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
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
</tr>
<tr>
<td>Preface</td>
</tr>
<tr>
<td>Table of Cases</td>
</tr>
<tr>
<td>Table of Statutes</td>
</tr>
<tr>
<td>Table of Statutory Instruments</td>
</tr>
<tr>
<td>Table of Abbreviations</td>
</tr>
</tbody>
</table>

## Chapter 1

**Introduction**

1. Property insolvency – overview
   1. A brief history
   1. Modern property insolvency
   2. Human rights

2. Insolvency – overview
   4. Immediate considerations and signs that a tenant may be or may become insolvent
   4. Pre-insolvency action by directors
   6. When is a company insolvent?
   8. Determining the insolvency of an individual debtor

3. Voluntary arrangements
   8. Individual voluntary arrangements (IVAs)
   9. Company voluntary arrangements (CVAs)
   13. The effect of the approval of the voluntary arrangement
   14. Challenging voluntary arrangements
   15. Material irregularity
   16. Time-limits for challenge
   17. The court’s power on making a finding of unfair prejudice or material irregularity
   17. Variation of voluntary arrangement

4. Administrative receivership

5. Administration
   17. Administration order
   20. Appointment of administrator by holder of qualifying floating charge out of court
   20. Appointment of administrator by company or its directors
   21. The status of the administrator
   22. The effect of administration
   23. The duration of the administration
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  
Varying the order of priority under r 2.67(2) and (3) IR 1986  
Administration expenses – the practical position  
Liquidation/administration set-off  

Chapter 3  
Distress for Rent and Commercial Rent Arrears Recovery and Court Enforcement  
Enforcement and the remedies available to debtors (and office holders in any event)  
General principles and objectives of TCEA 2007  
Enforcement agents  
   Client account and financial/statutory requirements for enforcement agencies  
   Certification process  
   Complaints  
   Appeal  
   Costs  
   Application of security after consideration of complaint at a hearing  
   Commercial rent arrears recovery  
   Distress abolished 6 April 2014  
CRAR – Commercial Rent Arrears Recovery (ss 71 and 72 of the Act)  
   Definition of landlord  
   Mortgagees  
   Enforcement agent  
   Lease  
      Exclusive possession: the difference between a lease and licence  
   Tenancy at will and sufferance  
      Tenancy at will  
      Tenancy at sufferance  
   Commercial premises  
   Pure rent only  
      Further rent conditions  
   Permitted deductions  
      Deductions that can be made  
   CRAR after the end of lease  
   Right to recover rent from sub-tenant  
      New procedure (post 6 April 2014)  
      The notified amount  
      The effect of a s 81 notice  
      Off-setting payments under a notice  
      Withdrawal and replacement of notices  
   Restrictions on enforcement and CRAR following insolvency of tenant/debtor
Receivership
  Receivership and court execution and CRAR 100
  Fixed charges, receivership and CRAR 101
Compulsory liquidation
  When would an application to use enforcement succeed?
    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
  Administration 109
    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 127
Landlord’s /creditors’ remedies 127
Wrongful interference 127
Offences 128
Intentional obstruction 128

Chapter 4
Forfeiture (and Possession) 129
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
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 227
  Time-limits 227
Guarantors and other third party sureties 228
The landlord 228
Subtenants with an underlease of the whole of the property demised by the disclaimed lease 229
Subtenants with an underlease of part only of the property demised by the disclaimed lease 229
Purchasers of leases 230
Original tenants and previous assignees 230
The effect of the vesting order 231
The landlord’s claim following disclaimer 231
Other claims following disclaimer 233
Bona vacantia and Crown disclaimer 233
Disclaimer and bankruptcy (IA 1986, s 315) 233
  Distinguishing characteristics of disclaimer in bankruptcy cases 234
Effect of trustee’s disclaimer 234
Leaseholds 235
Disclaimer of dwelling house 235
Rentcharges 236
Where permission of court is required 236
Failure of Service of Notice or other default 236

Chapter 8
Insolvency Sale of Tenancy – Assignments, Valuations and ‘Pre-packs’ 239
Assignments 239
  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? 240
Valuations 241
  Can the lease be sold without prior court or creditor or landlord approval? 244
‘Pre-packs’ 245
  Landlord’s remedies in relation to a pre-pack 247

Part 2
Freeholder/Landlord Insolvency
Chapter 9
Landlord’s Covenants and Insolvency 253
Tenant’s proof in landlord’s liquidation 254
Tenant’s proof in administration 256
Voluntary arrangements 256
Receivership 257
Bankruptcy 258
Set-off 258
Injunctive relief 259
  Insolvency restrictions 259
## Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>Freehold Covenants and Insolvency</td>
<td>261</td>
</tr>
<tr>
<td></td>
<td>The burden in common law</td>
<td>261</td>
</tr>
<tr>
<td></td>
<td>The burden in equity – restrictive covenants</td>
<td>262</td>
</tr>
<tr>
<td></td>
<td>The benefit</td>
<td>263</td>
</tr>
<tr>
<td></td>
<td>Insolvency restrictions and enforcement of freehold covenants</td>
<td>264</td>
</tr>
<tr>
<td>11</td>
<td>Disclaimer of Freehold – Escheat</td>
<td>267</td>
</tr>
<tr>
<td>12</td>
<td>Developer/Construction Insolvency</td>
<td>271</td>
</tr>
<tr>
<td></td>
<td>Termination</td>
<td>272</td>
</tr>
<tr>
<td></td>
<td>No express termination clause</td>
<td>272</td>
</tr>
<tr>
<td></td>
<td>Express termination clause</td>
<td>273</td>
</tr>
<tr>
<td></td>
<td>Waiver</td>
<td>274</td>
</tr>
<tr>
<td></td>
<td>Termination and moratoria</td>
<td>274</td>
</tr>
<tr>
<td></td>
<td>Effect of termination on subcontracts</td>
<td>274</td>
</tr>
<tr>
<td></td>
<td>Liabilities, post-insolvency</td>
<td>275</td>
</tr>
<tr>
<td></td>
<td>Completion of the works</td>
<td>278</td>
</tr>
<tr>
<td>13</td>
<td>Insolvency Sale of Freehold</td>
<td>281</td>
</tr>
<tr>
<td></td>
<td>Administration</td>
<td>282</td>
</tr>
<tr>
<td></td>
<td>Contracting party going into administration prior to administration</td>
<td>283</td>
</tr>
<tr>
<td></td>
<td>Liquidations</td>
<td>283</td>
</tr>
<tr>
<td></td>
<td>Receivership</td>
<td>284</td>
</tr>
<tr>
<td></td>
<td>Representations, liabilities and warranties of title</td>
<td>285</td>
</tr>
<tr>
<td>3</td>
<td>Mortgagees and Receivers</td>
<td>289</td>
</tr>
<tr>
<td>14</td>
<td>Overview of Mortgages and the Position of the Mortgagor</td>
<td>289</td>
</tr>
<tr>
<td></td>
<td>Legal mortgages</td>
<td>290</td>
</tr>
<tr>
<td></td>
<td>Equitable mortgages</td>
<td>290</td>
</tr>
<tr>
<td></td>
<td>The position of the mortgagor</td>
<td>291</td>
</tr>
<tr>
<td></td>
<td>The right of redemption</td>
<td>291</td>
</tr>
<tr>
<td></td>
<td>The terms of the mortgage</td>
<td>292</td>
</tr>
<tr>
<td></td>
<td>Undue influence</td>
<td>292</td>
</tr>
<tr>
<td></td>
<td>Undue influence, misrepresentation and commercial mortgages</td>
<td>293</td>
</tr>
<tr>
<td></td>
<td>Residential mortgages</td>
<td>293</td>
</tr>
<tr>
<td>15</td>
<td>Interaction between the Rights of Mortgagees and Formal Insolvency Regimes</td>
<td>295</td>
</tr>
<tr>
<td></td>
<td>Bankruptcy</td>
<td>295</td>
</tr>
<tr>
<td></td>
<td>Voluntary arrangements (company and individual)</td>
<td>295</td>
</tr>
</tbody>
</table>
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 332
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 342
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
At Francis Wilks Jones we have extensive experience of dealing with property in insolvency related situations. Landlords of Insolvent Tenants

The law relating to tenant insolvency can be complex and it is important to take advice at an early stage to ensure that you have as many options and possible recovery methods open to you as possible. Insolvency Act 1986. c. 45. Provisions applicable to every receivership. Section. 39. Notification that receiver or manager appointed. 40. Payment of charged property, etc.

44. Agency and liability for contracts. 45. Vacation of office. Administrative receivers: ascertainment and investigation. Insolvency vs. Bankruptcy. Insolvency is a type of financial distress, meaning the financial state in which a person or entity is no longer able to pay the bills or other obligations. The IRS states that a person is insolvent when the total liabilities exceed total assets. A bankruptcy, on the other hand, is an actual court order that depicts how an insolvent person or business will pay off their creditors, or how they will sell their assets in order to make the payments. Property insolvency is both a complex and opaque process that requires specialist knowledge. An understanding of insolvency law and regulation is essential. With property insolvency, the effect of the current economic climate has had on property markets needs to take into consideration. Although there has been a hint of recovery in specific locations, most notably London. However, most regional markets are still suffering and face an uncertain future. Intellectual property (IP) is a complex asset class that requires specialist valuation, but also one that can add considerable value to a company in insolvency. In fact, the total value of a company’s intellectual property portfolio can be a determining factor in the eventual outcome of their insolvency event.