wave



## The CVA in a nutshell

- 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 new A1 moratorium and CVAs

- New short moratorium introduced as Part A1 of the IA 1986 by the Corporate Insolvency and Governance Act 2020 effective from 26.6.2020 and exercisable by e-filing
- Could give directors of a distressed company valuable breathing space to propose a CVA.
- Moratorium imposes restrictions on a landlord's ability to forfeit
- But - the company must pay contractual rent in respect of the period of the moratorium

# Future Rent



## Can CVAs be used to reduce future rents?

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

- Future rent and other contingent liabilities under a lease (such as a future dilapidations claim) can be included in a CVA.
- Not automatically unfairly prejudicial for a CVA to reduce future rents even where the company continues to use the demised premises



# Challenges to Turnover Rents



## Can CVAs abrogate landlords' proprietary rights?

Debenhams Retail Ltd [2019] EWHC 2441 (Ch)

- 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

## Forfeiting in the event of a CVA

- Basic – check re-entry provisions, comply with s.146 of the LPA 1925 and don't waive
- Waiver by voting for or against a CVA?
- To forfeit or not to forfeit?
- Will the company get relief and if so on what terms?

## Sureties: how do CVAs impact upon their obligations?



**Evie Barden**

## What is a guarantee?

- The purpose of a guarantee is to secure the performance of the principal's obligations.
- “It follows from the secondary nature of the [guarantee] obligation that the guarantor is generally only liable to the same extent that the principal is liable to the creditor, and that there is no liability on the part of the guarantor if the underlying obligation is void or unenforceable, or if that obligation ceases to exist. This is known as the “**principle of co-extensiveness**” (emphasis added): *Dennis v the Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 0735 (TC) at [31].

## The principle of co-extensiveness

- Discharge of the principal leads to discharge of the surety?
  - Payment by the principal will discharge surety.
  - Release of the principal will discharge surety.
- The rule in *Holme v Brunskill*: variation of the principal's obligations, without the surety's consent, will result in the discharge of the surety unless it is self-evident that the alteration is insubstantial or cannot be prejudicial to the surety.
- BUT all dependent on the terms of the surety's obligations.

## What is the effect of approval of a CVA?

- Section 5 of the Insolvency Act 1986:
  - CVA takes effect *as if* made by the company at the time the creditors approve it, and
  - It binds everyone who was entitled or would have been entitled if they had had notice of the decision procedure.
- The hypothesis of a “statutory contract”.

## How does that impact a surety's obligations?

- A CVA can expressly 'strip' a creditor of their rights of recourse against a guarantor.
- Otherwise, the 'general law' applies: *Johnson v Davies* [1999] Ch. 117 at 138.
- Time to reconsider in light of recent cases on the "statutory contract"?





## Authorised guarantee agreements

- Section 17(2) of the Landlord and Tenant (Covenants) Act 1995 :
 

“(2) The former tenant shall not be liable under that agreement or (as the case may be) the covenant to pay any amount in respect of any fixed charge **payable under the covenant** unless, within the period of six months beginning with the date when the charge becomes due, the landlord serves on the former tenant a notice informing him—

  - (a) that the charge is now due; and
  - (b) that in respect of the charge the landlord intends to recover from the former tenant such amount as is specified in the notice and (where payable) interest calculated on such basis as is so specified (emphasis added).”

# Practical challenges for landlords



## Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.**

# Thank you for listening

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