



Tenant Insolvency and Company Voluntary Arrangements (CVAs) in Commercial Property

Richard Eaton
Head of Property Litigation
Birketts LLP

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Identifying different types of Insolvency

Individual

IVA
Bankruptcy

Company

LPA Receivership
Administration
Administrative Receivership
Winding Up/Liquidation
CVA



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Key Tools

1. Forfeiture
2. CRAR
3. Pursue guarantor / previous tenant
4. Court proceedings for rent arrears
5. Rent deposit - draw down
6. Divert sub-tenant's rent
7. Trigger election to disclaim



But consider significant restrictions under different insolvency regimes.

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Tenant is individual



Individual Voluntary Arrangement

Settlement with creditors.

Check if interim order. If yes court permission needed.

Bankruptcy

If bankruptcy order – can still:

1. Divert sub-tenant's rent
2. Draw down rent deposit
3. Pursue guarantor or former tenant
4. CRAR up to 6 months before Order
5. Forfeit (only with permission of court)
6. Give election notice to trustee in Bankruptcy to disclaim.

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Tenant is a Company



- LPA Receivership
- Administrative Receivership
- Company Voluntary Arrangement
- Administration
- Liquidation



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LPA Receiver



- Appointed under fixed charge
- Generally L/L retains right to enforce remedies without permission of court or LPA receiver
- No power of LPA Receiver to disclaim lease but power of sale to sell property subject to change

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Administrative Receiver

- Available only for floating charges needed before 15/9/2003 (or other various limited circumstances).
- Administrative Receiver – role to realise security of chargee to pay debt. Does not affect right of L/L to sue for rent/CRAR/Forfeit.
- No power of Administrative Receiver to disclaim.



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CVA

Voluntary settlement between insolvent and creditors
 May be instigated by Company Directors, Administrator or Liquidation.
 Appoint nominee (if no Administrator/Liquidator)
 Qualifying Decision Procedure – vote for by 75% creditors
 Right to challenge if unfairly prejudiced or material irregularity (s 6) BUT MUST BE WITHIN 28 DAYS
 L/L retains right to forfeit? What is needed on relief. Lease rent or CVA rent? Consider dilaps as damages
 Release of Guarantors? Depends on terms.

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CVA Small Co Moratorium

- If 2 or more of following:
- Turnover no greater than £10.2m
 - Balance sheet assets no more than £5.1m
 - No more than 50 employees



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Administration



- Powerful restructuring tool.
- Administrator manages company's affairs and property where company is unlikely to be able to pay debts.
- Hierarchy of objective:
 - Rescue
 - Better for creditors than winding up
 - Realising property for secured or preferential Creditors
- Interim Moratorium:
 - No enforcement without court permission
 - May get permission if will not impede Purpose of Admin Order
- Beware of "pre packs" - Guarantee stripping.



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Liquidation or Winding Up



About realisation not rescue – the death of the company, company ceases to be beneficial owner of assets.

May be Compulsory or Voluntary Winding Up where co unable to pay debts
If liquidator appointed – freeze on enforcement action. Liquidator retaining possession - poss rent as expense of liquidation

If order not yet made – all remedies but court can stay action for rent / unwind CRAR.

Consider election notice to Liquidator re disclaimer (28 days to do so or lose rights) NB disclaimer does not extinguish 3 party obligations (but retaking possession would!!!) No duty to mitigate.

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Former Tenants or Guarantors?



Privity of contract – former tenants and guarantor remain on hook for remainder of term.
But S17 Landlord and Tenant (Covenants) Act 1995 form 1/1/1996

1. Automatic release of tenant from its contractual liability on assignment of its leasehold interest.
2. Original tenant liability may be weakened by Authorised Guarantee Agreement (AGA – usually as condition of consent to assign)
3. Strict notice/procedural requirements. Essentially notice needed to cover every 6 month period of liability by service of Notice.

Care where rent review is pending – (Scottish & Newcastle v Raguz [2008])
Paying guarantor or former tenant may call for overriding lease (Permits occupation – find new tenant)



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CRAR



Distress abolished by Tribunals Courts & Enforcement Act 2007
 Replaced by Commercial Rent Arrears Recovery
 Looks similar – more formality/procedure
 Key difference – requirement for Notices
 Must be a written tenancy agreement of commercial properties
 Exercising CRAR will waive right for forfeiture
 Only exercisable by enforcement agent Prescribed written instructions required
 Only covers 'pure' rent – When more than 7 clear days arrears as date of notice and enforcement
 7 clear days excludes, Sunday, bank holidays and Christmas day

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CRAR (Continued)



Can obtain warrant to enter
 May enter into Controlled Goods Agreement – keep goods in situ.
 Prepare and save inventory/valuation
 Notice of intention to sell
 By public auction – at best price necessarily obtainable (costs storage, locksmith, court fees, auctioneers commission).



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Richard Eaton

Partner, Solicitor-Advocate
 01473 406291
richard-eaton@birketts.co.uk
 Head of Property Litigation
 Birketts LLP

Clear Legal Advice

www.birketts.co.uk
