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Bitesize Commercial Litigation Tips: practicalities, petitions, privilege and pandemic related issues

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ENFORCEMENT IN THE COVID ERA: INSOLVENCY PROCEEDINGS

Statutory Demands, Winding Up Petitions, and the Corporate
Insolvency and Governance Act 2020

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Statutory Demands

- Company Insolvency

- S.123(1)(a) IA 1986 (company)

- “A company is unable to pay its debts –

- (a) If a creditor [...] to whom a company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company’s registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor”

Statutory Demands

- Personal Insolvency

- S.268(1)+(2) IA 1986

*“(1) For the purposes of section 267(2)(c), the debtor appears to be **unable to pay** a debt if, but only if, the debt is payable immediately and either—*

- *(a) the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as “the statutory demand”) in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules*

- *(2) For the purposes of section 267(2)(c) the debtor appears to have **no reasonable prospect of being able to pay** a debt if, but only if, the debt is not immediately payable and—*

- *(a) the petitioning creditor to whom it is owed has served on the debtor a demand (also known as “the statutory demand”) in the prescribed form requiring him to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due,*
 - *(b) at least 3 weeks have elapsed since the demand was served, and*
 - *(c) the demand has been neither complied with nor set aside in accordance with the rules.*

Statutory Demands

- Not a debt collection tool
 - See, e.g. Harman J in Re a Company No.001573 [1983]: *“It is trite law that the Companies Court is not, and should not be used as (despite the methods in fact adopted) a debt-collecting court. The proper remedy for debt collecting is execution upon a judgment [...]”*
- Covid-19:
 - Corporate Insolvency and Governance Act 2020 now makes the insolvency regime vis-à-vis debtors even more debtor-friendly (at least temporarily)

Statutory Demands

- CIGA 2020 Schedule 10 §1(1)
 - “No petition for the winding up of a registered company may be presented under section 124 of the 1986 Act on or after 27 April 2020 on the ground specified in paragraph (a) of section 123(1) of that Act, where the demand referred to in that paragraph was served during the relevant period.”
 - “Relevant Period” defined in §1(3): 1 March 2020– 30 September 2020
- Can stat demands still be served?
 - Yes. *But* questionable utility
- What about Bankruptcy?
 - No such prohibition. *But* bankruptcy court likely to adopt more debtor-friendly approach @ petition stage

Winding Up Petitions

- CIGA 2020, Schedule 10, para 2:

→ Re s.123(1)(a)-(d) IA 1986

(Petitions **based on Stat Demand/Judgment/Decree/Order**)

*“(1) A creditor **may not** during the relevant period 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 (“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.**”*

Winding Up Petitions

- CIGA 2020, Schedule 10, para 2:

→ Re s.123(1)(e)/s.123(2) IA 1986

(Petitions based on an **inability to pay debts as they fall due/ or assets < liabilities**)

*(3) A creditor **may not** during the relevant period 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) or (2) 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.***

Winding Up Petitions

- Equivalent provisions for petitions already afoot but presented in “*Relevant Period*” – see Schedule 10, para 5.
- “*Relevant Period*” for the purposes of Schedule 10 =
1 March - 30 September 2020 (Schedule 10, para 1(3))
- New rules considered in:
 - Re A Company [2020] EWHC 1406 (Morgan J)
 - and
 - Re A Company [2020] EWHC 1551 (ICCJ Barber)

Winding Up Petitions

Re A Company [2020] EWHC 1406 (Morgan J)

- Application to restrain advertisement of a winding up petition
 - Pre-promulgation of 2020 Act but post-introduction of Bill.
 - Morgan J applies relevant test under Schedule 10, para 5(2): Court could only wind up company if satisfied that facts upon which petition was based would have arisen even if Coronavirus had not had a financial effect on the company.
 - On evidence presented to Court: *“strong case (at the lowest) that coronavirus has had a financial effect on the company before the presentation of the petition and, further, that the facts on which the petition would be based would not have arisen if coronavirus had not had a financial effect on the company. This means that it appears that a petition to wind up the company would not result in the court making a winding up order.”*

Winding Up Petitions

Re A Company [2020] EWHC 1551 (ICCJ Barber)

- Application to restrain advertisement of Petition; but unlike in previous case, quality of evidence before Court (relating to a funding drive said to have been thwarted by emergence of pandemic) was not as high, and Court expresses reservations about the same.
- However, Court makes clear threshold for proving a ‘Coronavirus effect’ is low. Per ICCJ Barber at [44]:
 - The requirement was simply that "a" financial effect had to be shown: it was not a requirement that the pandemic be shown to be the (or even a) cause of the company's insolvency.
 - The evidential burden on the company for these purposes had to be to establish a prima facie case, rather than to prove the "financial effect" asserted on a balance of probabilities.

Winding Up Petitions

Some final practical considerations

- ‘Relevant Period’ set to expire on 30 September 2020;
 - but see s.41 CIGA 2020: power to extend “*relevant period*” by 6 months via statutory instrument.
- Considerations for creditors:
 - Effect of any such extension on timeframes: winding up route no longer necessarily as rapid?
 - Low threshold: careful consideration needs to be given re: whether Petition would survive an application to restrain advertisement, etc, where debtor needs only to show that Coronavirus has “a” financial effect. Focus, evidentially, needs to be on showing insolvency *irrespective* of Coronavirus.
- Considerations for debtors:
 - Regime is benign. Need to show ‘an’ effect; and Court inclined to give benefit of the doubt. BUT, don’t leave to chance. E.g. Evidence not only on behalf of company but from funder.
 - And only a temporary reprieve! Once provisions of Act expire, creditors will be entitled to prosecute petition without restriction (and, quite possibly, in front of a less indulgent Court)



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Referring to legal advice in witness statements without waiving privilege

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When will privilege be waived?

PCP Capital Partners v Barclays [2020] EWHC 1393
(Comm), Waksman J:

- The reference to the legal advice must be sufficient
- The party waiving must be relying on that reference in some way to support or advance its case on an issue that the court has to decide

Instances of No Waiver

- Purely narrative reference to the giving of legal advice
- The fact of having sought and/or taken legal advice

Instances of Waiver

- Deploying the content or substance of the legal advice
 - but not in context of procedural requirements to state in evidence the effect of legal advice received (e.g., claimant describing possible defences on service out, summary judgment applications etc.)
- Reliance upon / having considered legal advice in characterising the nature of actions:

"I went and discussed it with my solicitor and he told me that it would be okay to go and do this transaction as a matter of law on Tuesday. On Tuesday I went and did it."

Contrasting Waiver v No Waiver I

No Waiver: *“My solicitor gave me detailed advice. The following day I entered into the contract”*

Waiver: *“My solicitor gave me detailed advice. I entered into the contract as a result of that legal advice”*

(assuming the party’s motivation in entering the contract is relevant to an issue the Court is deciding upon)

Contrasting Waiver v No Waiver II

- C serves claim form on D
 - D obtains (bad) legal advice that service is invalid and ignores claim
 - Service is actually valid; default judgment entered against D
 - D makes w/s in support of application to set aside default judgment
-
- Reference to having taken time to obtain advice from lawyers so as to explain delay in D's response: no waiver
 - Reference to advice so as to suggest that D reasonably believed no need to file acknowledgment of service: waiver

Lessons

- Take care with phrasing to avoid inadvertent reliance on the content of the advice
- If waiver occurs, may be possible to rescue situation by withdrawing reliance: ***PCP v Barclays*** at [129]
- Efficacy of language such as “*Without any waiver of privilege ...*”?
- Avoid agonising? Either rely outright on the content of the advice and accept waiver consequences or make no reference to the advice at all



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Freezing and recovering assets in a pandemic

Obstacles and opportunities

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Search orders – gatherings

- New restrictions on gatherings over 6 people in England, from 14/9
 - Health Protection (Coronavirus, Restrictions) (No. 2) (England), reg. 5 (amended by Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020, reg. 2)
- North of England, restrictions on all gatherings in private homes
 - Health Protection (Coronavirus, Restrictions) (North of England) Regulations 2020, reg. 5
- Criminal offence committed, punishable by a fine
- Gathering: respondent & family, applicant's solicitors, supervising solicitors, usually computer specialist, possible translator
- Exceptions?
 - (a) 'Reasonably necessary for work purposes' **reg. 5(3)(c)(i)**
 - (b) 'Person concerned is fulfilling a legal obligation' **reg. 5(3)(d)**

Search orders – Court considerations

Relevant factors, to be covered in applicant's evidence

- Health & travel history of search party, risk assessment
- Number of people expected at premises to be searched, their health & travel history (if known), including any children or vulnerable people
- Layout of property (if known) to permit social distancing
- 'Covid undertakings' in draft order on search procedures: *Calor Gas v Chorley Bottle Gas* [2020] EWHC 2426 (QB)

Court order likely more limited than standard:

- Delivery-up of electronic devices by respondent
- Search of specific areas of property, e.g. ground floor not bedrooms

Search orders – carrying out the search

Respondent refuses entry because he or family member self-isolating:

- Search party do not have power to enter if R refuses
- Respondent exposed to contempt proceedings
- Court would consider genuine Covid risks
- But still removes secrecy & urgency, allows risk of destruction of evidence
- Or rely on order for delivery-up of electronic devices: *Hyperama v Poulis* [2018] EWHC 3483 (QB) – need varied order to take them away

Search party members fear Covid infection from R or property:

- Search party can wear PPE
- Not obliged to enter premises if genuine concerns (order directed at R only)
- Can rely on order for delivery up of electronic devices only

Injunctions – affidavits

Can affidavits be sworn by video conferencing?

- Freezing & search orders need affidavit in support: **CPR PD 25, para. 3.1**
- Convention for physical presence: jurat says ‘sworn before me’; must state place sworn: **s. 5 Commissioner for Oaths Act 1889, s. 183(4) Legal Services Act 2007**
- Ethical concerns for solicitors on whether authorised to administer oath: **O(11.4) SRA Code of Conduct**
- Court can admit a defective affidavit: ***Haederle v Thomas* [2016] EWHC 3498 (Ch)**
- Statutory declarations can be sworn remotely defect waived by court, e.g. **Temporary Insolvency Practice Direction, para. 9.2**
- Court also willing to accept witness statement evidence, with undertaking to file affidavit when possible

Injunctions – service

Personal service during lockdown

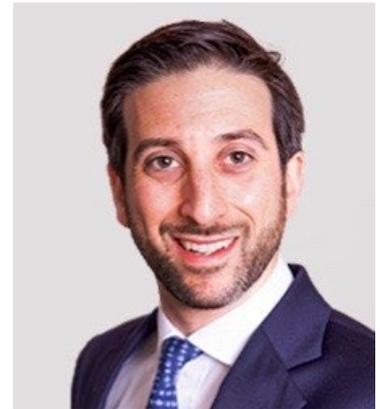
- Injunctions required to be served on respondent personally – express requirement if going to enforce penal notice: **CPR r. 81.5**
- Court can dispense with personal service if satisfied respondent had notice: **CPR r. 81.8**
- Personal service by telling respondent what document contains & leaving it with or near him: ***Gorbachev v Guriev* [2019] EWHC 2684 (Comm)**
- Process servers still worked in lockdown, serving with appropriate coronavirus precautions
- Courts were more willing to order alternative service, e.g. by email, social media or data room: **CPR rr. 6.15, 6.27**

Enforcing judgments against assets

- Bailiff enforcement by writs of control suspended 23 March – 23 August – no enforcement in houses or on highway
 - Taking Control of Goods Regulations 2013 (amended by Taking Control of Goods and Certification of Enforcement Agents (Amendment) (No. 2) (Coronavirus) Regulations 2020, reg. 2)
- Enforcement notices extended where expire during that period
- Now Ministry of Justice guidance on Covid-safe enforcement practices
- Charging orders on property still allowed – orders for sale not suspended (unlike like possession claims, until 20 September: **CPR PD 51Z, r. 55.29**), but depends on property market
- Other enforcement methods still permitted – non-bailiff enforcement work given priority listing



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Resisting loan foreclosure and the appointment of receivers: a brief guide for businesses

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Introduction

- Unprecedented combination of financial stress and rolling legislative intervention.
- Understandable focus on furlough, wrongful trading, possession moratorium.
- Questions for this talk are narrower: a) the position of a business in financial distress as regards its bankers b) the key CIGA 2020 provisions and c) their (likely) effect.

The common position

- Bank has been granted a right to appoint administrators out of court.
- Also has right to appoint LPA receivers over assets.
- Rights exercisable in wide range of circumstances.
- Bank entitled to make demand by virtue of breach of provisions of loan contract(s).

Key principles (pre-CIGA)

- Where there is a dispute over the exercise of a power of appointment of administrators the directors have locus to apply for a declaration that appointment was invalid: *Closegate Hotel Development (Durham) Ltd v McLean* [2014] BusLR 405.
- The court will require cogent evidence before making such a declaration. Where the application is based upon an alleged estoppel “the court should scrutinize such a claim with particular caution”: *SS Agri Power Limited v Dorins (1) Privilege Project Finance Limited* [2017] EWHC 3563 (Ch) (receivership).

Corporate Insolvency and Governance Act 2020

- Significant changes to the law.
- Moratorium provisions: leave directors in control of company subject to supervision by a 'monitor' (IP). Some comparison with US Chapter 11.
- Note devil in the detail, esp. s. 1 (inserting Part A1 into Insolvency Act 1986) and Schedule 1 (inserting Part ZA1).
- Many key provisions change & tighten on 30.9.20: see Schedule 4 and definition of 'relevant period'.
- Likely to be heavily litigated.

CIGA provisions: eligibility

- Schedule ZA1: determines eligibility criteria.
- Many exclusions to eligibility. For purposes of this talk note paragraph 2: a company subject to “current or recent insolvency procedure” is not eligible for a moratorium w.e.f. 30.9.20.
- (For position prior to 30.9.20 see: CIGA Schedule 4, s. 6)
- Exception will bite where a creditor has appointed an administrator out of court or filed a notice of intention to appoint.

A race to appoint?

- Prospect of a race between directors seeking to avail themselves of a moratorium and lenders seeking to appoint administrator.
- Potential for significantly different outcomes, but:
- CIGA does not make lender's rights disappear. Lender protections include provisions that:
 - Debts under financial services contracts (broadly defined) are not “pre-moratorium” debts.
 - To extend the moratorium beyond 20 business days one must (materially) have either a) creditor consent or b) court sanction on an application or c) have proposed a CVA: see ss. A9-A14.

Likely impact

- Moratorium provisions are attractive for companies despite their complexity.
- Particularly attractive if there are concerns that lenders contemplating appointing administrators and disposing of assets fast.
- In this scenario very likely to be the preferred route given the difficulty of challenges to appointment of administrators or receivers (cf. Westregister disputes).
- If properly deployed, use of the moratorium provisions of CIGA will allow directors a window of time in which to try and determine the shape of any corporate rescue in the face of putative lender action.
- Would be no surprise to see challenges by lenders e.g. to monitors' judgments.

Cautionary note for users

- Numerous provisions of CIGA applied only between enactment and 30.9.20. There is a general need to check what is in force, for how long, and what the transitional provisions are.
- Speculation about future government action.
- Changes w.e.f. 30 September 2020 cover important issues, including eligibility, and what the monitor has to be satisfied of.
- Judicial approach to applications under Part A1, Chapter 3, likely to be critical.

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James has a busy commercial litigation practice with particular strengths in banking, insolvency and fraud. 2020 cases as sole counsel have included a successful two-day insolvency trial against a Band Two rated commercial chancery silk. Judgment in James' most recent led case (concerning a high-value swap transaction) was handed down in the Commercial Court on 11.9.2020: *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2020] EWHC 2436 (Comm).



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**SERVICE OUT OF THE JURISDICTION:
Problems and possibilities of the pandemic**

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How can you serve out? (1):

The basic position

- 1) Under the Service Regulation (CPR 6.40(3)(a)(i) and 6.41);
- 2) Under any Civil Procedure Convention or Treaty, often the Hague Service Convention (CPR 6.40(3)(b));
- 3) Through foreign governments, judicial authorities and British Consular authorities (CPR 6.40(3)(a)(ii) and 6.42);
- 4) By any other method permitted by the law of the country in which it is to be served – DIY (CPR 6.40(3)(c)).

How can you serve out? (2):

The problem – closure/backlog of the FPS

- Methods (1)-(3) require involvement of Foreign Process Section
- Closed in April – now re-open, but large backlog
- Delays in other countries

How can you serve out? (3): *The first solution – wait...*

- Assess urgency of litigation – can it wait?
 - Limitation periods
 - Urgency of remedy
- Assess position and estimate delay
- Application to extend time for service
 - *Serious Fraud Office v Karimova* (unreported)

How can you serve out? (4): *The second solution – DIY*

- CPR 6.40(3)(c) – service can be:
 - by any other method permitted by the law of the country in which it is to be served.*
- Potential difficulties:
 - Local law advice needed to ensure ‘permitted’ method of service - *Amalgamated Metal Trading Ltd and others v Baron* [2010] EWHC 3207 (Comm)
 - Exclusivity of service conventions

How can you serve out? (5):

The third solution – alternative service

- Alternative service out of the jurisdiction is available
 - *Abela and others v Baadarani* [2013] UKSC 44
- Non-Hague Convention cases
 - Only need to show ‘good reason’ (*Abela*)
- Hague Convention cases
 - ‘Special’ or ‘exceptional’ circumstances are required - ‘mere delay’ is insufficient (*Marashen v Kenvett* [2017] EWHC 1706 (Ch); *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat A.S.* [2018] EWCA Civ 1093)
 - Effect of the pandemic - *Celgard, LLC v Shenzhen Senior Technology Material Co Ltd* [2020] EWHC 2072 (Ch) (at [115]-[123])

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Q&A

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