

TENANT INSOLVENCY - A WHISTLE STOP TOUR FOR LANDLORDS



IDENTIFYING THE RELEVANT INSOLVENCY REGIME

When faced with an insolvent tenant it is imperative for a landlord to identify as early as possible which insolvency regime applies. Each regime listed below has unique characteristics which can have a direct bearing on the strategy a landlord is able to adopt when dealing with a defaulting tenant.

- **ADMINISTRATION**

If the tenant has entered into administration a statutory moratorium is placed over the tenant and its assets meaning that no action can be taken against the tenant by a landlord without a court order (i) or express consent of the administrator (ii.) The underlying lease remains vested in the tenant who remains liable for the lease covenants subject to the moratorium. The administrator does not have the ability to disclaim the tenant's liability under the lease and it is the primary objective of the administrator to rescue the company as a going concern. Rent may be paid as an expense of the administration but the landlord will not be able to forfeit the lease without either permission of the court or consent from the administrator. However, if the lease is subject to an underlease then it is possible for the landlord to require the undertenant to redirect rent to it.

- **LIQUIDATION**

Unlike administration, if a tenant enters into liquidation there is no statutory moratorium placed over it or its assets. The underlying lease remains vested in the tenant and the liquidator has the power to disclaim the whole of the insolvent tenant's liability under the lease, ending the tenant's rights, interests and liabilities under the lease. Rent may be paid as an expense of the liquidation and the landlord can require an undertenant to redirect rent to it. The primary objective of the liquidator is to collect the tenant's assets, realise them and distribute them to creditors; not to rescue the company.

- **COMPANY VOLUNTARY ARRANGEMENT (CVA)**

CVAs are topical at present, given the recent demise of certain high profile retailers in the context of CVAs. A CVA is a statutory binding agreement between an insolvent company and all creditors. Rent falling after the date of the CVA should not be caught, as the CVA relates solely to the current indebtedness of the tenant at the date of the CVA. The ability of the landlord to forfeit the lease for pre-CVA arrears is lost but a key point in favour of the landlord is that there is no statutory moratorium over the tenant and furthermore there is no power to disclaim the underlying lease.

- **RECEIVERSHIP**

Receivership is only available to a secured creditor. There is no statutory moratorium over the tenant and there is no power conferred on the receiver to disclaim the underlying lease. The lease remains vested in the tenant who remains liable for all lease covenants including payment of rent. The primary objective of the receiver is to realise the security of the tenant in order to repay the secured debt



At Davidson McDonnell, we regularly advise on the full range of commercial property matters.
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