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June Quarter day – a Coronavirus update

1 July 2020



Agenda

1. An update on the current protection afforded to tenants by the Coronavirus Act – Mark Barley
2. An update on the Corporate Insolvency and Governance Act 2020 – Jonathan Dunkley
3. CRAR - Should you be concerned? – Sasha Hinton
4. Coronavirus and the 1954 Act – James Rees/Naomi Cunningham
5. An update from Scotland – Philip Knight
6. Coronavirus drafting – the market – Alistair Walton

Unpaid Rents and Covid-19 – current position Mark Barley

1 July 2020



Remedies

- Forfeiture
 - No forfeiture for unpaid rent until 30 September 2020
 - The Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2020 – w.e.f 29 June 2020
 - Rent includes any sum payable under a business tenancy.
 - Will landlords want to forfeit anyway when right becomes available again?
- Commercial rent arrears recovery
 - To be dealt with later in this Webinar
- Recovery from a sub-tenant
 - Notice under Regulation 54 Taking Control of Goods Regulations 2013
 - 189 days' worth of rent arrears required.
 - Can oblige sub-tenant to pay its rent direct to head landlord in satisfaction of immediate tenant's arrears.

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- Statutory demand and winding up petition.
 - To be dealt with later in presentation.
 - Debt claim
 - No restriction on landlords pursuing unpaid rent or other sums through the Court as a debt.
 - May be a slow process due to Court administration being affected by COVID.
 - Possibility of default judgment or summary judgment?
 - Enforcement action in respect of judgment obtained not subject to CRAR restrictions.

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- Interest
 - Interest likely to be payable on unpaid rent pursuant to late payment provisions in lease.
 - Rent Deposit
 - No restriction on landlords accessing rent deposits.
 - Query what rights landlords have to insist on rent deposits being topped up?
 - Rent Guarantee
 - No specific COVID restrictions on pursuing guarantors.
 - However, notice within six months of rent becoming due required under Landlord and Tenant (Covenants) Act section 17

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- CPR Practice Direction 51Z and CPR 55.29 : possession proceedings and all enforcement proceedings are stayed until 23 August 2020 – NB not trespassers.
 - Code of Practice for commercial property relationships during the COVID-19 pandemic
 - Voluntary
 - Applies to all commercial leases held by businesses which have been seriously negatively impacted by the COVID-19 crisis,
 - Collaboration of retail, hospitality and property sectors
 - “encourages best practice so that all parties are supported”
 - Recognises that legally tenants are liable for covenants and payment obligations under leases, unless this is renegotiated by agreement with landlords.
 - Tenants who are in a position to pay in full are encouraged to do so
 - Tenants who are unable to pay in full should seek agreement from landlords to pay what they can
 - Landlords should provide concessions where they reasonably can taking into account their own financial commitments

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An update on the Corporate Insolvency and Governance Act 2020

Jonathan Dunkley



Corporate Insolvency and Governance Act 2020 (“CIGA”)

- The CIGA (effective 26 June 2020) introduces several changes to the current UK restructuring and insolvency framework.
- Temporary
 - restrictions on the use of winding-up petitions and statutory demands
 - suspension of liability for wrongful trading
- Permanent
 - a new freestanding moratorium
 - a new restructuring plan process
 - restrictions on the use of ipso facto provisions - invalidating contractual clauses that are triggered by insolvency

Changes to the Winding-up Petition and Statutory Demand Processes

- **What is changing?**

- Temporary prohibition on issuing a winding up petition on the basis of an unsatisfied statutory demand served between 1 March 2020 and 30 September 2020.
- Winding up petitions, presented on or after 27 April 2020, will be void unless the creditor can prove that (a) coronavirus has not had a financial effect on the debtor; or (b) that the debtor would have been unable to pay its debts even if coronavirus had not had a financial effect on the debtor.

- **What does 'financial effect' mean?**

- There is limited guidance on what '*financial effect*' means other than that coronavirus must have caused the financial position of a company to worsen. The degree of this is not expanded upon so this would appear to be a relatively low threshold.

Changes to the Winding-up Petition and Statutory Demand Processes

- **Freezing of bank accounts still a risk?**
 - For company's wound up on the basis of a petition presented during the relevant period, the winding up will be deemed to commence from the date of the winding up order and not the presentation of the petition. Practically, this will have the effect of suspending section 127 of the Insolvency Act 1986 – which voids all dispositions of property made after the presentation of a winding up petition in the event a company is wound up.
 - Provisions requiring notice or advertisement of winding up petitions don't apply until the Court has made a determination as to whether a petition will succeed.



New Freestanding Moratorium on Enforcement Action

- **What does the granting of a moratorium mean for creditors?**
 - Prevents creditors bringing enforcement action against a company during the period of the moratorium, without leave of the court.
 - Initial period of 20 business days but capable of extension, without creditor consent, for a further period of 20 business days, or up to one year with the consent of creditors or by the court.
 - Business continues to be run by directors under the supervision of an IP (the 'monitor').
 - Payment holiday for pre-moratorium debts BUT rent in respect of the period during the moratorium must be paid.
- **Gating Requirements?**
 - A statement from the directors of the company that, in their view, the company, is or is likely to become, unable to pay its debts.
 - A statement from the proposed monitor that it is likely that a moratorium would result in the rescue of the company as a going concern.
- **Who is eligible for the moratorium?**
 - All companies save for certain exceptions (e.g. insurance companies, banks etc.), companies already in a formal insolvency process and those that have been subject to a CVA or administration in the previous 12 months.
 - This expands its utility beyond small companies (two of: turnover < £10.2m; assets < £5.2m; employees < 50) making it useful for any eligible companies considering a CVA or using a scheme or restructuring plan.

New 'Restructuring Plan'

- A Restructuring Plan is a new method for a company to compromise its liabilities to its creditors in addition to those methods which already exist (the CVA and a scheme of arrangement ("Scheme")).
- The Restructuring Plan will operate much in the same way as a Scheme and, unlike a CVA (but like a Scheme), will be able to affect the rights of secured creditors without their consent.
- Like a Scheme, a Restructuring Plan will require creditor consent (with 75% approval required for each class of creditors) and court approval (this is not required for a CVA).
- However, unlike in a Scheme, votes on a Restructuring Plan will be calculated solely by the value of the relevant creditors' debt or members' shares. Therefore, the Scheme's requirement for "*a majority in number representing 75% in value*" is adjusted merely to "*a number representing 75% in value*".
- Cross class cram down - Where a class of creditors or members votes against the plan, the court can still sanction it if:
 - the court is satisfied that if the plan were to be sanctioned, none of the members of the dissenting class would be worse off than under a relevant alternative. The relevant alternative is "*whatever the court considers would be most likely to occur in relation to the company if the plan were not sanctioned*".
 - at least 75% by value of a class of creditor or members, which would receive a payment or have a genuine economic interest if the relevant alternative were pursued, had still voted in favour of the plan.



Invalidating contractual clauses that terminate for reasons of insolvency

- Insolvency-related termination provisions in contracts for the supply of certain *essential* services are already invalid under the existing legislation if the counterparty enters administration or a CVA.
- However, the CIGA now provides that when a company enters into a relevant insolvency procedure (see below), a supplier to that company is not entitled to exercise its contractual right to cease supplying goods or services under their contract. This is the case under the supply contract whether termination operates automatically or requires an election to be made (or notice given by the other party) simply because of the insolvency process.
- The relevant insolvency procedures are: (i) the new statutory moratorium; (ii) administration; (iii) the appointment of an administrative receiver (unless another administrative receiver was already in office); (iv) CVA; (v) liquidation; (vi) the appointment of a provisional liquidator (unless another provisional liquidator was already in office); and (vii) the new Restructuring Plan.
- Furthermore, where the supplier was contractually entitled to terminate the contract or supply *before* the company went into an insolvency process, because of an event occurring before the insolvency process, the supplier cannot then exercise that termination right once the company is in the insolvency process.
- Additional restriction on doing '*any other thing*' if triggered by insolvency. This would prevent accelerating payment.



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CRAR – Commercial Rent Arrears Recovery

Sasha Hinton

1 July 2020



CRAR Coronavirus update

The Taking Control of Goods and Certification of Enforcement Agents (Amendment) (No. 2) (Coronavirus) Regulations 2020

- Until 30 September 2020
- Minimum of amount equivalent to 189 days' net rent
- Time limit for taking control of goods and certificates extended



CRAR – what do you need to know?

- Conditions to be satisfied
- Notice requirements
- Can the agent force entry?
- What about security guards?
- Warrant to use reasonable force
- Process following removal



Coronavirus and the 1954 Act

James Rees and Naomi Cunningham

1 July 2020



Keep open covenants

- T's covenant to keep open:
 - Non-"permitted" businesses – obligation likely to be suspended
 - "Permitted" businesses obligation will continue to apply
 - Specific performance unlikely – what loss will L suffer?



Frustration of a lease

- **Frustration** – occurs where, through no fault of either party, the contractual obligation has become incapable of being performed
- Courts usually will not order that lease has been frustrated
- Exception might be if?:
 - - not a “permitted” business, and
 - - unit closed, and
 - - short unexpired lease term
- Can you argue “frustration of part” of the lease – i.e. for the Covid-19 period?



Withholding rent and abatement

- Cesser of rent – is there a provision which covers Covid-19?
- If not, and T stops paying rent?
- L's remedies – discussed earlier
- T's defences – very limited:
 - Suspension of obligations if performance becomes "impossible" or just "difficult"
 - Stronger arguments possibly where a permitted business and L has closed a shopping centre – possible abatement or even that L had repudiated the lease



Break clauses – non-compliance with conditions?

- What if T cannot comply with the conditions?
- If T is unable to comply because of the Coronavirus SI restrictions - reasonable argument that condition is suspended
- Likely result? – break effective but L entitled to damages for non compliance



Interim Rent – effects of Covid-19

- Interim rent – overview
- The ‘appropriate date’
- LTA 1954 s.24(c) – rebuttable presumption
- LTA 1954 s.24(3)(a) – a ‘substantial change’
- Valuation evidence



Lease renewals – Covid-19 clauses

- *O'May v City of London Real Property Co Ltd* [1983]
- Trends in the market - Covid-19 clauses
- Insuring against future Covid-19 risks
- Covid-19 clauses - impact on rent

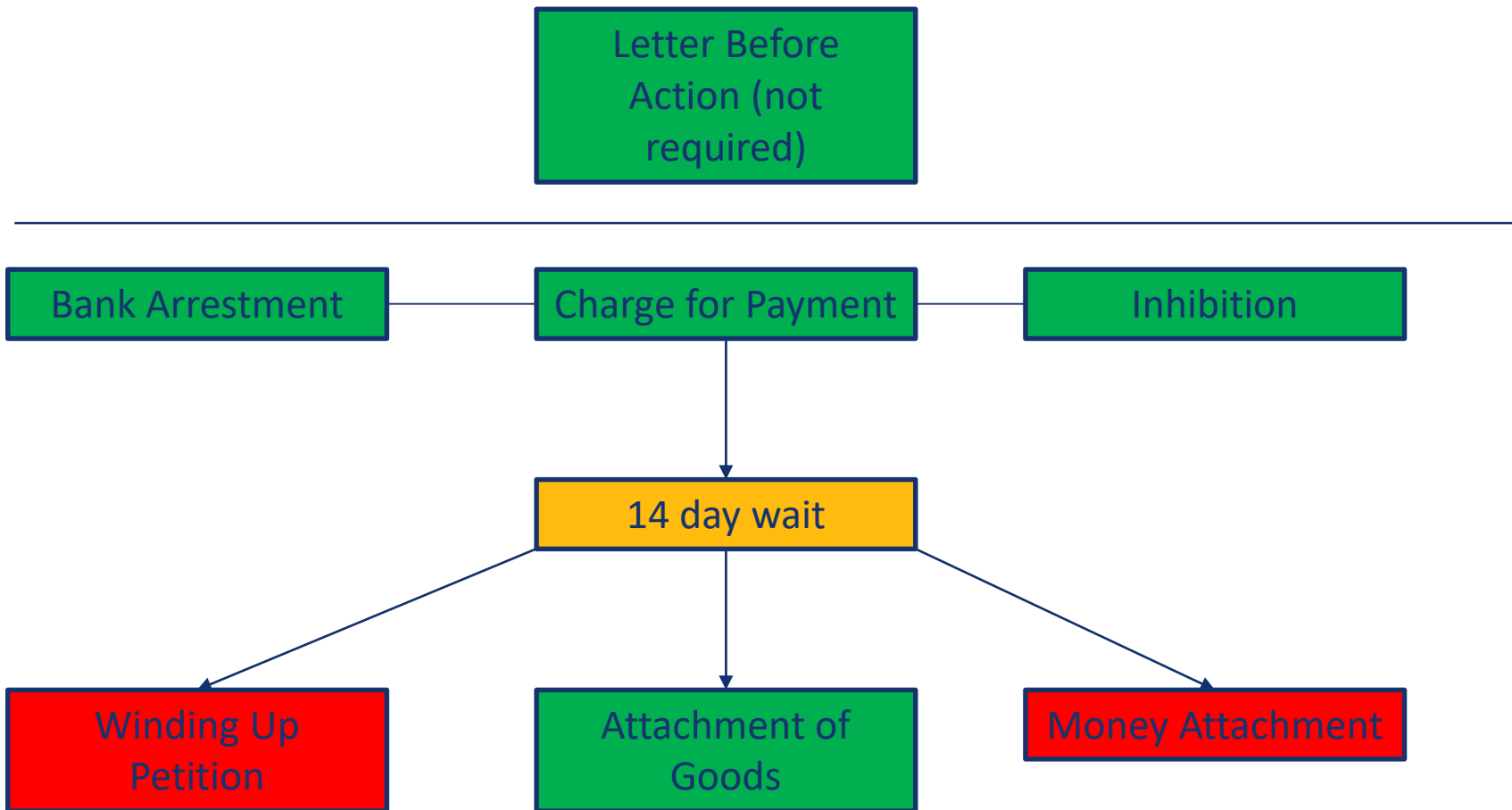
Rent Recovery - Scotland

Philip Knight



Summary Diligence

- Lease registered in the **Books of Council and Session** and becomes a court order for enforcement by Sheriff Officer without any further steps in court required – quick, easy and cheap to enforce (circa £300 cost for landlord).
- Only for rent and not for service charge or insurance (unless the insurance and service charge is a fixed sum and contained in the lease).



Irritancy (forfeiture)

- The new Coronavirus (Scotland) Bill will extend this notice period so that landlords will now be required to give at least 14 weeks' (as opposed to 14 days') notice to tenants before being able to terminate a commercial lease for non-payment of rent.
- The initial duration of the Coronavirus (Scotland) Bill is until 30 September 2020
- Not a remedy that most landlords would use.



Alistair Walton

Coronavirus drafting – the
market



The market

- Risk transfer; or
- Risk sharing

Key themes and approaches

- Rent cesser – a variety of approaches – points to consider
- Landlord's responses – risk sharing/appetite to engage
- Other lease clauses - break and keep open
- New stores – pre-lets

Rent cesser

"Force Majeure Health Event" means (a) an epidemic, pandemic, public health emergency or communicable disease outbreak (whether regional, national or international); or (b) any Act of Parliament, statutory instrument, statutory power or decree passed, issued or exercised by or on behalf of the United Kingdom Government or any advice issued by the United Kingdom Government, the National Health Service or other health or regulatory bodies in relation to any of the matters referred to at (a) above (including, for the avoidance of doubt, in relation to the COVID 19 virus);

8. FORCE MAJEURE HEALTH EVENT

8.1 If the Tenant is **required to close** the Property to its staff or employees due to a Force Majeure Health Event the Annual Rent for the time being payable under Clause 4.1 shall be suspended and cease to be payable from the date the Tenant closes the Property pursuant to the foregoing requirements or advice **until the earlier of (i) the date that the Tenant re-opens the Property to its staff and employees and (ii) the date that the Tenant is advised that it can re-open the Property as aforesaid.** Any Annual Rent paid by the Tenant in advance and relating to any period from and including the date of commencement of the suspension of rental payments, as aforesaid, shall be repaid to the Tenant within 28 days of the date thereof.

8.2 If the rent suspension period specified in Clause 10.1 commences before the Rent Commencement Date:

8.2.1 that rent suspension period shall be extended by the number of days from and including the date on which the rent suspension period commenced to but excluding the Rent Commencement Date; and

8.2.2 the Rent Commencement Date shall then be the day after the expiry of the rent suspension period (as extended under clause 10.3.1).

8.3 If the rent suspension period specified in clause 10.1 commences during the rent free period referred to in clause 42.6:

8.3.1 that rent suspension period shall be extended by the number of days from and including the date on which the rent suspension period commenced to but excluding the expiry of the rent free period; and

8.3.2 the rent free period shall then expire the day after the expiry of the rent suspension period (as extended under clause 10.4.1).

Rent cesser continued

“**Force Majeure Health Event**” means (a) an epidemic, pandemic, ETC..... (b) any Act of Parliament, statutory instrument, statutory power ETC.....(including, for the avoidance of doubt, in relation to the COVID 19 virus); **and/or (c) any unavailability of staff and/or stock due to the impact of either of the scenarios specified at (a) and/or (b) above**

If:

- (i) the Tenants require to close or are advised to close the Property to the general public for trade due to a Force Majeure Health Event; **or [HELPS NEGATE THE ESSENTIAL RETAILER ARGUMENT – EG FOOD]**
- (ii) **the Tenants close the Property because the Tenants’ trade from the Property is demonstrably materially adversely affected due to a Force Majeure Health Event; or**
- (iii) **the Tenants close the Property because the majority of other Lettable Units at the Centre close due to a Force Majeure Health Event and the Tenants’ trade is thereby materially adversely affected,**

the yearly rent for the time being payable under Clause 3.3.1 of the Lease shall be suspended from the date the Tenants close the Property to the general public until the earliest of (i) the date that the Tenants re-open the Property to the general public; (ii) the date that the Force Majeure Health Event has ended or is deemed to have ended

Rent cesser continued – risk sharing

“**Coronavirus**” means severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)

“**Coronavirus Outbreak**” means any Associated Person being confirmed as having tested positive for Coronavirus.

“**Coronavirus Period**” means any period of time during which the Tenant is not occupying or using the Premises for the Authorised Use as it ordinarily would, as a result of:

- (a) the Tenant using reasonable endeavours to comply with Government Instructions; or
- (b) the Tenant using reasonable endeavours to mitigate a Coronavirus Outbreak.

- Rents during a Coronavirus Period

- The Tenant shall only be required to pay **50% (fifty percent) of the Principal Rent and Service Charge** during any Coronavirus Period subject to the terms of this clause 3.2. **[NOTE – INSERT EXPRESS OBLIGATION ON LANDLORD TO MINIMISE SERVICES]**
- The parties shall act reasonably in agreeing the duration of a Coronavirus Period and any dispute relating to the commencement, duration or conclusion of the same shall be referred to Arbitration.
- **During any Coronavirus Period any references in this lease to Principal Rent or Service Charge shall be references to the Principal Rent or Service Charge as reduced by this clause 3.2. [BREAK CLAUSE RELEVANCE]**

Landlords responses

- Get lost! Why should I bear all the risk?
- How about some more rent free?
- How about we re-gear/extend the term in exchange
- OK but not at 100% rent reduction – let's share the risk
- OK but I need a cap on how long the rent cesser can run for and right to end
- OK but not a rent cesser but a rent deferment

Cap on cesser or recission

Coronavirus: the disease known as coronavirus disease (COVID-19) and the virus known as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

Use Prevention Date: the date on which a Use Prevention Measure takes effect.

Use Prevention End Date: the date which is five working days from and including the date on which the Use Prevention Measure ceases to take effect.

Use Prevention Measure: any mandatory measure imposed by the Government for the prevention or delay of the spread of Coronavirus or any other epidemic or pandemic disease which requires:

- a) the Tenant not to use the Premises (or any part of it) for the use referred to in clause 4.14 of this lease; or
- b) the Landlord to prevent or restrict access to the Premises for the Tenant (including its employees and customers) so that the Tenant is not able to use the
- c) **7.4 If the Basic Rent is suspended under clause 7.1 and the Use Prevention End Date has not occurred by the date specified in clause 7.1(b), being a 6 month longstop date then either party may at any time terminate this lease by giving notice to the other provided that that notice is served before the Use Prevention End Date. OR JUST RENT CESSER END? AT TENANTS DISCRETION?**

Other lease clauses

Repair and Cleaning

- To repair the Property in good repair and condition ETC.....**PROVIDED THAT the Tenant is not in breach of its obligations under this clause 1.1 during any Covid 19 Rent Cesser Period and instead the obligations in this clause 1.1 will resume at the end of the Covid 19 Rent Cesser Period with immediate effect**

Decoration

- As often as may be reasonably necessary and also in the last 12 months of the Term to decorate the Property ETC..... **PROVIDED THAT the Tenant is not in breach of its obligations under this clause 1.2 during any Covid 19 Rent Cesser Period and instead the obligations in this clause 1.2 will resume at the end of the Covid 19 Rent Cesser Period with immediate effect.**

YIELDING UP AT TERM EXPIRY? AGREEMENTS FOR SURRENDER?



Other Lease Clauses

Break Clauses – Pre-conditions

- [1.1] the Tenant has given up occupation of the Property and handed back the Property free from all third party interests and with vacant possession
- **Provided that Tenant shall not be in breach of his obligations under clause [1.1] during a Covid 19 Rent Cesser Period notwithstanding that the Tenant has not complied with clause [1.1] The Landlord will following a request by the Tenant that should the Covid 19 Rent Cesser Period end after the Break Date grant a licence at no cost to the Tenant for a reasonable period of time following the end date of any Lockdown Period to allow the Tenant to enter the Property to remove its property and comply with the obligations in clause 7.2.2.**

Keep Open Clauses – Turnover Leases

- **Expressly include carve out for Coronavirus events**

New stores and Pre-lets

- Agreements for Lease
- Delay or Recission – akin to a closed window clause
- Force Majeure where works involved – Tenants Fit out
 - Consider making it expressly refer to coronavirus now
 - as this is an known condition therefore an existing/standard clause may not cover you

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