NEW SQUARE Chambers

Corporate Insolvency

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COMMERCIAL LANDLORD & TENANT UPDATE
WHERE ARE WE NOW AND WHAT IS NEXT TO COME?

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Introduction

James Saunders provides an update on commercial landlord and tenant relations focusing upon the current landscape of enforcement and debt recovery with a look ahead at the Commercial Rent (Coronavirus) Bill.

WINDING UP PETITIONS & COMMERCIAL RENT ARREARS

The coronavirus pandemic has seen dramatic changes in the enforcement options available to commercial landlords for tenants falling into debt (universally restrictive in nature).

The winding up petition saw long term suspension followed by a period of special treatment for rent related debts under the winding up machinery provided by the Insolvency Act 1986 ("IA1986").

From October 2021 to, on the current version of the Corporate Insolvency and Governance Act 2020 (CIGA), 31 March 2022, restrictions are in place for petitions linked to covid-related rent arrears. The relevant amendments to the IA1986 were introduced by the *Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No. 2) Regulations 2021/1091.*

Materially, the revised Schedule 10 to CIGA now provides as follows:

- A petition may not be presented before 31 March 2022 unless four conditions, A-D, are met.

Condition A requires the debt to be liquidated, have fallen due for payment and not feature in the list of "excluded debts." Excluded debt means a debt in respect of rent, or any sum or other payment that a tenant is liable to pay, under a relevant business tenancy and which is unpaid by reason of a financial effect of coronavirus.

Condition B requires the creditor to deliver a written notice to the debtor in accordance with the provisions of the schedule. The notice must contain the following:
(a) identification details for the company,
(b) the name and address of the creditor,
(c) the amount of the debt and the way in which it arises,
(d) the date of the notice,
(e) a statement that the creditor is seeking the company's proposals for the payment of the debt, and
(f) a statement that if no proposal to the creditor's satisfaction is made within the period of 21 days beginning with the date on which the notice is delivered, the creditor intends to present a petition to the court for the winding-up of the company.

The notice must be delivered to the company's registered office or, if impracticable, otherwise in accordance with paragraph (6) of the Schedule. Part 1, Chapter 9 of the Insolvency Rules covers delivery.

Condition C is that at end of the period of 21 days beginning with the day on which condition B was met the company has not made a proposal for the payment of the debt that is to the creditor's satisfaction. This permits a winding up petition to be issued even if proposals have been made provided they are unsatisfactory. Little guidance is given by the section on how the courts will approach the creditor's satisfaction requirement. One would anticipate the same or a similar approach being adopted to that applied under S.271(3) to unreasonable refusals to accept an offer to secure or compound a debt in the bankruptcy context.

Condition D is that where the petition is presented by one creditor, the sum of the debts owed by the company to that creditor in respect which conditions A to C are met is £10,000 or more

It is also worth bearing in mind the requirement for the threshold to be satisfied at the date of issuing the petition not the date of the hearing; avoiding tactical part payments to be low the £10,000 threshold.[1]

OVERVIEW

From the above two points arise:

1) The definition of "excluded debt" at first glance catches rent arrears and other lease related liabilities. However, the carve out applies only where payment has not been made "*by reason of a financial effect of coronavirus*." The excluded debt category harkens back to the previous iteration of CIGA schedule 10 which required a petition to overcome the "coronavirus test." If a petitioner can show the petition debt was unconnected with Covid the winding up can proceed.

2) There are however two central points of difference. First, there is no "reasonable belief" element to the test as was previously the case. Second, the focus of the test is on the connection between "a financial effect" of Covid and the non-payment, if a creditor can show another reason for non-payment even where the business is affected by Covid there may be scope for the winding up to continue.

CONSEQUENTIAL RULE CHANGES - INSOLVENCY RULES 2016

It is worth noting that paragraph 2 of Schedule 10 introduces a change to the Insolvency Rules requiring a statement that the relevant notice requiring payment proposals in 21 days was sent and no satisfactory proposal received in reply. The petition must contain statements that:

(a) that the requirements in paragraph 1 of the Schedule are met, and

[1] See Lilley v American Express Europe Ltd [2000] B.P.I.R 70

(b) that no proposals for the payment of the debt have been made. or a summary of the reasons why the proposals are not to the creditor's satisfaction (as the case may be).
Petitions which omit such statements may require an adjournment at the first hearing for amendment or a winding up order may be granted on an undertaking to amend by an ordered deadline.

Forfeiture

Finally, as to forfeiture the final iteration of the Coronavirus Act 2020 remains in force coming to an end on 25 March 2022. However, as a result of the Commercial Rent (Coronavirus) Bill the ability to forfeit for rent arrears does not look set to be reintroduced when the Coronavirus Act moratorium ends.

LOOKING AHEAD - THE COMMERCIAL RENT (CORONAVIRUS) BILL

At the time of writing the Bill is currently at the committee stage in the House of Lords. What follows is an overview of the Bill in its current form to assist in preparing practitioners for the likely changes ahead. The final Act may well differ so do check the Act as passed.

When the moratorium on winding-up petitions and forfeiture based upon covid-related commercial rent arrears ends the contents of the Bill are designed to step in to facilitate resolution without resort to such traditional “remedies”. To this end the Bill will introduce an arbitration scheme together with even more wide-ranging moratorium provisions on “protected rent debts”. The Bill is concerned with “protected rent debts” which are time limited. Rent (including service charges) is covered where it accrued after 21 March 2020 and during a period where the whole or part of the business carried on at the premises was subject to a closure requirement or specific coronavirus restriction (or 18 July 2021 at the latest). A coronavirus restriction is any governing the way the business was to be carried on or the premises was to be used but must be business specific.

MORATORIUMS

Part 3 of the Bill and Schedule 2 currently provides for the following.

Temporary moratorium on enforcement of protected rent debts

The moratorium period begins from the passage of the Act and ends, where the matter is referred to arbitration, with the conclusion of the arbitration, else on the final day for arbitration references under the Act (which may be extended beyond 6 months).

The Bill makes provisions preventing a landlord who is owed a protected rent debt from using the following remedies in relation to (or on the basis of) the debt during the moratorium period -
(i) making a debt claim in civil proceedings
(ii) using the commercial rent arrears recovery power
(iii) enforcing a right of re-entry or forfeiture;
(iv) using a tenant's deposit,

Debt Claim

The landlord may not, during the moratorium period for the debt, make a debt claim to enforce the protected debt. This includes by way of counterclaim. For debt claims made after 10 November 2021 but before the Act is passed (the “Lookback Period”) either of the parties to the business tenancy may apply to the court for the proceedings on the debt claim to be stayed in order to enable the matter of payment of the protected rent debt to be resolved (whether by arbitration or otherwise). The stay is mandatory if the application

is made and the claim concerns a protected rent debt.

If the landlord obtained a judgment for the debt in the Lookback Period and the debt is unpaid relief may be sought via the arbitration procedure. The landlord cannot rely on or enforce the debt before the end of the moratorium period. A "tenant" for these purposes includes a guarantor of the tenant's obligations.

CRAR

CRAR cannot be used at all during the moratorium period.

Re-Entry and Forfeiture

The Coronavirus Act 2020 prohibition continues and the landlord may not, by action or otherwise enforce a right of re-entry or forfeiture for non-payment of the debt during the moratorium period. Failure to pay rent during the moratorium period is again disregarded for the purposes of S.30(1)(b) of the Landlord and Tenant Act 1954.

Rent Appropriation

A landlord who receives rent during the moratorium period when any right to appropriate said payment to meet the unprotected (historic) rent debt.

Tenant Deposit

The landlord may not, during the moratorium period, recover the debt from a tenancy deposit.

CVAs/IVAs

Where a reference to arbitration has been made no CVA or IVA proposals can be made which relate to the whole or part of the debt during the currency of the arbitration.

Winding-up Petitions/Bankruptcy Petitions

By Sch.3 winding up petitions will again be restricted during the moratorium period effectively continuing the current CIGA Schedule 10 restrictions.

Where the tenant is an individual the landlord may not present a bankruptcy petition where the demand relates to a protected rent debt and was served during the relevant period. If a petition is presented the court has a broad discretion to make such orders as it considers necessary to restore the position to pre-presentation. The relevant period is 10 November 2021 to the completion of any rent arbitration or the end of the period for references to arbitration (currently 6 months from passage of the Act).

Where a bankruptcy order was made after 10 November 2021 based upon a protected rent debt an the court would not have made such an order if the Act was in force the court is to be treated as not having had power to make the order, which is to be regarded as void.

ARBITRATION

S.1 of the Bill provides an overview which summarises this objective as follows:

"This Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration (if not resolved by agreement)."

Part 2 governs the arbitration scheme, the function of which is for approved arbitration bodies to appoint arbitrators to deal with the matter of relief from payment of a protected rent debt. Rent is relevantly "protected" if:

- the tenancy was adversely affected by coronavirus (see section 4), and
- the rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy (see section 5).

As for adverse effect which must be shown as a cumulative condition this will again be tied to a closure requirement rather than having an economic focus. That a business was adversely affected is therefore implied from closure alone.

References to Arbitration

References are made under the Arbitration Act 1996 and have appropriate binding force.

References may be made within the first 6 months after the Bill is passed. This period may be extended by future regulations. A 14-day period must be given in which an intention to make a referral is notified to the relevant counterparty to the lease. Any tenants which are already subjected to CVAs, or IVAs in the case of individuals, or a Companies Act 2006 sanctioned compromise are outside the arbitration scheme.

The arbitration scheme is designed to provide a more structured environment in which rent concessions and payment proposals can be negotiated. The referring party must put forward a formal proposal which may be met with a counter-proposal (s.11). Any proposals must be accompanied by supporting evidence.

As to awards, S.13 relevantly provides:

(2) If the arbitrator determines that-

(a) the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made,

(b) the tenancy in question is not a business tenancy, or

(c) there is no protected rent debt, the arbitrator must take an award dismissing the reference.

(3) If, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business—

(a) is not viable, and

(b) would not be viable even if the tenant were to be given relief from payment of any kind, the arbitrator must make an award dismissing the reference.

If the business is viable or would become so if relief from payment of any kind were granted then the arbitrator must proceed to resolve the matter of relief by considering whether relief should be awarded and if so make such an award.

By reference to the criteria in S.15 the Arbitrator will have regard to the proposals submitted and make a determination having regard to the proposal(s) if consistent with S.15. If none are consistent the arbitrator must make a decision which is so consistent. It is possible for the arbitrator to make no award for relief as well as reducing the rent arrears due or giving extended time to pay up to a maximum of 24 months.

The focus of awards under S.15 are preserving, or restoring and preserving, the viability of the business of the tenant, so far as that is consistent with also preserving the landlord's solvency. Further, that the tenant should, so far as it is consistent with the above, be required to meet its obligations as regards the payment of protected rent in full and without delay.

In assessing the viability of the business of the tenant, the arbitrator must, so far as known, have regard to (a) the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party, (b) the previous rental payments made under the business tenancy from the tenant to the landlord, (c) the impact of coronavirus on the business of the tenant, and (d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

Arbitration fees and expenses must be paid by the applicant in advance of the arbitration. If an award is made then the arbitrator must also make an award requiring the respondent to reimburse the applicant for half the arbitration fees. The arbitrator may however vary the contribution proportion (including to

zero). The landlord cannot rely upon the terms of the lease to recover legal fees.

Finally, where an oral hearing takes place and is jointly requested the costs are shared, where only on party requests the hearing they must pay the hearing fees.

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