



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

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RICS Seminar (1 Hour CPD)  
Presenter: Jan Chillery MIPA MABRP  
Partner, Insolvency Practitioner  
Aaron & Partners LLP Solicitors  
jan.chillery@aaronandpartners.com  
01244 405 441 / 07912 781 629



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### Types of Corporate Insolvency - Statistics

3,918 corporate insolvencies Q2 2018

Being:	2,731 CVL	69.7%
	752 Compulsory winding up	19.2%
	341 Administrations	8.7%
	94 CVA	2.4%
	0 Administrative Receiverships	



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By contrast...

28,951 personal insolvencies Q2 2018

Being:	17,987 IVA	62%
	4,043 Bankruptcies	14%
	6,921 Debt Relief Orders	24%



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## Why be interested in CVA?



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## Administration

NOIA filed at Court (company / directors / Qualifying Floating Charge-Holder)

- Interim moratorium starts (10 business days)
- Directors remain in control of company

NOA filed at Court

- Full moratorium starts (to end of Administration)
- Control of company passes to Administrators
- Sections 212, 213, 214 Insolvency Act 1986 (IA86) apply
- Administration is time limited (contrast Liquidation)
- Administration may exit into CVA
- On-going rent is an expense of the Administration whilst in use (per day)

*Pillar Denton Ltd v Jervis [2014] EWCA 180 (aka Re Gamestation)*

Ask immediately for permission to forfeit lease / Deed of Surrender - refusal is evidence of use!



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## Administration (continued)

Repeated filing of NOIA to obtain successive interim moratoria may be an abuse of Court

Must have a "settled intention to appoint Administrators"

*JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd [2017] EWCA Civ 267*

*South Coast Construction Ltd v Iverson Road Ltd [2017] EWHC 61 (TCC)*



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## Insolvent Liquidation

Compulsory winding up at Court

- Date of presentation of petition = commencement of liquidation

Voluntary winding up

- Special resolution of members (75%) = commencement of liquidation
- Notice to creditors – use of deemed consent procedure

Sections 212, 213, 214 IA86 apply

Liquidators (but not Administrators) can disclaim onerous leases (ss 178 / 179 IA86)

Consider writing to Liquidator seeking decision on disclaimer (section 178 IA86)



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## What is a “voluntary arrangement”?

“The directors of a company ... may make a proposal ... to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs...”

Proposal may also be made by an administrator or liquidator

*S.1 Insolvency Act 1986*

A CVA is a statutory contract between the company and its creditors, with the essential support of an insolvency practitioner who acts as “nominee” & “supervisor”  
Commonly two or more IPs hold office jointly



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Under common law part payment is not full satisfaction of the debt owed

*Pinnel's Case [1600]*

*“The essence of a voluntary arrangement is that under it each creditor compromises or releases his rights against the debtor in respect of his pre-existing debt and receives in exchange and full satisfaction whatever payment terms are being offered by the debtor.”*

*Re Bradley-Hole [1995] 2 BCLC 163 at 186*



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## “Composition” or “scheme of arrangement”?

*“In this context a scheme of arrangement (a scheme) is plainly something different from a composition and involves something less than the release or discharge of creditors’ debts, eg: a moratorium.”*

*March Estates v Gunmark [1996] BCLC 1*

Not fatal to a valid CVA that there will be no distribution to unsecured creditors

*Re Adam & Partners Ltd [2002] BCC 247*



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- The scope of a proposal will be limited by:
- What the company and creditors will approve
  - Proposal
  - Agreed modifications
- Section 4 IA86
  - Secured creditors
  - Preferential creditors
- Potential challenge – Section 6 IA86



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## Secured creditors

A CVA proposal cannot affect the rights of a secured creditor to enforce its security unless that creditor consents - section 4(3) IA86

A secured creditor is:-

- a creditor of the company who holds a security “over property of the company”
- “security” means “any mortgage, charge, lien or other security”

*Section 248 IA86*

But Landlords are not security creditors with respect to forfeiture rights

... as this is not a remedy against the Tenant’s property

*Razzaq v Pala [1998] BCC 66*



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## Preferential creditors

A CVA proposal cannot provide for:-

- preferential debts to be paid otherwise than in priority to non-preferential debts; or
- different levels of payment to different preferential debts

unless each affected preferential creditor agrees – section 4(4) IA86



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## Antecedent Transactions

Sections 238, 239, 244, 245 IA86 do not apply to CVAs

Proposal must detail any possible claims under those sections - Rule 2.3(1) IR 2016

Criminal offence for an officer of the company to make a false representation in the proposal – Section 6A IA86



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## CVA procedure (1)

CVA is a statutory contract

1. The "offer" = proposal by company to its creditors, signed by the Board  
IP helps draft it – prescribed content including statement of affairs
2. Nominee reports to court and creditors, including:
  - Position is not materially different than described
  - Fair balance between company and creditors generally
  - No manifest unavoidable prospective unfairness
  - Reasonable prospect of being successfully implemented as drafted
  - Nominee recommends it is accepted



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## CVA procedure (2)

3. Decision = "acceptance" of the "offer"
- Notice to every creditor whose name and address the Nominee is aware
  - Proposal may be subject to agreed modifications
  - Members also vote on proposal, within 5 business days of creditors decision



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## CVA procedure (3)

CVA must be approved by at least 75% (by value) of unsecured creditors who vote

Unless more than 50% of unconnected creditors vote against (Rule 15.34 IR 2016)

"Connected creditors" and "associates" as defined in sections 249 and 435 IA 86

Shareholders can approve the CVA by simple majority in value, but if creditors approve the proposal then the CVA will be implemented whether or not members approve it (Rule 2.36 IR 2016, section 4A IA86)



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## CVA procedure (4)

No automatic moratorium during decision process

Small companies can take benefit of a moratorium (initially 28 days) – section 1A and Schedule A1 IA86

- Turnover less than £10.2 million
- Balance sheet total is less than £5.1 million
- Fewer than 50 employees

Some exceptions. But requires support of the Nominee and in practice rarely used



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## Effect of CVA approval

Nominee becomes Supervisor and empowered to implement its terms  
But Supervisor is not a "super-director" (unlike Administrator) and directors remain in control of company activity  
Ends moratorium (if any)  
Binds all creditors who were entitled to vote in the decision procedure or who would have been entitled to vote if they had had notice (section 5 IA86) ... even dissenting parties  
Including contingent creditors if proposal is so drafted  
So CVA does not bind future trading creditors but does bind Landlords for future rent  
*Re: Cancel Ltd [1995] BCC 1133*



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## Impact on Landlord

**Pre-approval:-**  
Is there a CVA or Administration moratorium? If so, Court permission required to enforce remedies  
If not, can enforce remedies in the usual way (CRAR, etc)

**Post-approval:-**  
Landlord bound by CVA  
Check terms carefully / get specialist advice  
Consider challenging the CVA if material irregularity / unfair prejudice



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## Pursuing former tenants and guarantors

General rule: CVA does not compromise claims against third parties  
*RA Securities Ltd v Mercantile Credit Co Ltd [1994] BCC 598*

...unless effectively so drafted  
*Prudential Assurance Company Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch)*

where the CVA was drafted to release guarantees in favour of landlords, but Court held this result was unfairly prejudicial because it left landlords in a worse position without compensation for that loss.



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Ask the right questions!  
Lease compromises - important CVA provisions

- Will rent payment frequency be altered for some or all landlords?
- How will dilapidations be dealt with?
- What will happen to tenant assets on exit?
- What additional forfeiture rights will be granted to compromised landlords?
- What will happen on expiry of the run-off period?



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Ask the right questions!  
Lease compromises - important CVA provisions

- What notice period will the company need to vacate a property where the landlord requests?
- What mechanisms will be available to terminate the lease (landlord's request)?
- How will any guarantees be dealt with?
- Are landlords being singled out or is the pain being shared?



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Ask the right questions!  
Lease compromises - important CVA provisions

- Are there any moratoria provisions preventing landlords (or others) from taking enforcement action under forfeiture rights which arise from proposal or approval of the CVA?
- Is the implementation of this CVA dependant on the implementation of a related CVA proposal?
- How are contingent creditors (eg: predecessor tenants under the same lease; landlords of assigned leases holding Authorised Guarantee Agreements) dealt with?
- Are there any anti-embarrassment provisions?



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## More questions to ask

- Is there a credible business plan?
- Have central overheads been right-sized following reduction of footprint?
- Has the business considered the impact of launching and delivering a CVA on its cash flows?
- Is there sufficient or additional funding available to enable any lump sum payment?
- Has there been prior consultation with the British Property Federation and if not, why not?
- Will the company share individual site performance data with the relevant landlords?



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## Voting power

Can be difficult to determine voting rights of creditors with disputed, unliquidated or unascertained debts eg: Landlord dilapidations claim  
Courts unlikely to allow challenges to Nominee's estimates of value of debt if made in good faith and rationally  
*Sisu Capital Fund Ltd & Others v Tucker & Others [2005] EWHC 2170 (Ch)*

- Use proxies carefully:-
- Consider requiring modifications as condition of support of CVA
  - Contact other creditors, vote together to improve influence



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## Calculating the Landlord's claim

Arrears plus loss of future income less mitigation less discount for early receipt  
*Re Park Air Services [1999] UKHL 2*

Average criteria for claims calculation should be supported by professional advice  
Claim calculation should be set out in the CVA proposal

... and include a dispute resolution process



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## Challenging a CVA (2)

### 1. Unfair prejudice

Differential treatment of creditors is a relevant factor in determining unfairness but not necessarily sufficient to establish unfair prejudice

*Prudential Assurance v PRG Powerhouse [2007] EWHC 1003 (Ch)*

Court will consider all the circumstances:

- Vertical comparison – company proposal against winding up
- Horizontal comparison – treatment of applicant against treatment of other creditors

Example: payment in full of suppliers whose continuing support is essential not unfair

*Re Concol Ltd [1995] 1 BCC 1133*



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## Challenging a CVA (3)

“In times of commercial and financial turmoil, the ability to enforce the terms of the existing leases against the guarantor .....was a most valuable right, and there was no sufficient justification for requiring any of the guaranteed landlords (let alone just one of them) to accept a sum of money in lieu.....To adopt such a procedure, in circumstances where the solvency of the guarantor is not in issue, is to undermine the basic commercial function of the guarantee, and to force the landlord to accept a commercially inferior substitute for it.”

*Mourant & Co Trustees Ltd v Sixty UK Ltd [2010] EWHC 1890 (Ch)*



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## Challenging a CVA (4)

### 2. Material irregularity

Examples

- Misrepresentation / omission of material information in proposal  
*Goldstein v Bishop [2016] EWHC 2187 (Ch)*
- Failure to comply with procedural rules
- Failure to adjourn meeting on receipt of material new information
- Voting contrary to proxy
- Failure to notify a creditor of proposal



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## Challenging a CVA (5)

### Is the irregularity material?

The test:

“...whether, had the truth been told, it would be likely to have made a material difference to the way in which the creditors would have considered and assessed the terms of the proposed IVA”

*Cadbury Schweppes v Somji [2001] 1 WLR 615*

Failure to notify a creditor is unlikely to be material unless that vote could have changed the outcome ...

... but what if that creditor could have influenced other voters?



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## Implementation of the CVA

Supervisor monitors CVA throughout

Annual reports to creditors within 60 days of anniversary

Can petition for winding up / place into Administration – check proposal

If successfully implemented = Certificate of Completion, satisfies CVA debts

Otherwise, Termination frees creditors to act independently

*Wright & Rowley v Prudential Assurance Co Ltd [2018] EWHC 402 (Ch)*



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## The Future?

Government consultation process underway

Free-standing moratorium procedure?

Protection of essential contracts?

Flexible restructuring plan:

- class-based
- bind secured creditors

Consider a fresh look at new leases

Eg: market rent, not upwards-only rent reviews, in exchange for no security of tenure



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**Offices**

**Chester**  
Tel: 01244 405555  
**Shrewsbury**  
Tel: 01743 443043  
**Manchester**  
Tel: 0844 600 8346

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jan.chillery@aaronandpartners.com  
01244 405 441 / 07912 781 629

[aaronandpartners.com](http://aaronandpartners.com)  
@aaronlegal



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