

Collecting and enforcing rates in an economic downturn



Jacqueline Lean



Evie Barden



What will we cover?

- (1) Potential constraints on a billing authority's ability to collect or enforce liability for business rates in various insolvency scenarios
- (2) Some particular issues which may arise with CVAs, & practical considerations for tenants and landlords



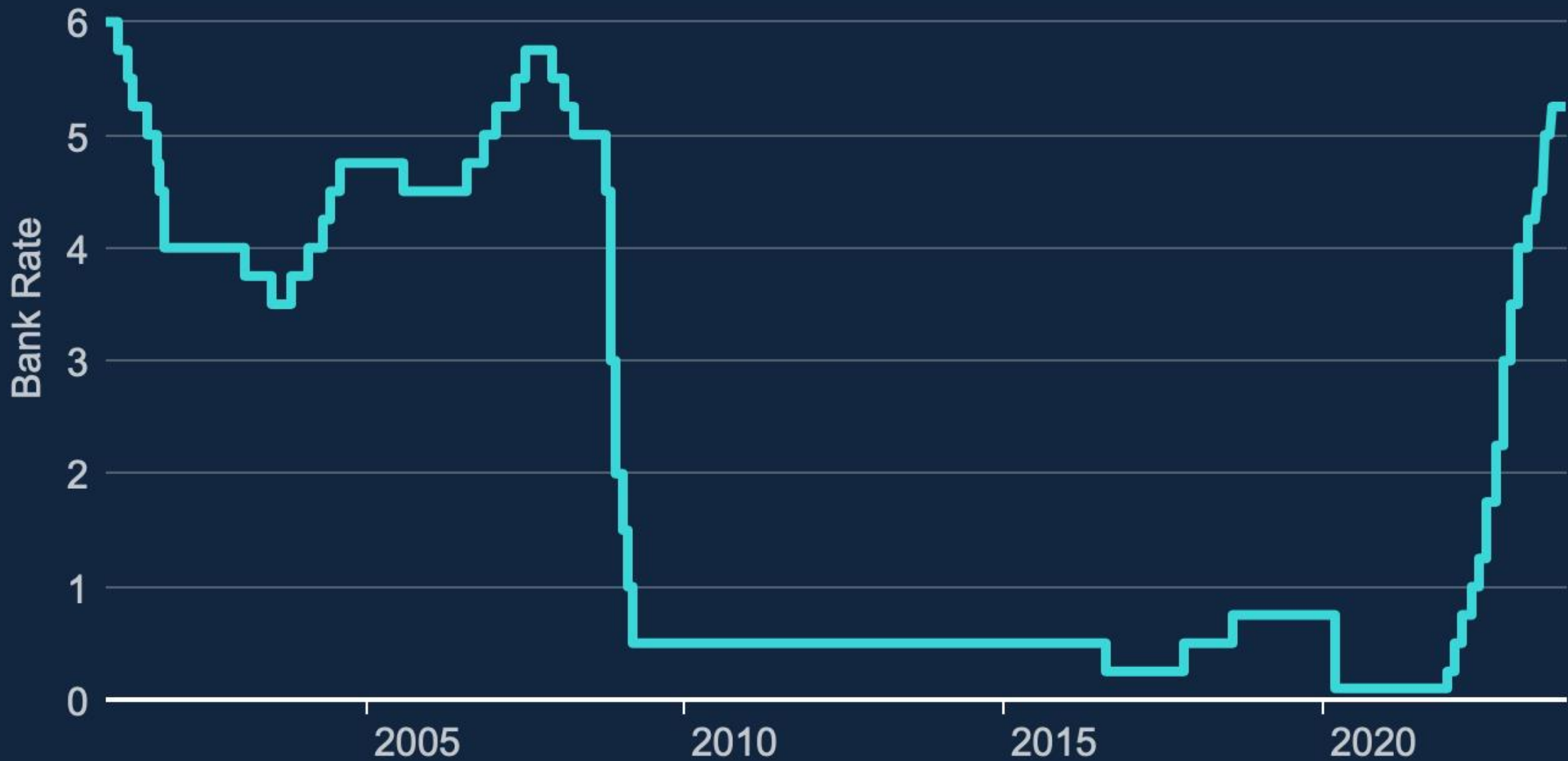
Context

- Registered company insolvencies for Q3 was 6,208 and 10% higher than Q3 2022:
- 735 compulsory liquidations;
- 466 administrations;
- 41 CVAs;
- 4,965 CVLs. This figure represents the biggest increase from the start of the first lockdown: in Q3 2020 there were c.2,000 CVLs. Highest number of CVLs since 1960.

Individual insolvency data for Q3 2023 shows a drop, by 6% from Q2 2023 and by 15% from Q3 2022 but:

- One in 441 entered into insolvency between 1 October 2022 and 30 September 2023.
- Highest number of Debt Relief Orders (DROs) in Q3 2023 since introduction in 2009 (8,438).
- 23,809 Breathing Space registrations in Q3 2023, which is 26% higher than Q3 2022.





Bank Rate

Usual collection / enforcement methods

- Applications for liability orders
- Civil claim for rates
- Taking control of goods
- Statutory demand / winding up petition
- Statutory demand / bankruptcy



Insolvency moratoria: companies

Some regimes have “automatic” moratoria:
e.g. compulsory liquidation / administration.

Certain regimes have mechanisms built in
for the Court to stay action.

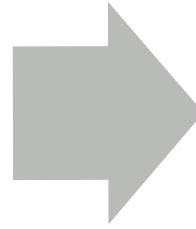
Additionally: the moratoria in Part A1 of the
Insolvency Act 1986.

Administration

Pre-appointment but post application
/ notice of intention to appoint:

No legal process may be instituted or continued against the company or company property and no step taken to enforce security UNLESS the Court gives permission.

Also no winding up order.



Appointment made:

No legal process may be instituted or continued against the company or company property and no step to enforce security UNLESS the Court gives permission or administrator consents.

Also no winding up order.



Expenses of administration

Exeter City Council v Bairstow [2007] Bus LR 813 at [84]:

“Just as rates are payable in a liquidation as a necessary disbursement, so in my judgment they are payable in an administration.”

Not at the top of the list priority as expenses incurred by the administrators, but payable as a necessary disbursement under rule 3.51(2)(g) of the Insolvency (England and Wales) Rules 2016.



Compulsory liquidation

At any time after the petition and before the order is made, the Court may stay pending proceedings or restrain further proceedings.



After winding up order made, *"no action or proceeding shall be proceeded with or commenced against the company or its property except by leave of the court and subject to such terms as the court may impose"*.



Anti-avoidance provisions

- Section 127(1) of the Insolvency Act 1986: “In a winding up by the court, any disposition of the company’s property [...] made after the commencement of the winding up is, unless the court otherwise orders, void.”
- “Whether the transaction would or would not be retrospectively validated by the court is irrelevant, if no application is ever made by the recipient for such validation. In the absence of such an application, the court must proceed on the basis that the disposition of the Company’s property is void, as the statute says it is”: *Officeserve Technologies Ltd (In Liquidation) v Annabel’s (Berkeley Square) Ltd* [2019] Ch. 103 per HHJ Paul Matthews at [17].
- In considering whether to validate, the Court is considering whether there are special circumstances which exist to make the particular transaction in the interests of the creditors as a whole so as to override the *pari passu* principle: *Changtel Solutions UK Ltd (In Liquidation) v G4S Secure Solutions (UK) Ltd* [2023] BCC 143 at [64].



CVL / MVL

- There is no equivalent provision to sections 126(1) or 130(2) of the IA in voluntary liquidation.
- The liquidator or a contributory or creditor can apply to the court to determine a question in the winding up or for the court to exercise “all or any of the powers which the court might exercise if the company were being wound up by the court”: section 112(1) of the Insolvency Act 1986.
- The court can accede wholly or partly to such an application on such terms and conditions as it thinks fit if the exercise of the power will be “just and beneficial” or make such other order as it thinks just: section 112(2) of the IA.



Part A1 Moratorium

- (1) Who is eligible? Schedule ZA1. Operates so that all companies are eligible unless excepted. Main exceptions: (a) already a moratorium in place or there was one in the last 12 months; (b) in CVA, administration, liquidation etc or that has been the case in the last 12 months; (c) certain entities like RSLs or banks.
- (2) How long does it last? If no winding up petition is outstanding, starts when the documents are filed. If a winding up petition is outstanding, starts when an order is made by the Court. Initially lasts 20 business days: section A9(1) and (2).
- (3) What is its impact on collection / enforcement? No insolvency proceedings: section A20(1). No enforcement or legal proceedings: section A21.
- (4) What about payments? No payments that exceed £5,000 or 1% of the value of debts without consent from the monitor, pursuant to a Court order or payment to discharge security.



Bankruptcy

- Stay on proceedings, once the bankruptcy order is made: section 285 of the Insolvency Act 1986.
- Similar anti-avoidance provisions to those in section 127: section 284 of the Insolvency Act 1986.



DROs

- Small-scale insolvency with debts less than £30,000.
- If an order is made, a creditor with a “qualifying debt” has no remedy and cannot commence any action or bring a petition, except with Court permission.
- QDs = liquidated sums immediately payable which are not excluded. Excluded debts = prescribed debts. Rates are **not** excluded debts.
- Lasts for one year unless terminated early or extended.
- At the end of the period, discharged from all qualifying debts.





CVAs

- Companies Act 2006 Part 26.
- Scheme of arrangement whereby limited company can pay creditors over a fixed period
- Requires 75% of creditors (by value) to agree the proposed compromise / arrangement
- + Court sanction.



CVAs

- 4 things for a Court to consider:

“First, the court must consider whether the provisions of the Companies Act 2006 have been complied with, including questions of class composition, whether an adequate explanatory statement was distributed to creditors and whether the statutory majorities were obtained. Secondly, the court must consider whether each class was fairly represented at the relevant meeting and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent. Thirdly, the court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Fourthly, the court must consider whether there is any “blot” or defect in the scheme which, for example, would make it unlawful or in any other way inoperable.

In the matter of Instant Cash Loans Limited [2019] EWHC 2795 (Ch) per Zacaroli J at para 2 citing Snowden J in *Re Noble Group Limited* [2019] BCC 349 at para 17



CVAs

- Business rates are proveable in a CVA in respect of all rates due for that financial year – even if otherwise payable by instalments and ratepayer not in default: *Kaye v South Oxfordshire District Council* [2013] EWHC 4165 (Ch) (full year's business rates are a contingent liability for the purpose of rule 13.12 of the Insolvency Rules 1986)
- Business rates for that year can therefore be compromised within a CVA.
- Billing authority is a creditor, entitled to vote at the creditors' meeting, and can in principle challenge the CVA: see, e.g. *Richmondshire District Council v Dealmaster Ltd* [2021] EWHC 2892



CVAs & future years' rates

- But what about future years?
- Rates for financial years post-dating the creditors' meeting are not proveable in the CVA as not a liability (or contingent liability) at that time
- Rates therefore due in full for financial years thereafter.
- Therefore necessary to consider:
 - (i) Any reliefs that might be available / could be applied for to mitigate rates liability;
 - (ii) Implications of business rates liability for the feasibility of the proposals/ability of the company to make payments in accordance with the payment plan



CVAs & future years' rates

- What if the proposal involves 'giving up' a property / properties?
- CVA cannot, in and of itself, bring a lease to an end: *In the matter of Instant Cash Loans Limited* [2019] EWHC 2795 (Ch)
- What does this mean for business rates liability?



The *Instant Cash Loans* case

- Court asked to sanction arrangement which provided that from the effective date, and in exchange for the landlord's right to submit a scheme claim for the amounts specified, each of the leases would terminate and/or:

“(a) All of the Company's rights, obligations and liabilities (whether past, present or future) pursuant to the Leases shall end and any sums payable under or in relation to any Lease (including any liability for non-domestic rates), other than under the terms of this Scheme, shall be reduced to nil.

(b) The Company's estate, interests and rights in each of the premises shall be surrendered to, and accepted by, the relevant Landlord and shall merge and be extinguished into the reversion immediately expectant on the termination of each Lease.



The *Instant Cash Loans* case

(c) The Company shall immediately cease to enjoy any rights to occupy or in any way benefit from any of the premises.

(d) The Company agrees to relinquish any right of occupation and shall execute any document required to effect a surrender or termination of each Lease.

(e) The Company shall no longer be deemed or otherwise considered to be or treated by any of the Landlords for any purpose as being, in occupation of any of the premises.

(f) The Company shall as soon as reasonably practicable deliver to the Landlords all keys and (where relevant) security and alarm codes for each of the Premises".



The *Instant Cash Loans* case

- The CVA was not challenged by any creditor, but Zacaroli J had raised a concern, of his own volition, as to whether such a proposal could be effected under a CVA and whether surrender of leases fell within the jurisdiction of Part 26 of the Companies Act 2006.
- His conclusion was that it was not.
- The starting point, was that a CVA was “A scheme of arrangement between a company and its creditors must mean an arrangement which deals with their rights *inter se* as debtor and creditor.” (at para 6, citing the CA in *Re Lehman Brothers International Europe* [2010] BCLC 496)
- That did not mean that a CVA was not capable of affecting proprietary rights, but that the extent to which it could do so was “significantly circumscribed” (para 7).



The *Instant Cash Loans* case

"[10]... It seems to me, however, that the objection is best formulated along the following lines. While a lease of land is a creature of contract and creates contractual rights and obligations, it also constitutes a proprietary interest, a legal estate in the land. For so long as the lease subsists, the landlord's right is limited to a right in the reversion immediately expectant upon the lease. Importantly, during the subsistence of the lease it is the tenant, not the landlord, that has possession of the property. This may have important consequences so far as obligations towards third parties are concerned. For example, as is accepted by the company in this case, while a lease subsists over the properties, it is the tenant company and not the relevant landlord who incurs a liability in respect of unoccupied business rates, but that is reversed when the lease comes to an end, subject to a grace period of some three months. Occupiers' liabilities and environmental liabilities may be other examples that fall on the tenant while the lease subsists, but on the landlord upon the resumption of possession by it when the lease terminates" (underlining my emphasis)



The *Instant Cash Loans* case

"[11] Perhaps as a consequence of this, a lease may not be terminated at the will of the tenant. It cannot be unilaterally surrendered. Surrender is a consensual process. It is true, as I will come on later to explain, that surrender may be the consequence of some other arrangement; for example an agreement between the landlord and tenant that the tenant shall no longer have exclusive possession, but that still requires the landlord's consent to something which, as a matter of law, has the effect of bringing the tenancy to an end. Clause 2.4.1 of this scheme, while not purporting directly to modify any proprietary right of the landlord, does in fact affect the proprietary interest. It effects a change in the nature of that interest. It ceases to be a reversionary interest encumbered by a lease and becomes one that is not so encumbered. To put it another way, the tenant ceases to be in possession of the premises and possession reverts to the landlord."



The *Instant Cash Loans* case

“[12] It might well be said, “So what? This can only be to the landlord’s benefit, because it is increasing the nature of its proprietary interest by removing an encumbrance that was carved out from it”. For reasons I have already mentioned, however, that is not necessarily so. Depending on the circumstances, a landlord may positively wish to avoid resuming possession of a premises, either at all until the expiry of the lease or on the basis of the timing forced upon it by the scheme. I do not mean, by referring to these possibilities to identify a potential unfairness in such a scheme. That is irrelevant to the question of jurisdiction. I refer to these in order to highlight the fact that the termination of the tenant’s lease effects a substantive change in the nature of the landlord’s interest in the property.” (underlining my emphasis)



The *Instant Cash Loans* case

- The crux of the Judge's reasoning is at para 24:

“The proper analysis, therefore, of a deal which is embodied in, and thus imposed on landlords by, the scheme is that in return for the tenant agreeing to pay disclaimer damages, the landlord is required to do two things: (1) forego its debt claim and (2) agree to the tenant going out of possession with the consequence that the lease is terminated. The giving up of possession is not properly seen, therefore, as the quid pro quo of the landlord’s agreement to forego its debt. Instead, it is properly analysed as an additional something being imposed upon the landlord by the scheme. It is within the scope of the scheme jurisdiction to impose such a term on a creditor only if it is ancillary to the compromise of the pecuniary liability or necessary to ensure the effectiveness of the compromise effected by the scheme. For the reasons I have already given, I do not see that it is. There is no need for the tenant to give up exclusive possession in order to be relieved of liability for future rent. Nor is it a consequence of the compromise of the future rent liability that exclusive possession is given up. In fact, the reverse is true: giving up possession in circumstances that it is treated by the law as a surrender of the lease has the consequence that the obligation to pay future rent is extinguished.”

The *Instant Cash Loans* case: ramifications?

- Position would seem to be that CVA cannot in and of itself effect a termination of the Lease – even if it provides (or purports to provide) that that is what is intended.
- It would therefore seem to be open to a landlord to refuse to accept the giving up of possession / proposed surrender of a lease by its tenant
- If the Lease remains extant, then it would seem that tenant may remain liable for business rates (for financial years post-dating those compromised in the CVA) either on the basis of being in occupation of the premises (under s.43 LGFA 1988) or as “the owner” of an unoccupied hereditament for the purposes of s.45 LGFA 1988



The *Instant Cash Loans* case: ramifications?

Landlords:

- Do you need to / want to accept surrender?

Tenants

- Have you considered potential rates liability when assessing CVA proposals?
- Have you considered potential reliefs that might be available and steps that need to be taken to make best use of the same?

Local authorities:

- Do you know who to pursue for rates?
- What is the best strategy to pursue to collect rates due for future years?



Three further thoughts, for landlords and/or tenants

Empty property relief:

- Does the lease that if landlord is unable to obtain a relief because it has already been enjoyed by the tenant, the tenant will pay the equivalent of that lost relief to the landlord?

Forfeiture

- CVAs do not affect ability of landlord to forfeit a lease for non-compliance with tenant's obligations (save where those modifications are modified by a CVA, they only apply to non-compliance with the obligation as modified): *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch)

Unoccupied hereditaments – certain insolvency events

- See reg 4(i) – (m) of the Non-Domestic Rating (Unoccupied Properties) (England) Regulations 2008



Concluding thoughts?





- Don't delay in enforcing for arrears!
- For billing authority: cons of pushing for a winding up order / bankruptcy order?
- Check the potential exemptions that might apply for (current) rates in certain insolvency events
- CVAs: does it do what you think it does? What are the potential implications if it doesn't? Is the compromise better than the alternative situation?
- What other reliefs might be available? And are they worth it?



Thank you

180 Fleet Street
London
EC4A 2HG

clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk
+44 (0)20 7430 1221

 Landmark Chambers
 @Landmark_LC
 Landmark.Chambers
 Landmark Chambers

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