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A PROPERTY-INSOLVENCY MASTERCLASS

PROPERTY-INSOLVENCY: LEGAL UPDATE

MASTERING POSSESSION & SALE APPLICATIONS

SECTION 127 IN THE PROPERTY CONTEXT

KAVAN GUNARATNA

CLAIRE THOMPSON

AMIT GUPTA

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PROPERTY-INSOLVENCY: LEGAL UPDATE

KAVAN GUNARATNA

Biography

Kavan is ranked by the Legal500 and Chambers & Partners as a leading junior, simultaneously in the fields of Insolvency and Property and Chancery-Commercial litigation, where quotes about him have included the following:

"*unfailingly brilliant*"; "*one of the best barristers in the area*";

"*exceptionally user-friendly*"; "*a delight to work with*"; "*clients love him*"

"*highly intelligent, quick to get to the bottom of an issue, articulate and charming*"

"*has a masterful grasp of the law*" and is "*as strong with strategic advice*"

"*a wonderful opponent - very able and slightly deadly*"

"*knows exactly how to present a case to a judge*" and "*gets amazing results*".

He is an author of 'The Landlord and Tenant Factbook' and 'Butterworth's Property Insolvency' amongst other publications, and has provided training for bodies including the PLA, ILA, R3 and the ICAEW, as well as in-house for leading law firms.

Introduction

1. Everyone who works in property litigation or insolvency should be aware of two recent developments or proposed developments in the law and at least two very recent cases which deal with such changes. These are developments which affect the balance of power between landlords and their tenants in financial distress, and are matters that we need to master in order to competently advise our clients in this context. The two 'developments' are:

    1.1. First, the 'restrictions' on stat. demands and petitions by landlords.

    1.2. Second, the new "preliminary moratorium", which a tenant may invoke.

1. and the two cases which arise under the first heading are called *Re St Benedict's Land Trust Limited / Re Shorts Gardens LLP* [2020] EWHC 1001 (Ch) and *Re Travelodge Hotels Limited* (as yet unreported but mentioned first in the Financial Times, 14.5.20).

2. In this very short, 15-minute session, I will attempt to summarise the developments in those two areas, in turn.

The restrictions on stat. demands and petitions by landlords

3. There are three points to consider under this heading:

    3.1. What is the current state of play with these 'restrictions'?

    3.2. What is their scope and content?

    3.3. What might a landlord do to get around them or to get an edge when faced with them?

(1) The current state of play with these 'restrictions'

4. As to the current state of play. On 23.4.20 (roughly *three weeks ago*) the Business Secretary, the Rt. Hon. Alok Sharma MP, attended before a House of Commons Select Committee and was asked a question about landlords' use of Commercial Rent Arrears Recovery (CRAR) and stat. demands, and in response, he said that he would "look to introduce temporary measures…which will ease commercial rent demand and protect the UK high street…very very shortly". When asked "exactly when", and whether that would be "within the next week", he said "I hope *even sooner than that*", indicating that draft legislation would be laid *within a matter of days*.

5. Later that same day (on 23.4.20), a press release was uploaded to the gov.uk website on behalf of Alok Sharma and the Rt. Hon. Robert Jenrick MP (the Secretary of State for Housing, Communities and Local Government), confirming that the Government intended to introduce new measures to restrict the use of stat. demands, petitions and CRAR – the detail of which we will consider in a moment. The press release was updated on 25.4.20 to add a touch more detail.

6. From that moment onwards, headlines began to appear in the press, indicating that the Government had already "banned" (past tense) landlords from taking such action. An article in The Times published on 24.4.20 led with the report that "Businesses have been given "a licence not to pay rent" after *the government banned* landlords from taking action against tenants who don't pay as a result of the coronavirus. New legislation will temporarily stop landlords from issuing statutory demands and winding-up orders against tenants struggling to pay bills because of the impact of Covid-19".

7. Three weeks on, and somewhat astonishingly, no such legislation has been enacted; the Government has not even yet laid its draft Bill before Parliament to bring in any such changes. So much for those measures being introduced 'within days'.

8. There are probably two reasons for the delay:

   8.1. First, the press release of 23.4.20 indicated that the proposed new measures would be included in the Corporate Insolvency and Governance Bill ("the CI&GB 2020"), which is set to introduce some very important and long-lasting changes to our insolvency laws and which the Government is presumably taking their time to get right.

   8.2. Second, the mere announcement of the Government's intention to legislate may have substantially achieved the objective of putting landlords off from using the insolvency route [especially if the legislation will be retrospective].

9. However, as things stand at the time of writing, there are in fact no Covid-related restrictions in force prohibiting landlords from serving stat. demands or presenting winding-up petitions against their tenants. Whether a landlord would wish to do so is another question, which we will consider below.

10. It is also worth remembering that the CI&GB 2020 (as proposed primary legislation) will need to be put through multiple readings in the House of Commons and the House of Lords before it can receive Royal Assent, and that process is likely to take time. Even the Coronavirus Act 2020, which was put through Parliament on an expedited basis, took the best part of a week to come into force, and other legislation can take very much longer to pass.

(2) The scope and content of these restrictions

11. How exactly will these proposed restrictions work? The devil is in the detail. But in the absence of the Bill, we have very little detail. All we have to go on at present is what was in the press release. That included the following statements:

> "High street shops and other companies under strain will be protected from aggressive rent collection and asked to pay what they can during the coronavirus pandemic, the Business Secretary has set out today (23 April 2020).
>
> The majority of landlords and tenants are working well together to reach agreements on debt obligations, but some landlords have been putting tenants under undue pressure by using aggressive debt recovery tactics.
>
> To stop these unfair practices, *the government will temporarily ban the use of statutory demands (made between 1 March 2020 and 30 June 2020) and winding up petitions presented from Monday 27 April, through to 30 June, where a company cannot pay its bills due to coronavirus.* This will help ensure these companies do not fall into deeper financial strain. The measures will be included in the Corporate Insolvency and Governance Bill, which the Business Secretary Alok Sharma set out earlier this month. …
>
> Notes to editors
>
> Under these measures, *any winding-up petition that claims that the company is unable to pay its debts must first be reviewed by the court to determine why. The law will not permit petitions to be presented, or winding-up orders made, where the company's inability to pay is the result of COVID-19.*
>
> *The new legislation to protect tenants will be in force until 30 June, and can be extended* in line with the moratorium on commercial lease forfeiture…"

The full press release can be accessed here:

https://www.gov.uk/government/news/new-measures-to-protect-uk-high-street-from-aggressive-rent-collection-and-closure?utm_source=5dc5fb4c-2e93-416a-93fe-10d8e923b3ba&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate#history

12. Many questions arise from this. Subject to seeing what emerges in the CI&GB 2020, a best guess to each of those is as follows.

13. Question 1: will the restrictions apply to stat. demands and petitions by *any creditor* against *any company* or will they just restrict landlord action against tenants (or even just against tenants in particular sectors)? The press announcement talks about banning the use of stat. demands and winding up petitions where "*a company*" cannot pay its bills due to coronavirus, and aims to ensure that "*companies*" do not fall into deeper financial strain, and elsewhere refers to "*any* winding-up petition". Its sub-heading talked about "High street shops *and other companies* under strain". However, read in context, the announcement was targeted at action by commercial landlords, not creditors outside the landlord and tenant relationship.

14. That was also the view taken by Snowden J. in the recent case of *Re St Benedict's Land Trust Limited and Re Shorts Gardens LLP* [2020] EWHC 1001 (Ch), when rejecting applications for orders restraining presentation of winding-up petitions by local authorities for unpaid business rates, made partly in reliance on the proposed legislation. He also thought that the restrictions would only apply to landlord action against tenants in particular sectors, such as retail or hospitality:

> "83. …it seems overwhelmingly likely that the proposed legislation will be limited to companies in *certain identified sectors* of economic activity, and to relate to statutory demands and petitions based upon *claims by landlords for arrears of rent*. Although the press statement does contain phrases that might, if taken out of context, suggest a wider prohibition, when those phrases are read in the broader context of the announcement as a whole, I anticipate that the prohibitions are not intended to extend to entities such as SBLT and Shorts Gardens, neither of which is a tenant *in the retail or hospitality industry*, or to petitions which are not based upon arrears of rent, but are based upon outstanding court orders and longstanding arrears of NNDR owing under liability orders to local authorities."

15. Question 2: will the restrictions apply to protect tenants who are not corporate entities but individuals? Although the press announcement referred several times to "companies", the main aim appears to protect

tenants of "commercial premises", so it would be surprising if the protection was not afforded to such tenants even if they trade as sole traders rather than through a company.

16. Question 3: how and when will there be an assessment of whether Covid is the cause of the tenant company's inability to pay its debts? In *Shorts Gardens*, Snowden J. said:

> "84. Further, it seems from the Government's announcement that *some threshold test is envisaged* under which the restrictions on use of statutory demands and presentation of petitions will only apply where the reason that the company is unable to pay its debts is due to the coronavirus (although *the mechanism for the application of that test is entirely unclear*)."

17. The press announcement said: "Under these measures, *any winding-up petition* that claims that the company is unable to pay its debts *must first be reviewed by the court to determine why*. The law will not permit petitions to be presented, or winding-up orders made, where the company's inability to pay is the result of COVID-19."

18. For petitions that are not already on foot, it is plausible that the new restrictions may work in one or more of these ways:

    18.1. Before a petition can be issued, a landlord might first be required to apply to court for permission to present, doing so on notice to the tenant, thereby enabling the tenant to advance the Covid-ground for refusing permission.

    18.2. A tenant might be given the option to file or serve a 'Covid-19 statutory declaration' in response to any threat of enforcement action by a landlord, with the law then prohibiting presentation of a petition where that had been done. This approach borrows from some of the proposals made in the City of London Law Society's Insolvency Law Committee Paper entitled 'Proposals for Mitigating

the Short Term Effects on Viable Businesses of Covid-19'. Where a director signs a statutory declaration without honestly believing in the truth of the statements made, that would be a matter for his/her potential criminal prosecution.

18.3. Tenants might also be permitted to apply to restrain presentation of a petition on the specific Covid-19 ground.

18.4. Given those mechanisms, it seems unlikely that the legislation would need to separately deal with statutory demands. It would seem unnecessary to require a landlord to first apply to court for permission to serve a statutory demand. The law may however provide that a stat. demand will be treated as void or of no effect if the Covid ground is established when the court reviews any threatened petition.

19. For petitions that are already pending before the courts, the new law may provide for such existing petitions to be stayed until 30.6.20 or dismissed, where the Covid ground is established.

20. Question 4: will the legislation be retrospective? Yes, in the sense that it will not just apply to statutory demands and petitions which follow the date on which the new restrictions are brought into force, but will catch stat. demands served or petitions presented in the windows of time mentioned. To recap from the press release:

> "The government will temporarily ban the use of statutory demands (made between *1 March 2020 and 30 June 2020*) and winding up petitions presented from *Monday 27 April, through to 30 June*, where a company cannot pay its bills due to coronavirus."

(3) What might a landlord do to get around the current state of play or to get an edge when faced with such restrictions?

21. Query: if the proposed restrictions are not yet in force and the Government has not yet even presented draft legislation to Parliament, can a landlord go ahead and present a petition to pip the Government to the post before the law is changed? A winding up petition does not have to be preceded by a statutory demand, and quite typically is not, as long as the would-be petitioner has invoiced and less formally demanded payment and the company has failed to pay the debt when due. The petitioner will not have the advantage of a deeming provision as to the company's insolvency and the company may seek to prove at the winding up hearing that it is not unable to pay its debts, when analysing the cash flow test on the more detailed enquiry as to its ability in the present and reasonably near future: *BNY v Eurosail* [2013] UKSC 28; *Re Casa Estates* [2014] EWCA Civ 383. However, if a landlord was motivated to move quickly in view of the prospective restrictions, then apart from any other considerations, it would not need to wait 21 days for a stat. demand to first elapse.

22. However, if a landlord were to present a petition today, it would face three risks:

    22.1. First (even if the tenant did not seek to restrain the proceedings), the landlord would face the risk that the legislation may be brought into force before it made any real headway with its petition. If the restrictions then applied to the landlord's petition, with retrospective effect, the petition might be struck out or dismissed and the court might exercise its broad costs discretion against the landlord, potentially with indemnity costs.

22.2. Second, the tenant might apply for an injunction to restrain presentation or advertisement or further proceedings on the petition. As long as the tenant came up with enough of an argument to draw out the hearing (i.e. some basis for arguing that it had a bona fide dispute on substantial grounds or a cross-claim), it might buy itself enough time to see the legislation finally enacted.

22.3. Third, even if the tenant cannot raise a genuine and substantial dispute to the petition debt or a cross-claim, it might apply for an injunction alleging that the petition was an abuse of the court's process (or that the court ought to exercise its discretion to stay or dismiss the petition, and in any event, to stay advertisement) by direct reliance on the Government's announcements of the proposed (and apparently imminent) restrictions, despite the fact that those are yet to be enacted or even laid in the form of draft legislation.

23. As to the last point, note that:

23.1. On 27.4.20, in *Shorts Gardens*, Snowden J. held that the debtor companies were right to accept that the court had to decide such an application on the basis of the law as it stands:

> "80. At present, although the indication in the Government's press announcement is that the proposed restrictions are intended to apply from next Monday 27 April 2020, no draft legislation has been published. The scope of the intended restriction and precisely how it will be implemented is unclear.
>
> 81. [Counsel for the companies applying to restrain presentation] *therefore accepted, rightly, that I had to make my decision on the basis of the law as it stands*; but he submitted that I could and should exercise my discretion as to whether it was just and equitable to grant an injunction on the basis of [the companies' evidence about the impact of Covid-19], viewed in the light of the Government's announcement."

23.2. However, on 6.5.20, in *Re Travelodge Limited*, Birss J. agreed to grant a temporary 14 day injunction (on an ex parte hearing, pending an inter partes return date) restraining presentation of a winding up petition, partly on the basis that the company had a *prima facie* case for saying that the petition was abuse of the court's process, because the imminent legislation meant it was bound to fail. He distinguished the facts of *Shorts Gardens* on the basis that the companies there were failing to pay the creditors for reasons that were nothing to do with Covid. He also declined to follow Snowden J. where he said that such an application must be decided on the basis of the law as it stood. Birss J. relied on authority (*Hill v Parsons* [1972] Ch 305, CA) which had not been cited in *Shorts Gardens*, which indicated that the court may take into account of law that was not yet in force. Notably, the relevant statute in *Hill v Parsons* (the Industrial Relations Act 1971) had reached the statute book long before the hearing, and only days after the Defendant's acts in question.

23.3. The courts have a number of other such injunction cases in the pipeline or are dealing with others at the time of writing.

24. Having said that, if Snowden J. was right in his other assessment (that "it seems overwhelmingly likely that the proposed legislation will be limited to companies in certain identified sectors of economic activity… [e.g.]…in the retail or hospitality industry"], a landlord ought to be in a much stronger position if threatening insolvency proceedings against say a law firm or say a manufacturing tenant.

25. Landlord may also be wise to the fact that many commercial tenants are electing to withhold payment of the whole or part of their rent for the sake of being financially prudent and conserving cash for their own commercial advantage, rather than as a matter of necessity or where

Covid-19 has meant they are actually unable to pay their debts. A well-advised landlord in those circumstances may press its tenant for financial disclosure and for evidence showing whether or not it would fall within the proposed Covid restriction, or possibly an affidavit, statutory declaration or undertaking to that effect.

26. If, on account of the proposed restrictions, a stat. demand or petition is not an option for a landlord in any particular case, it might (amongst other things):

    26.1. Get its paperwork ready to present and serve a petition on its tenant in just 6½ weeks' time, unless the window of protection is extended from the currently proposed expiry of 30.6.20. By that time, it should be clear whether any June quarter rent has been paid in full and on time, or not.

    26.2. Sue the tenant for judgment without delay and attempt to enforce its judgment. In the event that execution is returned unsatisfied, the landlord may then present a petition after 30.6.20 (unless the window is extended) and take advantage of the tenant's 'deemed inability to pay its debts' of the tenant under section 123(1)(b) of the 1986 Act, putting it in an equivalent position to a creditor which had served a stat. demand but without having to wait a further 21 days after 30.6.20.

27. It is plausible that the proposed 30.6.20 date may be extended, especially if lockdown for relevant sectors is likely to continue well past that date. However, commercial tenants should be aware that the Government proposals are not a panacea or permanent form of protection from a very serious form of threatened legal action by landlords.

The new "Preliminary [aka Restructuring] Moratorium" ("PM")

28. It is important to note that, unlike the discussion under the last heading, this development will not just limit landlords from presenting petitions against their tenants; it will prohibit all enforcement action – whether forfeiture, petitions, CRAR or Part 7 claims for judgment for arrears and execution following that. On the other hand, this is not a measure which is specifically targeted at landlords and tenants, although it will impact a landlord as much as any other category of creditor of a company in financial distress.

29. We can again consider three points under this heading:

    29.1. What is the current state of play with the introduction of the PM?

    29.2. What will be its scope and content?

    29.3. What might a landlord do in response to a PM?

(1) The current state of play with the introduction of the PM

30. In another press announcement by the Business Secretary (this one on 28.3.20), the Government indicated that it intended to bring forward legislation to amend the Insolvency Act 1986 in several ways, including to introduce the new Preliminary (a.k.a. Restructuring) Moratorium which it has been talking about since two prior consultations in 2016 and 2018 and its official Response paper of 26.8.18. In that Response paper, almost 2 years ago, the Government promised to:

    "bring forward legislation to implement the measures *as soon as parliamentary time permits*".

2. Perhaps unsurprisingly, this appeared to have been derailed for some time by Brexit.

31. In his Covid-related press announcement on 28.3.20, the Business Secretary said:

> "We will introduce measures to improve the insolvency system, which provides the legal options for companies running into major difficulties.
>
> Our overriding objective is to help UK *companies which need to undergo a financial rescue or restructuring process to keep trading. These measures will give those firms extra time and space* to weather the storm and be ready when the crisis ends, whilst ensuring that creditors get the best return possible in circumstances. …
>
> *We will bring forward legislation in these areas at the earliest opportunity*."

32. A House of Commons Briefing Paper No. 8877 of 31.3.20 noted as follows:

> "Based on Alok Sharma's announcement on 28 March 2020, *it now appears that the government intends to fast track the implementation of these proposed reforms* (as well as suspend the law on wrongful trading) in order to help viable companies to survive the crisis created by COVID -19."

33. Despite the phrases "earliest possible opportunity" and "fast track", the draft legislation to introduce the PM and these other reforms has still yet to be published at the time of writing, around 7 weeks after that press announcement. The amendments will feature in the Corporate Insolvency and Governance Bill 2020, but we will simply have to keep an eye out for when this is finally published.

(2) What will the scope and content of the PM be?

34. Again, the devil will be in the detail. Until we see it, we cannot be sure whether the Bill will put forward a PM that follows the form which the Government proposed in 2018, or whether that will be amended in the light of Covid.

35. However, given that these are intended to be permanent and long-term changes to our insolvency framework, a reasonable assumption is that they will broadly mirror what was proposed in 2018. On that footing, key points for landlords to note about the proposed new PM regime are as follows.

36. Under the new PM regime, the tenant if eligible would get an initial period of 4 weeks in which landlords and other creditors would be precluded from taking forfeiture or other enforcement action whilst it considered its options for rescue. The period would be extendable to 8 weeks without creditor consent, or beyond that with 50% of secured and unsecured creditor consent or court order, or pending a CVA meeting of creditors.

37. To be eligible for a PM:

    37.1. The tenant must be in a state of 'prospective insolvency' such that it will become insolvent if action is not taken – however the PM will not be available to a tenant which is 'already insolvent'. If the Government considers changing the PM proposals in light of the pandemic and its extraordinary impact, this is one condition that may well need to change in order to make the PM of greater use.

    37.2. The tenant's rescue must be shown to be more likely than not to occur, at least in the event that the PM is invoked.

    37.3. Importantly, the tenant must have the funds or ability to pay its debts (including its rent) as they fall due during the PM.

    37.4. The tenant cannot have entered into a PM or an administration or a CVA in the previous 12 months, and if a creditor's winding-up petition is already pending, the court must approve any PM.

38. A qualified insolvency practitioner must be appointed as 'Monitor' and must:

38.1. Confirm whether the tenant meets the eligibility criteria at commencement (and at the 4-to-8-week extension point).

38.2. Notify all creditors of the PM and register it at Companies House.

38.3. Terminate the PM if the eligibility criteria cease to be met.

38.4. Sanction any disposals of assets outside the normal course of business.

38.5. Refrain from acting as the tenant's administrator or liquidator within the next year, although may provide insolvency advice and supervise a CVA.

39. The PM will be a largely out-of-court process, subject to creditor challenge in court. The tenant's existing board of directors will remain in control of it during the PM.

(3) What might a landlord do in response to a PM?

40. If a tenant taking advantage of a PM had already been failing to pay its rent as it fell due or started defaulting once it had the protection of the moratorium, a landlord might threaten to challenge its eligibility in court or lobby the Monitor to terminate the PM on the ground that the criteria ceased to be met.

41. During the course of any PM, landlords will also no doubt no doubt want to:

41.1. push their tenant to provide as much detail as possible (and as early as possible) about any potential restructuring plans and their impact on the relevant lease; and

41.2. prepare themselves for any negotiations or contest over the terms of the CVA, including issues such as the valuation of their claims and over any terms that may be attempted to circumvent the effects of the High Court decisions in *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch) and *Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch).

Kavan Gunaratna
Enterprise Chambers
14 May 2020

Email: kavangunaratna@enterprisechambers.com

Tel: 020 74050 9471

MASTERING POSSESSION & SALE APPLICATIONS

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Property solely owned by the bankrupt

3. Where the property is solely owned by the bankrupt it will vest in the trustee in bankruptcy/ the OR upon the bankruptcy order being made in the bankrupt's trustee in bankruptcy: s.306 Insolvency Act (IA) 1986.

4. This includes the legal title to the Property and under s.27 (5) LRA 2002 the trustee does not need to register their interest for the legal title to pass.

5. The trustee in bankruptcy is then entitled to bring an application for possession and sale of any properties owned by the bankrupt.

6. Where the property is solely owned the trustee does not need to consider the provisions of s.335A IA 1986 and the application can simply be made under the court's general powers over the bankruptcy under s.363 IA 1986 (*Holtham v Kelmanson* [2006] EWHC 2588 (Ch); *Carter & Nillson v Hewitt* [2019] EWHC 3729 (Ch)). However, s.337 will apply. S.337 IA 1986 provides a right for the bankrupt and any persons under 18 to not be evicted without a court order.

7. Therefore, the bankrupt will have a right of occupation, but creditors are given priority after the 1-year anniversary of the vesting in a trustee. It will be noted here that the needs of the bankrupt are not taken into account even at the stage before the 1-year anniversary. In *Hewitt* the court applied s.335A by analogy rather than s.337 because the bankrupt lived in the property alone.

8. Where an application is made before the 1-year anniversary but by the date of the hearing the 1-year anniversary has passed, strictly speaking the principles under subsection 5 will apply, but in practice the court will

take into account that the time has passed: *Martin-Sklan v White* [2007] B.P.I.R. 76.

9. If a spouse has registered home rights under the Family Law Act 1996 these will usually need to be terminated. Otherwise selling can be difficult because they operate as a first charge on the property. However, the insolvency court can deal with this as part of the application for possession and sale.

10. Exceptional circumstances has no defined meaning. *Dean v Stout* [2004] EWHC 3315 (Ch); [2006] 1 F.L.R. 725 Lawrence-Collins J made clear at [10] that the fact that the spouse and children face eviction, and the spouse's beneficial share of the proceeds will not allow the purchase of a comparable property does not constitute exceptional circumstances.

11. In *Pickard v Constable [2018] BPIR 140* the bankrupt's husband suffered from myasthenia gravis, an autoimmune condition which affected his muscles. He used a ventilator for several hours per day. His carer said that there was no way that he would cope with a move. The judge at first instance concluded that the circumstances were exceptional and postponed the order for sale under the husband's death. The appeal succeeded and Warren J considered that it the circumstances should warrant a 12-month suspension with liberty to the husband to apply for a longer suspension if there was a change of position.

12. Mental health illnesses can also qualify as exceptional circumstances in the same way as physical illnesses: *Hosking v Michaelides* [2006] BPIR 1192.

13. The Bankrupt's needs are not to be considered in relation to exceptional circumstances. However, the needs of a wife caring for a terminally ill bankrupt can constitute exceptional circumstances, and in this way the ill health of the bankrupt can be relevant: *Re Bremner* [1999] 1 FLR 912.

14. It is to be expected that there will be some sort of medical evidence to justify a finding of exceptional circumstances and also that there is some sort of reason to explain why these circumstances make it necessary for the person to remain in the specific property. If you come up against this as an issue it can be worth getting evidence from the local rental market

or the local authority of how long and the likely cost of finding alternative suitable accommodation.

15. Where the exceptional circumstances are ongoing, a court will be very reluctant to order an indefinite stay on any possession and sale proceedings and is far more likely to merely delay for a period of time it considers appropriate for suitable alternative accommodation to be sourced.

Property jointly owned with the bankrupt

16. Where there is no dispute as to ownership and it is accepted that the property is jointly owned, the provisions of s.335A IA 1986 and s.14 TOLATA 1996 will apply. However, the conduct of the application is likely to be very similar to that set out above.

17. After the first year, in the absence of exceptional circumstances, the interests of creditors prevail. Exceptional circumstances has exactly the same meaning. The co-habitant/spouse will receive their share of the sale proceeds, but it is not exceptional if they cannot purchase an equivalent property with that share.

18. One point to be alive to is that the legal title does not vest in the trustee in bankruptcy where the property is jointly owned on the legal title, only the equitable interest does. The legal title will therefore remain with the bankrupt and the co-owner and they will hold it on trust for the trustee and co-owner in their respective shares.

19. This will be important in relation to terminating occupiers' rights, as will be discussed below, because an equitable co-owner cannot, for example, serve a s.21 notice to determine an AST.

Where there is a dispute as to ownership

20. A dispute as to ownership could arise in a number of ways. Firstly, the bankrupt could be the sole owner and another party could assert an interest in the property. It could equally be that the trustee wishes to

assert an interest in the property where it is solely owned by another party.

21. Where the bankrupt has formerly had an interest but has transferred it to another party the transaction avoidance provisions under ss.339, 340 and 423 IA 1986 will need to be considered. These will sometimes prove easier for the trustee to rely upon. However, there will be times when a common intention constructive trust is the only solution given the timing of the transaction.

22. Usual property principles will apply to the determination of the beneficial interests of the parties. Therefore, the basic principle is that equity follows the law and that the party asserting a beneficial interest in the property who is not on the legal title will be required to demonstrate on the balance of probabilities that they have such an interest.

23. Furthermore, it is often the case where a property is purchased as an investment property the resulting trust analysis arises, rather than the common intention constructive trust. Although as noted in *Marr v Collie* [2017] UKPC 17; [2017] 3 W.L.R. 1507 this is not necessarily the case and depends upon the intentions of the parties.

24. Where both parties are on the legal title, but one wants to assert a greater interest the court will need to consider the nature of the underlying agreement between the parties.

25. The Court of Appeal has at [13] made clear in *Pankhania v Changegra* [2012] EWCA Civ 1438; [2013] 1 P. & C.R. 16 that where there is a declaration of trust it will only in very exceptional circumstances deviate from it.

26. Where there is a common intention constructive trust but the parties have expressly discussed their shares, then unless there is a subsequent agreement, some proprietary estoppel or the court can infer that the agreement has changed, the court will conclude that the parties hold the property in the shares agreed.

27. It is only where the parties have not considered or given any thought to their respective shares that the court is entitled to impute their intentions,

taking a holistic approach and considering the parties whole course of dealing (*Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432).

28. Once the dispute as to ownership has been determined, provided it is concluded that the bankrupt has some interest it will be dealt with on the basis of the principles set out above in accordance with their respective interests.

Where a property has been sold by a previous trustee in bankruptcy for little to no consideration

29. It appears to have been a frequent occurrence between 2000-2002 that the Official Receiver and various Trustees in Bankruptcy sold properties which had vested in them, but were in negative equity, for a nominal sum, being usually the conveyancing costs. Therefore, there are two relatively recent reported cases on this point.

30. In *Re Lowe* [2016] EWHC 1010 (Ch) Mr Lowe had been made bankrupt and his beneficial interests in one of his properties was assigned to his daughter, Emma, in 2002 by his trustee in bankruptcy for the sum of £250 as it was in negative equity. Emma occupied the property. However, the transfer was never registered. Subsequently, Mr Lowe was made bankrupt again and Emma asserted that the entire beneficial interest had vested in her. HHJ Roger Kaye QC held at [48] that Emma was simply the intended nominee and that any beneficial interest she had acquired was held for Mr Lowe's benefit. This was based on the court looking at what had in fact happened in respect of the property and how the respective parties had treated it. For example, Emma had never been registered as proprietor, Mr Lowe had executed mortgages without Emma's consent being formally sought or given, and he gave full title guarantee and had held himself out to be the owner of the property in these dealings.

31. Subsequently in *Pretty and Kent v Crosbie* [2015] EWHC 3592 (Ch); [2016] BPIR 460 (ChD) Registrar Briggs, as he then was, had to consider this question. Mr and Mrs Crosbie jointly owned a property. Mr Crosbie was made bankrupt in in 1993, and again in 2002. The property was in negative equity and therefore Mr Crosbie's trustee in bankruptcy sold his interest in the property to Mrs Crosbie for a sum of £250. Following this, a number of charges were registered against Mr Crosbie's interest in the

property, none of which were challenged by Mrs Crosbie and during some unrelated proceedings Mr Crosbie had informed the judge that he had a 50% beneficial interest in the property, which had been transferred back to him.

32. Registrar Briggs concluded that having regard to the whole course of dealings between the parties the property continued to be held in equal shares by Mr and Mrs Crosbie even after Mrs Crosbie purchased Mr Crosbie's beneficial interest in the property.

33. It therefore seems that provided there is some evidence that in reality the property was passed back to the bankrupt it is likely that the subsequent trustee is going to be able to assert that the bankrupt has retained his interest and recover it for the benefit of the 2nd bankruptcy estate.

Occupiers

Nature of occupation

34. Clearly there can be any number of different types of occupiers in property which vests in a trustee in bankruptcy including licencees and tenants.

35. The first things to confirm are what is the nature of the arrangement, when the arrangement was entered into, and who it was entered into with. If the arrangement post-dates the bankruptcy it is likely that it will not be binding upon the trustee and proceedings can simply be issued against them as trespassers.

36. That said, the normal CPR Part 55 procedure should be used rather than the speedier trespassers procedure as they are not likely to be trespassers for the purposes of that procedure. A court order will definitely be required where the property is residential.

37. Otherwise the usual property law principles will apply where their occupation is binding upon the trustee. A detailed consideration of each is outside the scope of this course, but below are some guiding principles.

38. Generally speaking, possession claims to evict occupiers should not be brought as part of a possession and sale application. They should be brought as a separate claim in the county court under the Part 55 procedure.

39. However, it is often the case that the tenants and bankrupt are unresponsive and it is not possible prior to issuing the possession and sale application for the trustee to establish the basis upon which the occupiers are in possession and therefore how to correctly determine their occupation.

40. The trustee in these circumstances can issue proceedings and include "the occupiers" as respondents to the application. Despite the fact that usually the Part 55 procedure should be used, the bankruptcy court, however, has jurisdiction to make an order for possession against these occupiers under section 363. It has been suggested that in such a case, the trustee in bankruptcy must allege what the cause of action is against those persons: *Garwood v Bolter* [2015] EWHC 3619 (Ch) at [31].

41. *Garwood v Bolter* also suggests that it may be possible for a court to make a possession order against such occupiers if, during proceedings, they produce a binding tenancy agreement and this is terminated during the proceedings by way of, for example, a s.21 notice. This point has not been decided, but it may provide some comfort for trustees in this difficult position.

42. The best advice to trustees would be to write to the occupiers and the bankrupt asking them to produce any agreement or tenancy under which they occupy. If no responses are forthcoming, issue the possession and sale proceedings against the bankrupt, any co-owners and the "occupiers" and ensure that the witness statement in support sets out the basis upon which it is alleged that they must give up possession. That is, in the absence of any binding tenancy agreement being produced, they are considered to be trespassers.

43. A licensee will only be entitled to notice given to them under the Protection from Eviction Act 1977 where they are residential occupiers.

44. It is important to note that these notices must include the prescribed information under the PEA and if the notice to quit does not include it, it will be invalid and the licencee will have a defence and proceedings against them will be dismissed.

45. Where the tenants have exclusive possession, for a rent, provided the agreement was entered into after 1997 it is likely that they occupy residential property pursuant to an assured shorthold tenancy agreement unless the agreement states otherwise. These will be the most commonly encountered residential occupiers.

46. Since the Deregulation Act 2015 came into force there are numerous requirements that need to be in place before a s.21 notice can be served under s.21 of the Housing Act 1988 which is a precursor to possession proceedings being started. Trustees must ensure that they have provided gas safety certificates and complied with all other provisions before service of the s.21 notice.

47. Failure to do so in advance of service of the notice will invalidate the notice and cannot be cured by service before the possession hearing.

48. Trustees will also need to find out whether there was a deposit paid and whether it was protected inside the 30-day period and the prescribed information provided. Where it has not been, the deposit will need to be returned to the tenant before the s.21 notice is served or it will invalidate the notice to quit.

49. A s.21 notice must be in the prescribed form and contain the prescribed information.

50. It may also be possible to serve a notice to quit under s.8 of the Housing Act 1988 where one of the grounds is made out, such as rent arrears, and in this case the above requirements would not need to be complied with.

51. Where the property is solely owned the trustee would have become the sole landlord because they automatically become the legal owner and they will plainly be entitled to serve the s.21/s.8 notice.

52. Matters are more difficult where the trustee is not the legal owner of the property. In these circumstances where the bankrupt and co-owner will not engage, the trustee may be required to apply to court for an order requiring them to sign the relevant documents (such as the notice to quit) and in default of this for the court to approve the trustee or someone at court to sign on their behalf.

53. If the tenants cannot be evicted, the property will need to be sold subject to the tenancies in place.

Service of notices

54. In terms of the method of service in most residential occupier scenarios none of the acts in question have any deeming provisions in relation to service. That means that unless there is a deeming provision in the tenancy agreement, the common law rules in relation to service apply, and the notice must come to the tenant's attention on the balance of probabilities.

55. This is very challenging in circumstances where the tenant evades service of the notice to quit. Unless there is some form of evidence from, for example, a process server stating that it was handed to the tenant you cannot be confident that your possession proceedings will be successful.

56. It is a common misconception that posting a notice to the property will constitute good service. The common law rules on service are such that leaving notice at the Property will only constitute good service where it comes to the tenant's attention before the commencement of the notice period (*Alford v Vickery* (1842) car. & M. 280).

57. Of course, the trustee could rely upon it having come to the tenant's attention on the balance of probabilities. However, if they respond to the claim form and say they did not receive the notice this will be a complete defence to the claim.

58. S.196 of the Law of Property Act 1925 provides that any notice "required or authorised by this Act" is deemed served if "it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor…".

59. Given the difficulties that are often faced with tenants evading service of s.21 notice such that it cannot be said to have come to their attention, this is obviously a very useful provision where it applies. Unfortunately, it has long been considered that it only applies to notices which are required to be served, rather than authorised to be served. This has therefore precluded its application to service of s.21 notices (see *Wandsworth LBC v Atwell* (1995) 27 H.L.R. 536; 94 L.G.R. 419 per Glidewell LJ).

60. However, the general consensus has always been that where s.196 is expressly incorporated into the tenancy agreement, service by the methods referred to in s.196 will constitute deemed service in the same way as a notice served under that provision. This view is supported by the case of *Southwark LBC v Akhtar* [2017] UKUT 150 (LC) where notices under s.20B of the Landlord and Tenant Act 1985 relating to works were considered where s.196 had been incorporated into the tenancy agreement.

61. It is also worth noting that there is a question mark over whether property notices can presently be served by email. *Assethold Ltd v 110 Boulevard RTM Co Ltd* [2017] UKUT 316 (LC) and *Cowthorpe Road 1–1A Freehold Ltd v Wahedally* [2017] L & TR 4 are both county court decisions of Circuit Judges and appear to go different ways, albeit are not inconsistent per se. However, the Law Society released guidance in September 2019 which suggests that it is likely that service of notices by email should be valid.

62. Clearly this is not binding and the safest course at present remains to avoid service by email, but to ensure that the notice has come to notice of the tenant and this can be evidentially proven or that the provisions of the tenancy agreement have been complied with.

Claire Thompson
Enterprise Chambers

Email: clairethompson@enterprisechambers.com
Tel: 0117 450 7920 / 020 7405 9471

SECTION 127 OF THE INSOLVENCY ACT 1986 IN THE PROPERTY CONTEXT:

AKERS V SAMBA FINANCIAL GROUP [2017] UKSC 6

AMIT GUPTA

Remit

63. This talk focusses on s.127 of the Insolvency Act 1986 in the corporate and property context, with a particular emphasis on the case of *Akers*.

64. Whilst there is much commonality with the effect of s.284 in the context of bankruptcy, decisions under one provision are not necessarily binding under the other: *Pettit v Novakovic* [2007] BCC 462 and s.284(4).

The relevant facts

65. The facts were complex, including a crossover between Cayman law and Saudi Arabian law (with the latter jurisdiction not recognising the existence of trusts). For the purposes of this talk however, the following is relevant: Mr Al-Sanea held certain shares on trust for the benefit of Saad Investments Co Ltd ("SICL"), and, six weeks after the compulsory winding up of SICL commenced, he transferred those shares to Samba Financial Group ("Samba") in discharge of some of his liabilities to Samba. The transfer was to a creditor of Mr Al-Sanea in satisfaction of a personal debt. The value of the shares was $318M.

The issues

66. The original application sought a declaration as to the effect of s.127 on the transaction in question. The way the case was presented at each level was a moving target. Ultimately, the Supreme Court was left to consider two questions, but decided the case on one issue.

67. The seminal question which arose was whether, assuming Samba was a bona fide purchaser for value of the shares without notice of SICL's beneficial interest, the transfer (at least in so far as it relates to SICL's beneficial interest) was to be treated as "void" for the purposes of section 127 of the Insolvency Act 1986.

68. It was accepted for the purpose of these proceedings that the creditor was acting in good faith and without notice of the company's beneficial interest, and that consequently the effect of the transfer was to extinguish the company's beneficial interest in the shares.

69. It is crucial to remember that SICL owned an equitable interest in the shares, but not title to the shares.

The relevant provisions of the Insolvency Act 1986

Section 127

70. Section 127(1) provides that a *"disposition of the company's property … made after the commencement of the winding up is, unless the court otherwise orders, void."* A "company's property" has traditionally been interpreted as meaning property beneficially owned by the company: *Re Margart Pty Ltd* (1984) 1 ACLA 709; *Re Branston & Gothard Ltd* [1999] BPIR 466.

71. The liquidator's right to recover property paid over by a disposition avoided by s.127 is restitutionary in nature, as confirmed by the Privy Council in *Skandinaviska Enskilda Banken v Conway* [2019] UKPC 36.

72. Section 127 does not of itself provide the liquidator with a cause of action; it merely invalidates the impugned disposition, leaving it to the general law to provide remedies for reversing the effect of that disposition. Of course, unless a validation order is obtained, the transaction is void: *Express Electrical Distributors Ltd v Beavis* [2016] 1 WLR 4783.

73. Section 129 establishes the date of "commencement" for the application of s.127 as being the date the petition was presented on.

Section 436

74. Section 436 defines "property" as including:

> *"money, goods, things in action, land and* ***every description of property*** *wherever situated and also* ***obligations and every description of interest****, whether present or future or vested or contingent,* ***arising out of, or incidental to, property****."*

The decision

75. The leading judgment was delivered by Lord Mance, the then Deputy President of the Supreme Court; all of the judges agreed with his judgment, albeit separate judgements were also delivered by Lord Neuberger, Lord Sumption and Lord Collins to complement the leading judgment.

Property

76. The Supreme Court started its analysis by stating that the meaning of the word *'property'* is heavily dependent on context (at [15]). Lord Mance reviewed the authorities and the academic literature on the question of the property rights held by beneficiaries of trusts, and the trusts at issue in the case; he recognised that the word *'property'* is given the widest of meanings in the context of the Insolvency Act 1986 by s.436 of the Act such that (at [42]):

> *"The definition of 'property' in section 436 is wide enough to embrace both equitable proprietary and purely personal interests."*

77. With that said, the court did not decide the appeal based on the conflict of laws point. It decided it on the interpretation of the word *'disposition'*.

Dispositions

78. Section 127 provides a prima facie right to recover any property disposed of in which SICL had the legal title, subject only to a power in the court to validate the disposition by order (at [47]).

79. The word *'disposition'* may well require a wide construction in the context of s.127 (per Neuberger at [67]). Furthermore, *'disposition'* can sometimes include a dealing with rights by which they are extinguished, such as the surrender of a lease (per Neuberger at [68]).

80. Lord Mance found that (at [51]):

"What is clear, on any analysis, is that, where a trust exists, the legal and beneficial interests are distinct, and what affects the former does not necessarily affect the latter. Where an asset is held on trust, the legal title remains capable of transfer to a third party, although this undoubted disposition may be in breach of trust. But the trust rights, including the right to have the legal title held and applied in accordance with the terms of the trust, remain. They are not disposed of. They continue to be capable of enforcement unless and until the disposition of the legal title has the effect under the lex situs of the trust asset of overriding the protected trust rights. If the trust rights are overridden, it is not because they have been disposed of by virtue of the transfer of the legal title. It is because they were protected rights that were always limited and in certain circumstances capable of being overridden by virtue of a rule of law governing equitable rights, protecting in particular (under common law) bona fide third-party purchasers for value (equity's "darling")…"

81. Furthermore, that (at [55]):

"…the natural meaning of "disposition" in the context of section 127 …refers to a transfer by a disponor to a disponee of the relevant property…"

82. The Supreme Court decided there was no basis for extending s.127 to cover three-party situations where legal title is held and disposed of to a third party by a trustee, and the beneficiary's beneficial interest either survives or is overridden by virtue of the disposition of the legal title to the third party. The law regulates, protects and circumscribes beneficial

interests under a trust in a manner which is separate from and outside the scope of section 127.

83. Ultimately, the court held that the holder of interests such as SICL's did not need protection by s.127. Mr Al-Sanea disposed of his legal interest in the shares, which involved him in a breach of trust. But it did not involve any disposition of SICL's property. SICL's property, whether it consisted of an equitable proprietary interest or personal rights to have the shares held for its benefit, continued, despite the disposal of the legal title, unless and until that disposal overrode it. If the disposal overrode SICL's interest as regards a third-party transferee of the legal title such as Samba, that was not because of any disposal of SICL's interest; it was because SICL's interest was always limited in this respect i.e. fragile to a claim by equity's darling.

84. Lord Neuberger also point out that (at [71]):

a. Mr Al-Sanea was a bare trustee of the shares - i.e. the whole of the beneficial interest in the shares was vested in SICL.

b. A transfer of the bare legal estate by the trustee to a purchaser with notice of the trust would not be caught, because he would only acquire the bare legal interest, which would normally be worth nothing, and no disposition of the company's property would have occurred.

c. A transfer by the company of its equitable interest would undoubtedly be caught by section 127 as it would involve a disposition by the company of that interest.

The take away message

85. As [75] Lord Neuberger acknowledged:

"Section 127 can operate harshly so far as people dealing in good faith with a company are concerned. In many cases, a person dealing with a company will be unaware that a petition has been presented (particularly if the presentation occurred very recently), and the section contains no

exception for transactions in the ordinary course of business or for transactions for which the company receives full value…"

86. This does nothing to change the more ordinary application of s.127 e.g. a creditor who receives payment for a pre-existing debt.

87. In addition, it does not change the position where the company's property is held by, for example, a director or agent and is disposed of by him to a third party: *In re J Leslie Engineers Co Ltd* [1976] 1 WLR 292.

88. Further still, a director who has authorised dispositions avoided by s.127 may still be liable for misfeasance or breach of statutory duty: see *Phillips v McGregor-Paterson* [2009] EWHC 2385 and *Re Oxford Pharmaceuticals Ltd* [2009] EWHC 1753 (Ch.).

89. In *Officeserve Technologies Ltd v Anthony-Mike* [2017] EWHC 1920, HHJ Matthews considered the applicability of s.127 to a settlement agreement entered into between a company and its former director/shareholder. HHJ Matthews concluded that the effect of the settlement was not to release the former chairman from liability under potential claims against him by the company, but that if it had been, the release would have been void by operation of s.127. It appears that HHJ Matthews might not have been a fan of the decision in *Akers*:

"98 …I am therefore free to hold that the release of contractual rights such as a debt by a creditor company in favour of the debtor constitutes a 'disposition' of the property of the company within the meaning of s 127. I accept that the word 'disposition' is not apt to cover mere effluxion of time of a wasting asset, such as a lease. Nor is it apt to cover deliberate consumption or waste by the company of its assets. ***But there is nothing in the section to require that the disposition of the company's property should be one by which the same identifiable property should leave the ownership of the company and become the identifiable property of another person.***

In my judgment, ***it is sufficient that identifiable property by some act having legal consequences (so excluding mere effluxion of time) ceases to be in the ownership of the company, so that it is no longer available to the liquidator of the company for the statutory purposes, and the value accrues to some other person (so excluding consumption or waste), even though that other person cannot necessarily be said to become the owner of the same property****. So a surrender of a lease to a landlord, the release of a debt to the debtor, and the cancellation of a charge on property are all cases which, in my judgment, can in principle fall within section 127 of the 1986 Act."*

90. In *SL Claimants v Tesco* [2019] EWHC 2858 (Ch.) (whilst a financial services case) the court reiterated that *Akers* demonstrates equity's darling will trump when the company had no role in a transaction that was being. In this decision, the court seemed keen to treat *Akers* as being a decision based on s.127 and of no broader application.

91. Ultimately, s.127 cannot be used as a shortcut to claims which are more properly framed as other causes of action, for example breach of trust, misfeasance, transactions to defraud creditors, transactions at an undervalue etc.

92. The saga concerning the share transfer continues; the liquidators deleted the claim pursuant to s.127 and amended the claim to breach of constructive trust, which landed before the Court of Appeal last year: [2019] EWCA Civ 416.

Amit Gupta
Enterprise Chambers

Email: amitgupta@enterprisechambers.com
Tel: 020 7405 9471