



IMPACT ON COMMERCIAL LEASES: THE LAST WORD?

1 June 2020

The Corporate Insolvency and Governance Bill has now been introduced to Parliament and includes the last of the statutory measures so far promised to protect commercial tenants from what the Government characterises as “aggressive debt recovery actions during the coronavirus pandemic”.¹ But will this be enough?

The story so far

Our previous briefings have looked at the continuing obligation on tenants to pay rent despite the pandemic and the moratorium on forfeiture ([26 March 2020](#)) and the restrictions on the use of CRAR ([29 April 2020](#)). Measures announced in April in relation to limitations on the use of winding up petitions have now been introduced as draft legislation (which also includes [wider restructuring and insolvency reforms](#)) and are expected to be enacted in short order.

The further changes to landlord remedies

Once the Government restricted the use of forfeiture for non-payment of rent, a number of landlords resorted to presenting winding-up petitions as a debt collection tool (or threatened to do so). A winding-up petition is presented to the court and, if successful, will result in the compulsory liquidation of a company. Creditors (including landlords) are able to petition for the winding-up of a company in certain circumstances, including if they are able to show that the company is unable to pay its debts. One way of demonstrating this is to serve a statutory demand: a formal written demand for payment of a debt (such as rent) of more than £750 which, if not complied with within 21 days, can be used as evidence of a company’s inability to pay its debts for these purposes. The threat of this process is often powerful enough to result in swift payment of overdue debts.

The new legislation will prevent presentation of a winding-up petition based on a statutory demand which was served between 1 March 2020 and 30 June 2020 (or one month after the enactment of the Bill, whichever is the later). It will also prohibit the presentation of a winding-up petition by a creditor unless the creditor has reasonable grounds for believing that COVID-19 has not had a financial effect on the company, or that the relevant ground would have arisen even if COVID-19 had not had a financial effect on the company. Even if a creditor can overcome this hurdle (which may prove challenging in many cases), the court may decline to make a winding-up order in certain circumstances.

These measures will apply with retrospective effect from 27 April 2020 to 30 June 2020 (or one month after the enactment of the Bill, whichever is the later). The legislation contains a mechanism to deal with winding up petitions and orders made in the period between 27 April and the date when these measures come into force, although precisely how the courts will approach this is unclear.

The initial announcement is likely to have deterred some creditors from resorting to winding-up petitions, particularly landlords of commercial premises who appeared to be the target of the measures. The draft legislation confirms that it will be very difficult for a creditor to use a winding-up petition as a debt collection tool. Although the legislation will not prohibit landlords (or other creditors) from applying to place a company in administration, this has not so far proved an appealing substitute for a number of reasons.

What next?

The Government's intervention to date has effectively paused most routes available to a landlord to collect overdue rent (most notably, the ability to forfeit for non-payment). Some measures are capable of extension beyond the end of June, but this pause cannot last indefinitely. Although some formal concessions are being agreed and in some cases rent is being written off, for most commercial tenants rental liabilities will be a looming issue. Landlords (with their own financial position to consider) will no doubt be resorting to the usual enforcement mechanisms to collect the balance when these temporary measures are lifted, particularly where tenants have taken an aggressive stance or failed to engage in this initial period. Whether the money will be available to collect is another question. Rental liabilities, and whether these are sustainable, will be in sharp focus.

The Government announced on Friday that it will publish a code of practice to support high street businesses. This is to encourage "fair and transparent discussions" and to "help ensure no one part of the chain shoulders the full burden of payment".ⁱⁱ The code is to be voluntary, but the Government has indicated that it would consider making it mandatory if necessary.

The Bill also contains a number of permanent additions to the UK's restructuring toolbox. Those include a standalone moratorium, during which companies that are insolvent or likely to become so, may obtain protection from certain creditors. There is also a restructuring plan procedure, which will provide companies facing financial distress with a new means of restructuring that may prove more flexible than the scheme of arrangement and company voluntary arrangement ("CVA") in some circumstances. These reforms have been in the pipeline for some time, but have been fast-tracked as part of the Government's response to COVID-19. Together with the existing tools, they provide a range of options for landlords and tenants to explore in the face of the financial difficulties we will see as we start to emerge from the public health crisis.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



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ⁱ <https://www.gov.uk/government/news/new-measures-to-protect-uk-high-street-from-aggressive-rent-collection-and-closure>, accessed 1 June 2020.

ⁱⁱ <https://www.gov.uk/government/news/government-to-publish-code-of-practice-with-commercial-sector-in-boost-to-high-street>, accessed 1 June 2020.