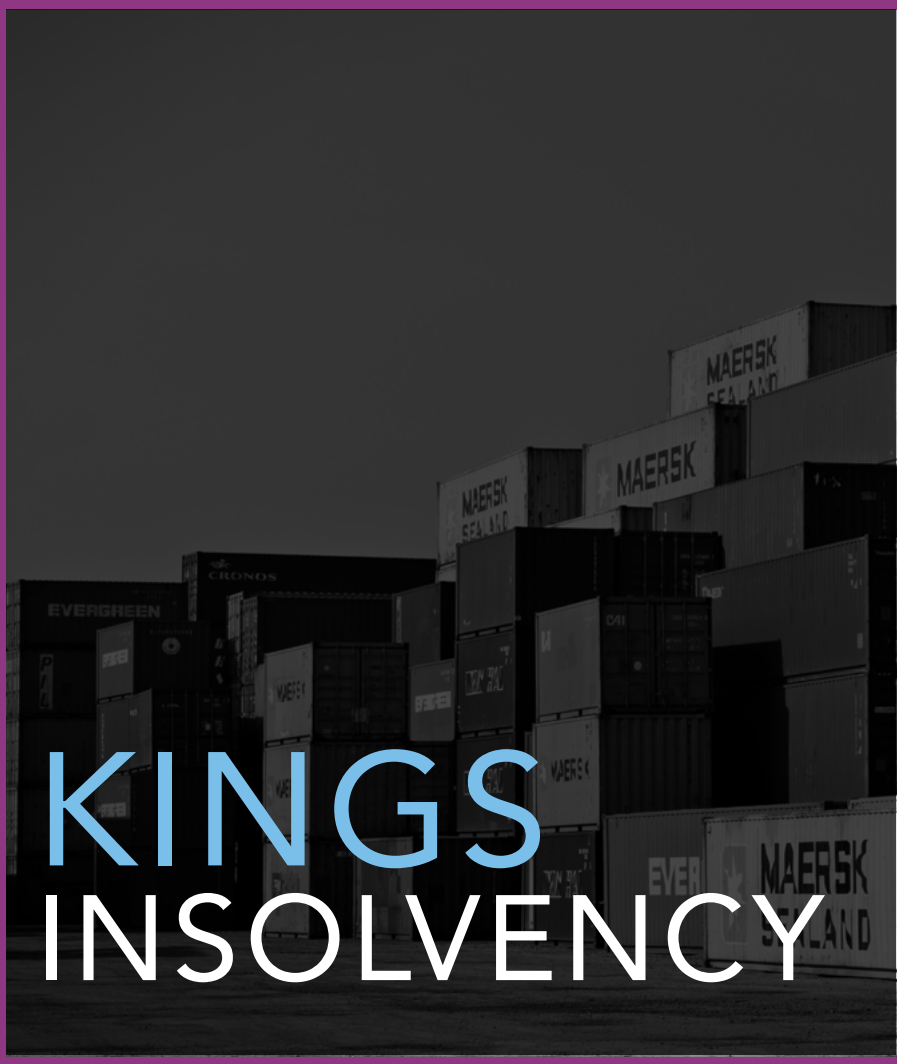

KINGS INSOLVENCY

CORONAVIRUS TEMPORARY MEASURES: ALL CHANGE

September 2021

KINGS CHAMBERS

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THE CONTINUED EVOLUTION OF THE CORONAVIRUS TEMPORARY MEASURES

The fact that the modern and flexible s.423 of the Insolvency Act 1986 (transactions defrauding creditors) finds its roots in the Fraudulent Conveyances Act 1571 (also known as the Statute of 13 Elizabeth, Chapter 5) is often cited as the longest-standing evidence of our jurisdiction being tilted in favour of creditor interests. Such abstract ideas about titling, however, go out of the window when a global and virulent pandemic from nowhere threatens economic Armageddon. In the absence of any modern precedent, Government has had to act quickly in protecting the economy by striking the inevitably difficult balance between supporting debtors against potentially terminal but unforeseen financial consequences and resiling from what is any more than strictly justifiable in intruding upon the existing legal rights of creditors, using tools no more subtle than primary and secondary legislation, put in place for periods measured in extendable blocks of months, and absent any sort of even basic cost-benefit analysis.

Section 20 of the hurriedly enacted Corporate Insolvency and Governance Act 2020 empowers the Secretary of State for Business, Enterprise and Industrial Strategy to introduce insolvency measures, but only if he or she considers it expedient to do so for purposes related to an effect of coronavirus and subject to stipulated purposes and restrictions in sections 21 and 22 respectively of the 2020 Act. Those limitations include the use of the power in specific circumstances, including to help to reduce the number of corporate entities entering insolvency or restructuring proceedings, mitigating the effect of a rise in case numbers and mitigating the impact of corporate insolvency on business, for example through constraints on the ability of people to work or public health constraints. Section 23 time-limits the scope of such measures. Further, the Secretary of State must be satisfied that the use of the power is urgent and proportionate. It is this power which has provided the footing for the temporary insolvency measures we have looked at in previous editions of Kings Insolvency, and now the variations to those temporary restrictions in response to the economy showing signs of opening-up, albeit nothing beyond the short term can be said with any real confidence as to how matters might now develop.

The next article below focuses on the crucial area of winding-up petitions under the regimes applicable to presentation up to 30 September 2021 and after, up to (for now) 31 March 2022. Winding-up petitions apart, and following the expiry on 30 June 2021 of the suspension of wrongful trading liability and the exemption for small suppliers from the restrictions on the termination of supply contracts resulting from a customer's insolvency, the following represent the key changes to the other temporary measures previously brought into effect.

The Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No.2) Regulations 2021 (SI 2021/732) came into force on 30 June 2021 and extend the moratorium on the forfeiture of business tenancies to 25 March 2022, subject to any further extension (the restriction originally having been imposed until 30 June 2020 before being extended four times to 30 September 2020, 31 December 2020, 31 March 2021 and 30 June 2021). The moratorium extends to forfeiture by way of court proceedings as well as a landlord instructing a bailiff to re-enter and change locks. Although not binding (presently), the Government has indicated that arrears which have arisen during period when a tenant business was forced to close by reason of the pandemic will be "ring-fenced" and landlords and tenants encouraged to reach agreement regarding arrears. Where agreement cannot be reached, new legislation will impose a new binding adjudication scheme. In the absence of any further details of that scheme, landlords and tenants are left with voluntary Code of Practice for commercial property relationships during the Covid-19 pandemic, published in June 2020, the Government's best effort in sometimes impossible financial circumstances at seeking "to encourage commercial tenants and landlords to work together to protect viable businesses, developed with leaders from the retail, hospitality and property sectors". There is a specific carve out for lease-related debts as "excluded debts" for the purposes of the new temporary winding-up petition regime, as explained in the article devoted to that subject below. That exclusion only exacerbates the position of landlords who, in some cases, will be dealing with tenants who have paid nothing by way of

rent or other lease liabilities since as long ago as 26 March 2020.

The effect of extending the moratorium on landlord action even further into 2022 is that, in the vast majority of cases (the moratorium has no application to leases with a term of less than six months), commercial landlords will be unable to forfeit for non-payment of rent or other sums due under a lease which have accrued between 26 March 2020 and 25 March 2022, although the moratorium does not prevent forfeiture for breaches not related to non-payment of rent, or other sums due under the lease. The preservation of a landlord's rights by the provision that, during the moratorium, it is not possible to waive the right to forfeit for non-payment of rent would suggest that a landlord may, notwithstanding the moratorium, continue to serve demands for rent and other sums due without waiving a later right to forfeit by affirming the continued existence of the lease, although the point is clearly not beyond argument.

The Insolvency (England and Wales) (No.2) (Amendment) Rules 2021 (SI 2021/1028) come into force on 1 October 2021. These new provisions (a) insert a new Part 1A into the Insolvency Rules 2016 to provide permanent procedural rules for the company moratorium procedure under Part A1 of the 1986 Act, and (b) remove references in the 2016 Rules to the now repealed Schedule A1 moratorium. It is obvious that the new permanent rules are not a cut, paste and very slight amend of the temporary rules applicable to any process that comes into force or is the subject of an application made on or before 30 September 2021, although the Explanatory Memorandum provided by the Department for BEIS accompanying the legislation explains that the drafting policy underlining the new provisions very much follows the policy behind the existing temporary provisions. Two changes do stand out. First, one ambiguity has been cleared up in that notice periods are now framed in terms of "business days", not "days". Secondly, the monitor is afforded more room for manoeuvre is the assessment of whether he or she should terminate the moratorium on the ground of the company being unable to pay its moratorium debts or pre-moratorium debts not subject to a holiday by excluding those debts for the purpose of the assessment.

Though not an extended protection measure, the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311), secondary legislation rooted in the Conservative Party's 2017 Manifesto and the concept of "fair debt", came into force on 4 May 2021. The Insolvency Service has published some useful guidance for money advisers. The judgment of His Honour Paul Matthews in Axnoller Events v Brake [2021] EWHC 2308 (Ch), another judgment in the ongoing Brake litigation, is the first decision on the provisions and involves a judgment creditor's unsuccessful application to cancel a mental health crisis moratorium under the new Regulations. The judge's approach to the medical evidence in the case, and what such evidence ought to address, will be of interest to anybody engaging with the new and novel Breathing Space regime.

We were hoping to see and meet you in the flesh in the not-too-distant future. Sadly, given the ongoing uncertainty as to what may be the restrictions position as Autumn comes on, we have been driven to the conclusion that this year's Kings Insolvency conference is going to have to be a remote affair. Make a date for Thursday 11 November 2021. The one-day event is free of charge and splits into consecutive corporate and personal half-days; delegates can subscribe for either or both. Each half-day will be broken down into highly topical, and entertaining bit-size sessions delivered by an agglomeration – is there a better collective noun for barristers? - of Kings Insolvency team members of all levels of seniority which will focus on latest developments and issues. Booking details appear below.

Louis Doyle QC

Kings Insolvency Conference 2021

11th November 2021
Hosted remotely via Zoom

MORNING SESSION: CORPORATE INSOLVENCY
Chair: Louis Doyle QC

AFTERNOON SESSION: PERSONAL INSOLVENCY
Chair: Lesley Anderson QC

This one-day conference examines the very latest developments and issues in corporate insolvency (morning session) and personal insolvency (afternoon session), delivered by barristers from silks to newly called members of the Kings Insolvency team. After specifically targeted sessions each half-day will culminate in a case law update looking at the key decisions in each sphere.

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PLEASE DON'T WIND ME UP

WINDING-UP PETITIONS AND THE CORONAVIRUS TEST UP TO 30 SEPTEMBER 2021 AND THE REPLACEMENT TAPERING TEMPORARY MEASURES THEREAFTER

Statutory provisions with long titles and their effective dates

Part 2 of the present, but very soon to be defunct, form of Sch 10 of the Corporate Insolvency and Governance Act 2020 ("CIGA") is headed "Restriction on Winding-Up Petitions and Orders" and contains restrictions on such petitions and orders in defined Covid-related circumstances relating to a petition presented during the "relevant period", as defined in para 21(1) of the same Sch 10. The relevant period started on 24 April 2020 and, as most recently amended by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No.2) Regulations (SI 2021/718), effective from 22 June 2021, expires on 30 September 2021. We now know that the relevant period will not be extended further and will come to an end on that date. On 10 September 2021 Parliament approved new provisions which come into effect on 29 September 2021 by way of The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021. Those new provisions ("the New Regs") stipulate (by sub-para 4(1)) the "relevant time" as being from 1 October 2021 to 31 March 2022.

In this article, which considers both, the form of Sch 10 effective in respect of petitions presented up to 30 September 2021 is termed "the outgoing Sch 10", and the new from of Sch 10, applicable to petitions presented between 1 October 2021 and (as matters presently stand) 31 March 2022 is termed "the New Sch 10".

Section 10 of CIGA and the end of the CIGA IPD's application to petitions presented after 30 September 2021

The law and procedure relevant to the outgoing Sch 10 provisions is set out in: (a) the Insolvency Act 1986 and the Insolvency Rules 2016; (b) CIGA; and (c) the Insolvency Practice Direction relating to CIGA ("CIGA IPD"), published at [2020] BPIR 1207. The CIGA IPD supplements the 2020 Act. Para 2.1 of the CIGA IPD provides that "Paragraphs 3 to 8 of this practice direction apply to winding-up petitions presented during the relevant period". The term "relevant period" is also defined in para 1.1(7) by reference to para 21(1) of Sch 10 of CIGA. The relevance of the CIGA IPD to winding-up petitions falls away in respect of any winding-up petition presented after 30 September 2021.

Prior to the coronavirus pandemic, and no doubt subsequent to it at some point, in accordance with the 2016 Rules, a winding-up petition would be presented to the court, listed for hearing (invariably in a winding-up list) and served on the debtor company. Notwithstanding the new provisions, it remains uncontroversial that a winding-up petition should not be used as a debt collection tool, and that a petition will be dismissed (as an abuse of the court's process, usually with costs on the indemnity basis) if the petition debt is genuinely disputed on substantial grounds. It is fair to say that the outgoing Sch 10 provisions served to provide an additional basis upon which a debtor, including the unscrupulous debtor, might seek to avoid the consequences of a winding-up petition and order. As will be apparent, the new regime presents similar footholds.

The outgoing Sch 10 (until 30 September 2021) and the new Sch 10 (thereafter) to CIGA

According to Para 7 of the Explanatory Memorandum to the New Regs, produced by the Department for Business, Energy and Industrial Strategy, the removal

justifies the current restrictions embodied in the form of the outgoing Sch 10 being replaced with what are termed "new tapering measures" that will help business get back to normal without facing a so-called cliff edge following withdrawal of the outgoing Sch 10. The idea, the Department suggests, is to protect companies from aggressive creditor enforcement as the economy opens up, whilst allowing business to get back to a more normal way of working. According to the Department for BEIS, albeit in somewhat abstract terms at what might be considered some remove from the coal face, "This will enable companies that are viable but cash poor due to recent trading restrictions to make use of the range of tools available to them and where appropriate to work out a rescue, and non-viable companies that cannot be saved to exit the marketplace with their productive assets recycled to the economy".

Para 2 of the New Regs amends the outgoing Sch 10 by substituting an entirely new version of it. The New Sch 10 provides a reduced level of protection by way of new targeted temporary measures available to corporate debtors as the economy emerges from the effects of the pandemic. The Department for BEIS recognises that these reduced measures remain a significant intervention into the normal workings of insolvency law, in particular creditor rights, and will therefore keep the temporary measures under constant review. This is good news for creditors, no doubt, but the idea of the new regime being withdrawn or watered down further prior to 31 March 2022 (at least) is probably something of a very, very long shot.

The relevant provisions in the outgoing Sch 10 of CIGA and the CIGA IPD

The key provisions of the outgoing Sch 10 lie in sub-paras 2(3), 2(4), 5(3) and 21(3) (which defines terms including 'coronavirus'). As will be seen below, some of these provisions, and especially the court's approach to the coronavirus test, may have a relevance to the construction of the New Sch 10.

The condition in para 5(3) of Sch 10 embodies the coronavirus test and provides that the court may only wind up the company, "if the court is satisfied that the ground would apply even if coronavirus had not had a financial effect on the company". The key provisions in the CIGA IPD lie in paras 3, 4, 6, 7 and 8.

The term "the coronavirus test", as appears in both sub-paras 8.1(a) and (b) of the CIGA IPD, is relevant for the purposes of a petition based on the alternative inability to pay grounds in s 123(1)(e) or (2) of the IA 1986 in requiring that the condition in para 5(3) of the outgoing Sch 10 (above) is met.

The three-stage process envisaged by the combined provisions of the outgoing Sch 10 and the CIGA IPD

The procedural position is best understood as follows, including reference to the first instance judgments of Her Honour Judge Kelly, sitting as a High Court Judge, in A v B [2021] EWHC 2289 (Ch) (11 August 2021) ("A v B") and, consistent with it, the decision of Insolvency & Companies Court Judge Mullen in Re Investin Quay House Ltd [2021] EWHC 2371 (Ch) (20 August 2021) ("Investin").

Initially, the burden rests on a petitioner to meet the requirement of the pre-condition in sub-para 2(4) of the outgoing Sch 10. Rule 7.5(1) of the IR 2016 (contents of petition) is amended by sub-para 19(3) of the outgoing Sch 10 to require the statement as to the petitioner's belief of those relevant matters identified in para 2 of the outgoing Sch 10. Sub-para 3.1 of the CIGA IPD provides that the court will not accept a petition for filing unless such a statement is included in the petition. Checking for the statement is an administrative step by the court, usually undertaken without further inquiry if the requirement for the statement is found to be met.

Sub-para 4.1 of the CIGA IPD then provides that, if the petition is not rejected for filing pursuant to para 3 of the CIGA IPD, "the petition shall be listed for a non-attendance pre-trial review with a time estimate of 15 minutes". Sub-para 4.2 of the CIGA IPD provides the purpose of the non-attendance pre-trial review is specifically the fixing of a preliminary hearing "in order for the court to determine whether it is likely that it will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test" (underlined emphasis).

The third stage of the winding-up process is the hearing of the petition (usually in a winding-up list), but only if the petition survives stages one and two above. It is perfectly possible that, if disputed, the petition will go off at this third stage hearing subject to directions for evidence and listing. What might be termed non-coronavirus matters giving rise to such a procedural outcome, however, are not appropriate to being dealt with at this preliminary hearing stage which is concerned only with the coronavirus test.

The nature of the preliminary hearing under the outgoing Sch 10

The preliminary hearing amounts to no more than a procedural filter designed to ensure that, having regard to the coronavirus test, there is a likelihood that the court will be able to make a winding-up order. It is no coincidence that the preliminary hearing concept was introduced by the pandemic-driven CIGA and the CIGA IPD. Accordingly, at the preliminary hearing the court is not concerned with any issue other than

the coronavirus test. It follows that there are only two possible outcomes at the preliminary hearing, as envisaged by the sub-paras 8.1(1) and 8.1(2) of the CIGA IPD, being dismissal at that stage or listing in the winding-up list. Apparently, there is no third way: see the ICC Judge's observation to this effect in Investin at [18]. Stepping back, there are at least four reasons for the scope of the preliminary hearing being so restricted.

First, if the court was intended to be concerned with anything other than the coronavirus test at the preliminary hearing, then the words "having regard to the coronavirus test" in sub-paras 8.1(1) and (2) of the CIGA IPD would be otiose and meaningless. That is an inherently implausible position. Further, the language used does not suggest consideration of any other matter. It mentions only the coronavirus test. So, nothing else is relevant, including the issue of insolvency because, if the petition is listed in the winding-up list and is found not to be the subject of a genuine dispute on substantial grounds then, at least in a non-payment of a due debt case, the non-payment of the petition debt is itself evidence of insolvency (a proposition for which Cornhill Insurance plc v Improvement Services Ltd [1986] 1 WLR 114 is authority). Insolvency, however, is not a matter for the preliminary hearing.

Secondly, if sub-para 8.1 of the CIGA IPD went further than consideration of the coronavirus test then, in effect, the door would be open to a debtor company to dispute a petition at that stage on any grounds, coronavirus-related or not. That, it is submitted, cannot have been the intention of Parliament when it enacted the legislation or those responsible for the CIGA IPD supplementing it. Such an outcome would produce the result that solvent companies and companies wholly unaffected by the pandemic could seek the protection of the new and temporary legislation. Self-evidently, and as its long heading spells out – "An Act to make provision about companies and other entities in financial difficulty" – the legislation was enacted to address the economic difficulties experienced by companies as a consequence of the pandemic.

Thirdly, the procedure under para 6 of the CIGA IPD does not give a petitioning creditor a right of reply to the respondent company's evidence. That is consistent with the respondent company only responding to the petitioning creditor's preceding evidence on the coronavirus test issue. It would be very odd if the petitioner had no right of response if the respondent company was free to address an unlimited range of matters in opposition to the petition which extended beyond the issue of the coronavirus test.

Fourthly, a respondent company remains at liberty to seek to apply to restrain presentation or advertisement or to dispute the petition in the winding-up list. The preliminary hearing cannot have been intended to provide another forum for non-coronavirus related disputes to be raised. A respondent company requires no such further opportunity. The idea of the preliminary hearing and a hearing in the winding-up list having the same purpose is the antithesis of the overriding objective.

What is the question before the court at the preliminary hearing under the outgoing Sch 10?

It follows that the question before the court at the preliminary hearing is whether or not the court is satisfied that it is likely that it will be able to make an order under s 122(1)(f) of the IA 1986 on the ground specified in s 123(1)(e) or (2) (that is, make such an order at a substantive hearing of the petition in the winding-up list) having regard to the coronavirus test. That test requires the court to be satisfied that the condition in sub-para 5(3) of the outgoing Sch 10 is met. That provision provides that the court may only wind up the company "if the court is satisfied that the ground [ie s 123(1)(e) or (2)] would apply even if coronavirus had not had a financial effect on the company". The constituent parts of the above test raise a number of issues.

First, the question of whether it is "likely" that the court "will be able to make an order" winding-up the company at the substantive hearing should be read as asking whether the court "may well" be able to make such an order. The term "may well" applies a threshold test that is more than fanciful but without meaning more likely than not. That was the meaning attributed to the term by Deputy ICC Judge Passfield in In the matter of PGH Investments Limited [2021] EWHC 533 (Ch) at [33] – correctly, it is submitted – by reference to the interpretation of the same term by Chadwick LJ in Three Rivers DC v Bank of England (No.4) [2002] EWCA Civ 1182, [2003] 1 WLR 210. (A decision of an ICC or Deputy ICC Judge is not binding on a High Court Judge, or a s 9 Judge sitting as a High Court Judge, but will be of persuasive effect). So interpreted, the test is relatively modest, in terms of the likelihood of the court making an order, and, without getting into a sterile argument as to what might be the marginal differences in likelihood involve, it is submitted, amounts to something equivalent, or very close to, the threshold test on the setting aside of a statutory demand or the granting of summary judgment, if that. That is a test with which the courts are well acquainted in weeding out shadowy, implausible, unsubstantiated or imprecise arguments.

Secondly, in considering such likelihood, the court has regard to the coronavirus test, and nothing else raised by either party.

Thirdly, the burden of proving the condition in sub-para 5(3) of the outgoing Sch 10 has been held in the context of a substantive hearing to restrain advertisement of a winding-up petition to rest with

the petitioner, assuming the respondent company can make out a prima facie case as regards the requirement in sub-para 5(1)(c) of the Outgoing Sch 10 that coronavirus had a financial effect on the company before presentation of the petition so as to shift the burden onto the petitioner: Re A Company (Application to Restrain Advertisement of a Winding-Up Petition) [2020] EWHC 1551 (Ch), [2020] 2 BCLC 307, [2020] BPIR 1100 at [46] (ICC Judge Barber). The definition of the coronavirus test in para 1 of the CIGA IPD refers to para 5(3) of the outgoing Sch 10, but the provision makes no reference to sub-para 5(1)(c). That approach was followed (with the agreement of petitioner and debtor) by HHJ Kelly in A v B at [24]. In Investin at [16], ICC Judge Mullen drew attention to the fact that the burden rested on the debtor for the first part of the test, but, if discharged, shifted onto the petitioner for the second part. In so shifting the burden, ICC Judge Barber identified in Re A Company at [16] that the debtor need show no more than a prima facie case (although, on the facts of Investin, even that prima facie test was not met by the debtor: see [23]). ICC Judge Mullen in Investin at [17] also drew attention to the fact that the requirement in sub-para 21(3) of the outgoing Sch 10 (the judgment erroneously refers to CIGA 2020) for establishing "financial effect" upon the debtor is wide enough to extend to an indirect effect. The scope and limits of such indirect financial effect may need working out further under the New Sch 10.

Fourthly, as regards the burden of proof on the petitioner, and as identified above, at the preliminary hearing stage, the court is not reaching a definitive finding; it is considering only whether or not it is likely that the court will – "may well" – be able to make a winding-up order having regard to the coronavirus test alone. Any conclusion reached by the court as to the meeting of the coronavirus test at the preliminary hearing need not bind the court at the substantive hearing, although it is likely to be persuasive, at least as a starting point, and subject to further evidence, for the purpose of sub-para 5(3) of the outgoing Sch 10. If the intention was that the finding at the preliminary hearing stage as to the meeting of the coronavirus test was final and definitive in the event of the petition being listed in the winding-up list then sub-para 5(3) of the outgoing Sch 10 (which would apply at that stage) would be meaningless. Rather, in applying a relatively summary filter, the court is being asked to form a preliminary view as regards the meeting of the coronavirus test, but without that view necessarily being definitive.

The substance of the New Sch 10 as regards presentation of a winding-up petition

Neither the New Regs nor the New Sch 10 impose any restriction on the service of statutory demands, although this would not prevent service of a statutory demand prompting an application to restrain presentation of a petition.

Para 1 of the New Reg provides that a winding-up petition may not be presented by a creditor on the grounds that an registered or unregistered company (as defined in Para 4) is unable to pay its debts unless certain conditions ("conditions A to D"). Those four conditions appear in sub-paras 1(2), (3), (7) and (8) and are:

(A) The first condition is that the petition debt must be liquidated, have fallen due for payment and not be an "excluded debt", as defined in sub-para 4(3) as "a debt in respect of rent, or any sum or other payment that a tenant is liable to pay" under (in England) a relevant business tenancy (as defined) "and which is unpaid by reason of a financial effect of coronavirus". The previous article (above) covers the extension of the moratorium against the forfeiture of business tenancies until 31 March 2022. The carve out for "excluded debt", as defined, from the new temporary winding-up regime represents particularly sharp edged salt granules being rubbed into the open wound of the forfeiture moratorium because it means that a commercial landlord cannot present a petition against a tenant for outstanding rent or other sum for which the tenant is liable unless the petitioning landlord can demonstrate that the non-payment is not by reason of the effect of Covid-19, subject to the petition debt being at least £10,000 (see condition D below). There are obvious good grounds for the "financial effect of coronavirus" test for these purposes being developed consistent with the development of the coronavirus test under the outgoing Sch 10 (above). However it is approached, the evidential bar confronting a landlord in proving the negative required by the test will be a difficult one to surmount in most cases by reason of the debtor tenant being best placed in terms of first-hand information to tell a court in evidence what financial effect coronavirus has had on it.

(B) The second condition requires that the creditor has made a formal request to the debtor company seeking proposals for the repayment of the debt. There are prescribed contents for the request, including notice of intention to present a petition in the absence of any proposal within 21-days of delivery. This new requirement for a request for proposals amounts to a mandatory requirement on the creditor for the opening of negotiations for repayment. The creditor might actually have no interest in such a request, but the requirement is mandatory, subject to the court ordering otherwise, and, as further bad news to creditors, it seems unavoidable that any reasonable response from the debtor, taken against the particular facts of the case, will inform the court's exercise of discretion on the petition coming before it for substantive hearing. This condition, like condition C, may be varied by the court on the application of a creditor, either by the complete removal of the condition or the shortening of the 21-day period in

condition C. It seems highly unlikely that the court will remove or vary conditions B and/or C as a matter of course; some compelling factor or cause justifying variance with the default position will almost certainly be required, such as, for example, in the case of condition B, irrefutable evidence that the debtor has ceased operations, has no assets and/or is in no position to make any remotely reasonable proposal.

(C) The third condition requires that "at the end of the 21 days beginning with the day on which condition B was met the company has not made a proposal for the payment of the debt that is to the creditor's satisfaction". One obvious question that might arise here is by what standard "the creditor's satisfaction" is judged. An entirely subjective approach, viewed from the creditor's position alone, is implausible because it would allow any debtor's own view, however objectively unreasonable, to dictate whether or not the condition had been met. Far more likely is the fact-specific approach taken to unreasonable offers to secure or compound a bankruptcy debt for the purposes of s 271(3) of the Insolvency Act 1986. The most comprehensive analysis of that approach appears in the judgment of Chief Registrar Baister in HMRC v Garwood [2012] BPIR 575.

(D) The fourth condition is that the petition debt, or sum of debts where the petition is to be presented by more than one creditor and conditions A to C are met in respect of each, is £10,000 or more.

These new provisions clearly provide a great deal of scope for litigation as the strictures imposed by the pandemic reduce and the economy appears to have started on the long road to previous performance or thereabouts. One obvious observation is that, if the coronavirus test continues to be construed as extending to indirect financial effect (see Investin at [17] (ICC Judge Mullen)), as the wording of the provision so construed appears broad enough to admit, the knock-on financial effects of coronavirus consequences first experienced by a debtor in previous financial periods are capable, prima face, of meeting the test, subject to substantiation in evidence such that the court can be satisfied as to the domino effect of those earlier consequences. A v B and Investin each demonstrates the importance of evidence supporting and corroborating the debtor's position. This cannot be overstated. Unevidenced bare assertions represent an ever-ready trap for the mistaken who suppose that meeting the coronavirus test is no more than than a box-ticking exercise; it is most certainly not, and the burden rests on the debtor in making out at least a prima facie case that the test is met.

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Doyle, Keay & Curl's Annotated Insolvency Legislation

The tenth edition of the above text, written by Louis Doyle QC, Professor Andrew Keay and Jospeh Curl QC, assisted by a team of specialist contributors and editiors, will be available from 21 October 2021. The new edition is fully updated to keep abreast of the ever developing case law and includes the Corporate Insolvency & Governance Act and its schedules. The first two named authors are members of Kings Chambers and have been responsible for the text since its first publication in 2005.

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