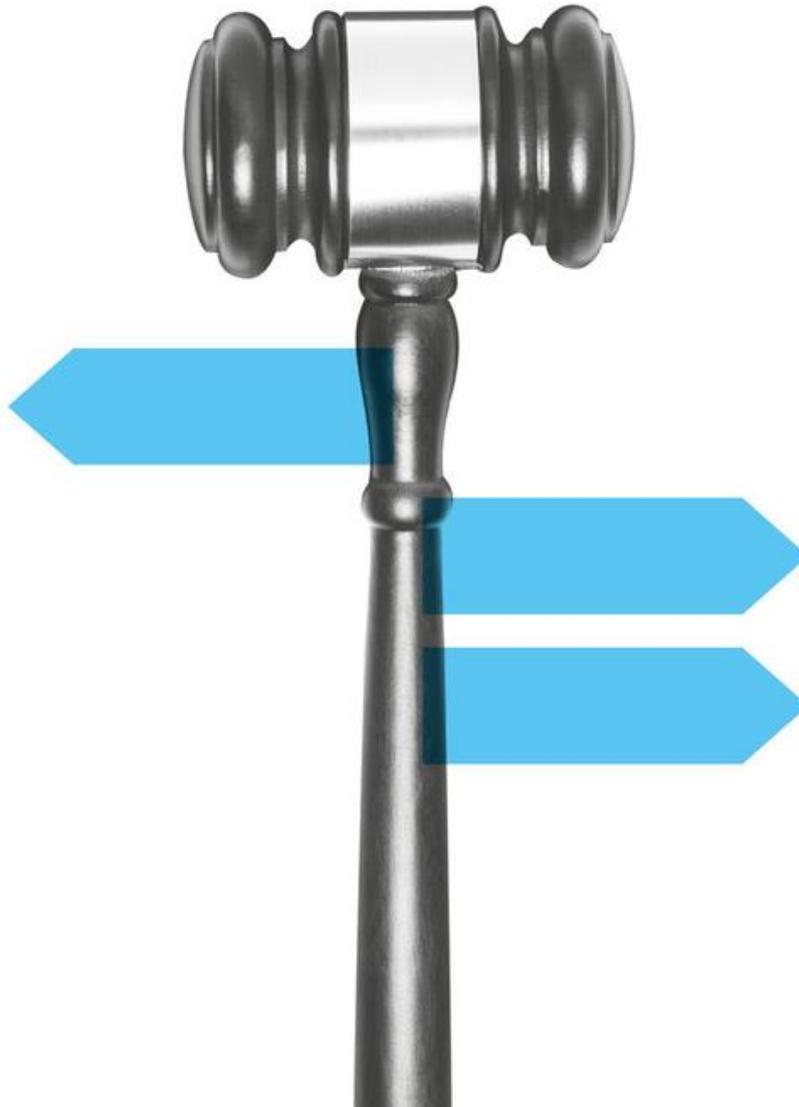


**Robust support for the Company
Voluntary Arrangement -
the New Look Judgement**



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It would be an understatement to say that May was a difficult month for landlords. Two judgements in quick succession dismissed landlord challenges to both the New Look company voluntary arrangement (“CVA”) and the Virgin Active restructuring plan. Whilst the subsequent Regis CVA judgement found in favour of the landlords on a narrow point and revoked the CVA, it did little to improve the position for landlords on the key restructuring issues arising out of CVAs.

With landlords facing estimated pandemic-related rental arrears of £6 billion for the period from March 2020 to June 2021, these judgements provide for an extremely challenging environment for rental recoveries as tenants look to restructure their liabilities using these two restructuring tools.



New Look CVA

May started with the much awaited judgement on the landlords’ challenge to the New Look CVA. This is a long standing restructuring tool, however, it has come to the fore in the last decade as an effective means of compromising lease liabilities in the retail sector. It has caused significant concern in the landlord community for the way in which it has provided for the targeted restructuring of landlords whilst leaving other stakeholders relatively unimpaired.

The New Look CVA was approved in September 2020 by 81.6% by value of the unsecured creditors that voted and was part of a wider restructuring of its secured debt involving a debt for equity swap that was implemented through a parallel scheme of arrangement. The CVA divided unsecured creditors into a variety of classes which received different outcomes; classes included critical trade creditors, finance creditors and landlords. Landlords were themselves divided into three classes with certain landlords left largely unimpaired, whilst, in line with what has become market practice, the majority of landlords had their rental arrears compromised and were switched to either turnover or zero rents. Importantly, however, the CVA provided all landlords with break rights allowing them the option to take their property back and to seek to re-let on more favourable terms in the open market.



High-level overview of the CVA restructuring tool

The CVA allows for a debtor to restructure its unsecured liabilities provided the restructuring proposal has the requisite support of its unsecured creditors. The CVA process involves the directors formulating a restructuring proposal which is then reviewed by an insolvency practitioner who will consider its viability.

The insolvency practitioner submits a report to the Court addressing whether the proposal should be considered by the debtor’s creditors and members. Following which the insolvency practitioner will put the proposal to a vote and it becomes binding on all unsecured creditors provided it is approved by at least 75% by value of the unsecured creditors who take part in the vote, save for it will fail if more than 50% of the unconnected creditors vote against it.

The insolvency practitioner must send a report to the Court following the vote and disgruntled creditors then have a 28-day window in which to challenge the CVA on the grounds of unfair prejudice or material irregularity.





The New Look challenges

A group of landlords launched a root and branch challenge to the scope of the New Look CVA, challenging its jurisdictional basis and asserting unfair prejudice and material irregularity.

Jurisdictional Challenge

The New Look CVA was challenged on jurisdictional grounds on the basis that:

- it constituted a number of separate arrangements leaving it outside the scope of a CVA;
- it did not provide for sufficient give and take between New Look and its creditors; and
- the reduction of certain rents to zero constituted a surrender of the relevant leases and interfered with landlords' property rights.

The court rejected these jurisdictional challenges on the basis that:

- a CVA may provide for differential treatment of creditors;
- give and take is a low jurisdictional threshold and that the landlords were being offered a better return than they would receive in the relevant alternative; and
- landlords' property rights were not being interfered with as zero sum rents did not amount to a surrender of the lease and the CVA allowed, but did not require, relevant landlords to agree to a surrender of the lease.

Unfair Prejudice

Unfair prejudice was asserted on the following grounds:

- the votes of unimpaired creditors had been required to achieve the requisite majority at the creditors' meeting;
- differential treatment of unsecured creditors was not justifiable; and
- the rent had been reduced to a level that was below the market rate and the fundamental changes to the terms of the leases from fixed to turnover rent was unfair.

The court rejected the unfair prejudice challenges on the basis that:

- relying on the votes of unimpaired creditors needs to be carefully considered but it is not conclusive of unfair prejudice;
- likewise it is a fact specific question, regarding the fairness of any differential treatment of unsecured creditors, which involves looking at a number of factors including the commercial rationale for the differential treatment, the nature and extent of the differential treatment (taking into account compromises implemented through the restructuring as a whole rather than just the CVA), whether a different allocation of the assets was feasible, and the extent to which equivalent creditors to the objecting creditor approved the CVA; and
- the court will be slow to question the substance of the compromise on offer in circumstances where the compromise provides for an outcome which is at least as beneficial as the relevant alternative (which may in certain circumstances be below market) or landlords have the ability to terminate and seek a more favourable alternative themselves if they believe that the proposal does not reflect the market rate.

Material Irregularity

Material irregularity was asserted on the grounds that:

- the Chairman had wrongly applied a 25% discount to landlords' claims for voting purposes; and
- there had been material omissions in the disclosure provided to creditors.

The court rejected the material irregularity challenges on the basis that:

- it was appropriate to apply a discount; no landlord had objected to the discount that had been applied at the time and in any event the discount did not impact the outcome of the vote as it applied to all landlords; and
- there had been omissions, nevertheless, they were not material.



New Look Takeaways

The New Look judgement firmly moves the dial in favour of tenants providing greater certainty for future CVAs. In doing so, it provides support generally for insolvent but viable businesses which need a restructuring tool in order to impose a compromise on certain of their unsecured creditors to allow them to continue to trade and maximise value for all stakeholders. The three core issues for structuring any CVA are whether:

- the scope of the restructuring proposal is within the bounds of the CVA jurisdiction;
- creditors are receiving a better return than they would if the CVA was not implemented (the so-called vertical comparator); and
- whether the differential treatment of different unsecured creditor classes is justifiable (the so-called horizontal comparator).

This judgement provides much awaited guidance on all of these issues and, subject to the result of any appeal, can be expected to unlock the market for debtors to make greater use of the CVA to restructure their operational liabilities. The key takeaways from the judgement are the importance of break rights in mitigating any arguments of unfair prejudice in relation to compromises of contractual rights going forward as well as the importance of having careful regard to the fact specific circumstances of the different unsecured creditor groups when considering the so-called horizontal comparator test.

For further information please get in touch with [Alex Rogan](#).

Read our additional article on ['Key messages from the Virgin Active sanction judgement'](#)



