Property Insolvency

Second Edition

Peter Levaggi
Partner, Joint Head of Property Litigation Group and Head of Property Insolvency Group
Charles Russell Speechlys

Roger Elford
Partner, Corporate Recovery & Insolvency Group and Property Group
Charles Russell Speechlys

With a Foreword by Peter Arden QC

JORDAN PUBLISHING
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>v</td>
</tr>
<tr>
<td>Preface</td>
<td>vi</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>xxiii</td>
</tr>
<tr>
<td>Table of Statutes</td>
<td>xliii</td>
</tr>
<tr>
<td>Table of Statutory Instruments</td>
<td>li</td>
</tr>
<tr>
<td>Table of Abbreviations</td>
<td>liii</td>
</tr>
<tr>
<td>Chapter 1</td>
<td></td>
</tr>
<tr>
<td><strong>Introduction</strong></td>
<td>1</td>
</tr>
<tr>
<td>Property insolvency – overview</td>
<td>1</td>
</tr>
<tr>
<td>A brief history</td>
<td>1</td>
</tr>
<tr>
<td>Modern property insolvency</td>
<td>2</td>
</tr>
<tr>
<td>Human rights</td>
<td>4</td>
</tr>
<tr>
<td>Insolvency – overview</td>
<td>4</td>
</tr>
<tr>
<td>Immediate considerations and signs that a tenant may be or may</td>
<td>4</td>
</tr>
<tr>
<td>become insolvent</td>
<td></td>
</tr>
<tr>
<td>Pre-insolvency action by directors</td>
<td>6</td>
</tr>
<tr>
<td>When is a company insolvent?</td>
<td>8</td>
</tr>
<tr>
<td>Determining the insolvency of an individual debtor</td>
<td>8</td>
</tr>
<tr>
<td>Voluntary arrangements</td>
<td>8</td>
</tr>
<tr>
<td>Individual voluntary arrangements (IVAs)</td>
<td>9</td>
</tr>
<tr>
<td>Company voluntary arrangements (CVAs)</td>
<td>13</td>
</tr>
<tr>
<td>The effect of the approval of the voluntary arrangement</td>
<td>14</td>
</tr>
<tr>
<td>Challenging voluntary arrangements</td>
<td>15</td>
</tr>
<tr>
<td>Material irregularity</td>
<td>16</td>
</tr>
<tr>
<td>Time-limits for challenge</td>
<td>17</td>
</tr>
<tr>
<td>The court’s power on making a finding of unfair prejudice or</td>
<td>17</td>
</tr>
<tr>
<td>material irregularity</td>
<td></td>
</tr>
<tr>
<td>Variation of voluntary arrangement</td>
<td>17</td>
</tr>
<tr>
<td>Administrative receivership</td>
<td>17</td>
</tr>
<tr>
<td>Administration</td>
<td>18</td>
</tr>
<tr>
<td>Administration order</td>
<td>20</td>
</tr>
<tr>
<td>Appointment of administrator by holder of qualifying floating</td>
<td>20</td>
</tr>
<tr>
<td>charge out of court</td>
<td></td>
</tr>
<tr>
<td>Appointment of administrator by company or its directors</td>
<td>21</td>
</tr>
<tr>
<td>The status of the administrator</td>
<td>22</td>
</tr>
<tr>
<td>The effect of administration</td>
<td>23</td>
</tr>
<tr>
<td>The duration of the administration</td>
<td>24</td>
</tr>
</tbody>
</table>
Property Insolvency

Bankruptcy and individual insolvency
  Debtor’s petition
  Creditor’s petition
  The bankruptcy petition
  Action following making of bankruptcy order
Liquidation
  Voluntary liquidation
  Compulsory winding up by the court
  Partnerships and limited liability partnerships

Part 1
Tenant’s Insolvency

Chapter 2
Liability for Rent and Other Obligations under a Lease
  Receiverships – rent and liabilities
    Where the receiver has use for the property (or there is value)
    Where the receiver has no use for the property (and there is no value)
    Where the landlord appoints a receiver
    Is a receiver personally liable to pay rent?
  Voluntary arrangements – rent and liabilities
    Landlord’s position prior to the creditors’ meeting
    Rent arrears and other obligations due prior to VA
    Future rent – the landlord’s position in relation to rent and obligations falling due post-VA meeting
    Where the landlord has additional security over the tenant’s property
    Liabilities where VA is not approved
    Where the lease has been guaranteed
Liquidation – rent and liabilities
  Rent prior to commencement of liquidation
    Quantification and procedure of landlord’s claim – proof of debt
    Unliquidated claims
    Interest
  Rent falling due after the commencement of the liquidation
    Rent and other obligations arising which have fallen due after the commencement of liquidation
    Liquidation expenses
  Rent not yet fallen due
  Rent following disclaimer
Administration – rent and other liabilities
  Pre-administration rent arrears and other liabilities
  Post-administration rents and liabilities
    Rent – expense of administration
    Old-style administration expenses governed by IA 1986, s 19
    New-style administrations (post 15 September 2003) – the development of the administration expenses regime under IR 1986, r 2.67
Contents

New-style administrations (post 15 September 2003) – the current position under IR 1986, r 2.67 65
Varying the order of priority under r 2.67(2) and (3) IR 1986 67
Administration expenses – the practical position 70
Liquidation/administration set-off 72

Chapter 3
Distress for Rent and Commercial Rent Arrears Recovery and Court Enforcement 75

Enforcement and the remedies available to debtors (and office holders in any event) 75
General principles and objectives of TCEA 2007 76
Enforcement agents
  Client account and financial/statutory requirements for enforcement agencies 80
  Certification process 80
  Complaints 81
  Appeal 82
  Costs 82
  Application of security after consideration of complaint at a hearing 82
  Commercial rent arrears recovery 83
  Distress abolished 6 April 2014 83
CRAR – Commercial Rent Arrears Recovery (ss 71 and 72 of the Act) 84
  Definition of landlord 84
  Mortgagors 86
  Enforcement agent 86
  Lease
    Exclusive possession: the difference between a lease and licence 87
  Tenancy at will and sufferance 87
    Tenancy at will 87
    Tenancy at sufferance 88
  Commercial premises 88
  Pure rent only 89
    Further rent conditions 90
  Permitted deductions 91
    Deductions that can be made 92
  CRAR after the end of lease 93
Right to recover rent from sub-tenant 94
  New procedure (post 6 April 2014) 95
  The notified amount 96
  The effect of a s 81 notice 96
  Off-setting payments under a notice 97
  Withdrawal and replacement of notices 98
Restrictions on enforcement and CRAR following insolvency of tenant/debtor 98
Receivership
  Receivership and court execution and CRAR 100
  Fixed charges, receivership and CRAR 101
Compulsory liquidation
  When would an application to use enforcement succeed? 103
    Where enforcement/CRAR is commenced and completed prior to the petition 103
    Where enforcement/CRAR is commenced prior to winding-up petition but not completed 103
    Where enforcement/CRAR commenced in the period after winding-up petition but before winding-up order 104
    Where enforcement/CRAR is commenced after winding-up order 105
Voluntary liquidation 108
Administration
  Effect of moratorium 109
  When will the court’s permission be granted 109
  The status of the distress if no application under para 43 to continue the enforcement is made 110
  Procedural difficulties from moratorium 112
  Enforce or pay - consent under the moratorium; administration expenses governed by IR 1986, r 2.67 112
  The landlord’s position 113
    Landlords administration expenses 113
Bankruptcy
  Distress/CRAR and bankruptcy 114
  CRAR v execution 115
Voluntary arrangements
  CRAR and VAs 116
  Moratorium 116
  Individual voluntary arrangements – moratorium 116
  Small company – moratorium 117
  Liability and remedies under TCEA 2007 118
Third party claiming goods
  Landlords 118
  Other creditors – interpleader removed 119
  Procedure for making a claim to controlled goods para 60 and procedure Part 85 CPR 119
  Procedure for making a claim to controlled goods where the claim is disputed 122
    The balance between innocent third parties and unscrupulous debtors 123
Exclusion of liability for sale or payment of proceeds
  Liability prior to sale 123
  Liability for sale 124
Remedies available to debtor
  Damages claim for breach of Schedule 12 125
  Assignment/transfer while goods are bound 126
  Continuing enforcement after payment 126
## CRAR

Landlord’s /creditors’ remedies 127

Wrongful interference 127

Offences 128

Intentional obstruction 128

## Chapter 4

### Forfeiture (and Possession)

Overview 129

The status of the tenant 130

Status of sub-licence to occupy granted by an administrator or liquidator 133

Termination of the contractual interest and common law right to occupy 135

Termination of licence 135

Residential licence 136

Termination of tenancy on a contractual basis 136

Statutory protection 137

Which statutory code applies? 137

Business tenancies 138

Conditions for protection 138

Security of tenure 139

Cesser of business use 139

Business tenant’s right to apply for a new tenancy 140

Assignment of statutory business tenancy 141

Residential tenancies 142

Rent Act 1977 142

Housing Act 1988 143

Forfeiture 146

Forfeiture of statutory protected tenancies 146

When can the landlord forfeit? 146

Forfeiture clause 146

Insolvency event as a condition allowing forfeiture 147

Standard forfeiture clause 148

Waiver 149

Restrictions on forfeiture 151

Warning notice under the Law of Property Act 1925, s 146 151

Remediable/irremediable breach 151

Bankruptcy/liquidation exceptions to s 146 152

Other exceptions to s 146 153

Long residential leases 154

Insolvency restrictions 154

Receivership 154

Individual voluntary arrangements 155

Company voluntary arrangements 155

Administration 158

Consent to assign 161

Voluntary liquidation 163
Compulsory liquidation 164
Prospect of landlord obtaining the court’s permission to issue
forfeiture proceedings 165
Bankruptcy 166
Debt Relief Orders (DRO) 166
An overview of DROs 167
DRO moratorium 168
Discharge 169
Remedies of creditors, landlords and others 170
Relief from forfeiture 170
Who can apply for relief? 171
Court’s discretion 172
Relief and non-payment of rent 173
Terms of relief 173
Insolvency and relief 174
Forfeiture – effect 175
How does forfeiture take place? 175
Effect of forfeiture 176

Chapter 5
Third Party Liability 177
Surety of existing tenant 177
Release of guarantor 179
Forfeiture 179
Changes to the terms of the lease 179
Other forms of release 181
Death of surety 181
Bankruptcy of the guarantor 182
The position of a guarantor on the disclaimer of the lease 182
Other liabilities of the guarantor 183
Liability to landlord’s successors in title 183
Dissolution of the tenant 183
Administration – particular guarantor problems 184
Original tenant liability 184
Old tenancies 185
The s 17 notice 185
Non-release of original tenant 186
Voluntary arrangement of tenant 186
Variations to the lease agreed by the landlord and subsequent
assignees 187
Liability for reviewed rent 188
Original tenant liability during continuation tenancy 188
New leases 188
Leases created on or after 1 January 1996 188
Intermediate assignee 190
Old tenancy 190
New tenancy 190
Contents

Sureties of original tenant or intermediate assignee 190
  Old tenancy 190
  New tenancy 191
Subtenants 191
  (The now repealed) Law of Distress Amendment Act 1908 192
  Tribunals, Courts and Enforcement Act 2007 192
  New procedure 193
  The notified amount 193
  The effect of a TCEA 2007, s 81 notice 194
  Off-setting payments under a notice 195
  Withdrawal and replacement of notices 195
The effect of voluntary arrangements on the liability of guarantors and other sureties 195
  Overview of arrangements 196
  Schemes of arrangement 196
  Voluntary arrangements 197
  Effect on third party liability 198
  Powerhouse 200
  Practical considerations for landlords 205

Chapter 6
Leasehold Security – Rent Deposits and Other Forms of Security 207
  Introduction 207
  How the deposit is held 208
  Administrative or other form of LPA/fixed charge receivership 210
    Voluntary liquidation 210
    Compulsory liquidation 211
    Administration 211
    Voluntary arrangements 211
    Financial collateral arrangements and bank guarantees 212

Chapter 7
Disclaimer 215
  Onerous property 215
    ‘Unsaleable or not readily saleable’ 215
    Property giving rise to a liability 216
  Disclaimer in liquidation (IA 1986, s 178) 217
    Procedure in liquidation 217
    Giving up possession of disclaimed property 219
    Notice to elect (IA 1986, s 178(5)) 220
  Disclaimer and third parties 221
    Guarantors and former tenants 221
    Obligation to take new lease 224
  Subtenants 224
    Subtenancies of part 225
  Mortgagees 226
  Parties who have acquired rights under other contracts 226
  Deposits and retentions 227
Vesting orders
  Time-limits
  Guarantors and other third party sureties
  The landlord
  Subtenants with an underlease of the whole of the property demised by the disclaimed lease
  Subtenants with an underlease of part only of the property demised by the disclaimed lease
  Purchasers of leases
  Original tenants and previous assignees
  The effect of the vesting order
  The landlord’s claim following disclaimer
  Other claims following disclaimer
    Bona vacantia and Crown disclaimer
  Disclaimer and bankruptcy (IA 1986, s 315)
    Distinguishing characteristics of disclaimer in bankruptcy cases
    Effect of trustee’s disclaimer
    Leaseholds
    Disclaimer of dwelling house
    Rentcharges
    Where permission of court is required
    Failure of Service of Notice or other default

Chapter 8
Insolvency Sale of Tenancy – Assignments, Valuations and ‘Pre-packs’
Assignments
  Insolvent tenant’s application for licence: can the landlord be compelled to accept an unsuitable assignee simply because it might be in the best interests of creditors?
Valuations
  Can the lease be sold without prior court or creditor or landlord approval?
‘Pre-packs’
  Landlord’s remedies in relation to a pre-pack

Part 2
Freeholder/Landlord Insolvency
Chapter 9
Landlord’s Covenants and Insolvency
  Tenant’s proof in landlord’s liquidation
  Tenant’s proof in administration
  Voluntary arrangements
  Receivership
  Bankruptcy
  Set-off
  Injunctive relief
  Insolvency restrictions
Chapter 10
Freehold Covenants and Insolvency 261
The burden in common law 261
The burden in equity – restrictive covenants 262
The benefit 263
Insolvency restrictions and enforcement of freehold covenants 264

Chapter 11
Disclaimer of Freehold – Escheat 267

Chapter 12
Developer/Construction Insolvency 271
Termination 272
No express termination clause 272
Express termination clause 273
Waiver 274
Termination and moratoria 274
Effect of termination on subcontracts 274
Liabilities, post-insolvency 275
Completion of the works 278

Chapter 13
Insolvency Sale of Freehold 281
Administration 282
Contracting party going into administration prior to administration 283
Liquidations 283
Receivership 284
Representations, liabilities and warranties of title 285

Part 3
Mortgagees and Receivers

Chapter 14
Overview of Mortgages and the Position of the Mortgagor 289
Legal mortgages 289
Equitable mortgages 290
The position of the mortgagor 290
The right of redemption 291
The terms of the mortgage 291
Undue influence 291
Undue influence, misrepresentation and commercial mortgages 292
Residential mortgages 293

Chapter 15
Interaction between the Rights of Mortgagees and Formal Insolvency Regimes 295
Bankruptcy 295
Voluntary arrangements (company and individual) 295
Administration 297
   The effect of the moratorium 297
   Sale of mortgaged property by the administrator 298
Liquidation 298
   Creditors’ voluntary liquidation 298
   Compulsory liquidation 299

Chapter 16
Mortgagees’ Remedies 301
   Suing under the covenant to repay 303
Entry into possession 304
   The right to possession – the restrictions 304
       Statutory restrictions on the right to possession in respect of
       residential property 304
       Vacant property 305
Proceedings for possession 305
   Administration of Justice Acts 305
   Exceptions to AJA 1970 and AJA 1973 306
   Reasonable period for repayment 308
   Costs of an application for a possession order 309
The status of the mortgagee in possession 309
   Rights of the mortgagee 311
   Right to enforce leasehold covenants 311
   Mortgagee’s right to carry on business 311
   Agricultural land 312
   Right to grant and surrender leases 312
The Mortgage Repossession (Protection of Tenants etc) Act 2010 313
The mortgagee’s power of sale and other remedies 314
   The statutory power of sale (LPA 1925, s 101) 315
       When the power of sale arises 315
       Exercise of the power of sale 317
       Duty to act in good faith 317
       Duty to obtain best price 317
   Contracting out of mortgagees’ duties 319
   Mortgagees’ duties post-Cuckmere 320
       No duty to enhance the value of the mortgaged property 320
       Mortgagee’s liability for failure to market the property correctly 321
       Is there an obligation to sell a portfolio of properties individually? 323
       Time-limit for challenging the mortgagee’s conduct of sale 323
Sale to mortgagee 324
   The proceeds of sale 325

Chapter 17
Receivers 327
   LPA receivers 327
   Fixed charge receivers 328
       The agency and duties of the receiver 328
       Position of third parties dealing with a receiver 329
Contents

Remuneration of the receiver 330
Termination of receivership 330
Duties of receivers when managing the mortgagor’s business 330
Costs awards against receivers and third parties 330
Cases where the receiver acts as agent of the mortgagee 331
Application of receipts by the receiver 332
Administrative receivers
  Liability (if any) to mortgagor of third parties instructed by receiver 333
  The abolition of administrative receivership 334
Foreclosure 334
Limitation periods applicable to the enforcement of mortgages 335
  Limitation period for actions to recover land 335
  Limitation period for actions to recover mortgage monies where the mortgagee faces a shortfall 336
Claims for interest 337

Part 4
Property Assets and Personal Insolvency
Chapter 18
Personal Insolvency 341
  Introduction 341
  The effect of bankruptcy 341
  The matrimonial home
    Official Receiver’s and trustees’ inquiries 342
    The bankrupt’s interest 342
    The quantification of the bankrupt’s beneficial interest in the property 343
  Existence of a deed of trust 347
Enforcement of the trustee’s interest 348
  Applications for an order for possession and sale 350
    Charges under IA 1986, s 313 350
    Orders for possession and sale 351
  Human Rights and IA 1986, s 335A 354
  Improving a party’s share and equitable accounting 356
Improvements to the property 356
  Equitable accounting 357
  Mortgage payments and occupational rent 357
    Mortgage contributions by the non-bankrupt spouse/partner 357
    Mortgage contributions by the bankrupt 359
  Equity of exoneration 359
  Bankruptcy and commercial leases 361
  Residential tenancies 361
After-acquired property (IA 1986, s 307) 362
Contracts for the sale of land 363
Secured creditors 363
Chapter 19
Ancillary Relief and Bankruptcy 365
Property adjustment orders 365
Insolvency Act 1986, s 284 366
Transactions at an undervalue and *Hill and Bangham v Haines* 367
The Appeal 368

Part 5
Property Taxation and Insolvency
Chapter 20
Tax 373
Introduction 373
An overview of taxes 374
Corporation tax 374
Income tax 375
Capital gains tax 376
Value added tax 377
Stamp Duty Land Tax 377
Other taxes 378
Liability for tax 379
Liquidators and administrators 379
Value added tax 380
Sale of property 381
VAT 382
Option to tax 382
Liability to VAT 383
Transfer of going concern 383
Surrender of a lease 385
Rates 386

Part 6
Appendices
Appendix 1
The Options for Landlords with Insolvent Tenants 391

Appendix 2
Notice under Section 146 of the Law of Property Act 1925 395

Appendix 3
Notice of Intended Disclaimer 397

Appendix 4
Notice to Elect – Liquidation 399

Appendix 5
Notice of Disclaimer under Section 178 of the Insolvency Act 1986 401
Appendix 6
Notice of Intended Disclaimer to Interested Party 403

Appendix 7
Notice to Elect – Bankruptcy 405

Appendix 8
Notice of Disclaimer under Section 315 of the Insolvency Act 1986 407

Appendix 9
Proof of Debt – General Form 409

Appendix 10
Witness Statement 413

Appendix 11
Application Notice 415

Appendix 12
Licence to Occupy 417

Appendix 13
Deed of Appointment of Receiver Under Law of Property Act 1925 429

Appendix 14
Written Acceptance of Appointment by Receiver 431

Appendix 15
Deed of Indemnity to Receivers 433

Index 435