

## Article

# Distress in the UK Commercial Real Estate Market: The BVI Perspective

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**The global COVID-19 pandemic, together with the longer-term move towards online shopping and pressures on the UK high street, continues to have a significant negative impact on the UK commercial real estate market. Many UK real estate assets, including high profile “trophy” developments, are owned by British Virgin Islands (BVI) companies. In this article we consider some of the key issues to be considered and steps which may be taken by BVI real estate holding companies to protect their position during these tumultuous times.**

Commercial real estate holding companies are currently facing unprecedented pressures on rental income as a result of lockdowns, travel restrictions, store closures and offices switching to working from home as a result of the global pandemic. These pressures come on top of the existing difficulties facing many high street stores and anchor tenants including high-profile chains such as Debenhams, the Arcadia Group and Laura Ashley. Hotels, offices and shopping centres have all been affected. The situation is likely to deteriorate further as tenants face increased stress following the recent expiration of the moratorium imposed by the UK Government on landlords serving statutory demands on corporate tenants for unpaid rent.

According to property data company Re-Leased, retail landlords across the UK collected just 54% of the rent they were owed for the December 2020 quarter and there is little certainty for landlords on what the market will look like once the pandemic restrictions are relaxed.

## Debt Servicing Issues

One of the key concerns arising from delayed or reduced rental income is the inability of real estate holding companies to service their debt in a timely manner and the desire to avoid distressed asset sales/enforcement of security by creditors. There are a number of practical steps which may be taken in such circumstances including:

- refinancing or extending the maturity date of existing financing;
- equity raises or other forms of capital injections; or
- negotiating with existing tenants to allow them to sublet unneeded floor space or allowing tenants to downsize in return for extending leases. This may be an attractive option for some tenants as homeworking is likely to be more than a temporary measure, with London already seeing a major cut in office floor space requirements, particularly for “trophy offices”.

## Plans and Schemes of Arrangement and Creditor Arrangements

If the above approaches are not sufficient to alleviate the pressure on a holding company’s cash flow, it may be necessary for the company to restructure. The BVI Business Companies Act, 2004 (as amended) provides two mechanisms for carrying out a wide range of corporate restructurings by way of court approval — plans and schemes of arrangement. Both mechanisms provide for compromises to be reached between a BVI company and its creditors or members (or a class of them) and are available where a company does not have sufficient member or creditor support to carry out a proposed action, or where it is otherwise desirable to “wrap” an action in a court sanctioned arrangement.

Once a plan or scheme of arrangement has been duly approved and sanctioned by the Court (which may include oversight from a court appointed provisional liquidator) it will be binding on the company, its members and creditors, and interested parties will typically have

no right to dissent. Care must however be taken to ensure cross-border recognition of any schemes, particularly where English law security has been granted over real estate in the United Kingdom.

The BVI Insolvency Act, 2003 also provides restructuring mechanisms for BVI companies which are insolvent, or are approaching insolvency. Creditor arrangements enable BVI companies to compromise liabilities with creditors without the need for court involvement - this process is only available where the company is insolvent or is likely to become insolvent and is supervised by a nominated insolvency practitioner. Creditor arrangements are very flexible and allow for debts to be varied or cancelled, although the rights of secured or preferential creditors cannot be affected without their written consent.

## Potential Disputes

If security has been granted over the assets or shares of a BVI company, a secured creditor may seek enforcement against the company following the occurrence of an event of default. In respect of charges governed by BVI law, secured creditors may have to resort to the following statutory remedies: (i) the right to sell the assets; and (ii) the right to appoint a receiver who may vote any charged shares of the BVI company and receive distributions in respect of the same. In respect of security governed by foreign law, the enforcement remedies available to the chargee or mortgagee will depend on the relevant foreign law and the instrument creating the mortgage or charge. As noted above this will be of particular relevance where English law security has been granted over real estate in the United Kingdom.

It is important for BVI companies to proactively assess their existing security and the priorities of such security during the course of any restructuring. Charges which are publicly registered in the BVI take priority over those which are not so registered, and generally also have priority over those which are subsequently registered. Key dates ought to be diarized and continuously monitored in respect of what constitutes an “event of default” and the subsequent triggering of enforcement remedies. For example, in respect of BVI law governed charges, statutory enforcement remedies are not exercisable until 30 days after a default (or such shorter period as may be specified in the instrument creating the charge). Legal advice on the governing law of the security should be sought in respect of potential enforcement remedies and their timings.

For information regarding the process for the enforcement of security over the assets or shares of BVI companies please see Conyers’ publications [“Granting and Enforcing Security over Assets of British Virgin Islands Companies”](#) and [“Granting and Enforcing Security over Shares of British Virgin Islands Companies”](#).

## Insolvency

It is very important that directors of BVI companies which may be approaching insolvency take steps to evaluate the position of the company. A director of a BVI company can be personally liable if such director fails to take appropriate steps to commence formal liquidation where there is no reasonable prospect of the company avoiding insolvent liquidation.

A company will be insolvent under BVI law if any of the following apply:

- the company fails to comply with a statutory demand which has not been set aside;
- the company’s liabilities exceed its assets;
- the company is unable to pay its debts as they fall due; or
- execution or other process issued on a judgment is returned wholly or partly unsatisfied.

The fundamental question directors should consider, both when financial difficulties first become apparent and on an ongoing basis until the financial difficulties are resolved, is whether there are reasonable prospects that the company will avoid insolvent liquidation. If the answer is that there are no such reasonable prospects, the directors should take appropriate steps to appoint an insolvency practitioner to act as liquidator of the company as soon as reasonably practicable.

Although the directors’ primary consideration will be whether the company should continue to trade at all or whether an insolvency practitioner should be appointed to act as liquidator, there are also a variety of grounds provided for under the BVI Insolvency Act, 2003 upon which transactions made by a company which subsequently becomes formally insolvent can be set aside. For so long as the directors continue to manage the business (i.e. until the appointment of a liquidator) while it is of doubtful solvency, all transactions entered into by the company should be considered carefully in relation to whether the transaction may be potentially voidable as an unfair preference, undervalue transaction, voidable floating charge or extortionate credit transaction.

For further information regarding insolvent trading and voidable transactions please see Conyers’ publications [“Insolvent Trading - British Virgin Islands Companies”](#) and [“Voidable Transactions – BVI Companies”](#).

## Practical Steps

The practical steps that a BVI holding company should take will depend on the individual set of circumstances. As such, obtaining tailored professional advice at an early stage is important. Directors of BVI companies should however be alive to any warning signs of impending financial difficulty and, as soon as they are aware that there may be concerns about the company's solvency or prospects for continued solvency, they should take the following steps:

- seek legal advice as soon as possible, as well as other appropriate professional advice aimed at reviewing whether insolvent liquidation is inevitable or whether there are potential ways of resolving or mitigating the financial difficulties;
- if a director concludes (or thinks there is a sufficient risk such that the directors ought to conclude) that there is no reasonable prospect of the company avoiding insolvent liquidation, seek legal advice and take such steps as are necessary to appoint an insolvency practitioner to act as liquidator, as well as taking all steps reasonably available to minimise losses to creditors in the meantime;
- hold regular meetings of directors, with appropriate minutes kept that record the ongoing evaluation of decisions and, specifically, the company's financial position and prospects;
- exercise caution about entering into any transaction which could be considered to be a voidable transaction were the company to enter formal insolvency within the applicable vulnerability period; and
- keep the company's position under constant review for so long as the financial difficulties continue and seek further professional advice as to the implications of any change in the company's position.

## We are here to help

Tailored professional advice should be sought in respect of individual circumstances. Please feel free to reach out to your usual Conyers contacts with any questions regarding BVI real estate holding companies, refinancing/restructuring, insolvency or enforcement proceedings against BVI companies. We are always available to provide continuing support and would be pleased to help.

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