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Blake Morgan LLP

Key facts

111 <small>partners</small>	400 <small>other lawyers</small>
71 <small>legal disciplines</small>	56 <small>tier 1 rankings</small>
800+ <small>total staff</small>	6 <small>UK locations</small>

What they say about us

“I have always found that they provide a great service,” one client reports, adding: “The team can provide expertise for all angles of business.”

Chambers & Partners 2020

“I have found them to be very efficient, very easy to work with and prompt. There is always very good contact with them - they are clear on their advice.”

Chambers & Partners, 2020

“They have really good, strong people and very strong skills.”

Chambers & Partners, 2020

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Company Voluntary Arrangements (CVAs)

In the context of landlord and tenants

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What is a CVA?

An agreement between a company and its creditors to help the company address its financial difficulties. It often involves the company paying a proportion of the monies it owes either to some or all of its creditors.

Commercial tenants who have entered into CVAs:

- Debenhams
- Arcadia
- House of Fraser
- Monsoon
- Jamie's Italian
- Mothercare
- Homebase
- Toys'R'Us

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Commencement



- Company finds itself in financial difficulty
- Directors (or administrator or liquidator if company is in administration or liquidation) propose to the shareholders and creditors that a CVA is entered into
- Will nominate a qualified insolvency practitioner (nominee) to supervise the proposal and implementation of the CVA
- The nominee will give notice to all creditors (of which they're aware of) of the decision making procedure and seek the creditors' approval of the CVA proposal

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Moratorium



- There is no automatic moratorium to prevent creditors taking action to recover their debts from the company's assets (including forfeiture and commercial rent arrears recovery)
- Can enter into administration in connection with the CVA to benefit from a moratorium but will incur increased costs
- However a small company may apply for a 28 day moratorium whilst the CVA is being considered
- The Government is planning on abolishing the small companies' moratorium and introducing a new moratorium for companies which are solvent and will be able to carry on business and meet liabilities during the moratorium, but will become insolvent if action isn't taken

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Approval of a CVA



- The terms of a CVA will vary and will be drawn up by the directors and the nominee
- The unsecured creditors which have been notified of the CVA will consider its terms
- Secured creditors' debts are not included in a CVA and they are not entitled to vote
- The unsecured creditors will vote on the CVA
- If 75% of the unsecured creditors (by value of the debt) vote in favour, the CVA is approved (providing that at least 50% of the creditors (by value) in favour of the CVA aren't directors or their family)

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Effect of approval



- The directors will continue to run the business
- The nominee becomes the CVA supervisor
- Which debts and creditors are covered will depend on the terms of the CVA
- Binds all unsecured creditors whether they voted in favour of the CVA, and whether they received notice of the vote
- For landlords, the CVA will include rent arrears and future rent unless the CVA terms exclude this
- Will often involve creditors being paid a proportion of the debt owed

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Challenging CVA



- Creditors can challenge a CVA for being unfairly prejudicial or materially irregular
- Must challenge within 28 days of the CVA's approval, or if a creditor was not given notice of the CVA, within 28 days of the them becoming aware of the vote
- If a creditor was paid in full before the CVA proposal, they are no longer a creditor so can't vote or challenge, but can fund the challenge of another creditor. As Sports Direct did in the Debenhams CVA
- Can challenge a CVA after it has been terminated. Landlord wanted CVA revoked as if it never happened and the variations to their leases undone. Awaiting trial to see how this would be done - *Williams v Carraway Guildford (Nominee A) Ltd [2019] EWHC 3073 (Ch)*

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Unfair Prejudice



Depends on the facts. Common for CVAs to treat creditors differently

Powerhouse Case

- CVA released parent company guarantee under the company's leases
- Landlords would not get paid in full and would lose their guarantee whilst other creditors who voted for the CVA would get paid in full
- The Court decided that the CVA couldn't actually unilaterally release the guarantor but could in theory prevent the landlord taking action against them
- Was unfairly prejudicial to the landlords as there was no compensation for their loss of guarantee

Prudential Assurance Company Ltd and others v PRG Powerhouse Ltd and others [2007] EWHC 1002 (Ch)

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Debenhams CVA case



Landlords challenged the CVA claiming:

- That future rent payments were not 'debts' and therefore were outside the scope of the CVA
- That reducing rent payments changed the terms of the lease which a CVA couldn't do
- That restricting the landlords' proprietary right of forfeiture was outside the scope of what a CVA could do
- The CVA prejudiced the landlords as it treated them less fairly than other creditors
- Material irregularity in the CVA process as it was not disclosed that Debenhams had potential claw back claims

06/03/2020 *Discovery (Northampton) Ltd v Debenhams Retail Ltd [2019] EWHC 2441 (Ch)* 11

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Debenhams - Court decision



- Dismissed all arguments except in relation to forfeiture
- As a proprietary right a CVA can't remove a landlord's right to forfeiture but it can change the tenant's obligations to change what can trigger forfeiture. Therefore this provision of the CVA was removed
- Reducing the future rent payments was not unfairly prejudicial but importantly the contractual rent was far above market rent and the reduction did not bring it below market
- In assessing the fairness of rent cuts:
 - a landlord must receive at least market value;
 - landlords should not be subsidising other creditors; and
 - the rent payments should be interfered with as little as possible and only to the extent necessary to achieve the purpose of the CVA

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Ending a CVA



- When the supervisor is satisfied that the objective of the CVA has been fulfilled. Usually after 2 – 5 years.
- If the supervisor decides that the objectives can't be fulfilled they can petition that the company be put into administration or wound up
- CVA should deal with the consequences if the company doesn't comply with the terms of the CVA. Usually the supervisor will be able to consider whether to continue, end the CVA or seek another insolvency procedure
- If the CVA is prematurely ended the creditors will be able to pursue the debtor for the original value of their debts

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Effect on Tenants



Advantages

- The management retain control of the company unlike administration and liquidation
- Less costly and more informal than other insolvency procedures
- Allows the company to terminate unprofitable contracts and make staff redundant more easily
- Can result in reduced rent
- Reduces the companies debts or allows it more time to pay

Disadvantages

- Brings the company's credit rating to zero potentially making it harder for it to trade in future
- Often results in administration regardless, leading to increased costs
- Does not cover secured creditors who may still enforce their security
- Requires 75% of creditors by value to agree
- No statutory moratorium so creditors may seek to enforce their debts prior to the CVA being agreed

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Controversies



- Other creditors (who may be paid in full under the CVA) can outvote landlords, forcing them to accept a reduced rent
- Unascertained debts (such as future rent) are given a lesser value than incurred debts and it is common for the amount owed in future rent to be reduced by 75% for voting purposes
- Often seen as a tool that tenants use to achieve reduced rents and close unprofitable stores, at the expense of landlords and other retailers
- As not overseen by the courts, some CVAs may be unfairly prejudicial but not all creditors will be able to afford to take the matter to court
- Concerns that CVAs are seen as a quick fix; they do not address managerial or structural issues of a company, with half of companies later going into administration according to Colliers.

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Effect of CVAs on the market

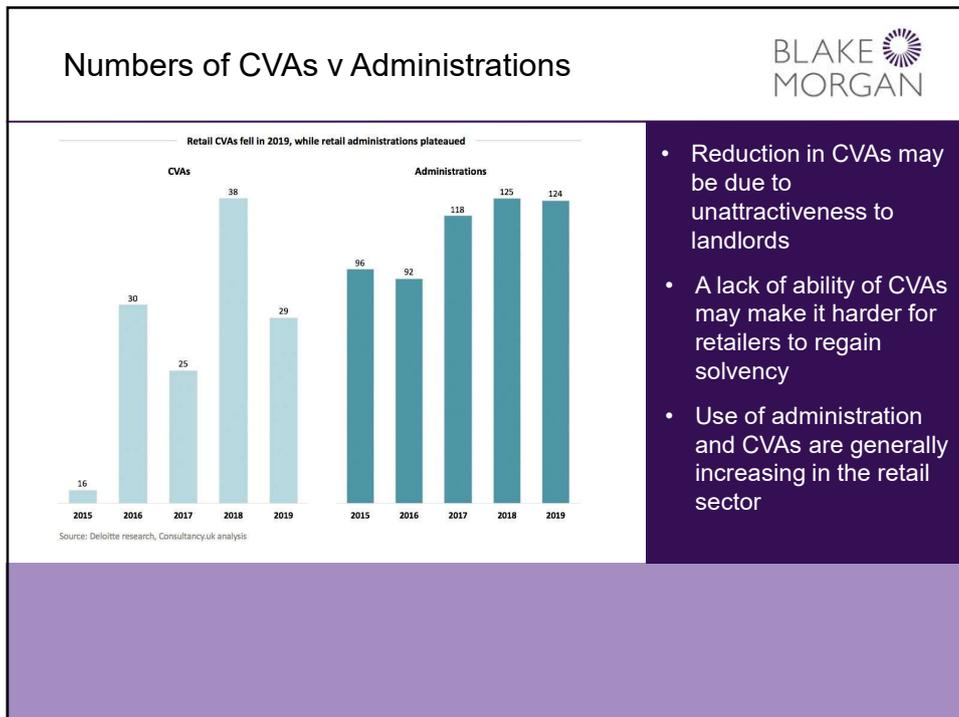


- Next has reportedly added clauses into their leases which provide for rent reduction where a neighbour receives a similar reduction through a CVA.
- Calls by some retailers such as Mike Ashley for rents linked to performance (based on turnover or brand exposure)
- Shorter length leases or more break options
- Calls from profitable retailers like Primark who have strong negotiating position for rent reductions
- Intu Properties, a shopping centre landlord has blamed its financial difficulties in part on CVAs, as a number of its tenants have obtained reduced rents.
- Landlords accepting stakes in the tenant or enter into profit-sharing schemes in exchange for rent reductions (in Arcadia and Monsoon's CVAs)

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Research by Savills on CVAs between Jan 2018 – Sep 2019 show:

- 39% resulted in no rent reduction
- 37% resulted in rent reduction
- 24% closed stores

Shows less rent reductions than the media implies

Alternative is often liquidation or administration which could see landlords receiving nothing and left with empty premises

Potential Positives for Landlords

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