

CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020 – WHAT DOES IT MEAN FOR LANDLORDS?

The Corporate Insolvency and Governance Act 2020 was passed on 25 June 2020. The legislation has been in contemplation for a number of years, and has implemented a significant reform to the UK's restructuring and insolvency framework. It has also implemented certain temporary measures that are designed to protect and support businesses, protect jobs and, in doing so, attempt to preserve the economy during the COVID-19 pandemic.

WHAT MEASURES ARE INTRODUCED BY THE ACT?

NEW PERMANENT MEASURES

New moratorium

To allow companies a breathing space from creditors to formulate a rescue plan

Restructuring plan

A way to compromise secured and unsecured creditors through one process

Insolvency termination clauses

Prohibition on enforcing them when a customer of goods/services goes into insolvency process

NEW TEMPORARY MEASURES

Winding up petitions

Cannot be presented until 31 December 2020 unless it can be shown coronavirus has not had "financial effect" on debtor

Statutory demands

Cannot present a winding up petition on/after 27 April based on stat demand served between 1 March 2020 and 31 December 2020

Suspension of personal liability for wrongful trading

Removal of threat of personal liability for wrongful trading from directors who try to keep their companies afloat

Other

Relaxation of time to file accounts and assistance for holding AGMs in COVID-19 environment

This note will focus on the provisions of the Act that are likely to impact landlords of commercial tenants.

HOW WILL THESE MEASURES IMPACT LANDLORDS?

The NEW statutory moratorium, and the temporary measures concerning statutory demands and winding up petitions are most likely to impact landlords whose tenants are struggling and/or refusing to pay rent and other sums due under a lease due to coronavirus. The details of these measures are set out below.

Provisions restricting statutory demands and the presentation of winding up petitions

This new temporary measure provides that, on or after 27 April 2020 (note the retrospective effect), no winding up petitions can be presented on the basis of:

- A statutory demand served during the period beginning on 1 March 2020 and ending on 31 December 2020; and/or
- Other evidence of an inability to pay debts, *unless the creditor has reasonable grounds for believing that the coronavirus has **not** had a financial effect (by worsening the financial position) on the company or that the debt issues would have arisen anyway.*

Points to note:

- o The above restrictions only apply to the service of *winding up* petitions on registered and unregistered companies, not bankruptcy petitions. This means that landlords may continue to serve statutory demands on individuals (including sole traders - potentially the most vulnerable), and then go on to present a bankruptcy petition (although, in Central London, bankruptcy proceedings are currently being adjourned or dismissed).
- o There is an unqualified, blanket ban on serving winding up petitions on the basis of *any* statutory demand, which effectively renders void any statutory demand served after 1 March 2020 (regardless of whether or not the failure to pay the underlying debt is caused by or related to coronavirus).
- o Any winding up order made after 27 April 2020 that could not have been made under the new legislation, will be regarded as void, and the company will be restored to the position it was in immediately before the petition was presented.
- o The restrictions on statutory demands and winding up petitions apply broadly to all debtor companies (not narrowly to landlords and tenants, as previously hinted). These restrictions will therefore also apply to other entities who could be pursued by landlords for sums due under a lease, such as guarantors, subtenants, former tenants.

New statutory moratorium

- A new *permanent* statutory moratorium (available to registered and unregistered UK and overseas companies, and LLPs) allows certain eligible companies in financial distress a breathing space of initially 20 working days in which to explore rescue and restructuring options free from creditor action. The initial period can be extended to 40 working days by directors without creditor consent, with further extensions (of up to a year) subject to agreement of creditors or the court.
- The moratorium is freestanding - there is no requirement to have a particular outcome in mind at the time of entry into a moratorium.
- The company remains under the control of its directors as a "debtor in possession". However the moratorium process is overseen by a monitor (who must be a licensed insolvency practitioner, who is an officer of the court), who is required to monitor the company's affairs for the purpose of forming a view as to whether it remains likely that the moratorium will result in the rescue of the company as a going concern.

Effect of the moratorium

The effect of this new moratorium is broadly similar to the current administration moratorium.

Court proceedings, insolvency, forfeiture, CRAR

- No legal process, including legal proceedings (except certain employment claims), execution, distress or diligence, may be instituted against a company, which could extend to the use by a landlord of CRAR during the moratorium period.
- With limited exceptions (or the permission of the court), no insolvency proceedings may be commenced against the company during the moratorium period, and security cannot be enforced without court permission (other than certain types of financial collateral¹).
- A landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company (except with the court's permission).

Payments during the moratorium

- The company must pay all debts incurred (the costs of trading) while the moratorium is in force.
- The company benefits from a payment holiday in respect of "pre-moratorium" debts i.e. (a) any debt or other liability to which the company becomes subject **before** the moratorium comes into force, or (b) any debt or other liability to which the company has become or may become subject **during** the moratorium by reason of any obligation incurred before the moratorium comes into force.
- There are a number of exceptions to the payment holiday of pre-moratorium debts, including the **payment of rent in respect of the period of the moratorium**, goods or services supplied, salaries, and any debts or liabilities arising under a loan agreement or other financial services contracts.
- The company may not obtain credit of more than £500, unless the creditor has been informed that a moratorium is in force for the company.

Disposing of property

- There are restrictions on the company disposing of property and/or granting security over its property during the moratorium.
- During a moratorium, the company may, with the permission of the court, dispose of property which is subject to a security interest as if it were not subject to the security interest if (i) the disposal is in the ordinary course of business; (ii) the monitor consents; or (iii) there is a court order.
- The monitor may give consent only if they think that the disposal will support the rescue of the company as a going concern.

Procedure for commencement, extension and termination of moratorium

- The directors of a company may obtain a moratorium by filing the relevant documents at court, or by application to the court if there is an outstanding winding-up petition against the company. The moratorium will come in to force on the date of filing or court order.
- To ensure the moratorium is used appropriately, there will be a number of exclusions that mean that a company is not eligible. For example, it cannot have been in a moratorium in the previous 12 months unless the court has ordered otherwise.

¹ This could affect the drawdown of rent deposits. Deposits held on trust or absolutely by the landlord should be a "financial collateral arrangement", so expressly unaffected by the moratorium. Deposits held by the tenant or by landlord as stakeholder are not financial collateral arrangements, so will be affected.

- The company and its proposed monitor must make a number of statements regarding the company's financial state and prospects for rescue, before it can enter a moratorium.
- There are a number of conditions that must be met for a moratorium to be extended, including the discharge of all moratorium debts and pre-moratorium debts not subject to a payment holiday (so, including rent).
- The moratorium must be brought to an end if it becomes apparent to the monitor that:
 - the company is unlikely to be rescued or enters into an insolvency process, or the objective of rescuing the company as a going concern has been reached;
 - the company is unable to pay moratorium debts that have fallen due or pre-moratorium debts not subject to a payment holiday; and/or
 - the monitor cannot carry out his/her functions because the directors have not provided the monitor with necessary information.

Points to note:

- "Rent" (and presumably items reserved as "rent" under a lease) continue to be payable during the moratorium, but it is not clear whether this includes other sums payable under the lease, and the exception is limited to "*rent in respect of the period during the moratorium*". It is not clear what this means – might rent be apportioned, along similar lines to an administration scenario?
- Any extension of the moratorium is conditional on all payments being made – a way of ensuring that rent is paid. However if the directors do not wish to extend the moratorium, and the company hasn't paid the rent, the moratorium will come to an end, and the restrictions on court proceedings etc. will no longer apply to the company (although it is likely to be insolvent).
- The moratorium can last for up to a year.

SUMMARY EFFECT OF CIG ACT, INCLUDING TENANT MORATORIUM (IF RELEVANT), ON LANDLORD'S REMEDIES FOR TENANT DEFAULT

Remedy / Party ➡ ↓	Forfeiture	CRAR (incl subtenant notice)	Winding-Up	Judgment	Rent Deposit
Tenant	X	?	X	X	?
Sub-Tenant		?	?	✓	
Former Tenant			?	✓	
Guarantor			?	✓	