THE WORLD OF COVID-19 & LOCKDOWNS: UPDATE FOR (CREDITORS OF) CORPORATIONS

CIVIL WATCH – PRACTICE NOTE

As part of Goldsmith Chambers' Civil Watch series, Stephen Willmer, a practitioner within the Civil Team, provides an update on insolvency proceedings for corporations and their creditors.

INTRODUCTION

1. As many will have discovered over the last year, the legislative response to Covid lockdowns has been hostile to creditors owed money by corporations. It has also been hostile to landlords, but that is perhaps a briefing note for a different day.

2. In common with other areas of the economy – furlough payments in place of mass redundancies, for example – the government has attempted to impose a kind of legislative glacier over certain types of what ordinarily we would consider to be insolvency scenarios, in order to preserve a pre-lockdown *status quo*. This has been nowhere more apparent than in the difficulties facing creditors who might otherwise petition to wind-up firms owing them money: the legislature is unenthusiastic about the prospect of the extinction of a large part of corporate Britain and if that brings hardships to others to whom insolvent or delinquent corporates owe money, this is a feature rather than a bug.

3. In broad terms, winding-up a debtor firm has, therefore, in the last year or so, required creditors to satisfy the court that the debtor is not a debtor *due* to Covid. It might be thought that this must mean 'lockdowns', but in fact the legislation has tended to specify the virus rather than the policy response to it.

4. In other words, if the debtor firm could persuade the court that but for Covid it would have made good on its debts, then the petitioner will have wasted his time and money.

5. The ambit of this test was considered by Insolvency & Companies Court Judge Barber even *before* the Corporate Insolvency & Governance (CIG) Act 2020 – this being the government's primary legislative response to lockdowns as they affect firms – was enacted. In Re. A Company (Application to restrain advertisement of a winding-up petition) [2020] EWHC 1551 (Ch), in which judgment was given on 16th June 2020, the court granted the eponymous application.

6. It was held that, applying the likely terms of the, it was presumed, soon-to-be-enacted CIG Act (or Bill, as it then still was) there was no requirement on the debtor firm to show that Covid was a or *the* cause of its insolvency. Rather, the requirement was to show *some* financial effect on the debtor firm of Covid.

7. Applying that interpretation to the facts of the case, it was further held that attempts by the firm to raise funds and to restructure itself at the end of 2019 and the start of 2020 had been interrupted by the pandemic. Effectively, the court concluded that a firm which from before the first lockdown could not discharge a qualifying debt could nevertheless defeat a post first lockdown winding-up petition because of an effect of the virus on its prior fundraising.

8. Taken with what, soon thereafter under section 12 of the eventual CIG Act, was the *prima facie* suspension of directors' liability for wrongful trading, and the prohibition from section 14 on some suppliers of goods withholding their supplies from apparently insolvent debtor firms (yes, seriously), creditors, both prospective and actual, might at that stage have been forgiven for thinking that firms, by the summer of 2020, were immune from the ordinary and practical consequences of their financial distress, and that there was little point in anybody doing business with anyone else.

9. On the other hand, many practitioners will over the same period have seen the increased reliance, wherever possible, on personal guarantees. Indeed, the law of (un)foreseen consequences will almost certainly ensure an epidemic of personal insolvency – mostly of SME company directors who have given such guarantees – down whose road the can of corporate insolvency and delinquent behaviour will be kicked.

10. One supposes that the third-order consequences of the legislative glacier will therefore, eventually, be a refusal, as increasingly lessons are learned by directors, to give guarantees. In which case, insolvent firms will do what firms prevented from trading ought in the first place to have done: be wound-up.

11. And, as with the ever-extending termination date of the furlough scheme, to which ministers have for obvious reasons become attached, there is no sign of any legislative intention to melt the protective glacier around corporates. Putting aside, then, the inevitable incentives to bad behaviour that the above-mentioned measures create, the current position is that on 26th March 2021, the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 (2021/375) came into force and, as such, the protective glacier has been extended as follows:

    A) Directors remain prima facie immune from liability for wrongful trading, until 30th June 2021;

    B) Some suppliers remain forbidden to terminate their contracts of supply where their counterparty may be insolvent, also until 30th June 2021;

C) Winding-up petitions under sections 123 (1) (a) and 124 of the 1986 Insolvency Act, and based on a written demand, may not be presented to the court, also until 30th June 2021.

12. Doubtless, there will be a yet further flurry of extending statutory instrumentation in just under 90 days' time… .

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