

Company Voluntary Arrangements: Not Inherently Unfair to Landlords, But What Could Work Even Better?

30 June 2022

The UK Insolvency Service this week published its report on company voluntary arrangements (CVAs), investigating concerns expressed by the commercial property sector that CVAs are being used to disadvantage or target commercial landlords more than other creditors, especially in the retail and casual dining sector.

The research-based analysis conducted by RSM found that – counter to such complaints – “landlords are, broadly, equitably treated compared to other classes of unsecured creditors” in CVAs.

Key Findings of the Report

- *Equitable treatment:* There may be individual instances where landlords could argue that they have not been equitably treated, perhaps when compared to landlords in categories that impose lower compromises. However, based on the report’s analysis, it appears landlords are broadly treated equitably compared to other classes of unsecured creditors as:
 - they tend to have disproportionately larger voting rights than other groups of creditors;
 - CVA voting does not appear to be skewed by the impact of unconnected creditors; and
 - landlords have similar rights to all other creditors: they can propose modification(s) to the proposal and – if lease terms are being amended

(other than a move to monthly rather than quarterly payments) and they do not agree with a proposal that is voted through – they can exercise the break option and take their site(s) back (akin to withdrawing a service) or submit a statutory challenge.

- *Checks and balances*: The statutory requirements of the process include checks and balances (including the role of the nominee and the requirement for at least 75% of those voting to vote in favour of the CVA).
- *Forfeiture rights*: Criticisms of the CVA process have led to several recent high-profile challenges (e.g. *Debenhams*, *New Look* and *Regis*) – but these do not of themselves mean the CVA process discriminates against landlords. In particular, almost all leases include a clause permitting the landlord to take the site back if the company enters an insolvency process such as a CVA and (following *Debenhams*) this right cannot be extinguished by a CVA.
- *Returns*: All the CVA proposals in the analysis represented a better return for all classes of unsecured creditors – both compromised and uncompromised – compared to the relevant alternative of an insolvency process.

What Could Work Better?

- *Length and clarity of CVA proposals*: The analysis found certain CVA proposals were legalistic and lengthy, with unnecessary repetition; they could be improved with executive summaries, the standardisation of tables showing returns to different categories of creditor and the inclusion of a post-CVA balance sheet illustrating the impact of the CVA (including reference to any profit sharing/upside, or why this has not been included).
- *Consultation*: The report found that, whilst there is often consultation with key stakeholders, this could be improved. Specifically, the formal Statement of Insolvency Practice relating to CVAs (SIP 3.2) could be updated to include consultation with the British Property Federation, on behalf of their members, prior to launch of the CVA, if the CVA seeks to compromise landlords' claims and meets certain criteria; the results of the consultation would then be included in the CVA proposal.
- *Addressing complaints in respect of "vote swamping"*: Certain landlords (including

those who challenged *New Look's* CVA) have complained it is unfair to count the votes of creditors not compromised within the CVA. However, the report found that:

- any exclusion of uncompromised creditors would represent a fundamental change to the CVA process;
- given the low potential return in the relevant alternative (should the CVA proposals be rejected), uncompromised creditors may argue that they still have a very significant interest in the voting process;
- accordingly, any change (e.g. to exclude the votes of uncompromised creditors) ought to require consultation with the relevant stakeholders/industry.

Conclusion

The report forms the view that the CVA offers a "flexible and cost-effective solution that bridges the gap between informal negotiations and formal insolvency procedures such as Administration / Liquidation" and provides "an increased chance for the business to survive as a going concern, arguably a cornerstone of the UK's rescue culture".

The full report is [here](#).

For more information on CVAs, please feel free to reach out to Kirkland's restructuring partner Elaine Nolan, who recently co-edited the first practitioners' book on CVAs: 'Company Voluntary Arrangements: Law and Practice', with Tom Smith QC (South Square) (published February 2022).

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