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ARTICLE

Developments in the UK as a Result of COVID-19

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Synopsis

At the time of writing, the long-awaited Corporate Insolvency and Governance Bill (the 'Insolvency Bill') is yet to be published but a number of recent announcements by the UK Government have indicated what we can expect the legislation to include.

There have also been some interesting case developments and announcements which we cover in this article.

Proposed reform of insolvency law

In reaction to COVID-19 and in an attempt to provide 'extra time and space' for companies to 'weather the storm', on 28 March 2020, Alok Sharma, the Secretary of State for The Department for Business, Energy and Industrial Strategy announced certain proposals for change to UK insolvency law.[1] Three of the four points below reflect the proposals made by the UK Government in 2016 on which a consultation was carried out in 2018. These proposals may be amended to address the COVID-19 pandemic however the precise scope of the proposed changes will only become clearer once the draft legislation is published.

- *Temporary suspension of the wrongful trading provisions in the Insolvency Act 1986* ('IA') which will mitigate the risk of personal liability for directors who are trading after the point at which they knew or ought to have concluded that there was no reasonable prospect that the company could avoid going into an insolvency process. This temporary suspension will have retrospective effect from 1 March 2020 and is said to relieve the pressure on directors to put a company through an insolvency process prematurely in the current economic climate. This confidence to continue to trade will have to be balanced by the fact that directors' duties prescribed by the Companies Act 2006 and the fraudulent trading provisions in the IA remain in force. Given the potential uncertainty this brings, we consider that directors will continue to require detailed legal advice when considering the options for companies steering their way through this crisis.
- *Legal moratorium* for companies to relieve them from creditor pressure while they consider options for rescuing or restructuring companies. The eligibility criteria for this remain unclear but the company is likely to be assigned an independent 'moratorium monitor'. Whether the role of monitor can only be undertaken by a licensed insolvency practitioner has yet to be clarified.[2]
- *Prohibition on enforcement of termination on insolvency clauses* in contracts. This is to ensure that companies contemplating a restructure can continue to receive goods, supplies and services, which may not necessarily be essential, but are required for the continuation and rescue of the business. The 2016 proposals would suggest that this prohibition may only apply while the moratorium referred to above is in place. It is expected that 'supplies' will include intellectual property and software licences. However the detail will not be known until the draft legislation is published.
- *New formal restructuring plan* which will bind all creditors of a company. The proposal is for this to be a flexible restructuring plan to sit alongside the existing company voluntary arrangement and scheme of arrangement frameworks. Despite the views of many of the respondents in the 2018 consultation, the UK Government remained firmly of the view that this proposal was necessary to support company rescue and fill a gap. The proposed restructuring plan is expected to allow cross-class cram-down of creditors, which will be a significant step.

On 23 April 2020 the UK Government added further measures to be implemented in the Insolvency Bill to

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1 https://www.gov.uk/government/news/regulations-temporarily-suspended-to-fast-track-supplies-of-ppe-to-nhs-staff-and-protect-companies-hit-by-covid-19 .

2 https://www.gov.uk/government/consultations/insolvency-and-corporate-governance.

'protect the UK high street from aggressive rent collection and closure'. A temporary ban is imposed on the use by landlords of statutory demands between 1 March 2020 and 30 June 2020 and on presentation of winding up petitions from 27 April 2020, through to 30 June 2020. These bans will only be implemented where a company cannot pay its debts due to COVID-19. The UK Government also provided tenants with more breathing space to pay rent by preventing landlords from using Commercial Rent Arrears Recovery unless they are owed 90 days of unpaid rent.[3] There already appear to be examples of these measures having an effect in practice. Two landlords have now withdrawn their winding up petitions presented against a casual dining company which were presented ahead of the measures taking effect. On 29 April, an injunction is said to have been granted against a landlord (in a case in which the parties cannot be identified due to a privacy order) who had threatened to wind up its tenant. The court blocked the petition after assessing the UK Government measures.

Emergency measures

Certain emergency measures have been introduced by the UK Government to 'ensure businesses are kept afloat so that they can continue to provide the jobs our economy needs beyond the coronavirus pandemic'.[4] The intention is to provide companies with the best possible chance to emerge intact on the other side of the pandemic. These include:

- Coronavirus Business Interruption Loan Scheme ('CBILS') – available to UK-based trading businesses with an annual group turnover of no more than £45m who have been adversely affected by COVID-19. The lender is provided with a government-backed, partial guarantee against the outstanding balance of finance to encourage more lending. Loans have a maximum value of £5m, available on repayment terms of up to six years. The UK Government makes a payment to cover the first 12 months of interest payments. Personal guarantees cannot be required for facilities under £250k.
- Coronavirus Large Business Interruption Loan Scheme ('CLBILS') – similar to the CBILS but available to businesses with an annual group turnover of more than £45m. A government-backed guarantee of 80% to banks to enable them to make loans of up to £25m to businesses with a turnover of between £45m and £250m and loans of up to £50m to businesses whose turnover is over £250m, available on repayment terms of up to three years.
- Bank of England's COVID Corporate Financing Facility ('CCFF') – a facility administered by the Bank of England on behalf of the UK Government to purchase commercial paper to bridge cash flow issues as a result of COVID-19. Those eligible are companies who make a material contribution to economic activity in the UK and were of sound financial health prior to the pandemic. Evidence of this criteria will be through a short term credit rating of at least A3 or a long term credit rating of at least BBB-/Baa3. The minimum issuance is £1m.
- Future Fund – convertible unsecured bridge finance of between £125k and £5m for a term of up to three years. The funding must be matched by private investment of at least 50-50. This scheme is available to unlisted UK registered companies that have raised at least £250k from private investors in the last five years.
- Bounce Back Loan – the most recent of the measures – a new 100% government backed loan scheme for small businesses where they will be able to borrow between £2k and £50k and access the cash within days. Loans will be interest free for the first 12 months and businesses can apply online through a short and simple form.
- Coronavirus Job Retention Scheme ('JRS') – from 20 April 2020, employers in the UK were able to access the HMRC online portal to apply for a grant to cover 80% of the wages (up to a total of £2,500 per month) of employees who are not working but who are 'furloughed' and kept on payroll, as opposed to being dismissed/made redundant. The claims will be backdated to 1 March 2020. The aim is for these claims to be approved and paid within a period of 6 working days.

Developments in court procedure and case law

Since the introduction of the JRS, the courts of England and Wales have already heard two urgent cases dealing with the application of the JRS and insolvency law.

In the matter of Carluccio's Limited (in administration)[5]

The company entered into administration on 30 March 2020 and the administrators sought urgent directions

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3 https://www.gov.uk/government/news/new-measures-to-protect-uk-high-street-from-aggressive-rent-collection-and-closure.
4 https://www.gov.uk/government/news/new-measures-to-protect-uk-high-street-from-aggressive-rent-collection-and-closure.
5 [2020] EWHC 886 (Ch).

from the court over their ability lawfully to use the JRS while they continued in their attempts to sell the business as a going concern. The administrators had written to each of the employees asking if they wished to take part in the JRS. The majority agreed, others declined, while the rest did not respond. The administrators also sought clarity on whether they would be able to avoid incurring the liabilities associated with the adoption of employment contracts for those employees who had not responded, without having to make them redundant within 14 days of the date of administration.

Mr Justice Snowden held that the administrators could use the JRS if there was a reasonable likelihood that those employees would be returning to work. Further, it was only as and when the administrators made an application under the JRS in respect of employees or made a payment to the employees under their contracts, that this would amount to an adoption of the contracts of employment. This would enable super-priority payments to be made to those employees under paragraph 99(5) of Schedule B1 of IA.

In the matter of Debenhams Retail Ltd (in administration)[6]

In the same week, Mr Justice Trower was asked to consider and apply the decision of Mr Justice Snowden. The question was whether the employment contracts for those employees who had already been furloughed prior to the appointment of the administrators would be considered to have been adopted by the administrators if those employees remained furloughed and the administrators took no further action except to pay them the amounts provided by the government under the JRS.

The administrators sought further clarity that if those contracts were deemed as adopted, the amount payable would be capped at the amount claimed under the JRS scheme i.e. 80% of wages for the furloughed period up to a cap of £2,500 a month.

Mr Justice Trower followed Mr Justice Snowden's decision and held that it was likely that the acts of participation in the JRS and payment of the furloughed employees, would be considered an adoption of those employment contracts by the administrators. The Administrators appealed but the appeal was dismissed.

These are just two examples of how the Insolvency & Companies Court had to grapple with issues arising out of the COVID-19 pandemic. All insolvency hearings are now being conducted remotely unless this is determined by the judge as inappropriate, for whatever reason. The decision in the recent case of *In the Matter of One Blackfriars Ltd*[7] has shown the courts' reluctance to conclude that a remote hearing is inappropriate; the parties were ordered to continue to prepare for trial and explore the technological options available to facilitate a remote trial.

There are also logistical and practical issues for the courts. On 6 April 2010, the temporary Insolvency Practice Direction ('TIPD') was introduced to supplement the Insolvency Practice Direction and provide workable solutions to the need for courts to operate with limited staff and resources after the UK Government introduced social distancing rules in March 2020. The TIPD will remain in force until 1 October 2020 and includes much needed guidance on:

– E-filing appointment documents in an administration:
  - Notices of intention to appoint an administrator by either a company or its directors and notices of appointment by a qualifying floating chargeholder ('QFCH'), company or its directors shall all be treated as delivered to the court at the date and time recorded in the Filing Submission Email received by those filing. However, this is only if e-filed on days the court is open for business and between the hours of 10am and 4pm.
  - Any notice e-filed outside of this time period shall be treated as delivered to the court at 10am on the day that the courts are next open for business.
  - A notice of appointment by a QFCH can be filed outside of normal court opening hours however the out of hours procedure set out in Rules 3.20 to 3.22 of the Insolvency Rules 2016 must be followed.
– Making and administering statutory declarations in insolvency proceedings – where Schedule B1 of the IA requires a person to provide a sworn statutory declaration (e.g. when swearing a notice of intention to appoint an administrator), this is now possible even without this being conducted in the physical presence of the person authorised to administer the oath if:
  - The person making the statutory declaration does so by way of video conference with the person authorised to administer the oath;
  - The person authorised to administer the oath attests that the statutory declaration was made in this manner; and

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6 [2020] EWHC 921 (Ch).
7 [2020] EWHC 845 (Ch).

- The statutory declaration states that it was made in the manner referred to above.

The UK Government is constantly adapting measures in an attempt to balance liberty and necessity to maximise the survival of businesses. It will be interesting to see whether the detail in the Insolvency Bill achieves this balance.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

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