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PROPERTY LITIGATION ASSOCIATION

QUESTIONS REGARDING THE CORPORATE INSOLVENCY AND GOVERNANCE BILL 2020 ("CIGB 2020")

The Property Litigation Association (PLA) is a members' organisation founded in 1995 and comprising approximately 1400 solicitors and other legal professionals specialising in all aspects of property litigation situated throughout the United Kingdom.

Providing advice to property owners and occupiers dealing with insolvent company tenants is something that PLA members are routinely involved in. Indeed, it is expected that a very high proportion of the insolvency issues to which the CIGB 2020 applies will be landlord and tenant issues relating to unpaid rent accruing during the COVID-19 pandemic.

Therefore, the PLA reads the CIGB 2020 with great interest and has a number of points requiring clarification, as set out in this note. Any guidance and clarifications that can be provided would be gratefully received and disseminated to members via the PLA's website, which should reduce the possibility of issues and disputes being raised as to the meaning and effect of the CIGB 2020.

Questions and points requiring clarification

WINDING UP PETITIONS

ISSUE 1 – PARA 2(1) OF SCHEDULE 10

The creditor must have a "reasonable belief" that one of the "reasonable grounds" applies before it can present a winding up petition.

The first reasonable ground is that "*coronavirus has not had a financial effect on the company*". This is an impossible test for any creditor to answer as the assumption will be that every company in the UK has been financially affected by coronavirus one way or another.

The second reasonable ground is that "*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*". This requires the creditor to have detailed knowledge of the company's finances both before and since the start of the COVID-19 pandemic.

QUESTION:

Can paragraph 2(1) be amended so that the onus is on the company to rely upon the absence of the reasonable grounds? We would suggest that this could be achieved by the company having an opportunity to serve a counter-notice in which the directors certify that neither of the grounds apply as a pre-requisite for any petition being presented.

ISSUE 2 – PARA 2(2)(A) OF SCHEDULE 10

The test for “financial effect” is unfair to creditors. The threshold for coronavirus having a financial effect on a company is extremely low, and easy for any company to overcome. Coronavirus will have had a “financial effect” on a company if e.g. the company’s financial position worsens only slightly, or arguably is improved, for reasons relating to coronavirus.

It is also unclear whether the effect of "coronavirus" in this context means the effect of Government restrictions or wider issues such as global supply chain interruptions, economic downturn, consumer confidence and so on.

Question:

Can the test in paragraph 2(2)(a) be amended so that it involves a declaration by the company's directors: (a) that the company was solvent prior to the imposition of Government restrictions; (b) it is now insolvent; and (c) it has not in the meantime disposed of assets or undertaken liabilities other than in the ordinary course of business?

ISSUE 3 – PARAS 1 AND 2 OF SCHEDULE 10

The landlord cannot present a winding-up petition based on a statutory demand presented after 1 March 2020, and cannot present a winding-up petition in any other circumstances unless one of the "reasonable grounds" in paragraph 2(2) applies.

This is likely to amount to an effective ban on presenting winding up petitions. It is unfair to creditors as it fails to address the fundamental problem that companies will still owe debts when the pandemic is over. It is also out of step with the Government's previous stance that tenants should pay what they owe.

Question:

Can paragraphs 1 and 2 of Schedule 10 be amended to allow a landlord to present a winding-up petition based on a statutory demand (served at any time) which would be subject to a stay until after the end of the relevant period?

ISSUE 4 – PARA 7(2) OF SCHEDULE 10

Any winding-up order made after 27 April 2020 is automatically regarded as being void unless the order was one which the court would have made under paras 5 and 6, i.e. only if the court is satisfied that the ground for making the order or the facts by reference to which the ground applies would have arisen even if coronavirus had not had a financial effect on the company.

This is likely to result in chaos as no creditor will know for sure whether the order was one which the court would have made under paras 5 and 6 and there may well be disputes as to whether this should be the case. The parties will be operating in an impossible scenario of not knowing whether the company is wound up or not. It also appears that this will be the case even if the directors of the company have no interest in setting aside the winding-up order.

Question:

Can paragraph 7(2) be amended so that the directors of a wound-up company may make an application to set aside the winding up order if they want to rely upon the provisions of this paragraph? If it saw fit to set aside the order, the court could then immediately give consequential directions under para 7(4).

MORATORIUM

ISSUE 5 – SECTION 1 (SECTION A6 OF THE IA 1986)

In order to qualify for a moratorium, the directors must give a statement that, in their view, the company is, or is likely to become, unable to pay its debts and the monitor must give a statement that, in his or her view, it is likely that a moratorium for the company would result in the rescue of the company as a going concern. However, no-one has to give a statement that the company will

be able to pay its moratorium debts or its pre-moratorium debts for which the company does not have a payment holiday during the moratorium.

Question:

Can section 1 be amended so that the directors have to give a statement that, in their view, the company will be able to pay its moratorium debts or its pre-moratorium debts for which the company does not have a payment holiday during the moratorium? This would be consistent with the condition for extending the moratorium in section A10(1)(b) of the IA 1986, and the monitor's obligation to terminate the moratorium under section A38(1)(d).

ISSUE 6 – SECTION 1 (SECTION A8 OF THE IA 1986)

As soon as reasonably practicable after receiving a notice under section A8(1), the monitor must notify every "creditor" of the company of whose claim the monitor is aware that a moratorium for the company has come into force.

Question:

Please confirm that "creditor" in this context includes future and/or contingent creditors e.g. landlords due to be paid rent for the remaining term of existing leases?

ISSUE 7 – SECTION 1 (SECTION A18 OF THE IA 1986)

The term "pre-moratorium debts for which a company has a payment holiday during a moratorium" includes rent. In other words, the company has to pay rent falling due during the moratorium under leases entered into pre-moratorium.

Question:

Does rent mean pure rent or, consistent with section 82 of the Coronavirus Act 2020, "*any sum a tenant is liable to pay under a relevant… tenancy"*? There would be no reason in principle to include rent but no other lease payments such as service charge and insurance. Can this be extended further so that any liability under pre-moratorium lease covenants, such as repair, must still be performed during the moratorium? This would be consistent with the position under the "salvage principle" where the company is an administration and continues to use the leasehold premises.

ISSUE 8 – SECTION 1 (SECTION A21 OF THE IA 1986)

During a moratorium, no legal process, including "distress", may be instituted, carried out or continued against the company or its property.

Question:

Please confirm whether "distress" includes commercial rent arrears recovery (CRAR).

ISSUE 8 – SECTION 1 (SECTION A28(3) OF THE IA 1986)

The monitor may give consent to the company paying pre-moratorium debts under section A28(1)(a) of the IA if the monitor thinks that it will "support" the rescue of the company as a going concern. This is a low threshold test and may result in unfair differential treatment between creditors e.g. where all suppliers and group company creditors are paid in full, but landlords are not paid any pre-moratorium rent.

Question:

Can the test in section A28(3) of the IA 1986 be amended so that the monitor may only give consent to pre-moratorium debts being paid if that is considered "necessary" in order to rescue the company as a going concern? It is submitted that this is the test that a court would apply following an application under section A28(1)(b).

TERMINATION CLAUSES IN SUPPLY CONTRACTS

ISSUE 9 – SECTION 12

A provision of a "contract for the supply of goods or services" to the company ceases to have effect to the extent that, under the provision (a) the contract or the supply would terminate because the company becomes subject to the relevant insolvency procedure, or (b) the supplier would be entitled to terminate the contract or the supply because the company becomes subject to the relevant insolvency procedure.

Question:

Please confirm that a "contract for the supply of goods and services" does not include a lease, agreement for lease, agreement for sale of land or any other contract for the disposition of an interest in land.

ARRANGEMENTS AND RECONSTRUCTIONS FOR COMPANIES IN FINANCIAL DIFFICULTY

ISSUE 10 – PARA 1 OF SCHEDULE 9 (SECTION 901A(2) OF THE IA 1986)

The provisions of Part 26A of the IA 1986 are to apply if the company has encountered, or is likely to encounter "financial difficulties" that are affecting, or will or may affect, its ability to carry on business as a going concern. This condition appears vague and difficult to ascertain whether it applies.

Question:

What does "financial difficulties" mean, other than this is such that they affect, or will or may affect, the company's ability to carry on business as a going concern? Would it not be simpler to require the company's directors to certify that the company is, or is likely to become, unable to pay its debts (see e.g. para 27(2)(a) of Schedule B1 to the IA 1986)?