Guide to Company Voluntary Arrangements (CVAs)

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WHAT IS A CVA?

- Compromise between an English, Scottish or EEA company and all of its unsecured creditors
- Bespoke arrangement with contractual force (but not a true contract) given effect and challengeable by statute
- Insolvency Practitioner (IP) nominee/supervisor
- No moratorium on other claims prior to CVA implementation (except 28 day optional moratorium for “small” eligible companies)
- “Small” two or more of: £10.2m turnover or less; £5.1m balance sheet or less; 50 or fewer employees
WHAT DOES A CVA PROPOSAL COMPRISE?

- Statement of affairs, current financial position, compromise on debts, nomination of IP, IP comments
- IP submits report to court recommending consideration by creditors and shareholders
- IP then seeks decision
- 14 days’ notice to all known creditors
- Permanent or temporary variation of lease terms?
- Historic and/or forward looking?
WHY WOULD A TENANT COMPANY WANT TO ENTER A CVA?

- Financial difficulty with unsecured creditors
- Avoid terminal insolvency
- Directors remain in office
- Opportunism
- Cheaper than other insolvency procedures
- Limited court involvement
- Alternative: “CVA clause” in leases e.g. Next
- Average 5 year term
WHAT SHOULD A LANDLORD DO IF FACED WITH A CVA PROPOSAL?

- Read proposal carefully and seek legal advice
- Consider all options promptly within 14 day notice period
- Repossession prior to CVA approval (unless moratorium)
- Calling rent guarantee
- Influence content of CVA proposal
- Maximise value of landlord claim to maximise influence in vote
- Talk to other landlords/creditors to coordinate approach
- Consider rights on eventual failure of CVA
WHAT IS THE APPROVAL PROCESS?

- Vote by creditors and shareholders
- Virtual or physical meeting
- Approval by at least 75% (by value of unsecured claims) of creditors who vote
- Unless more than 50% (by value of unsecured claims) of unconnected creditors vote against
- Approval by simply majority (by value) of shareholders
- Cannot affect right of secured creditors to enforce, except with their consent
WHAT IS THE EFFECT ON A LANDLORD AND OTHER CREDITORS?

- Binds all known and unknown creditors entitled to vote (including dissenting parties)
- Usual contractual formation principles do not apply
- Determining rights of creditors
- Categories of leases
WHAT IS THE EFFECT ON A RENT GUARANTEE?

- No effect provided guarantee is worded to be unaffected by debt compromise and CVA proposal is silent
- Otherwise could release guarantor if CVA amounts to debt satisfaction
- Some CVAs seek release of guarantee provided adequate compensation paid to landlord
- Court reaction
CAN A CVA BE CHALLENGED AFTER CREDITOR APPROVAL?

- Within 28 days of the CVA’s approval by creditors and/or challenging creditor aware of CVA

- Unfair prejudice:
  - question of fact
  - treating of creditors in each category inconsistently (horizontal)
    - CVA is not materially better than likely alternative (vertical)

- Material irregularity:
  - conduct of the decision procedure / conflict of interest / non-disclosure
  - incorrect valuation of claims
WHAT IF A CVA IS NOT COMPLIED WITH AND/OR TERMINATES?

- 2013 CVAs:
  - 18.5% fully implemented
  - 16.5% ongoing
  - 65.0% terminated without achieving aims

- Average intended length of CVA is 5 years (too long?)

- 28 day pre-CVA moratorium reduced terminations to 20%

- Lack of standard terms; what happens for landlord on termination?
CAN A PROPERTY BE REPOSSESSED IF RENT PAYMENTS ARE SUBJECT TO CVA?

- Prior to CVA entry into force depends on:
  - no moratorium scenario
  - Moratorium scenario
- After CVA entry into force:
  - failure to pay future rent if CVA silent
  - scope of CVA agreement
MOTHERCARE CASE STUDY – JUNE 2018

Four categories of leases:

- **Category 1 Premises** (66 stores): performing adequately or core to future business – monthly rental payment for 3 years

- **Category 2 Premises** (21 stores): underperforming – marginally profitable and/or property costs are above market – rent reduced by 50%, paid monthly for 3 years and additional landlord right to terminate

- **Category 3 Premises** (50 stores): not of future strategic use – exit by June 2019 with rent reduced by 70% in meantime and additional landlord right to terminate

- **Category 4 Premises**: lease has expired – payment of 5% of final month’s rent paid for release of dilapidations
THE LANDLORDS STRIKE BACK

- **BHS** CVA March 2016 – landlord challenge to subsequent liquidators
  - Right to full rent after CVA termination is not a penalty
  - No permanent variation of leases (CVA not made by deed)
  - Full rent remained contingent liability (including any rent uplift)

- **House of Fraser** CVA July 2018 – landlord challenge
  - Disproportionate effect on landlords
  - Alternative rescue possible
  - Challenge settled prior to administration

- **Regis** CVA October 2018 – landlord challenge
  - “substantively unfair” CVA terms
  - Wide-ranging changes to lease terms
  - “questionable transactions” prior to business sale in October 2017