THE COVID-RELATED RESTRICTIONS ON INSOLVENCY ACTION: 5 KEY POINTS FROM THE NEW BILL

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Biography

Kavan is ranked by the Legal500 and Chambers & Partners as a leading junior simultaneously in the fields of Insolvency and Property and Chancery-Commercial litigation, where quotes about him have included the following:

"*unfailingly brilliant*"; "*one of the best barristers in the area*";
"*exceptionally user-friendly*"; "*a delight to work with*"; "*clients love him*"
"*highly intelligent, quick to get to the bottom of an issue, articulate and charming*"
"*has a masterful grasp of the law*" and is "*as strong with strategic advice*"
"*a wonderful opponent - very able and slightly deadly*"
"*knows exactly how to present a case to a judge*" and "*gets amazing results*".

He is an author of 'Butterworth's Property Insolvency' and 'The Landlord and Tenant Factbook' amongst other texts, and has published articles recently, including in 'Butterworth's Journal of International Banking and Financial Law'. He has provided training for bodies including the PLA, ILA, R3 and the ICAEW, as well as in-house for leading law firms. His list of reported cases and full CV is available on the Chambers website.

Introduction

1. There are 5 key points that practitioners should be aware of, in terms of the Covid-related restrictions on statutory demands and winding up petitions published in the Corporate Insolvency and Governance Bill last Wednesday 20 May 2020. This paper assumes that the Bill is enacted into law without modification of these provisions during its expedited passage through Parliament over the next week or so.

2. The new restrictions are set out in Schedule 10 to the Bill. References below to 'paragraphs' of the proposed legislation are to those of Schedule 10.

3. Whilst these measures will be temporary in nature, the Government is set to have power by statutory instrument to extend them so that they last for up to 6 months (see below), so it is possible that these may be around for an extended period.

4. I have outlined below those 5 key points, with some detailed commentary on each.

(1) The restrictions apply to *all creditors* and *all debtor companies*

5. This was the first big surprise of the Bill. Any reasonable person observing the Government's announcements in the four weeks prior to its publication would have concluded in the round that the new restrictions were going to be targeted at restricting *landlords of commercial premises* from serving stat. demands and presenting petitions *against their tenants*, rather than restricting *every single creditor* from taking such insolvency action *against any company of any description*:

5.1. The very first announcement about such measures came on 23 April 2020, when the Business Secretary, the Rt. Hon. Alok Sharma MP, attended before a House of Commons Select Committee. He was asked a question by Peter Kyle MP (the Labour MP for Hove) as follows (emphasis added – as with quotes in this paper):

> "Just to *specifically turn to rent*, it is very welcome the protection you have given to people from eviction; thank you so much for that because I know it benefits a huge amount to business. Some businesses are actually using other vehicles in order *to reclaim rent* and to make sure that some people, some businesses who are unable to pay for it are forced to do so through *Commercial Rent Arrears Recovery and statutory demand notices*. What's your view on these practices and do you think this is going to lead to the loss of businesses?

5.2. In response, the Business Secretary said:

> "I think this is a very important point that you raise. I do think the majority of *landlords and tenants* are working well; they are reaching agreements on debt obligations. But I'm certainly aware that certain *landlords* are putting undue financial pressure with aggressive *rent recovery* tactics. So what I'm very happy to say to you is that we will, I will look to introduce temporary measures *on this particular issue* which will ease *commercial rent demand* and *protect the UK high street*…".

5.3. Later that same day (on 23.4.20), a press release was uploaded to the gov.uk website on behalf of Alok Sharma and the Rt. Hon. Robert Jenrick MP (the Secretary of State for Housing, Communities and Local Government). That was the only press release ever published by the Government with a view to forewarning interested parties and their advisers about the intended provisions. It was entitled:

> "New measures *to protect UK high street* from aggressive *rent collection* and closure
>
> High street shops and other companies under strain will be *protected from aggressive rent collection* and asked to pay what they can during the coronavirus pandemic."

5.4. The (executive summary) bullet points in the press announcement read as follows:

- "Government to introduce temporary new measures *to safeguard the UK high street* against aggressive debt recovery actions during the coronavirus pandemic
- ***statutory demands and winding up petitions issued to commercial tenants to be temporarily voided*** and changes to be made to the use of Commercial Rent Arrears Recovery, building on measures already introduced in the Coronavirus Act
- *landlords* and investors asked to work collaboratively with *high street businesses* unable to pay their bills during COVID-19 pandemic."

5.5. The main body of the press announcement also included the following text:

High street shops and other companies under strain will be *protected from aggressive rent collection* and asked to pay what they can during the coronavirus pandemic, the Business Secretary has set out today (23 April 2020).

"The majority of *landlords and tenants* are working well together to reach agreements on debt obligations, but *some landlords have been putting tenants under undue pressure by using aggressive debt recovery tactics*.

To stop these unfair practices, the government will temporarily ban the use of statutory demands (made between 1 March 2020 and 30 June 2020) and winding up petitions presented from Monday 27 April, through to 30 June, where a company cannot pay its bills due to coronavirus. This will help ensure *these companies* do not fall into deeper financial strain. The measures will be included in the Corporate Insolvency and Governance Bill, which the Business Secretary Alok Sharma set out earlier this month.

Government is also laying secondary legislation to provide *tenants* with more breathing space to pay rent by preventing *landlords* using Commercial Rent Arrears Recovery (CRAR) unless they are owed 90 days of unpaid *rent*.

> This will further safeguard the high street and millions of jobs by helping to protect them from permanent closure during this time. However, while *landlords* are urged to give their tenants the breathing space needed, the government calls on *tenants* to pay *rent* where they can afford it or what they can in recognition of the strains felt by *commercial landlords* too.
>
> …
>
> Notes to editors
>
> Under these measures, any winding-up petition that claims that the company is unable to pay its debts must first be reviewed by the court to determine why. The law will not permit petitions to be presented, or winding-up orders made, where the company's inability to pay is the result of COVID-19.
>
> *The new legislation to protect tenants* will be in force until 30 June, and can be extended *in line with the moratorium on commercial lease forfeiture*.
>
> Legislation will also be brought forward to prevent *landlords* using commercial rent arrears recovery (CRAR) unless 90 days or more of unpaid *rent* is owed. …
>
> Emergency legislation *already* introduced by government includes a *suspension of forfeiture rights, which prevents all commercial tenants from being removed from their properties until 30 June. The government has also announced new insolvency measures which will provide further support* to businesses impacted by the COVID-19 pandemic."

5.6. The full press release was accessible here:

https://www.gov.uk/government/news/new-measures-to-protect-uk-high-street-from-aggressive-rent-collection-and-closure?utm_source=5dc5fb4c-2e93-416a-93fe-10d8e923b3ba&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate#history

5.7. Parts of that announcement might even have been taken as suggesting that the restrictions would be limited in their scope, not just to commercial

landlords, but to commercial landlords of tenants in particular sectors – such as high street retail trading.

6. On 27 April 2020, Snowden J. considered the likely scope of the new restrictions based on the Government's announcement, in *Re St Benedict's Land Trust Limited, Re Shorts Gardens LLP* [2020] EWHC 1001 (Ch). He concluded as follows:

> "83. …it seems *overwhelmingly likely that the proposed legislation will be limited to companies in certain identified sectors of economic activity, and to relate to statutory demands and petitions based upon claims by landlords for arrears of rent*. Although the press statement does contain phrases that might, if taken out of context, suggest a wider prohibition, when those phrases are read in the broader context of the announcement as a whole, I anticipate that the prohibitions are not intended to extend to entities such as SBLT and Shorts Gardens, neither of which is *a tenant in the retail or hospitality industry*, or to *petitions* which are not *based upon arrears of rent*, but are based upon outstanding court orders and longstanding arrears of NNDR owing under liability orders to local authorities."

7. The Government's announcement was also widely publicised in the national press on the same assumption, namely that it was a ban on landlords seeking to recover unpaid rent by insolvency action. Just by way of one example, an article in The Times published on 24 April 2020 led with the announcement that:

> "Businesses have been given "a licence not to pay rent" after *the government banned* landlords from taking action against tenants who don't pay as a result of the coronavirus. New legislation will temporarily stop landlords from issuing statutory demands and winding-up orders against tenants struggling to pay bills because of the impact of Covid-19".

8. The Government issued no further or correcting announcements during the long 4 week period which followed the Business Secretary's initial announcement and the press release on 23 April 2020 and prior to publication of the Bill on 20 May 2020 (save that the Government once updated its press announcement, on 25 April 2020, just to add some specific dates for the proposed bans).

9. Remarkably, these restrictions in the Bill (as now published) are in no way restricted to commercial landlords, but apply to creditors of all descriptions who might serve stat. demands or present petitions against companies of all descriptions:

9.1. The relevant paragraphs of Schedule 10 dealing with winding up petitions (paragraphs 2(1), 2(3), 3(1) and 3(3)) simply say "*a creditor* may not during the relevant period present a petition…" – without limiting the types of creditor targeted in any way and without limiting the types of debtor/company protected in any way.

9.2. The relevant paragraphs dealing with stat. demands (paragraphs 1(1) and 1(2)) simply prohibit reliance on any "[statutory] demand…served during the relevant period" – without limiting that to demands served by any particular type of creditor and without limiting the types of debtor/company protected in any way.

10. This change is even more remarkable given that the restrictions are set to have retrospective effect and are likely to have caught some parties (including non-landlord creditors) entirely unaware, with some striking potential consequences as noted below. It is also striking that the Government's Impact Assessment narrative and Explanatory Notes (in relation to these restrictions) are still replete with references to the commercial landlord and tenant context, even at the date of publication of the Bill:

> "Some *landlords* are pursuing aggressive tactics to seek *rental income*, albeit potentially motivated by business vulnerability. These actions are within the letter but not the spirit of *the forbearance the Government has legislated and called for from commercial landlords*, and risks creating a significant and unnecessary risk of insolvency for otherwise viable companies at an already challenging time. In the absence of government action, it is likely that some viable companies that create economic activity and employment will be unnecessarily forced down the route into insolvency.

While it is not thought that all *commercial landlords* would follow through with a petition to wind up a company if a statutory demand is not paid, for many businesses the filing of a petition alone can cause significant practical issues that may prevent them from continuing to trade.

…

While the measures will provide an element of relief to *business tenants* in particular, they will further increase pressures in the commercial property market. The longer social distancing and lock down policies are necessary, effectively preventing whole sectors from trading, the deeper the second-order impact on *commercial landlords* is likely to be.

…

Overall, while the Government acknowledges that the measure will to some extent increase risks to *commercial landlords*, some of which might be under pressure themselves, it assesses that the re-balancing of risks described above is an appropriate temporary intervention, especially considering the Government's wider business support measures."

11. It should also be noted that the restrictions will apply to protect, inter alia:

11.1. any UK company, i.e. a "registered company" (defined in paragraph 22 of Schedule 10 as "a company registered under the Companies Act 2006 in England and Wales or Scotland", and with section 1 of the Companies Act 2006 deeming companies formed under the predecessor CA 1985 as if registered under the 2006 Act) (and see the equivalent provisions in Northern Ireland in Schedule 11 paragraph 19);

11.2. any foreign company or other association or entity which could be wound up by our courts as an "unregistered company" under Part V, sections 220 onwards of the Insolvency Act 1986; and

11.3. any insolvent partnership, which could be wound up as such an "unregistered company" pursuant to the Insolvent Partnerships Order 1994 SI 1994/2421 paragraphs 7 and 8, applying sections 220 onwards of the Insolvency Act 1986 in a modified form': see paragraphs 1(2), 3 and 6 of Schedule 10 to the Bill.

(2) Stat. demands served between 1.3.20 and 1 month post-commencement of these restrictions can never be relied upon (for any petition presented after 27.4.20)

12. There are three important points to clock about the restrictions on stat. demands, which are found in paragraph 1 of Schedule 10. All three of these are points of contrast with the approach under (what I shall call) the 'main' restrictions on winding up petitions, found in paragraphs 2 to 4 of the Schedule as discussed under heading (3) below.

13. The first point relates to timing:

    13.1. The "relevant period" for restrictions on stat. demands is different to the relevant period for the main restrictions on winding up petitions.

    13.2. In relation to stat. demands, the period runs *from 1 March 2020* (as opposed to from 27 April 2020).

    13.3. For both sets of restrictions, the relevant period is currently set to end at midnight on the one month anniversary of the coming into force of these new provisions. The Bill's second and third readings in the House of Commons are scheduled for 3 June 2020, so it will not pass into law before then and hence the 1 month anniversary is likely to be a date in early (or possibly) mid July 2020.

    13.4. It should be noted however, that the Government will have power by statutory instrument to extend the period so that it is prolonged by up to six months: see clause (i.e. soon to be section) 39(1)(a) and (2)(d).

    13.5. Strictly speaking, the restriction is on presenting a petition in reliance on such a stat. demand, rather than by outlawing the service of the stat. demand per se. In and of itself, the legislation does not provide that the mere fact of service of the stat. demand in that period will have been

unlawful; it is just that nothing can be done with such a demand save with one exception. That is where the creditor has already presented a petition before 27 April 2020. The restrictions in paragraph 1 are deemed to come into force from that date (see paragraph 1(4)), so if a creditor served a demand say on Wednesday 1 April 2020 and presented a petition on Friday 24 April 2020 which is now on foot, that petition is not suddenly rendered void. Many judges may however be expected to take a sympathetic approach to debtor companies which are subject to petitions presented before 27 April 2020 and may exercise their discretion to effectively apply the gist of the new restrictions by analogy.

14. The second point also relates to timing. It is that:

14.1. There is no use a creditor 'sitting' on a stat. demand served in the relevant period and waiting to suddenly present a petition in July, once the relevant period has come to an end.

14.2. Rather, a stat. demand served in that period from 1 March 2020 can *never* be relied upon to found a petition (i.e. to establish the debtor company's inability to pay its debts) at any point whatsoever in the future (putting aside petitions that are already on foot, having been presented before 27 April 2020).

14.3. In contrast, under the main restrictions on petitions (discussed under heading (3) below), a creditor may hold their hand until the day after the 1 month anniversary of the restrictions being in force, and then present a petition, for example on the basis that it wishes to prove to the satisfaction of the court that the company is unable to pay its debts as they fall due, for example by using the non-payment of an invoice and the non-compliance with chasing correspondence as evidence of that cash-flow inability (not in reliance on a stat. demand served from 1 March 2020). In that case, the restrictions in Schedule 10 will not apply to such a petition.

15. The third point (again in contrast to the main restrictions on petitions discussed under heading (3) below) is that these particular restrictions on stat. demands apply irrespective of whether Covid had any financial impact on the debtor/company whatsoever. Even if a company was entirely unaffected by Covid, it will still be able to rely on these restrictions, which are presumably designed to be simple and more straightforward in that sense.

(3) Between 27.4.20 and 1 month post-commencement of these restrictions, creditors may not present a petition without 'reasonable grounds for believing' that the company would have been deemed insolvent even if Covid hadn't had a financial effect

16. Paragraph 2(1) and (3) set out what I call the 'main' Covid-related restrictions on winding up petitions. Those are the provisions for companies registered in England and Wales and in Scotland (see Schedule 11 for Northern Ireland) and equivalent provision is made in relation to foreign/unregistered companies by paragraphs 3(1) and (3).

17. For ease of reference, I have reproduced paragraph 2 below (with notes added in square brackets and grey text):

> "Restriction on winding-up petitions: registered companies
> 2 (1) A creditor may not during the relevant period [27.4.20 to 30.6.20 or if later, 1 month post commencement of this new law: see para. 21(1)] present a petition under section 124 of the 1986 Act for the winding up of a registered company on a ground specified in section 123(1)(a) to (d) of that Act [company's deemed inability to pay its debts by virtue of (a) a statutory demand or (b) unsatisfied execution issued on a judgment or (c) as applicable in Scotland or (d) as applicable in Northern Ireland] ("the relevant ground"), unless the condition in sub-paragraph (2) is met.
>
> (2) The condition referred to in sub-paragraph (1) is that the creditor has reasonable grounds for believing that—
> (a) coronavirus has not had a financial effect on the company, or

(b) the facts by reference to which the relevant ground applies would have arisen even if coronavirus had not had a financial effect on the company.

(3) A creditor may not during the relevant period [27.4.20 to 30.6.20 or if later, 1 month post commencement of this new law: see para. 21(1)] present a petition under section 124 of the 1986 Act for the winding up of a registered company on the ground specified in section 123(1)(e) [company's deemed inability to pay its debts by virtue of proof to the court's satisfaction that it is unable to pay its debts as they fall due] or (2) [company's deemed inability to pay its debts by virtue of proof to the court's satisfaction of its balance sheet insolvency] of that Act ("the relevant ground"), unless the condition in sub-paragraph (4) is met.

(4) The condition referred to in sub-paragraph (3) is that the creditor has reasonable grounds for believing that—
(a) coronavirus has not had a financial effect on the company, or
(b) the relevant ground would apply even if coronavirus had not had a financial effect on the company."

18. The three key points to note on this restriction are as follows.

19. First, the "relevant period" in this context runs from 27 April 2020 to midnight on the 1 month anniversary of this new law coming into force. This is set out in paragraph 21(1), which is somewhat buried in the later parts of the Schedule. As noted above, the presumptive expiry date is subject to the Government's power to extend the restrictions by statutory instrument so that they apply for up to 6 months in total: see clause/section 39(1)(b) and (2)(d).

20. Second, a creditor wishing to present a winding up petition within that relevant period will need, in essence, to:

(1) Plead and prove, in the usual way, one of the 4 statutory bases (applicable to matters in England & Wales) for deeming the company to be 'unable to pay its debts' as set out in s.123(1)(a),(b)(e)/(2) IA 1986, namely:

(i) a failure by the company to comply with a stat. demand [although not one served in the period discussed under section (2) of these notes above];

(ii) a return of execution on a judgment, unsatisfied in whole or part;

(iii) proof by other means, to the court's satisfaction, that the company is cash-flow insolvent (including, prima facie, by evidence of a debt owing to the petitioner which has fallen due and gone unpaid despite chasing, even without a formal stat. demand); or

(iv) proof to the court's satisfaction that the company is balance sheet insolvent.

and

(2) Plead and prove that it has reasonable grounds for believing that the statutory basis relied on (whether as noted in (i), (ii), (iii) or (iv) above) would have arisen even if you ignore any worsening of the company's financial position that has occurred in consequence of, or for reasons relating to, coronavirus.

or

(3) In the alternative to (2), the creditor may wish to plead and prove that it has reasonable grounds for believing that coronavirus has not caused the company's financial position to worsen at all in the manner noted above, although that is likely to be much rarer in practice.

21. Third, where a creditor is able to advance such "reasonable grounds" and present a petition in the relevant period notwithstanding these restrictions, the creditor should be aware that the procedural rules are amended, including as follows:

21.1. The petition must contain a paragraph stating that the creditor considers that the condition described in paragraph 2(2) or (4) [or 3(2) or (4) for foreign/unregistered companies] of Schedule 10 is met: see paragraph

19(3). No doubt, it would be prudent for this to be particularised in the petition and/or in any supporting evidence verifying the petition.

21.2. The petition must not be advertised (i.e. notice should not be given of it) "until such time as the court has made a determination in relation to the question of whether it is likely that the court will be able to make an order" winding the company up on the ground that it is unable to pay its debts, in light of the new restrictions: see paragraph 19(2) and paragraph 5(2).

21.3. In practice, the court will therefore have to convene a hearing (or the petitioner will have to apply for a hearing) on notice to the debtor/company, to enable the court to consider whether it is likely that the court will be satisfied that the statutory basis for deeming the company unable to pay its debts would have arisen even if coronavirus had not had an effect on the company.

22. Even if the creditor had "reasonable grounds" for believing the matters prescribed, if the court takes a different view when investigating those issues, and is not itself "satisfied" on the balance of probabilities that the basis of the company's deemed insolvency would have arisen regardless of Covid, the court is then precluded from making any winding up order: see paragraph 5.

(4) Petitions already presented or winding up orders already made between 27.4.20 and the coming into force of these restrictions will be undone/unwound, unless they would have passed muster under the new law

23. This is one of the remarkable retrospective parts of the proposed new law.

24. Even though:

24.1. these news laws will not be enacted until early (or mid) June at the earliest;

24.2. the Government gave no or no proper indication that the restrictions would catch all creditors, and relate to all debtor companies;

24.3. the Government took some 4 weeks to publish the Bill after making its initial announcements (referring to protecting commercial tenants); and

24.4. in the period prior to publication of this Bill on 20 May 2020, other (i.e. non-landlord) creditors will in good faith have proceeded with winding up petitions, and Judges will in good faith have proceeded to make compulsory winding up orders, where all the conventional criteria under the Insolvency Act 1986 were satisfied (and no-one being aware at the time of any new statutory criteria that would apply in such cases);

nonetheless, any such petitions presented, or any such winding up orders made, from 27 April until the commencement of these restrictions will be undone/unwound unless they would have been valid under the law that was not yet in force and not known about at the time.

25. Paragraphs 4 and 7 include the following provisions in that regard:

"Restriction on winding-up petitions: petitions made before commencement
4 (1) This paragraph applies where a creditor presents a petition under section 124 of the 1986 Act— (a) on or after 27 April 2020, but (b) before the day on which this Schedule comes into force.

(2) *If* the court to which the petition is presented is satisfied that *the creditor presented it without the condition in paragraph 2(2) or (4)* or [in respect of foreign/unregistered companies:] paragraph 3(2) or (4) (as the case may be) *being met*, *the court may make such order as it thinks appropriate to restore the position to what it would have been if the petition had not been presented*.

Restriction on winding-up orders: orders made before commencement
7 (1) This paragraph applies where—
(a) a court makes an order under section 122(1)(f) [winding the company up on the ground that it is unable to pay its debts] or 221(5)(b) [for a

foreign/unregistered company] of the 1986 Act on or after 27 April 2020 but before the day on which this Schedule comes into force, and
(b) the order was not one which the court would have made had paragraphs 5 and 6 been in force at the time.

(2) *The court is to be regarded as having had no power to make the order (and, accordingly, the order is to be regarded as void).*

(3) Neither the official receiver nor the liquidator or provisional liquidator is liable in any civil or criminal proceedings for anything done pursuant to the order.

(4) The court may give such directions to the official receiver, liquidator or provisional liquidator as it thinks fit for the purpose of *restoring the company to which the order relates to the position it was in immediately before the petition was presented*.

26. "Restoring the position" of the company in that way would prima facie entail rescinding any such winding up order, dismissing the petition, and ordering the petitioning creditor to pay its costs. There must however be at least compelling arguments for saying that the court should not "think fit" to make an adverse costs order against a petitioning creditor who has been unfairly caught out by the retrospective nature of these provisions and the matters noted at 24 above, although in practice it may take a relatively bold Judge to take such a principled and relatively pro-creditor stance, in the teeth of what some might assume was the presumptive outcome of these provisions. The Government's Explanatory Notes state in relation to paragraph 4 of Schedule 10 that:

"This allows the court to undo any negative effects of winding-up petitions that are brought under pre-existing law, and *may lead to the petitioner becoming liable for the cost of doing so*."

(5) A company subject to a petition, presented between 27.4.20 and one month after these restrictions come into force, will not have to apply for any validation orders under section 127

27. Where a creditor's petition is presented in this relevant period, various provisions of the Insolvency Act 1986 will be modified in the event that a winding up order is made. Of particular note is the modification to sections 127 and 129 IA 1986 brought about by paragraphs 8 and 9 of Schedule 10 of the Bill.

28. These provide as follows:

> "Modifications of 1986 Act
> 8 (1) Paragraphs 9 to 18 apply where—
> (a) a creditor presents a petition under section 124 of the 1986 Act during the relevant period in relation to a registered or unregistered company, and
> (b) the court to which it is presented makes an order under section 122(1)(f) or 221(5)(b) of that Act ("the winding-up order").
> (2) Paragraphs 9 to 18 are to be regarded as having come into force on 27 April 2020.
>
> 9 If the winding up would by virtue of section 129(2) of the 1986 Act be deemed to commence at the time of the presentation of the petition, *the winding up is* instead for the purposes of that Act to be *deemed to commence on the making of the winding-up order*."

29. In ordinary circumstances, section 127 would render dispositions of the company's property void (subject to court validation) where they had taken place at any time after presentation of the petition, given that the date of presentation ordinarily marked the date of 'commencement' of the winding up. The company would then need to seek a validation order if it wanted to ensure that any post-presentation dispositions of its property, including in the ordinary course of its business, were valid.

30. However, as the paragraph 9 pushes the date of 'commencement' back to the date of the winding up order itself (rather than the earlier date of presentation

of the petition), there will be no need for the company to seek any such validation of dispositions between presentation and winding up order, as those will no longer be caught by section 127.

31. This relaxation does not depend on the company showing that it is only insolvent on account of Covid; on the contrary, it will apply to companies that are proved to have been unable to pay their debts regardless of the impact of Covid. Indeed, the former type of company should not become subject to a winding up order in light of paragraph 5, and if a petition against it is dismissed, section 127 would never have effect. The latter type of company is the one against which a winding up order may be made, and it is only where a winding up order has been made that paragraph 9 applies: see paragraph 8(1)(b).

32. Finally, there is a possibility that, in light of these particular provisions, well-informed banks may agree not to freeze (or alternatively to unfreeze) the bank accounts of a client company which is subject to a winding up petition presented in the relevant period – since the practice of freezing accounts was tied to the potential application of section 127. If so, the threat of a winding up petition may have lost even more of its teeth thanks to these provisions – if the creditor's real goal was to secure recovery of its undisputed debt rather than to pursue its petition all the way to a compulsory order.

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