# PROPERTY-INSOLVENCY UPDATE

## EXTENSION OF EXISTING RESTRICTIONS ON ENFORCEMENT & ENTIRELY NEW PROPOSED RESTRICTIONS ON LANDLORD ACTION

**Legal Update by Kavan Gunaratna**
**Barrister, Enterprise Chambers on 16.6.21**

### Executive Summary

1. The Government has today (Wednesday 16.6.21) announced its intention to:

   1.1. Extend the existing restrictions on stat. demands and winding up petitions (and certain other Covid-related amendments to insolvency legislation) by 3 months to 30.9.21.

   1.2. Extend the restrictions on rent-related forfeiture of business tenancies by 9 months to 25.3.22.

   1.3. Extend the restrictions on commercial rent arrears recovery action/ CRAR by 9 months to 25.3.22.

   1.4. Introduce an entirely new Act of Parliament to deal with the accrued rent arrears of businesses which had to shut during the pandemic – forcing landlords to waive or agree long-term repayment plans with their tenants and providing a binding arbitration process in default of such agreement.

2. At the time of writing, the relevant statutory instruments (and the draft Bill for 1.4 above) have yet to be published, but the Government issued two press releases this afternoon, which can be accessed here:
https://www.gov.uk/government/news/government-extends-business-support-measures
https://www.gov.uk/government/news/eviction-protection-extended-for-businesses-most-in-need

3. This note sets out the points arising, which all property and insolvency practitioners should be aware of. **The busy reader can simply read the coloured sub-headings below, whilst those interested in the detail of any section may read the full text below it**.

### (1) The insolvency restrictions are being extended to 30.9.21

4. The existing restrictions on stat. demands and winding up petitions (under Schedule 10 of CIGA 2020) are being extended by 3 months from 30.6.21 to 30.9.21 – at least for the time being. As a reminder:

   4.1. These restrictions do not just apply in the landlord and tenant context. They affect all types of creditor, and protect all types of debtor company, including domestic and foreign companies and partnerships against whom a creditor is seeking to start winding up proceedings in our courts.

   4.2. The restrictions do not, however, protect individual debtors from personal stat. demands and bankruptcy proceedings – even if, for example, the debtor was a commercial tenant or a sole trader operating a business.

4.3. Under the restrictions, stat. demands served on corporate debtors before 1.10.21 cannot be relied on as a basis for winding up. This is so, even if the debtor was entirely unaffected by the pandemic – since the restriction on stat. demands is to be kept simple, and no 'Covid-impact-test' applies.

4.4. More importantly, under these restrictions, prior to 1.10.21, a creditor cannot present a winding up petition in our courts, unless (broadly speaking) it can BOTH:

(1) Plead and prove, in the usual way, one of the 4 statutory bases 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 between 1.3.20 and 30.9.21; (ii) a return of execution on a judgment, which is at least partly unsatisfied; (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 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 above [whether as noted in (i), (ii), (iii) or (iv) under (1) 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.

4.5. Where a creditor is able to validly present a petition before 1.10.21, the procedure is modified (see the 3.7.20 Practice Direction) and further, there is no need for the debtor to seek a validation order.

5. There will also be 3-month extensions (from 30.6.21 to 30.9.21) to other temporary Covid-related amendments to the insolvency legislation:

5.1. Readers may recall that small (but not large) suppliers were afforded a temporary exemption from the new rules (under ss.14-15 CIGA 2020) which restrict a supplier's reliance on contractual 'ipso facto' clauses. By way of reminder, those are clauses in supply contracts which entitle suppliers to pull the plug on supplying a customer that has become insolvent, or to alter the terms of supply in a relevant way. Those temporary exemptions are extended until 30.9.21.

5.2. Readers may also recall that the conditions for invoking the new insolvency 'Moratorium' were temporarily relaxed in some respects[1]. By way of reminder, the 'Moratorium' procedure is the new process designed to protect a company from creditor action – whilst giving it a 'breathing space' to formulate and/or implement a plan for how it might secure its recovery as a going concern. The Government's press release suggests that these temporary relaxations will now be extended until 30.9.21 – although, in fact, they had already been extended to that date, back on 26.3.21.

5.3. Although the press release is not entirely clear on this point, we would also expect to see a further 3 month extension (from 30.6.21 to 30.9.21) to the so-called "suspension of liability for wrongful trading" for company directors[2] and to the relaxations for EGMs and voting arrangements[3].

6. Plainly, there is a prospect of these restrictions/provisions being extended yet further in due course, beyond 30.9.21. When CIGA 2020 was enacted on 25.6.20, a long-stop date of 30.4.21 was introduced for certain such extensions, but that long-stop date has itself been pushed back to 29.4.22[4].

[1] see CIGA 2020 Sched. 4; IA 1986 Part A1 and Sched.ZA1; and S.I. 2020/1031 and 2020/1033 and 2021/375
[2] see ss.214 and 246ZB IA 1986; s.12 CIGA 2020 (which expired on 30.9.20); SI 2020/1349 (which re-enacted the suspension from 26.11.20) and SI 2021/375 reg. 2 which last extended that suspension to 30.6.21
[3] See Sched. 14 CIGA 2020
[4] SI 2021/441

## (2) The restrictions on rent-related forfeiture of business tenancies are being extended to 25.3.22

7. The existing restrictions on forfeiture of business tenancies are to be extended by almost 9 months, from 30.6.21 to next year's March quarter date, 25.3.22. As a reminder, under s.82 Coronavirus Act 2020:

   7.1. During the relevant period of this statutory restriction (which started on the morning of 26.3.20), a landlord may not forfeit a relevant business tenancy on the grounds of non-payment of rent.

   7.2. A landlord's right to forfeit for such non-payment is specifically preserved and cannot be waived (other than by giving an express waiver in writing). That means that most landlords (if they so wished) would have been ready and able to proceed to forfeit their tenants' leases on the day after these restrictions expired, by reference to the arrears which had accrued due in the meantime. However, that expected tsunami of forfeiture claims is now set to be held back as noted under sub-heading (4) below – at least in respect of certain business tenants' arrears.

   7.3. When first enacted, the s.82 restriction was initially set to last for around 3 months until 30.6.20. The relevant period of the restriction was then extended a further 4 times[5], on each occasion by 3 months only, most recently to 30.6.21. This makes the new *9*-month extension particularly stark.

   7.4. The restriction only applies to forfeiture for non-payment of rent, and not, for example, to forfeiture under a proviso for re-entry on condition of the tenant's insolvency, or for other breaches of lease.

   7.5. "Rent" for the purposes of s.82 does, though, include *any* sum at all which a tenant is liable to pay under a relevant business tenancy.

8. The Government's press release states that: "*The existing measures…will be extended to 25 March 2022…to ensure that the sectors who are unable to open have enough time to come to an agreement with their landlord without the threat of eviction*". Although this wording suggests that the extended protection is designed to assist specific "sectors" like hospitality and leisure, the existing restrictions are not limited in any such way, and nor is it thought likely that these extensions will be either, when drafted.

9. The Government's statutory instrument extending the restrictions by as long as 9 months could in theory be negated by a vote in either House of Parliament, although that seems unlikely given the consistent moves to prioritise the protection of tenants' businesses over the interests of landlords.

## (3) The restrictions on commercial rent arrears recovery (CRAR) are being extended to 25.3.22

10. The existing restrictions on landlords exercising CRAR will likewise be extended by almost 9 months to 25.3.22. As a reminder:

    10.1. During the relevant period of this Covid-related statutory restriction[6] (which started on the morning of 25.4.20), a landlord cannot exercise CRAR in the absence of certain levels of rent arrears.

    10.2. When that restriction was first enacted in the context of the pandemic, the minimum amount of rent arrears required was the equivalent of 90 days' rent (approximately 1 quarter). That minimum-arrears threshold was then increased a further 3 times[7], most recently to require minimum arrears of approximately 6 quarters' worth of rent for any intended CRAR from 24.6.21.

    10.3. Although this temporary restriction is now set to continue for another 9 months to 25.3.22[8], the minimum threshold (of c. 6 quarters' rent) is not set to be increased. Accordingly, a tenant who failed to pay rent from the March 2020 to June 2021 quarters (i.e. for the period from 25.3.20 to

[5] see (in relation to its application in England): SI 2020/602, 2020/994, 2020/1472 and 2020/283
[6] see reg. 52 (as amended) of the Taking Control of Goods Regulations 2013, SI 2013/1894
[7] see SI 2020/451, 2020/614, 2020/1002 and 2021/300
[8] It is unlikely that any further/separate legislation will be prepared specifically to give effect to this particular extension – since the "relevant period" under reg.52 of SI 2013/1894 is automatically tied to the definition of "relevant period" in s.82 CA 2020.

28.9.21) may be protected from CRAR, at least if they ensure their net arrears were less than 554 days' worth. However, such tenants will have to pay their September quarter rent onwards to avoid such an outcome. Broadly speaking, this appears to reflect the Government's new approach (see section (4) below) of now distinguishing between accrued arrears, and rent going forwards.

10.4. When calculating the arrears owed, a landlord may not count any VAT or interest. If a tenant would be able to claim any set-off or deduction etc. in a debt claim brought by the landlord, such a deduction will also be factored in to the calculation of the minimum arrears for CRAR purposes.[9]

## (4) A new Act of Parliament will deal with the accrued rent arrears of businesses forced to shut during the pandemic

11. The Government's press release indicates that it intends bring a new Act of Parliament onto the statute book, to deal with the vast arrears of rent which certain tenants have accrued to-date through the course of the pandemic and through our various national lockdowns. It speaks of such arrears being "ringfenced" and its intention appears to be to encourage tenants to prioritise payment of new/future sums of rent whilst having an extended form of protection against landlord action to recover those older "ringfenced" arrears. The press release states as follows:

> *"New rules to be established to ringfence COVID-19 commercial rent arrears and guide tenants and landlords to agree repayment plans …*
>
> *In order to give places such as nightclubs and other hospitality businesses the help they need to recover from the pandemic, … legislation will be introduced in this session to ringfence outstanding unpaid rent that has built up when a business has had to remain closed during the pandemic. Landlords are expected to make allowances for the ringfenced rent arrears from these specific periods of closure due to the pandemic, and share the financial impact with their tenants. The legislation will help tenants and landlords work together to come to an agreement on how to handle the money owed – this could be done by waiving some of the total amount or agreeing a longer-term repayment plan. … if…agreement cannot be made, the law will ensure a binding arbitration process will be put in place so that both parties can come to a formal agreement…that both parties must adhere to. …*
>
> *[Under] The new arbitration process…Covid-related rent debts will be settled fairly, and with finality…*
>
> *…the new measures…will only cover those impacted by closures. This means that rent debt accumulated before March 2020 and after the date when relevant sector restrictions on trading are lifted, will be actionable by landlords as soon as the tenant protection measures are lifted. The arbitration process will be delivered by private arbitrators but in accordance with guidelines which we will set out in the legislation…"* [Emphasis added]

12. Query: (i) When will this Bill be laid and brought into law? (ii) What exactly does "ringfence" mean in this context (and will it mean that no action at all, including a money judgment claim, can be instituted before such agreement is reached)? (iii) Will the protection be limited to certain sectors as the press release suggests? (iv) How will it discern between tenants who were "impacted by closures" and those who were not? (v) Which dates will count as those on which "relevant sector restrictions" were lifted? And perhaps most importantly - (vi) What will be in these arbitration "guidelines" and how will that process work?

13. We must await the detail of the draft Bill to understand these novel and radical proposals. Readers may recall that the detail of CIGA 2020 ended up being far removed, in certain respects, from the provisions that seemed to be on the cards from the similar press announcements that preceded that legislation. Watch this space.

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[9] see s.77(5) and (7) of the Tribunals, Courts and Enforcement Act 2007

## About the author

**Kavan is a barrister practising from Enterprise Chambers. He is ranked by the Legal500 and Chambers & Partners as a leading junior simultaneously in the fields of Insolvency/Restructuring and Real Estate/Property litigation 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 across his fields of practice, 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 Enterprise Chambers website.**