

# DOUG STEVENS SEMINAR

## 21st MAY 2018

### ▶ SUBJECT

- ▶ 1. CVA's - IVA's - PRE-PACKS - ADMINISTRATIONS - PHOENIX Co's -LIQUIDATION 20mins
- ▶ 2. ASSIGNING & UNDERLETTING PRE-EMPTION AGA's 30 mins
- ▶ 3. OPEN QUESTION TIME 10 mins

1. **NEXT SEMINAR 18<sup>th</sup> JUNE CBRE 'C' Bar at 08;00hrs**

2. **PREVIOUS SEMINARS - Notes posted [www.douglasstevens.co.uk](http://www.douglasstevens.co.uk) Seminars**

SEMINAR BY DOUG STEVENS TO 1<sup>st</sup> & 2<sup>nd</sup> YEAR GRADUATES  
DELIVERED AS A POWERPOINT PRESENTATION

# COMPANY VOLUNTARY ARRANGEMENT ( CVA )

## ▶ Q. WHAT IS A CVA?

- ▶ A. If your limited company is insolvent, it can use a Company Voluntary Arrangement (CVA) to pay creditors over a fixed period. If creditors agree, your limited company can continue trading. Creditors include suppliers and landlords.

## ▶ Q. HOW IS IT POSSIBLE?

- ▶ A. INSOLVENCY ACT 1986 This Act introduced CVA's. It was intended to be a positive option to help companies in financial trouble. It was moderately used in the early years – featured quite strongly post-credit crunch from 2008 - but is now is almost a default position for companies who are under-performing. A commonly held view is that it's provisions are now being abused. Also Insolvency Act 2000

## ▶ Q. HOW DOES IT WORK?

- ▶ A. A company or limited liability partnership (LLP) can apply for a CVA if **all** the directors or members agree. Using an insolvency practitioner the company prepares a plan to pay unsecured creditors less than they are actually owed. The creditors are given the opportunity to vote on the proposed terms

## ▶ Q. WHAT NUMBER OF VOTES ARE REQUIRED FOR THE CVA TO BE CARRIED?

- ▶ A. 75% of unsecured creditors

## CVA's - (RETAIL SECTOR) NUMBERS & NAMES & PLAYERS

- ▶ NUMBERS 2017                      48 CVA'S              1,383 stores              12,225 employees
- ▶      To APRIL 2018                      16 CVA's              1,256 stores              13,446 employees
- ▶ NAMES BENCH MAPLIN WINE RACK BARGAIN BOOZE TOYS R US EAST NEW LOOK CARPETRIGHT  
MOTHERCARE JAMIES OLIVER BYRON CARLUCCIOS HOUSE OF FRASER SELECT
- ▶ PLAYERS
- ▶ HMRC agency that decides on these proposals is called the Combined Voluntary Arrangement Service. Currently, it votes in favour of c.73% of all proposals.
- ▶ INSOLVENCY PRACTITIONERS - actually advertise their skills as follows -;
- ▶ Where retailer has some profitable & some loss making stores on leases it's often slow & difficult to assign lease or surrender it to the L/L. Assigning leaves a residual liability (AGA). Surrender may be at a cost (reverse premium).
- ▶ Use a CVA to exit those loss making stores by closing the store and terminating the lease - or - by demanding a significant rent reduction.
- ▶ RETAILERS - can re-shape their portfolio - reducing rents and ditching loss making stores.
- ▶ LANDLORDS - relatively helpless to stop CVA's. Must either accept reduced rent - or seek new tenant where store vacated or where a better tenant and/ or better rent is achievable

## CVA's continued

- ▶ Q. WHY CAN'T LANDLORDS VOTE IT DOWN? They don't want to accept a 30% (or more) reduction in rent and if store closure is proposed probably don't want the lease back
- ▶ A. The principal creditors for a retail company are (invariably) overwhelmingly the suppliers. In rough terms they might account for 90% of the creditors – so in effect the landlords vote is worth only 10%. The suppliers are happy (*sic*) to get part of their money back and continue supplying. Hence in the recent CVA votes the pass rate was Carpetright 98% - New Look 98% - Toys R Us 98% - Jamie Oliver 95%
- ▶ The principle of CVA's as provided for in INSOLVENCY ACT 1986 was to ensure that all creditors are treated the same. As currently operated CVA's arguably treat Landlords unfairly.
- ▶ Morgan Garfield of property company ELLANDi has suggested changes to and tests for CVA procedures aimed at making the process fairer to landlords as follows -;
- ▶ Obligation to provide - Up to date accounts at time of CVA - Pro-forma balance sheet and projected P&L post CVA
- ▶ Fully costed turnaround plan with third-party validation that the turnaround is credible
- ▶ Individual store trading figures provided to allow analysis of true rent affordability on a shop-by-shop level, and transparency that landlords are being treated fairly
- ▶ A structure whereby the shareholders and other creditors are also taking a reduction in their liabilities and/or committing genuine fresh risk capital (this should not be a senior secured equity cash injection that ranks ahead of other creditors, as proposed in many CVAs)
- ▶ A clause whereby any landlord has an option to take back a lease immediately post-CVA - this should apply to stores that are not having rent reductions as well as those that are. This would create a disincentive to tenants trying to cherry-pick stores, they could find they lose good stores in addition to dropping bad ones. It would hopefully mean that only companies in genuine distress would risk a CVA.
- ▶ That any store where the rent is reduced is no longer deemed to have security of tenure within the Landlord and Tenant Act. This would give a landlord the option to recruit a better tenant at a genuine market rent in the future.

# INDIVIDUAL VOLUNTARY ARRANGEMENTS (IVA`s)

- ▶ **Individual Voluntary Arrangement (IVA) - INSOLVENCY ACT 1986**
- ▶ A sole trader or self-employed trader who is insolvent can appoint an insolvency practitioner who works out what you can afford to repay and how long the IVA lasts. You'll have to give details about your financial situation, eg your assets, debts, income and creditors.
- ▶ Your insolvency practitioner will contact your creditors. The IVA will start if the creditors holding 75% of your debts agree to it. It will apply to all your creditors, including any who disagreed to it.

### ▶ Q. WHAT IS A PRE-PACK ADMINISTRATION

▶ A. Pre-pack Administration is an insolvency process which allows a viable but insolvent business to be sold in order that it can continue trading under a new name without the burden of its debts.

▶ The Pre-pack protects the limited company from action by creditors. The old company can then be sold to a third party or a phoenix company. Pre-pack is the pre-packaged sale of the companies assets and trade.

▶ A new company is formed and the old company is transferred to the new company. The old company is then put into administration. It is often the Directors of the 'OldCo' who form the 'NewCo'.

▶ Recent pre-packs - Barbecoa Steak Houses Jacques Vert, Joy, and Jones the Bootmaker;

▶ **79%** of pre-pack sales were to parties connected with the insolvent company (source 2011 survey)

▶ A revised SIP 16 (Statement of Insolvency Practice) was introduced by government in November 2015 to govern Insolvency Practitioners in pre-pack cases. It was designed to make the process more transparent for creditors and to ensure that fair value was obtained for the assets as pre-packs were seen to be unfair.

• Administrators undertook some marketing in only **51% of cases (2011 survey)**

• An element of the sale consideration was deferred in **63%** of cases

# 'PHOENIX' COMPANY

- ▶ A 'phoenix' company is a company that has been set up by the existing directors of the insolvent business before it goes into administration. It purchases the assets from the insolvent business pre- administration and continues trading.
- ▶ The 'phoenix' company retains the viable part of the business – with the non-viable part and debts left in the old company which then is put into administration.
- ▶ The Directors of the original business and the Phoenix company are the often the same. The process also saves staff their jobs and is relatively quick and easy to arrange. The 'phoenix' company is required to pay a fair price for the business and its assets – but the criticism is that that no other party gets the same opportunity.

## ADMINISTRATION - Company administration under the Insolvency Act 1986.

- Insolvent company enters administration **which** allows reorganisation of the company's affairs or realisation of its assets for the benefit of creditors. Company's affairs controlled by insolvency practitioner (not the company's directors).
- Administration requires a Court Order – filed by the creditors or directors of the company (or by CVA) or a party (bank or other lender) which has a floating charge
- ▶ Key aim is to rescue the company (not the business that the company carries on) so that it can continue trading as a going concern.
- ▶ If rescue is not possible administrator must attempt a better result for the company's creditors than would be likely if the company were put into **liquidation**
- ▶ If administrator cannot achieve better result for creditors the purpose of the administration is to realise the company's property (ie, assign the lease or sell freehold) to make a distribution to the company's secured or preferential creditors ie, the bank.
- ▶ NB If administrator trades the shops then rent must be paid. If not traded then no rent payable
- ▶ Administration ends after 1 x year, unless creditors or court agree an extension but many companies remain in administration for years. Eg, Phone 4 U - 4 years
- ▶ No liability for business rates – therefore L/L leaves property in administration until ready to take it back - hence many vacant properties in admin to save rates bill



# LIQUIDATION    Insolvency Act 1986 & 2000 –Insolvency Rules 2016

- ▶ Also known as winding up.. Used where company cannot pay it`s debts
- ▶ An insolvency procedure under which the assets of a company are realised and distributed to creditors by the **liquidator**
- ▶ **Compulsory liquidation** following a court order
- ▶ **Creditors Voluntary liquidation** instigated voluntarily by the members or creditors of the company. Also **Members Voluntary Liquidation**
- ▶ Unlike **administration** and **administrative receivership**, liquidation always results in the dissolution of the company.
- ▶ **SEE BELOW EXAMPLE OF AN ADVERTISEMENT FOR LIQUIDATION SERVICES**
- ▶ **KEY BENEFITS OF A CREDITORS VOLUNTARY LIQUIDATION**
- ▶ **WALK AWAY FROM YOUR DEBTS WHEN YOU LIQUIDATE;**
- ▶ **BUY BACK THE COMPANY ASSETS THROUGH A NEWCO WHICH IS DEBT FREE**
- ▶ **TERMINATE ANY LEASES THAT ARE NO LONGER REQUIRED;**
- ▶ **MAKE STAFF REDUNDANT.THEY WILL BE PAID REDUNDANCY AND OUTSTANDING WAGES BY THE REDUNDANCY PAYMENTS SERVICE**
- ▶ **CLOSE / LIQUIDATE THE LIMITED COMPANY**

# ALIENATION ASSIGNMENT - UNDERLETTING - PARTING WITH POSSESSION

- ▶ ALIENATION IS A GENERAL TERM FOR THE DISPOSAL/ PART DISPOSAL OF A LEASEHOLD INTEREST
- ▶ Q WHY AND WHERE IS AN UNDERSTANDING OF ALIENATION RELEVANT TO YOU?
- ▶ ASSET MANAGEMENT - 1. AN UNDERSTANDING OF THE ALIENATION PROVISIONS IN EXISTING LEASES IS FUNDAMENTAL TO EFFECTIVE MANAGEMENT / CONTROL OF PROPERTY. 2. DECIDING WHAT ALIENATION CLAUSES SHOULD GO IN NEW LEASES.
- ▶ AGENCY - DISPOSING OF OR ACQUIRING LEASES BY ASSIGNMENT OR UNDERLETTING IS DETERMINED / INFLUENCED BY ALIENATION PROVISIONS
- ▶ INVESTMENT AGENCY - DISPOSING OF OR ACQUIRING LONG LEASEHOLDS BY ASSIGNMENT DETERMINED / INFLUENCED BY ALIENATION PROVISIONS
- ▶ Q. WHAT DO YOU NEED TO KNOW AS A RETAIL AGENT INSTRUCTED TO SELL A SHOP LEASE?
- ▶ A. WHAT THE LEASE SAYS REGARDING ASSIGNMENT - SO YOU NEED A COPY + ANY ASSOCIATED DOCUMENTS SUCH AS DEEDS OF VARIATION
- ▶ THE QUESTIONS YOU NEED ANSWERS TO ARE -;
- ▶ DOES THE LEASE PERMIT ASSIGNMENT?
- ▶ IF SO WHAT CONDITIONS DOES IT IMPOSE?

# ASSIGNING A LEASE

- ▶ IS THERE A RESTRICTIVE USER OR TENANT MIX/GOOD ESTATE MANAGEMENT PROVISION WHICH MIGHT LIMIT WHICH TYPE OF USE THE ASSIGNEE (purchaser of the lease) CAN ADOPT?
- ▶ IS THE LEASE POST- JANUARY 1996 IN WHICH CASE THERE WILL BE AN AGA (Authorised Guarantee Agreement)
- ▶ WHAT DOES THE AGA REQUIRE IN TERMS OF CONDITIONS ie, Personal guarantees, rent deposit, UK based
- ▶ IF LEASE IS PRE-1996 PRIVITY OF CONTRACT WILL APPLY (original tenant and all previous assignees will be liable should the current tenant go bust)
- ▶ IS THERE A PRE-EMPTION CLAUSE IN THE LEASE?
- ▶ NB EVERY LEASE MAY CONTAIN DIFFERENT CLAUSES - and a Deed of Variation and/or previous Licence to Assign may vary those lease terms - so also needs checking
- ▶ BUT STATUTES BELOW WILL ALSO APPLY even though there may be no reference to them in the lease
- ▶ LANDLORD & TENANT ACT 1927 S.19
- ▶ LANDLORD & TENANT ACT 1988 S.1
- ▶ LANDLORD & TENANT COVENANTS ACT 1995

# ALIENATION

➤ **ASSIGNMENT** THE DISPOSAL OF A LEASE.

LEASE MAY -;

- PROHIBIT ASSIGNMENT ABSOLUTELY - L/L maintains full control - negative effect on value?
- PROHIBIT ASSIGNMENT FOR A SPECIFIED PERIOD - ie, for an anchor store in a centre
- PERMIT ASSIGNMENT OF WHOLE - (but not part) subject to various conditions
- PERMIT ASSIGNMENT BUT SUBJECT TO L/L PRE-EMPTION - allows L/L to take the lease back matching any premium offer
- STANDARD LEASE PROVISIONS WILL PERMIT ASSIGNMENT OF WHOLE SUBJECT TO CONDITIONS
  - good estate management/tenant mix - covenant - AGA - guarantor - rent deposit
- **LANDLORDS CONSENT NOT TO BE UNREASONABLY WITHHELD (or delayed)** **LCNTBUW**
- S.19 Landlord & Tenant Act 1927 - L/L deemed not to act unreasonably
- LANDLORD & TENANT ACT 1988 S.1 Landlord is obliged to act REASONABLY when considering Tenants application for Licence to Assign - BUT - this will not over-ride specified qualifications/conditions

# ALIENATION Continued

- ▶ **ASSIGNMENT** - TENANT SEEKS LANDLORDS CONSENT/ LICENCE TO ASSIGN
- ▶ LANDLORD CHECKS LEASE TO CHECK ANY SPECIAL CONDITIONS
- ▶ LANDLORD MUST ACT REASONABLY - L& T ACT 1988 S.1
- ▶ NO DELAYS - OBJECTION ON LEGITIMATE GROUND ONLY - see case law
- ▶ SUPERIOR LANDLORDS CONSENT OR DISCHARGE OF CHARGE?
- ▶ LANDLORD GRANTS LICENCE TO ASSIGN
- ▶ TENANT SIGNS AN AGA
- ▶ **CASE LAW** GO WEST V SPIGAROLO [2003] QB 1140
- ▶ DESIGN PROGRESSION V THURLOE PROPERTIES [2004] EWHC 324
- ▶ **PRE-EMPTION** - On receiving an application for assignment
- ▶ L/L reserves right to exercise a pre-emption to take the lease back (a surrender) at same premium as offered to T in market
- ▶ Does the existence of the pre-emption depress the rental value? No.

# AUTHORISED GUARANTEE AGREEMENTS (AGAs)

- ▶ Authorised guarantee agreements (AGAs) were created by the Landlord and Tenant (Covenants) Act 1995. Applies to all leases granted from 1 January 1996. It sought to strike a balance between the uncertainty of liability of a tenant who assigns a lease and the protection of the landlord if the tenant assigns to a party who is not particularly acceptable to the landlord.
- ▶ Previously privity of contract applied. If the former tenant was the original tenant of an old lease, it will remain liable for all liabilities due under the lease until the end of the term, even though the lease may have been assigned many times and many years ago.
- ▶ Now tenants and their guarantors are automatically released from liability to the landlord when a lease is lawfully assigned to a third party. Landlords can, however, require outgoing tenants to enter into AGAs guaranteeing the liabilities of the new tenant under a lease.
- ▶ **There is no set form for an AGA, although the 1995 Act does set out what certain characteristics which an AGA must have and also certain characteristics which it cannot have. Therefore you will be liable for whatever the AGA expressly provides for, unless your liability is limited by statute**

# AGAs continued

- ▶ CASE LAW ON AGAs
- ▶ **Good Harvest Partnership LLP v Centaur Services Limited** held that a guarantee of an assignee given by the outgoing tenant's guarantor was void.
- ▶ It was followed by **K/S Victoria Street and House of Fraser (Store Management) Ltd.**
- ▶ A guarantor can be liable for the new tenants liabilities under the terms of an AGA but only the terms of the AGA not all the lease terms.
- ▶ S.24(2) of the Act states that where a tenant is released from its covenants, a guarantor is also released "to the same extent as" the tenant. Where the tenant is only released from its obligations under the lease in so far as he is required to re-assume them under an AGA, equally the assignor's guarantor may be released from its obligations only to the same extent and may, accordingly, be required to guarantee the assignor's liability under the AGA
- ▶ NB On the renewal of a lease the landlord does not have the automatic right to insert AGA provisions and can only do so IF it is REASONABLE to do so

# UNDERLETTING

- ▶ **UNDERLETTING** THE DISPOSAL OF A LEASE BY GRANTING AN UNDERLEASE.
- ▶ LEASE MAY -;
- ▶ PROHIBIT UNDERLETTING ABSOLUTELY - L/L maintains full control - negative effect on value?
- ▶ PROHIBIT UNDERLETTING FOR A SPECIFIED PERIOD - ie, for an anchor store in a centre - or close to lease end
- ▶ PERMIT UNDERLETTING OF WHOLE - subject to various condition
- ▶ PROHIBIT OR PERMIT UNDERLETTING OF PART OR PARTS ONLY
- ▶ STANDARD LEASE PROVISIONS WILL PERMIT UNDERLETTING OF WHOLE ONLY BUT SUBJECT TO CONDITIONS
- ▶ good estate management/tenant mix - covenant - guarantor - rent deposit
- ▶ reserving a market rent - same rent review pattern permitted part(s)
- ▶ Contracted out of S.24-28 L & T Act 1954
- ▶ **LANDLORDS CONSENT NOT TO BE UNREASONABLY WITHHELD (or delayed)**
- ▶ S.19 Landlord & Tenant Act 1927 - L/L deemed not to act unreasonably
- ▶ LANDLORD & TENANT ACT 1988 S.1 L/L to act reasonably Consent not to be unreasonably withheld - BUT - this will not over-ride specified qualifications/conditions



# UNDERLETTING continued

- ▶ TENANT APPLIES FOR LANDLORDS CONSENT & LICENCE TO UNDERLET
  - ▶ LANDLORD CHECKS LEASE FOR SPECIAL CONDITIONS
  - ▶ LANDLORD MUST ACT REASONABLY - L&T ACT 1988 S.1
  - ▶ NO DELAYS - OBJECTION ON LEGITIMATE GROUND ONLY - see case law
  - ▶ SUPERIOR LANDLORDS CONSENT OR DISCHARGE OF CHARGE?
  - ▶ LANDLORD GRANTS LICENCE TO UNDERLET
- 
- ▶ MOST MODERN LEASES PROVIDE THAT UNDERLETTING IS AT MARKET RENT
  - ▶ CASE LAW - ;
  - ▶ BLOCKBUSTER ENTERTAINMENT V BARNSDALE [2003] EWHC 2912
  - ▶ MOUNT EDEN V FOLIA [2003] EWHC 1815 Ch
  - ▶ NCR V RIVERLAND [2004] EWHC 2073 (Ch).Sets out 10 principles