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CVAs and Restructuring Plans: A Comparative Introduction

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Today's Topics

- Key Figures on the use of Creditor Voluntary Arrangements ("CVAs") and Restructuring Plans
- How do CVAs and Restructuring Plan operate in practice?
- Key Caselaw
- Who are CVAs and Restructuring Plans for?

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Key Figures

- How Many Restructuring Plans since Part 26A's introduction?
- How Many CVAs on an annual basis?
- Popularity of CVAs v. Restructuring Plans v. Other Insolvency Processes
- Which industries are feeling financial pressures?

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CVAs in Practice

- The aim of CVAs is to reduce debt burden without entering another insolvency process which may lead to worse creditor outcomes. Typically a debt write-down and payment plan or an extension of time for repayment.
- Eligible Entities
- Nominee/Supervisor
- "Statutory Contract"
- Proposals ⇨⇨ Report to Court (unless Admin/Liq) ⇨⇨ Creditors' Decision Process
- Passes if passed by 75% by value of creditors who vote, unless 50% of creditors notified vote against proposals.
- No moratorium
- Binds Creditors Entitled to Vote (s5(2)(b) Insolvency Act 1986) but not secured or preferential creditors unless they agree.

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Part 26A in Practice

- The goal of a Restructuring Plan is the reorganization of a distressed company's liabilities via a compromise or arrangement with creditors to effect a corporate rescue.
- What companies are eligible?
- Financial Test: Financial difficulties (actual or likely) that are, or will, or may affect ability to carry on business as a going concern. (s. 901A(2) CA 2006)
- Purpose Test: (1) A compromise or arrangement with creditors and (2) its purpose is to eliminate, reduce or prevent, or mitigate, said financial difficulties.
- First Court Hearing ⇨⇨ Creditors' Meeting ⇨⇨ Second Court Hearing
- The cross class cram down
  - No dissenters worse off than under a relevant alternative
  - At least 75% by value of in the money creditors vote in favour of plan.
- Schemes of Arrangement?

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Key Caselaw (CVA)

- Challenges to CVAs are brought on two grounds (see s6 IA 1986)
- Unfair Prejudice
  - Differential Treatment Accorded to Different Classes v. Liquidation. The Court will consider vertical and horizontal comparators.
  - *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] Bus LR 915
- Material Irregularity (Meeting or Decision Making Procedure)
  - Must be material in that it is likely to have affected the outcome of vote (*Doorbar* [1996] 1 WLR 456)
  - Examples include blanket discounts on creditor claims affecting voting rights but irregularities **must** have an impact. (*Carraway Guildford (nominee A) Limited v Regis UK Ltd* [2021] BPIR 1006)
- Jurisdictional challenge? - see *Lazari*

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Restructuring Plan Key Caselaw

- Financial Test
  - The threshold is low. (*Re Hurricane Energy Plc* [2021] EWHC 1759)
- Class Composition
  - Same test as schemes of arrangement (*Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch)
  - Focus is on rights v. identity (*Re Amicus Finance Plc [2021] EWHC 2255 (Ch))*
- Notice to Creditors
  - Bare minimum is information explaining how outcome under plan is better than in relevant alternative

.

  - Ideally include information on treatment of other classes, underlying assumptions and valuation methodology and director financial and commercial interests of director (*Re Sunbird Business Services [2020] EWHC 2493*)

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First EWCA Decision on Restructuring Plans

- *Strategic Value Capital Solutions Master Fund LP and others v AGPS Bondco Plc* [2024] EWCA Civ 24
  - First CA decision in relation to restructuring plans. Specific focus on CCCD.
  - Senior Group Loan Notes – Proposed extension of maturity date
  - Restructuring plan passed by 5 of 6 creditor classes. Cram down requested.
  - HC sanctioned plan in April 2023 but overturned on appeal:
    - Pari Passu
    - Rationality
    - Consideration of Alternative Options
  - Criteria or Guidance?

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Who are these procedures for?

- Costs – *Re CB&I UK Ltd* [2024] EWHC 398 (Ch)
- Complexity
- SMEs

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Administration: Extending and fixing extensions gone wrong

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Extensions

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Duration of an administration – one year after the company first entered into administration under paragraph 76(1) of Schedule B1 of the Insolvency Act 1986

Extension can be effected in two ways:

- Consent of company's creditors
- Court order

First issue for the court: **is the administration still running**? Para 77(1)(b) is emphatic that an order for extension cannot be made after the expiry of the administrator's term of office (except in very rare circumstances; see e.g. *Re TT Industries Ltd* [2006] B.C.C. 372.

As extension by consent is first option, we need to consider how that works…

Extensions by consent

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Para 78(1), (2) - Consent is needed from each secured creditor and the unsecured creditors (if there are any) **unless** administrators have made a statement under paragraph 52(1)(b) saying that they do not expect any distributions to be made to unsecured creditors other than through the prescribed part

But note the difference in language used about secured creditors and unsecured creditors, and the magic words in para 77(2A) – "whether the company's unsecured creditors or preferential creditors consent is to be determined by the administrator **seeking a decision** from those creditors as to whether they consent".

This is the language of s.246ZE of the Insolvency Act 1986, which means under s. 246ZF administrators can use the deemed consent procedure.

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Definite mistake – trying to use deemed consent or other decision procedures for secured creditors! You need actual consent from each secured creditor – see *Baker and another v Biomethane (Castle Easton) Ltd* [2019] EWHC 3298 (Ch) at [5]. **Not** a procedural error that can be easily fixed under r. 12.64 of the Insolvency Rules 2016.

Maybe mistake? – r. 15.11(1) of the Insolvency Rules 2016 provides for notice to be delivered to "the creditors who had claims against the company at the date when the company entered administration **(except for those who have subsequently been paid in full)**". Seems to make sense, except…

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First Review of the Insolvency (England and Wales) Rules 2016 by the Insolvency Service:

> *Several respondents asked for clarification on the position of secured and preferential creditors that had received payment in full. It has been the Government's position for some time that the classification of a creditor is set at the point of entry to the procedure and that this remains, even if payment in full is subsequently made.*
>
> *…*
>
> *We will amend rule 15.11(1) to be clearer that where the Insolvency Act 1986 or the Rules require a decision from creditors who have been paid in full, notices of decision procedures must still be delivered to those creditors.*

But see s.248 of the Insolvency Act 1986, where a secured creditor is defined as "a creditor of the company who **holds** in respect of his debt a security over property of the company."

Probably better to ask those who were secured creditors when administration commenced even if no longer creditors, but… watch this space.

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Deemed consent procedure – always make sure you double-check the requirements in the Insolvency Act 1986 and the Insolvency Rules.

s. 246ZF – creditors must be given notice of:

- the matter about which they are to make a decision (i.e. that consent is being sought for an extension of the administration)
- the decision that the person giving the notice proposes should be made (i.e. that the administrators want the extension)
- the fact that if less than the relevant number of creditors object, the creditors are treated as having made the proposed decision, and otherwise that the decision is not made and that if consent is sought again it must be by qualifying decision procedure
- the procedure for objecting

IR r. 3.54 – notice must contain:

- reasons why administrator is seeking an extension

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IR 15.7 – the notice must contain

- A statement that in order to object, a creditor must have delivered a notice stating that they so object not later than the decision date together with a proof in respect of the creditor's claim in accordance with the Rules
- A statement that it is the convener's responsibility to aggregate any objections to see if the threshold is met for the decision to be taken as not having been made

IR 15.8 – the notice must be:

- Identification for the proceedings and confirmation that the decision is sought by deemed consent
- A statement of the decision date and the deadline to deliver a proof of a creditor's claim
- A statement that a creditor who has opted out from receiving notices may nevertheless vote if they so provide proof
- A statement that creditors who meet the threshold may within five business days of delivery require a physical meeting
- Notice to be authenticated and dated

IR 15.7 – timing

- 14 minimum days notice

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Note rule 12.64 – "No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."

See *Re Caversham Finance Ltd* [2022] EWHC 789 (Ch), and also *Re A.R.G. (Mansfield) Ltd* [2020] EWHC 1133 (Ch)

- left out rr. 15.8(3)(f) and 15.8(3)(g), but there were no opted-out creditors, so easy to resolve

- left out r. 3.54 by providing no reasons, but court considered the reasons were accessible from the Progress Report which were referred to in the covering letter

Query whether reference to the Insolvency Rules applying generally is a useful catch-all – does that leave only date and notice timing?

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Finally, consider *Re E Realisations 2020 Ltd* [2022] EWHC 1575 (Ch). Reasoning is a little difficult to understand. Consent from creditors to extension was obtained 2 months after Company entered administration; notice of extension was not filed until 2 months before extension was due to end. No reasons provided under r.3.54 but reference to progress report was made.

Deputy ICC Judge Curl QC expressed doubts as to whether the reasons for which the extension was made were actually those expressed in the progress report given the gap in time between when consent was granted and when consent was relied upon, but ultimately did not pursue the point further. But…

"unambiguous compliance with the requirement in r.3.54(2) of the Rules to give reasons for seeking an extension is always likely to be difficult where contingent consents are obtained as a matter of routine at a relatively early stage of an administration and before real thought has been given to whether or not an extension of the administrator's appointment beyond the initial one year period will be required."

Extensions in the court

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Two main authorities

- *Re Nortel Networks UK Ltd and others* [2017] EWHC 3299 (Ch)
  - Court's discretion to be exercised in the interests of the creditors of the company as a whole (but bear in mind e.g. *Biomethane* at [22] about the real economic interest)
  - Court should have regard to all the circumstances, including
    - Whether the purpose of the administration remains reasonably likely to be achieved
    - Whether any prejudice would be caused to creditors
    - Any views expressed by creditors
- *Re TPS Investments (UK) Ltd (in administration)* [2020] EWHC 1135 (Ch)
  - Why has the administration not yet been completed?
  - Is any other alternative insolvency regime more suitable?
  - Is the extension likely to achieve the purpose of the administration?
  - If the extension is appropriate, how long for?

Extensions in the court

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What to consider including in witness statements that occasionally gets left out:

- Clearly identify which purpose of administration the administrators are currently interested in (e.g. might have had initial goals of rescuing company as a going concern now focused simply on distribution)
- Dates to help contextualise key delays and indicate that the problem has not been the administrators
- Values realised or expected to be realised from past or future actions to help demonstrate the progress being made or expected to be made – clearly difficult if there is e.g. potential litigation, but assisting the court in understanding so far as possible
- Exhibit the latest progress reports

Extensions in the court

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Remember Practice Direction - Insolvency Proceedings paragraph 8.3:

In the absence of special circumstances, an application for the extension of an administration should be made not less than one month before the end of the administration. The evidence in support of any later application must explain why the application is being made late. The Court will consider whether any part of the costs should be disallowed where an application is made less than one month before the end of the administration.

If costs weren't good a reason enough, consider also *Re TT Industries Ltd* – reasonably clear that this would not extend to a very late application which cannot be listed in time through no other fault of the court staff

Remember also paragraph 3.3, under which applications for an administration order can only be heard by a High Court Judge or an ICC Judge, but not before a District Judge.

Retrospective administration orders

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Basis for retrospective administration orders discussed in *Biomethane* at [15], and comes from para 13 of Sch. B1 to the Insolvency Act 1986:

> (2) An appointment of an administrator by administration order takes effect—
>
> (a) **at a time appointed by the order**, or
>
> (b) where no time is appointed by the order, when the order is made.

Slightly curious line of authorities dating back to *Re G-Tech Construction* [2007] B.P.I.R. 1275, a reported judgment that was not unfortunately not finally approved given the death of author Judge Hart. Ordinarily, retrospective effect is very unusual and only happens without clear and explicit words to that effect (see e.g. *F Hoffmann-La Roche & Co AG v Inter-Continental Pharmaceuticals Ltd* [1965] Ch. 795 (CA), albeit in a different context).

Strictly speaking retrospective orders have so far only been dealt with at first instance, but seems very unlikely they would now be disposed of.

Retrospective administration orders

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What is clear – these are not extensions. First and foremost, they are applications for an administration and must meet all the usual requirements, as per *Re Care Matters Partnership Ltd* [2011] EWHC 2543 (Ch) at [10]-[11].

Para 11 to Schedule B1 - The court may make an administration order in relation to a company only if satisfied (a) that the company is or is likely to become unable to pay its debts, and (b) that the administration order is reasonably likely to achieve the purpose of administration

Para 12(1) to Schedule B1 - An application to the court for an administration order in respect of a company (an "administration application") may be made only by—

(a) the company,

(b) the directors of the company,

(c) one or more creditors of the company…

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Re Elgin Legal Ltd [2016] EWHC 2523 (Ch) – former administrators are creditors in respect of their unpaid fees, but **beware** as this assumes initial appointment was valid. Retrospective order might be able to fix a flawed extension; much more difficult to fix a flawed appointment. Also raises a minor evidential point going towards administrators' fees – for example, in *Biomethane* at [9] the court had sight of the administrators' invoice.

Retrospective aspect to be exercised with "extreme caution" (*Re Elgin*, [19) because of the potential disparity between different groups of creditors:

> Those creditors whose debts carry interest would, if the order were not to have retrospective effect, be entitled to continue to accrue and claim interest for the period since [the administration lapsed] until today—a period of nearly six months—and to include that increased amount in any proof of debt in the second administration

Ordinarily such an application will usually be made when unsecured creditors provided deemed consent and consent was not properly obtained from secured creditors, but not clear this is enough to overlook prejudice

Retrospective administration orders

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Re Mederco (Cardiff) Ltd [2021] EWHC 386 (Ch) at [32]-[44] – the court cannot grant back-to-back retrospective administration orders, which means that by virtue of para 76(1) the court cannot make a retrospective administration take place more than 364 days before the end of the order.

Extensions will normally be sent off for hearing on that point alone to District Judge – but if there are questions as to uncertainty of validity of extension, don't get caught out! Try and get transfer back, or you may run out of time (and you should be doing this because of PDIP 8.3 anyway…).

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