

**THE SOONER THE BETTER:
APPLYING TO BRING FORWARD AND DISMISS A WINDING-UP PETITION**

**OTIS GRAHAM**

**Introduction**

The coronavirus pandemic has severely disrupted the UK’s commercial ecosystem, and will inevitably push many businesses into insolvency. Both during and after the lockdown, the intense pressures the virus has placed on companies will cause cash flow difficulties that cannot easily be resolved. Some creditors may resist enforcing debts that have fallen due, but others will not: on 14 April [the BBC reported](https://www.bbc.co.uk/news/business-52274496) that some commercial landlords prevented from forfeiting leases by section 82 of the Coronavirus Act 2020 are turning instead to winding-up petitions.

A pending winding-up petition can cause great difficulties for a debtor company even when the petition debt itself has been paid. A company which finds itself in this position may apply to bring forward the hearing of the petition so that it can be dismissed sooner than would otherwise be the case.

This article deals with such applications. It first explains the problem to which they respond, and then examines the general law and practice that apply to them. A final section considers the impact on such applications of the coronavirus crisis and the measures implemented in response to it.

**The problem**

For some companies faced with a winding-up petition, liquidation is inevitable. For others, presentation of a petition will serve as a wake-up call which spurs directors into action to arrange repayment of the relevant debt. Ideally the debt will be satisfied and the petition withdrawn before advertisement, but this is rarely achieved in practice. As well as requiring the petitioner to make the application, withdrawal by consent is only permissible where no other creditor has given notice of intention to appear, advertisement has not taken place, and the petition has not yet been heard (rule 7.13 of the Insolvency (England and Wales) Rules 2016 (‘IR’)).

Where any of these conditions is not satisfied, withdrawal is unavailable. For instance, a company may find itself able to pay the petition debt, but unable to prevent the first hearing taking place because the petition has been advertised. Advertisement may in turn lead to action from other creditors spooked by the notice in the Gazette (although creditors are increasingly learning of petitions prior to advertisement, compounding the problem).

The debtor company faced with this situation may not be able to bear the strain to its business of the weeks (or perhaps just days) that it will have to wait before the petition is heard. The fact of a pending petition can itself imperil the survival of a business, as potential suppliers refuse to trade with the company and existing creditors take steps to enforce their own debts. Indeed, it is not unheard of for a company to obtain a lengthy adjournment at the first hearing of a petition, only to realise that this has caused more harm than good because it now faces weeks under the Damocles’ sword of pending insolvency proceedings.

One way of dealing with this problem is by obtaining a validation order under section 127 of the Insolvency Act, which allows the company to continue trading. But just because a company is able to trade does not mean others will be willing to trade with it. Nor will this relief prevent existing creditors who have seen that a petition is pending from rushing to call in their debts, or indeed enforcing contractual rights triggered by presentation of a petition.

**Applying to bring forward and dismiss the petition**

Another option available to a company confronted with such a situation is to apply to bring forward and dismiss the petition. This allows a company which has paid the petition debt but which remains threatened by the pendency of the petition to have it dismissed immediately, rather than have to wait for an adjourned hearing which may be weeks away.

There is no magic to an application of this sort, which to a large extent is what it says on the tin. Nonetheless, particular legal and procedural considerations must be borne in mind.

*Making the application*

The application should be made in accordance with IR 1.35 in the usual way. It should be supported by a witness statement – ideally made by a director or officer of the company with intimate knowledge of its affairs – and should include a draft order.

For obvious reasons, an application to bring forward a petition hearing will normally be made on an urgent basis. As regards urgent applications, the reader is referred to IR 12.10, paragraph 7 of the Insolvency Practice Direction (‘IPD’), CPR 23, and paragraphs 3-4 of the Practice Direction 23A. In addition, paragraph 25.19 of the Chancery Guide provides that the legal representative of an applicant in an urgent hearing should produce a certificate explaining why the hearing is urgent, which should be filed with the application.

Notice of the application should of course be given to the petitioner. As a practical matter the court may also expect it to have been given to any supporting creditor or person on whom the petition would have to be served under IR 7.9. Assuming that the case is urgent, the applicant will not be able to serve the petitioner at least 14 days ahead of the hearing as required by IR 12.9(3); for this reason abridgment of time for service will be sought (as considered below). It is important that the application is served ahead of the hearing in any event, if necessary informally by email or similar method.

The application will generally seek three main items of relief:

* That the hearing of the petition be brought forward;
* That the petition be dismissed;
* That time for service of the application itself be abridged.

Practically speaking, these three applications will turn on the same issues, and will stand or fall together.

*Bringing forward the hearing*

Jurisdiction to bring forward the hearing of a petition is found in CPR 3.1(2)(b), which sets out the court’s general power to ‘*adjourn or bring forward a hearing*’. This applies in insolvency proceedings by virtue of Insolvency Rule 12.1.

The use of this jurisdiction in an insolvency context is not uncontroversial. The editors of *Bailey & Groves* write:

*“If the petition has already been notified under IR 2016, r 7.10 it may be possible to obtain its dismissal by requesting the registrar to bring the hearing of the petition forward and dismiss it. This would be unusual but possible under the CPR, albeit that an argument could be made that it may be inconsistent with the nature of a winding-up petition being a class right”* (para 14.86)

In practice, it seems that the courts (and in particular ICC judges sitting in the Rolls Building) accept the jurisdiction. The concerns expressed in *Bailey & Groves* are generally addressed by applying close scrutiny to the position of the company’s creditors, in accordance with the nature of insolvency proceedings as a class remedy. The court’s power under CPR 3.1(2) is of course discretionary, and the judge will want to be satisfied that in all the circumstances of the case she should bring forward the hearing without full notice and thus disapply a protection offered to creditors by default.

The matters to be addressed in evidence will therefore be relatively wide-ranging. As they will be similar to those in an application for a validation order, evidence in support should comply with the requirements in paragraph 9 of the IPD insofar as applicable and practicable.

In particular, the evidence should convince the court of the following matters.

* First and most importantly it should show that the petitioning creditor consents to dismissal of the petition. Written confirmation from the petitioner will suffice; failing this a statement that oral confirmation of consent has been given by the petitioner may be adequate. It may not be enough for counsel to inform the judge on instructions that consent has been given.
* If express consent has not been given by the petitioner, it may be sufficient to prove that the petition debt has been paid, *and payment has cleared*. As confirmation of the latter fact will depend on communication from the petitioner, it will of course be a rare case where payment has cleared and consent has not been given. Such a situation may however arise, for instance where a disputed element of less than £750 remains.
* Ideally the applicant will be able to state that no supporting creditors have given notice of intention to appear at the hearing. Practically speaking, this will require confirmation from the petitioner, to whom any notices under IR 7.14 will have been delivered. The court will of course be keenly aware that supporting creditors are not required to give notice until the business day before the hearing, and that some may intend to appear even if they have not yet done so.
* If a supporting creditor *has* given notice of intention to appear, the court will need to be convinced that they no longer intend to do so. This will be proven in the same manner as with the petitioning creditor.
* If possible, the evidence should state that no other creditors have issued demands or otherwise expressed an intention to call in outstanding debts.
* If in a position to do so, the company should produce evidence that it is indeed solvent and able to pay its debts, as it would do when applying for a validation order. In some cases a validation order will already have been obtained by the time the application is heard, in which case the order should be exhibited.
* Relatedly, it will help to give a compelling explanation of the default which led to presentation of the petition (for instance with reference to seasonal cash flow difficulties or exceptional market conditions).
* The company should demonstrate that notice of the application has been given, as discussed above.

If there is a real chance that a creditor who intends to appear at the hearing of the petition – and may wish to be substituted – will be denied that opportunity by the grant of relief, then very strong reasons would be needed to overcome this.

*Dismissing the petition*

The second item of relief that the applicant will seek is, of course, dismissal of the petition. This will be dealt with under the usual principles and as such will turn on the matters discussed above.

Depending on the circumstances, it may be necessary to seek related relief such as dispensation with the need for advertisement of dismissal.

*Abridging time for service of the application*

Assuming that the case is urgent and service of the application 14 days ahead of the hearing has not been possible, the relief sought will include an application to abridge the time for service of the application itself, pursuant to IR 12.9(3)(b) and/or (c). If the court is content to bring forward and dismiss the petition, this will follow as a matter of course.

**Applications during the coronavirus pandemic**

At the time of writing, the courts are grappling with the immense challenge of the coronavirus pandemic and lockdown. Although a great degree of order has now been imposed on proceedings, any applicant should be mindful of the exceptional pressures that remain on the court system and the possibility of delay in obtaining relief. Needless to say, they should also consider carefully whether their case is indeed urgent as compared with the general run of winding-up petitions, such that the exceptional use of court resources can be justified at this time.

With that said, there is reason to believe that companies placed under extreme strain by the pandemic, and especially those whose ability to trade has a bearing on the provision of essential services, will have a stronger case than usual for early dismissal. In the writer’s experience, the ICC has been more willing than previously to relax strict protections for potential supporting creditors where coronavirus-related urgency can be shown.

The most obvious impact of the crisis will be on the mechanics of applications and hearings, as new measures have been brought in to facilitate proceedings at a time of social distancing. The key measures are considered below.

*The Temporary Insolvency Practice Direction*

The [Temporary Practice Direction Supporting the Insolvency Practice Direction](https://www.judiciary.uk/wp-content/uploads/2020/04/Temporary-IPD-April-2020_.pdf) (‘TPD’) came into force on 6 April 2020 and will provisionally remain in force until 1 October. It sets out a limited range of temporary measures designed to allow the Business and Property Courts to manage insolvency proceedings during the pandemic.

The critical provisions for the purpose of this article are:

* Paragraph 4 provides that non-urgent applications and petitions listed to be heard before 21 April (otherwise than before an ICC Judge sitting in the Rolls Building) are to be adjourned in accordance with the Temporary Listing Procedure, from the date that that procedure is brought into effect by a relevant supervising judge. Winding-up petitions listed to be heard before 21 April before an ICC Judge in the Rolls Building are not adjourned, but are listed in accordance with the Temporary Listing Procedure.
* Paragraph 5 deals with urgent cases. In summary, it provides for a party who wishes a matter to be heard urgently to email the ICC Judge’s clerks giving details of the application; for the court to allocate the hearing to a judge and send remote hearing invites to the parties; for arrangements to be made for issue of the application and payment of the court fee; and for the parties to file electronic documents.
* Paragraph 7 sets out the Temporary Listing Procedure, by which the Business and Property Courts will list winding-up petitions for video hearing in batches, with a link sent by the court to the parties in respect of each batch.
* Paragraph 7.4 provides that a person who intends to appear at the hearing of a petition must deliver a notice of intention to appear in accordance with IR 7.14, providing an email address or phone number for the purpose of being invited to join the remote hearing.
* Paragraph 8 deals with ‘Other insolvency hearings’, which presumably includes non-urgent applications to bring forward the hearing of petitions. It provides, in short, that the court will propose a remote hearing by sending an invitation to the parties; and that if the parties disagree with the proposal they may make written submissions suggesting alternative measures.

In practice, paragraph 5 is likely to govern any application to bring forward a petition hearing (at least in the Rolls Building), as such applications will generally be urgent. It is unclear whether the requirement in paragraph 5.1.2 that the email to the court explain the application’s urgency displaces the requirement to produce a certificate of urgency.

*Other measures relevant to applications in the High Court*

Applications relating to petitions listed in the Business and Property Courts outside of London will be subject to further guidance produced by the relevant courts. Guidance relating to the North and North Eastern Circuits was issued on 6 April and can be found [here](https://www.chba.org.uk/news/temporary-insolvency-north-guidance). Among other things, it provides that applications for validation orders (which involve many of the same considerations as applications to bring forward petition hearings) will be deemed urgent for the purpose of paragraph 5 of the TPD.

A document titled ‘High Court Business Contingency Plan for maintaining Urgent Court Hearings’ was issued on 27 March which sets out the general approach the High Court will take to urgent hearings during the pandemic. This has largely been superseded by the more specific measures set out in the TPD.

*Applications in the County Court*

For the minority of winding-up petitions that are heard in the County Court, no guidance specific to winding-up petitions has been issued. In particular, the [Protocol for Insolvency and Company Work at Central London County Court](https://www.chba.org.uk/news/protocol-for-insolvency-company-work-in-cccl) issued on 24 March deals only with bankruptcy petitions.

Applications will nonetheless be subject to the [Protocol Regarding Remote Hearings](https://www.judiciary.uk/wp-content/uploads/2020/03/Civil-court-guidance-on-how-to-conduct-remote-hearings.pdf) (of 20 March 2020); and the [‘Civil court listing priorities’](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878146/Civil_court_listing_priorities_6_April_2020.pdf) published on 6 April. The latter divides work into ‘work that must be done’ and ‘work that could be done’. The second category includes ‘*Applications or hearings pursuant to the Insolvency Act 1986 which concern the survival of a business or the solvency of a business or an individual’*.

**Conclusion**

The present crisis will have caused many companies which are fundamentally healthy to default on debts. Many will find themselves subject to winding-up proceedings, which may cause real financial peril that those companies are less able than ever to endure.

Applying to bring forward a petition where the petition debt has been paid is a particularly useful tool in such cases. But debt will outlive the coronavirus, and applications of this sort will remain useful to companies and their advisers in the happier future when a degree of normality returns to our lives.

**OTIS GRAHAM**

**15 April 2020**