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CVAs: HAS THE TIDE TURNED FOR LANDLORDS?

by

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Introduction

1. The case of *Discovery (Northampton) and others v Debenhams Retail Ltd [2019] EWHC 2441 (Ch)* last year was one of those urgent, heard in vacation cases. It was a challenge to a CVA which had not settled – most of them do. It was not the challenge case that the lawyers interested in this area wanted to see fight. The applicants were being funded by Mike Ashley. Those backing the company and its CVA were the 'loan to own' distressed debt purchasers. This is a growing group of players who frequently see the CVA mechanism as a way to ensure a business moves forward free of non profitable leases as well as reducing rents on other leases. The points being raised were important, but there always remained an impression that most judges would bend over backwards to stop the challenge succeeding, within of course the parameters of the law.

2. However even with that somewhat negative background, is Debenhams now viewed as the case which has stopped the juggernaut of the retail CVAs? The case does not resolve all the issues. It has already had a further outing before the Judge, Mr Justice Norris (now retired but still having to deal with this case). He has recently refused to review the decision made last year but has given permission to take the future rent issue to the Court of Appeal. I am not sure what else will make it up to the Court of Appeal (await the transcript). So this talk will consider the effect of the decision as well as challenges available. Has the tide turned for landlords? What types of successful challenges can be made in the future?

How did we get here ? Short history lesson and observations!

3. It is worth delving into the history of CVAs and how they have been used. In order understand their use and abuse, you need to know their purpose. CVAs /IVAs came into existence as part of the insolvency reforms in the mid 1980s. Reformers were looking at some alternative to the bankruptcy orders for individuals as well as alternatives to liquidations. Inspired by corporate schemes of arrangements (which I will came back to as well here) IVAs were created as an alternative to bankruptcy. This enabled a debtor to continue in his business and make contributions towards his creditors without the stigma of being made bankrupt and additionally without having all his assets vested in a trustee in bankruptcy.

4. In corporate insolvency, administrations were created as an alternative to liquidations. This meant that a company would not necessarily come to the end of its existence. Both voluntary and compulsory liquidations lead to a company being dissolved. CVAs were also created as an out of court alternative to liquidations. These were pretty much identical to IVAs.

5. The characteristic of CVA/IVAs is the flexibility relating to what can be proposed. There are a number of requirements relating to what information must in a CVA/IVA proposal. These requirements, like details of assets and liabilities, a list of creditors, security interests, whether there are potentially avoidable transactions, are designed to inform creditors voting on the proposal. The proposal itself merely has to fall under the definition of being '*a composition in satisfaction of its debts or a scheme of arrangement of its affairs'* (section 1 IA 1986). Something less than a release a discharge of a creditor's debts, eg a moratorium, has been held insufficient to constitute a composition but could be a scheme. (*Inland Revenue Commissioners v Adam & Partners Ltd [2000] BPIR 986*) Also, the proposal can include third party assets being offered. This is how you reach the position that a fund is put in place in a CVA proposal on behalf of financial creditors and payments are to be made out of that fund to the creditors bound by the CVAs. Retail CVAs are now based on this structure. The proposal does not necessarily require the company to be insolvent under the definition of that term under the Insolvency Act 1986.

6. The early years of the Insolvency Act 1986 saw a lot of IVAs. These were traditionally proposals whereby the individual could continue to trade and pay monthly instalments to the supervisor for the benefit of his creditors. Issues such as future rent and the position of leases came up in some of the earlier cases such as *Doorbar Securities v Alltime Securities [1994] BCC 994*. From a reading of the relevant provisions in the Insolvency Act 1986 relating to IVAs and CVAs not much thought appears to have been given to leases. There were also a number of cases relating to whether leases were a 'security interest'. Trading CVAs fell out of fashion with the increase of the third party fund retail CVAs.

7. CVAs/IVAs relate to unsecured creditors. This is not expressly stated in the statutory provisions but becomes obvious when the voting rights of the creditors are considered. Those with security over company property can only vote in respect of that part of its debt which is not covered by the security. (IR 15.31(5)) Where a debt is wholly secured, IR 15.31(4) states that its value for voting purposes is nil. Generally, notice is given to all creditors so that creditors who have security will be bound even though their secured debts are not affected by the CVA proposal. Any element of those debts which are unsecured will be bound.

8. Section 4(3) Insolvency Act 1986 states that neither the company or its creditors can approve any proposal or modification to the same which affects the rights of a secured creditor of the company to enforce its security except with the concurrence of the creditor concerned. The same protection is given to preferential creditors. The category of preferential creditors is due to be increased with the

proposed return of HMRC as a preferential creditor. This reform is unlikely to have an effect on retail CVAs because as we shall see, debts due to HMRC are due to be paid under the terms of retail CVAs. I will come back to this because to my mind this remains one area ripe for challenge. Why should HMRC be paid in full under the terms of the CVA? What makes it special? What makes pension schemes, who also in the past have got increased payments into the schemes, so special? This practice has phrase justifying its use – contagion risk !

9. Until about the last 10 years or so, most IVAs/CVAs fell into two categories. A trading CVA is where the company continued to trade and used profits to make instalment payments into a fund for the benefit of its creditors. A third party fund CVA was where a third party provided a fund from which the creditors bound into the CVA would be paid a dividend. There were proposals which combined the two types. Proposals where funding came from third parties lead to challenges like in *Inland Revenue Commissioners v The Wimbledon Football Club Limited [2004] EWCA Civ 655* where the Revenue challenged a CVA which provided for a dividend to be paid from third party funding. The complaint from the Revenue was that the so called 'football creditors' would be paid in full. That in itself does not affect the rights of a secured creditor over company property so that will not be in breach of section 4. The challenge failed even on appeal. However the area did not see a large expansion until the retail CVA was created. This was a third party funding proposal but more complex than earlier 'Wimbledon 'ones.

10. Now in the insolvency market, you need to find a new product to sell – so PWC discovered schemes of arrangements (pursuant to Part 26 of the Companies Act 2006) and 'sold' this to the restructuring world. By this time, insolvency as a term fell out of fashion and it was all about restructuring, the so called 'rescue culture'. Schemes of arrangement increased in usage and also became a global tool because of their flexibility. Any lending restructuring used a scheme as a tool. These are available to insolvent companies as well as solvent companies. One notable difference between CVAs and schemes is that the former has all creditors voting at one meeting with all votes counted together, whilst the latter deals with classes of creditors for voting purposes. A further difference is that schemes are a court process. CVAs only become a court process if there is a challenge. In relation to voting rights, all creditors in CVAs have a value placed on their claims and in order for a CVA to be approved, 75% in value of those unconnected had to vote in favour. In relation to schemes, the company needs the 75% approval in relation to each class. There are many cases relating to classification of classes. Companies and their advisors like as few classes which they cannot control as possible. CVAs are attractive because providing you have some large (unconnected) creditors, you can reach the 75%.

11. It was, to my recollection, KPMG who then discovered as 'their' new product, the CVA. This become the darling of the retail restructuring world. Now I have used the words retail CVA, but it is important to note that statutory provisions (both in the IA 1986 and the statutory instruments) relating to CVAs apply to all CVAs. There are no particular rules for the different types of CVAs which exist in the market. What has happened is that the market has created particular rules and standards it applies to particular types of CVAs proposals. These rules, called 'industry standards' are not the law. They are simply terms and conditions created in this field which are not part of statute or rules. Some of those standard terms and conditions may well not be valid if and when challenged. The way, for example, landlords are treated in relation to the value of their claim for voting purposes is a 'practice'. None of this is set out in the Act or Rules. Equally, conditions relating to how landlords are dealt with in relation to being able to exercise their right to forfeiture are also terms which until Debenhams had not really been the subject of challenge. I will deal in the next section as to why this is so.

12. The existence of these so called standard conditions, or market practice have become in this area pretty embedded. A very good example was the ability to effectively hand back properties to landlords as a term of the CVA. That practice in my opinion can longer be carried out. Part of the problem with standard terms arises because so little is set out in the Insolvency Act 1986 and the Insolvency Rules. Most standard terms set out the rules applicable to proving in the CVA for a dividend. Most of these are essentially the rules in existence in the Insolvency Rules to deal with proofs of debt and proving claims in relation to liquidations. So some of the standard terms are sensible. However due to the lack of supervision by the Courts, certain interest groups have certainly pushed what can be set out in CVA proposals. The decision in Debenhams does not help those involved in restructuring a business by dealing with its onerous property portfolio.

13. In relation to landlords, the CVA retail proposals divides up the way landlords are to be treated by using a complex valuation and having different category landlords. I suspect this way of dealing with landlords was not actually thought of when CVAs were created. The ability to deal with landlords in different ways does potentially fall under one of the challenge grounds and I will be looking at this. For present purposes, just the treatment of the landlords claims in different ways means that in many respects, CVAs are turning into schemes save for one important distinction – there is only one creditors meeting and the creditors who are going to be paid in full vote for a proposal which effectively have almost no effect upon them. Schemes can be of only part of the creditors – for example only the landlord creditors or only the trade creditors. Schemes are also used to effect a share acquisition. In those cases, the scheme has no effect on creditors as a whole. Equally in cases where creditors are not affected by the terms of the scheme and are not entitled to vote, then they have no

voting entitlement. In CVAs, those who will be paid in full under the terms of the scheme, or pretty much in full, all still have the entitlement to vote. Using the votes of those who suffer no disadvantage and are to be paid in full is frequently the way of obtaining approval of the CVA. This last point is an issue which still remains to be the subject of a challenge. Is it 'flexibility' gone too far? Or is it simply part of the rescue culture?

The lack of challenges to date

14. There is really no court supervision in relation to CVAs. In all cases save those where the company is in liquidation or administration, a nominee is appointed who has to file a report dealing with aspects of the scheme. The nominee is a licensed insolvency practitioner who has to 'cast a critical eye' on the proposal. This report is then filed at court but there is no procedure for a Judge to consider the report. Thereafter a meeting is convened and creditors are sent the proposal. In many cases, the nominees who are then generally chairing the meeting will have a good idea of whether the proposal is acceptable or not to the required majority. They can count on votes of HMRC as HMRC will be paid in full. Equally, recently there has also been a lot of weight given to keeping a pension scheme (frequently represented by the Pension Protection Fund (PPF)) on board. This means that the PPF or the pension scheme trustees in these cases can demand additional payments as a condition for their support of the CVA. This is despite the fact that the pension scheme debt (section 75 Pensions Act 1995) is just an unsecured creditor claim. It is a contingent claim which needs to have a value placed upon it. So in many respects it is similar to a future rent liability. However the difference is the pension scheme debt tends to be extremely large and therefore of great interest to the company and its advisors in seeking approval for a CVA proposal. In many cases if the pension scheme debt is voted against the CVA proposal, it will not be approved.

15. Unless a party bound by the CVA challenges it, the CVA is valid and enforceable. However many creditors simply do not want to incur the expense of challenging unless they can see that a challenge will make a difference in terms of recovery. A challenge was brought by certain creditors in the case of *Re Powerhouse [2007] BCC 83,* where the Court considered a CVA which it was asserted unfairly prejudiced certain parties. The terms of the CVA purported to act as a release of guarantors under leases at the same time of compromising the obligations under the leases owed by the company as tenant. The Court held that in so far as the terms did propose to have the effect of third party release of guarantee obligations, it would be unfairly prejudicial. It is easy to see why that challenge was made. The relevant creditors had every interest in ensuring that third parties, who were probably in many instances more solvent than the company proposing the CVA, remained bound. Thanks to *Powerhouse*, the 'guarantee stripping' CVA proposals have pretty much disappeared. In

fact when a CVA proposal is read, it may actually say now five times in five different ways that third party obligations are not discharged so as to avoid a challenge on this ground!

16. There are of course cases where challenges are brought because of some personal interest. Or where creditors feel strongly because in particular some conduct which is perceived as fraudulent. In *Cadbury Schweppes v. Somji [2001] 1WLR 615*, a creditor had proposed an IVA with his creditors under which they would receive 5 % in value of their debts. Cadbury Schweppes and three banks rejected the proposal and the meeting was adjourned. In the meantime, a friend of the debtor made proposals to three creditors (with the knowledge of the debtor) under which they would receive payments or their debts would be purchased in return for their support of the IVA proposal. Cadbury Schweppes rejected this offer but the three banks accepted it. The IVA proposal was approved without disclosure to other creditors of what the banks had agreed to. The classic 'vote buying' in secret. The Court of Appeal held that the court did impose a strict duty of good faith as between competing unsecured creditors and prohibited any secret inducement to one creditor even if that inducement did not come from the debtor' own estate. The good faith principle has been held in subsequent cases to form part of the material irregularity challenge. (*Kapoor v National Westminster Bank [2011] EWCA Civ 1083*) In *Gertner v FL Finance Limited [2018] EWCA Civ 1781*, Lord Justice Patten carried out a lengthy analysis of the cases relating to the 'good faith principle'. In *Gertner*, the 'vote buying' was perhaps a bit more sophisticated as the debtor's family trust had into a settlement agreement with a major creditor, Kaupthing Singer and Friedlander. One of the other lenders, CFL issued the challenge to Kaupthing being allowed to vote but also in relation to the fact that there was a breach of the good faith principle. CFL wanted an investigation into the affairs of the debtor as it clearly was of the view that there were assets there which may well be available to creditors as a whole. In the world of schemes, inducements for those who signal they will vote in favour of the scheme have not been struck down by the courts in cases where the 'inducement' is in the terms of the scheme – ie there is transparency. Challenges under the good faith principle exists, but perhaps it is sensible to view them in a restricted category. They are not related as such to the growth in retail CVAs.

17. The time limits for bringing a challenge also have in my opinion some bearing on the lack of challenges in this area. In my opinion, challenges mainly tend to arise because there is some 'misconduct' and a creditor believes there is a prospect of finding some asset recovery, or because there is some prospects of a better outcome. The lack of recovery from the insolvent company is in my opinion the real reason for the lack of challenges in this area. The grounds of challenge, discussed later, indicate that the Court will itself use an insolvency comparator in assessing the challenge. This will therefore discourage challenges. There is currently a push by certain landlords in a 'fed up'

category but equally linked to the 'misconduct' category. The case of *Regis* falls into this area. The case rumbles on but really only in relation to costs. The company was placed into administration and there remains additionally the complication of the administration as well as the CVA, but essentially the administration meant from the company point of view, it could argue there was no longer a need to have the CVA challenge heard by the Court. So this is an area of growth in its usage without a large number of challenges. To this extent, Debenhams is a useful even if it is not as helpful as some would hope.

The challenge grounds

18. There are two types of challenges under section 6 IA 1986,

(1) That the proposal unfairly prejudices the interests of one or more of the creditors;
(2) That there was a material irregularity at or in relation to the meeting

There are also what I call, 'jurisdictional' challenges which falls outside the ambit of the two statutory challenges. In many cases, the application notice will simply refer to everything. That is the usual 'make sure I haven't missed anything' but also because sometimes the characterisation of a challenge is difficult. Challenges under section 6 need to be brought within a time period of 28 days from the filing of the report by the Chair of the meeting. For complex reasons case law states it is not possible to extend this time period. (*Re Bournemouth & Boscombe AFC Co Ltd [1998] BPIR 183*).

19. In many cases, an application is issued with fairly rudimentary evidence in support. This can be dangerous because there is certainly an argument that the evidence upon which the applicant is relying on must be filed at the same time.

Unfair prejudice ground

20. This ground is all about inequality of treatment. It involves a comparison between the way creditors are treated. (see *Wimbledon* case). However key to note are the following factors. Firstly, even if there is inequality of treatment, this by itself may not mean that the challenge is successful. It has been recognised early on that inequality of treatment may well be justified and benefit creditors as whole. A classic uncontroversial example is paying essential suppliers on a trading CVA to enable new supplies to be made. Secondly, the inequality must be in relation to the CVA proposal. In both the *Wimbledon* case and the later case of *HMRC v Portsmouth City Football Club ltd [2010] EWHC 2013*, the Court rejected challenges on the basis of unfair prejudice. In both cases the so called football creditors were being paid outside of the proposals which related to the assets of the company. In Portsmouth, Mr Justice Mann rejected the 'troublesome point' as to whether allowing such creditors

(the football creditors) to vote was unfairly prejudicial in that these creditors were going to be paid in full from outside the CVA.

21. Case law has created the concepts of horizontal and vertical comparisons in this area. (*Portsmouth*) As highlighted above, this is one of the reason why so few challenges are brought. The proposal is tested on the basis of different treatment in relation to creditors – horizontal test. However the other test carried out is that of vertical comparison which enables the court to consider the position of creditors in the event that the CVA is not approved. The court will consider the position if the company goes into administration/liquidation, the test being to compare to a realistically available alternative. A CVA is generally going to have to 'beat' the lowest comparator and generally they do – just because they tend to rely on third party funds rather than the actual assets of the company. Although we talk of horizontal and vertical comparators, the facts remain paramount. (Debenhams) This again makes it difficult in the short period of 28 days to advise the client. In my opinion, the vertical comparator is what essentially prevents challenges. Most CVAs proposals will be designed to beat the 'lower bound' and they do so by bringing third party funds, frequently from a company connected to the 'loan to own' parties. Or in some cases, the funding comes in from those who have an interest in the company continuing in existence (Topshop). Even in cases where there may be potential avoidable transactions, the Court may not place a significant value on these as compared to what is available in the CVA. This is what is particularly frustrating in the CVA arena. However in my opinion the Debenhams case, alongside *Re Instant Cash Loans* places landlords on a better footing in relation to leases being handed back.

22. What about those who are to be paid in full voting to approve a CVA which comprises the claims of others? Is this in some way unfair prejudice? This type of argument has as yet to be taken properly. It is possible to see how it operates. The applicant asserts that the CVA proposal essentially treats compromised creditors unfairly because the votes of those who are to be paid in full (and therefore have in reality no interest in the CVA) are being used to obtain the relevant 75 % approval. However, the unfair prejudice ground relates to a challenge to the scheme. What is being complained in the above scenario relates to the way the voting rights are being used by relying on the votes of those will be paid in full to force an approval. I think a court may be troubled by various factors here. Firstly, the rules stipulate that all creditors who have had their claim for voting recognised are entitled to vote. No distinction is made between those who stand to lose nothing in the CVA as compared to those who will lose under the terms of the CVA. Secondly, the existence of the flexible restructuring tool principle will be considered. CVAs are part of the flexibility which exists in insolvency. Thirdly, unless there is some fraudulent conduct or behaviour, the Court will be unlikely to uphold a challenge

which effectively will destroy the CVA and put all creditors in a worse position on the vertical comparator. This is very much the approach taken by Mr Justice Mann in *Portsmouth*. However I can see the arguments going the other way. For example, those creditors who are going to be paid in full are not effectively being compromised. In a scheme, they would not be part of it. At some stage, the Court is going to have to grapple with whether those creditors who do not have their claims compromised or delayed can vote to approve a CVA which essentially does not affect them. However the points made earlier about the comparators means that to date, this type of challenge has not really reached the Courts. It has been raised in a different way in Debenhams but not really argued as I have set out here.

23. There may well be a way of arguing this based upon more general principles, being that what has occurred goes beyond the purpose and intention of the CVAs as created and it was not intended to use the votes of certain creditors such as HMRC to approve a CVA where they stand to lose nothing. Equally, agreeing increased payments to the pension scheme in exchange for their support (and votes) for the CVA proposal is again something which still can be considered challenge wise. There must be in my opinion a point where the Court considers that a CVA proposal which pays certain creditors and not others where it cannot justify those payments can be successfully challenged. The argument starts with the so called 'contagion risk' which I shall deal with below. I think properly argued, this argument is capable of being successful and landlords should consider it carefully in future CVA proposals.

Contagion risk

24. Whilst it is easy to see why an essential supplier may need to be paid its historic claim in full for supplies to be forthcoming in the future, some of those placed into this category do not in my opinion, deserve this place. In the 'trade' this has been called the contagion risk, but essentially it is seeking to justify the differential treatment between different creditors. The argument (used successfully in Debenhams) is that once creditors are aware that there is a proposed CVA, then there is a need to treat creditors in the same way (by paying them) to prevent damage to the business. A problem is that, as is apparent from Debenhams, the group of creditors who fall into this category has grown enormously. Some of those essential suppliers can be easily justified. The ones which I think give pause for concern as well as a potential challenge in the future are HMRC and the pension scheme. These are not going in my opinion to create any 'risk' to the business going forward! As we say in insolvency terms, HMRC is an involuntary creditor. Its liability is triggered by a company being in business. Equally the pension scheme is in the same position. If employees are members of a scheme, the trading on will create liabilities to the scheme as well as having to deal with past deficits

and liabilities which have accrued. In Debenhams, the Judge did not really engage with the position of HMRC. He seemed just to accept the evidence of an expert about the risks to the business. In many respects this type of challenge will be fact specific so in my opinion, this challenge to the catagion risk argument is open and should be considered by landlords in the future.

25. What about the way landlords are classified into different categories? Can this be justified? Debenhams accepted that this way of dealing with landlords was acceptable, but always open to seek to challenge on the particular facts of a case. In Debenhams, the Judge accepted the evidence presented that the classification of the landlords and the reduction in rents was not unfair bearing in mind there was evidence that rents were not being reduced to below market rent. The Judge also considered in this context the contagion risk arguments and accepted them as being valid. This to my mind was one of the weaker parts of the judgement. It remains to be seen if a future case raises this as a challenge on its facts. Landlord seeking to challenge will need a report and the time limits may play against such a challenge. One of the problems is that any landlord seeking to challenge has a limited time period to try and obtain the evidence.

<u>The material irregularity test</u>

26. This encompasses proposals which are challenged on the basis that they are inaccurate, misleading or incomplete because of a failure to comply with the requirements set out in the Insolvency Act 1986 and Rules. This ground also covers challenges to entitlement to vote and value of votes cast. As mentioned above, in many cases challenges are brought under both headings. This heading goes beyond the scheme itself and covers conduct relating and leading up to the approval. In *Kapoor v National Westminster*, the Court held that a breach of the good faith principle fell under this heading. I am not too convicted that is actually correct, but it is the current position. The later Court of Appeal case of Gertner discussed the good faith principle but made no observations as to whether it falls under material irregularity only. This makes a difference in terms of the 28 day limit.

27. Valuations of creditors claims for voting purposes was originally a great challenge area. This type of challenge has been narrowed, primarily because of changes to the rules relating to creditors being bound even when not given notice of the meeting in accordance with the rules. Also, the rules were modified making it clearer how the Chair was to deal with claims which are unliquidated or unascertained. Such claims are now allowed for voting purposes at the sum of £1. (15.31(3)) However in so far as a creditors places evidence before the Chair enabling an increased value to be placed upon the creditors claim, in my opinion, the Chair needs to consider the evidence and

determine what value to place upon the claim even under these new revised rules.(*Re Newlands (Seafood Educational Trust [2007] BCC 195*)

28. In the string of retail cases, there is a standard practice of allowing landlords to vote for a value of 25%. This is another practice as yet to be challenged but bearing in mind that the Rules allow the vote for unliquidated and unascertained claims to be valued at £1, then it may not be the most successful claim. However giving some value to landlords claim enables those landlords who are due to be paid all the rent or most of it to be able to vote in favour.

29. Both of these challenges are subject to an overriding discretion of the court. Even if the case is made out, the Court retains the discretion. A new meeting can be called in relation to a modified proposal, or with other voting entitlements. The Court will be aware, when exercising its discretion, that revocation of the CVA may well mean a worse return for creditors in an eventual liquidation. However there will also be cases where it is easy to see the discretion being exercised by revoking, in particular in cases of 'misconduct. *Somji* is an example as well as a case where the financial picture presented to creditors was misleading such that it was not possible for creditors to be able to assess the proposal.

<u>What is the relevance of Debenhams?</u>

30. I have dealt in part with Debenhams in this paper as I went through the earlier sections. In my opinion the most interesting part of Debenhams is the finding that the right of re-entry/right of forfeiture is a property right which cannot be dealt with under the terms of a proposed CVA. This means that although rent can be reduced under the terms of a proposed CVA, the CVA cannot alter the landlord's entitlement to exercise its right to re-entry. As Mr Justice Norris stated (paragraph 99), '*The CVA can modify any pecuniary obligation upon breach of which the right of re-entry may be exercised; and the right will then be exercisable only in relation to the pecuniary obligations as so modified. But it cannot modify the rights of re-entry itself. It can alter the covenant but must leave the reservation (or condition upon which the lease is granted) untouched. In seeking to prevent the Applicants from forfeiting because of the entry of the CVA or the occurrence of another CVA- related event the Debenhams CVA purports to do what cannot be done under s 1(1).*'

31. This is a jurisdiction argument, namely that such a clause or clauses cannot form part of the CVA proposal. In Debenhams, this meant that the offending clauses were struck out as there was a severability clause. Had no such severability clause exited, then the CVA would have been set aside as not being capable of being a CVA in accordance with section 1 of the Insolvency Act 1986.

However, what is also interesting is that jurisdiction challenges are in my opinion arguably outside the ambit of the challenge grounds in section 6. This means that a challenge under a jurisdiction ground is not subject to the 28 day time limit and also is not subject to the discretion of the Court. The Court will not apply any vertical/horizontal comparators to jurisdiction arguments. Also it is arguable that these CVAs are actually not valid even if not challenged. Put simply, they are not capable of being a CVA under the IA 1986. I await that argument being raised. Many of the CVAs may have severability clauses which of course would save them from this argument being used to set aside the entirety of the CVA itself.

32. In my opinion this also affects the clauses which seek to hand back leases. That would also affect the right of re-entry which are quite specific as to when the landlord can seek to exercise this right. This will have an impact on CVAs because part of the CVA retail model enables a company to hand back unprofitable leases and therefore no longer be liable for business rates. That in my opinion will no longer be possible. Will this mean CVAs become less attractive in this market? In my opinion yes because in many cases, one of the main aims behind the CVA proposal was the ability to hand back leases and accordingly 'trim down' the property portfolio.

33. Just after the Debenhams judgement, a scheme case, *Instant Cash Loans Ltd [2019] EWHC 2795 Ch* was heard before Mr Justice Zacaroli. This case directly dealt with the clause relating to handing back premises. In that case, the Judge held, relying on the same cases as in Debenhams (and in particular *Re Lehman Brothers International [2010] Bus LR 489*, that such a clause could not form part of a scheme under Part 26 of the Companies Act 2006 and it was removed under the severability provisions. There was no jurisdiction pursuant to Part 26 to include a term which affected the proprietary relationship between the landlord and the tenant. The judgement in that case sets out simply the difference as between the relationship debtor/creditor and landlord/tenant. So *Instant Cash Loans* provide further confirmation, if it was needed, that the rights of re-entry cannot be altered by the terms of the CVA pursuant to section 1 of the Insolvency Act 1986. There is, to my mind, some conceptual difficulty in accepting the analysis relating to the rights of re-entry but allowing CVA terms to reduce rents and in particular, to modify the entitlement of a landlord to exercise a right of re-entry to one based on the modified rent. For my part, it seems that the analysis in Debenhams relies on the rents being monetary in nature and therefore falling under the debtor/creditor relationship. It may well be that this as well can be explored in a future challenge.

34. The Judge spent some time in Debenhams dealing with the issue as to whether future rent was capable of forming part of a CVA. This part of the judgement may well form part of an appeal.

Permission was granted. For my part, I think the analysis here means that future rents can be included in a CVA. This does not in my opinion affect the landlord/tenant relationship. It merely compromises the monetary element under the terms of the CVA. That to my mind fits more easily into the compromise element of section 1 of the Insolvency Act 1986 without interfering with the landlord tenant relationship.

35. So turning back to the question I have posed myself. Has the tide turned ? I think Debenhams provides, very much like Powerhouse did in its time, a good brake on the scope and ambit of CVAs and what they can and cannot do. This can only be an advantage to landlords. For those acting for tenants, CVAs are still a valuable tool and properly used, they can enable a business which is insolvent to continue in existence. As CVAs can be proposed by solvent as well as insolvent companies, Debenhams prevents what looked to be a trend, proposing CVAs simply as a way of being able to hand back unprofitable leases. There remain, as I have highlighted above, other areas of challenge. These fall under the challenges in section 6 so they will be subject to the comparators and court discretion. For cases where the aim was not predominantly the handing back of the unprofitable leases, then CVAs will continue. I suspect new ways to stretch their ambit and scope will arise as that is the nature of the flexible tools given to restructuring lawyers and professional advisors. For now, for landlords, I would advise them to enjoy the moment !

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