Published on *The National Law Review* https://natlawreview.com

Virgin Active Restructuring Plan approved in a disappointing week for landlords

Article By:

Mark Prior

The pandemic and various lockdowns have been tough on the landlord community. The last few days have not made that any easier. First, the New Look decision dismissed the challenge mounted by a number of landlords (see our blog here). Then on 12 May 2021 the landlord community was dealt another blow by the outcome of the restructuring plan ("RP") in Virgin Active. Today, landlords faced further disappointment when the court dismissed all but one of the landlords' unfair prejudice CVA challenge grounds, in the Regis case.

In the Virgin Active case, a number of landlords voted against the Virgin Active RP and not all plan classes achieved the 75% in value required for creditor approval. On application to court, those classes who did not achieve creditor approval were "crammed down" and the RP approved. The objecting landlords stood not only to have the debt owed to them written off, but to accept much reduced or no rent going forward (although there was no attempt to remove their forfeiture powers so could exit the leases if they wished and rolling break rights were given to those most badly affected).

However, the cram down is a key feature of the new RP procedure and applying the appropriate test, those crammed-down landlords would not have done any better when compared to an alternative insolvency procedure- they were "out of the money" either way – therefore the court attached little weight to the fact that a large number of landlords voted against the plan. Accordingly this provides a living example of the court applying the law in practice. It ensured that those "in the money" had the say on what happens to the company, irrespective of the fact that certain voting thresholds were not met.

The cram down feature of an RP is one of the elements that distinguishes it the most from a CVA. In recent times CVAs have of course played a large part in retail and leisure restructurings. Invariably, these CVAs involve a significant body of landlords who can have a significant sway on the outcome and if the 75% majority in value is not reached, the CVA proposal fails.

Up to this point however, an RP has not always been the obvious solution due to additional costs, lack of caselaw on cross class cram down in RPs and the fact that the court has an ultimate discretion to refuse to sanction the RP (even if all creditor classes approve).

The Virgin Active RP now establishes some specific (albeit non-binding on other High Court

decisions) precedent in terms of fairly cramming down dissenting landlords in RPs.In cases where the votes of landlords not “in the money” (but who represent a large part of the creditor body in value) are likely to thwart the approval of a CVA, the appetite for using an RP could be strongly fuelled by this judgment.

We will examine the findings in Regis in our next blog, before considering in more detail what the impact of all these recent fairness challenges (New Look, Regis and Virgin Active) could mean for retail CVAs in practice.

National Law Review, Volume XI, Number 137