

Butterworths Property Insolvency

written by Magda Raczynska

Professor Jackson once characterised insolvency law as a response to a problem known in game theory as the prisoner's dilemma. In a situation when there are insufficient assets, individual efforts to satisfy conflicting claims tend to make bad situation worse for everyone as a whole.¹ To avoid the problems of individual debt collection the law imposes a collective and compulsory proceeding on the creditors. Exactly how the law does this is no easy matter, especially that the creditors' interests are not the only ones at play. Particularly complex and weighty issues arise when one of the assets of the insolvent is real estate, not least because this valuable asset is often subject to leases, necessitating consideration of interests of the tenant and the landlord when one of them becomes insolvent. *Butterworths Property Insolvency*, a new title from LexisNexis, is a practical guide to a number of these problems. It will be useful to a busy practitioner working in the area of property and insolvency law.

This 396-page work is a product of no fewer than thirty-three experienced minds, edited by two sets of editors, some of whom are also the authors (the general editors: Tim Calland and Dev Desai and the principal editors: Zia Bhaloo QC, Olivier Kalfon and Stuart Wortley). None of the names, not even the editors', are mentioned on the cover (instead, the book is said to be authored by a "team of experts from Enterprise Chambers, Pinsent Masons LLP and Grant Thornton LLP") and the authorship of each chapter remains unknown. This should not, however, affect the reader's expectations of the work.

The work is divided into eleven chapters. After an introduction, one is taken through the liabilities of the insolvent tenant, followed by two chapters on remedies of the landlord in the tenant's insolvency: one on forfeiture and one focused on other remedies, specifically the commercial rent arrears recovery (CRAR). The next two chapters treat about issues of disclaimer and dealings with the insolvent tenant's lease, including the discussion of clawback provisions as well as modes of disposition. What follows are four discrete chapters. Chapter 7 discusses liability of various third parties: guarantors and former tenants when the tenant becomes insolvent. Chapter 8 deals with insolvent freeholder/landlord while chapter 9 looks at leases and real property in bankruptcy, including issues of family home. Chapter 10 focuses on rights and remedies of secured creditors. The last chapter looks at environmental liabilities. This last topic, while perhaps unexpected as a standalone chapter in a book on property insolvency, may prove particularly useful to insolvency practitioners, at least in relation to disclaiming environmental permit as onerous property or criminal prosecution of companies in administration or liquidation for environmental crime.

The book is bound to become a helpful tool in conquering the procedural pitfalls and complexities which insolvency law is notorious for. The emphasis is on identification of issues and solutions, sometimes in a bullet-point format, coupled with succinct explanations, all of which are likely to appeal to a busy professional. A particularly good example of this practical approach is the chapter on CRAR, which contains lists of issues, checklists for the landlord as well as for the tenant (before and after exercising CRAR) and diagrams (for example, a summary of the effect of insolvency on CRAR).

¹ T Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 Yale LJ 857.

Criticisms can of course be made. The victims of this practical approach are the broad-brush accounts of some substantive law issues. One example is the section on beneficial ownership disputes in chapter 9, which does not discuss proprietary estoppel. Another concerns security rights in chapter 10, where the definitions of fixed and floating charges seem at odds with authorities like *Re Spectrum Plus Ltd* [2005] UKHL 41 (which, by the way, is not mentioned). It might have been better, for instance, to refer the reader to more specialist texts on the points which are not central to the book's topic. These are small points, though.

There will probably be some readers who will not share the authors' understanding of "property insolvency" or their expectations what a book with that title is about. They would no doubt benefit from an explanation at the start of the book of its aims, its intended use, approach and coverage. The introductory first chapter, notwithstanding its title ("Introduction"), does not really serve that purpose as the reader is thrown headlong into the distinctions between various insolvency procedures without so much as an indication of what sort of beast insolvency or insolvency law is, let alone an outline of the chapters. Readers are similarly thrown at the deep end in some other chapters, too (see, e.g. chapters 2 and 10). Someone lacking the relevant practical legal experience in this area may not get a sense in which direction to swim across the sea of detail and a novice might drown. For example, there are references in the book to *pari passu* rule and the anti-deprivation rule (at paras 1.26, 3.6 and 11.9) without any explanation, clearly assuming a certain level of knowledge. For that reason, the suggestion on the back cover (which I resorted to establish who the book is for given the absence of an introduction) that the work can be used in "all disciplines" should be taken cautiously. I would go further and suggest that even a seasoned insolvency practitioner would benefit from a gradual introduction into various topics or at least an explanation of the relevance of each topic to the wider theme of 'property insolvency'. But this may be akin to complaining that a car mechanic should be told about the purpose of each part and its role in the car's operation when all she wants to know is how an exhaust pipe works in light of an urgent repair.

The cohesion of the work as a whole could be stronger as it would make it easier to navigate around the book. One way to do it is to use narrative explaining the order of sections. Another (not mutually exclusive) is to use cross-referencing more rigorously. A few random examples will illustrate the case. The same section from Nicholls LJ in *Re Atlantic Computer Systems plc* [1992] Ch 505 is summarised in four places (paras 2.28, 3.23, 4.12, 10.28): was this necessary? The *Lundy Granite* principle is mentioned at paras 4.10 and 8.3 but no reference is made to its rather helpful exposition at paras 2.17-2.19. Para 8.1 opens with a reference to "other chapters" for treatment of particular concepts but the reader is not told which ones and the index, to which one turns for help, does not list all those concepts. Also, why is the table on the liability for rates generally (useful, as it is) in a chapter on third party liability? (One would have thought chapter 2 to be a better candidate). Referencing could similarly be more rigorous. For example, para 1.13 opens with a section repeating *verbatim* para 3(1) of schedule B1 of the Insolvency Act 1986 but lacks any reference thereto. Finally, a table of abbreviations would have been helpful.

That said, there is a wealth of knowledge here, so a practitioner familiar with the area and looking for an answer is expected to find the book helpful in navigating through the maize of insolvency law involving leases of real property.