4 STONE BUILDINGS

Litigation in the Time of Covid-19

Legal issues in commerce, finance and insolvency

Interim Update (25 September 2020) to the 5th Edition (3 September 2020):

Latest developments on the Corporate Insolvency and Governance Act 2020, company law, banking and financial services, civil procedure, remote litigation and offshore litigation in Bermuda, the British Virgin Islands and the DIFC

4 Stone Buildings, Lincoln's Inn, London WC2A 3XT. Tel: +44 (0)20 7242 5524

clerks@4stonebuildings.com

www.4stonebuildings.com

Preface

We at 4 Stone Buildings are pleased, and proud, to share with you the fifth edition of our e-book, '*Litigation in the time of Covid-19: Legal Issues in commerce, finance and insolvency*'. Over the last six months there have been dramatic changes in the legal and business world in this jurisdiction and beyond.

Our e-book identifies many of the novel legal issues that have arisen in our core areas of practice and that we have encountered over this period. Our aim is to offer an accessible, practical and up to date analysis of these issues which we hope will be of use to our clients. The rate of change and volume and complexity of the issues are illustrated by the size of the e-book and fact that it is already in its fifth edition.

The e-book has been a joint project by the members of 4 Stone Buildings. Almost every member of Chambers has been involved in the e-book project in some way. It is testament to our collaborative approach and the strength of our remote working systems that we have been able to produce this publication during what has been, in any event, a very busy period.

We are continuing to work on new material which will form part of subsequent editions. The latest edition of the e-book can always be found on our website at https://4stonebuildings.com/publication/litigation-covid-19/.

If you would like to be notified by email when each new edition of the e-book is released, please email us at ebook@4stonebuildings.com.

Feedback will of course be welcome, just as we will always be pleased to give you our help with any issues on which you may wish to consult us.

George Bompas QC, Head of Chambers, 3 September 2020

Postscript, 25 September 2020:

The 5th edition has benefitted from an interim update to the Corporate Insolvency chapter on 25 September 2020, following the approval of SI 2020/1031 Corporate Insolvency and Governance (Coronavirus) (Extension of the Relevant Period) Regulations 2020. This new Regulation extends the "relevant period", which was due to end on 30 September 2020, with effect from 29 September 2020.

Table of Contents

Disclaimer

This document has been produced collaboratively by members of 4 Stone Buildings to provide a useful starting point for legal and insolvency professionals. The content of this document is provided for information purposes only and does not constitute legal advice. You are strongly advised to obtain specific advice to address your own circumstances.

While the authors have made every reasonable effort to ensure the content of this document is accurate and up to date, no responsibility for the accuracy of the contents is assumed by the members of 4 Stone Buildings, and liability for relying on any of the views expressed is excluded.

If you do need advice on any particular issue or require representation, please contact the clerking team to instruct our barristers on 020 7242 5524 or clerks@4stonebuildings.com.

For more information on the areas in which 4 Stone Buildings specialises, please click here.

Section One: Contracts

George Bompas QC, Alastair Tomson, Andrew Rose, Zara McGlone ©

Last updated: 22 July 2020

INTRODUCTION

At the heart of most commercial relationships is a contract. The pandemic is likely to have a significant effect on parties' ability, or willingness, to meet contractual obligations which they agreed to in more normal circumstances. In this section we therefore examine some of the key issues facing contracting parties as the pandemic and its effects continue.

We start by considering the effect on parties who were in the process of negotiating a contract when the pandemic struck, including the circumstances in which an enforceable contract may have come into being even if all its terms have not been agreed; and the possible remedies available to parties who have made payments or rendered services in anticipation of concluding a contract where negotiations have now broken down.

For parties who are already in a contractual relationship, the present circumstances may lead one or more of them to seek to adjust certain of the terms of the agreement, unilaterally or by further agreement. Having discussed the key relevant considerations we go on to look at economic duress: given the severe economic pressure on many parties who are in the process of renegotiating contracts, what might make an unfair contractual variation voidable for duress?

As a consequence of the pandemic many parties will have found themselves unable to perform their contractual obligations, and unable to renegotiate them, which raises a number of important questions: in what circumstances should a non-defaulting party rely on contractual termination clauses, and what is the relationship between those clauses and common law termination rights? Will lenders be able to rely on material adverse change clauses as a result of the pandemic? In what circumstances can a party in default rely on a *force majeure* clause to save it from the usual consequences of breach of contract? And might the pandemic have caused the frustration of the parties' contract, and if so what follows?

We address all of these questions, and make practical suggestions in relation to them, below.

One topic which we have not covered in this edition of the e-book is business interruption insurance, which indemnifies a business for losses arising from damage to property or a non-damage peril. Many businesses which have been affected by the pandemic have made claims under business interruption policies or are considering doing so. But there is uncertainty for insureds and insurers about whether the wording of widely used policies covers the novel peril

of the pandemic and about whether insured can establish the causal link between the peril and their losses which their polices require.

In order to bring some clarity to these coverage and causation issues, the FCA (as the conduct regulator for insurance) and certain major insurers have agreed to participate in a test case which started in the Commercial Court in July 2020 as a Financial List case. The Court will be asked to decide how various widely used sample policies respond on assumed facts. We hope to publish an analysis of the court's decision in a future edition of this e-book. Those wishing to follow the progress of the test case may access a full set of materials on a dedicated page on the FCA website at: https://www.fca.org.uk/firms/business-interruption-insurance.

In the meantime, the FCA has issued guidance for insurers which came into effect on 17 June 2020. The guidance broadly (i) requires insurers to check which policies may be affected by the test case, (ii) requires insurers to communicate with policyholders about the test case and (iii) explains how claims should be handled by insurers while the test case is ongoing.

SPECIFIC ISSUES

1. What options may a party have if negotiations for a contract break down due to the pandemic?

As we discuss in later parts of this section, parties to contracts which have been affected by the pandemic will be considering how they might negotiate their way out of problems it has caused for their performance and what protections they have under the terms of the contract or under the general law of contract. But what if the pandemic has caused negotiations to hit a brick wall, and an anticipated deal had not been done, whether because of logistical challenges (e.g. an inability to do due diligence on a property by conducting a site visit) or a change in the business rationale for the deal? This section highlights recent caselaw which parties and their advisors will wish to have in mind in this situation.

As a starting point, it is always important to interrogate the premise that no deal has been done – i.e. that no enforceable contract has been formed. Could there be an enforceable oral agreement, even if the deal has not been documented? Is there a concluded agreement in respect of some aspect of the overall anticipated transaction but not others? The answers to these questions will all of course depend on a detailed examination of the evidence but market practice may also be important – for example, it may be the case that in the particular market contracts are formed by oral agreement which is subsequently documented. The legal principles as to whether or not a binding contract has been concluded were restated by the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14 at [45]:

> "*The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement*."

The force of the final sentence from that passage in *RTS Flexible Systems Ltd*, particularly in circumstances where parties proceed on the basis that there is a contract between them, is clear from the Supreme Court's recent decision *Devani v Wells* [2019] UKSC 4; [2020] AC 129, in which the court, overturning the Court of Appeal, allowed an estate agent to recover an orally agreed commission. The Court of Appeal had held that the lack of any express mention of the trigger for the payment of commission in the short conversation between the seller and the estate agent made the agreement too uncertain to be an enforceable contract. But the Supreme Court considered that the lack of express mention of the trigger did not matter because, absent that, the reasonable person would understand that commission would be payable on the "usual terms", i.e. out of the proceeds of any sale (Lord Kitchin JSC at [23]).

The Supreme Court considered that this result was open to it as a matter of interpretation, although it would have reached the same result by the implication of the payment trigger as an implied term. This approach is open to question, in that a case in which market practice fills in a gap which the parties have not addressed would appear to be textbook case for implication of a term. But for practical purposes the decision is a clear illustration of the court's willingness to use a variety of legal tools to uphold a deal which has been acted on, even if at first blush there appear to be gaps to be filled if the contract is to be made workable.

If a court decides that no contract has been concluded it is fundamental that a court will not force the parties to reach agreement, even if the parties have in some way committed themselves (perhaps in a preliminary agreement entered into before the main transaction) to seeking to agree. This was recently reaffirmed by the Court of Appeal in *Morris v Swanton Care & Community Ltd* [2018] EWCA Civ 2763. (The position is different where there is no issue as to whether a contract has been entered into at all, and the question is whether an "agreement to agree" as to future matters during performance is enforceable; this will depend in part on whether the parties have agreed objective criteria which the court can itself apply to decide the matter to be agreed, if agreement is not forthcoming.)

If the law of contract says that no contract has been concluded the law of unjust enrichment may none the less enable a party which has made payments or provides services in anticipation of an agreement is entitled to a restitutionary remedy. This is now a well-established type of unjust enrichment claim: see Goff & Jones The Law of Unjust Enrichment 9th Ed., chapter 16. There has been a series of recent cases which consider application of unjust enrichment principles in this context, including, for example: *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB); *AMP Advisory & Management Partners AG v Force India Formula One Team Ltd (in liquidation)* [2019] EWHC 2426 (Comm); and *Dowman Imports Ltd v 2 Toobz Ltd* [2020] EWHC 291 (Comm). The first of these cases, *MSM Consulting Ltd*, includes at [171] a useful restatement of the principles specific to this type of unjust enrichment claim which has been relied on in subsequent cases. In summary:

(1) The claimant's cost of demonstrating its skills to the defendant as part of bidding for the contract cannot generally be recovered.

(2) The court can impose an obligation where the defendant received an incontrovertible benefit in the knowledge that the services were not intended to be given freely.

(3) The court can however conclude that in the circumstances the risk should fall on the claimant.

(4) It may be just to impose an obligation if the defendant behaved unconscionably in declining to pay for a benefit received.

Many more claims of this kind may be expected in the wake of the pandemic. Often a claim of this kind is brought in conjunction with a contract claim, and it can be a valuable weapon to deploy in a dispute for negotiation purposes. The outcome of these claims is highly fact-specific, depending critically on why the work has been done or the payment has been made, why the negotiations for the contract have broken down, and what if any expectations the parties had about which would bear the risk if no contract resulted from negotiations. In respect of the last of these, market practice may be just as important as it can be in cases about the formation of contracts, discussed above.

2. What are the options and risks if parties wish to adjust their contractual arrangements due to the pandemic?

Anyone with a bank account or mortgage is likely to have personal experience of the pandemic changing the economics of a transaction, as banks move to adjust interest rates. Such changes in the economics of transactions, and in some cases the inability of one party or another to fulfil its contractual obligations, prompt parties to consider how to manage the contractual relationship. Sometimes the preferred option will be to bring the contract to an end by

exercising whatever termination rights which may be available (as discussed at question 4 below). But often there is the will to keep the contract alive in some way, but adjusted to meet the new circumstances. This section gives an overview of issues to be considered in that context.

As a starting point, it is not uncommon for contracts to provide one party or another with the ability to impose changes to the terms of a contract unilaterally, as in the case of the bank which changes the interest rate. Imposing changes on the other side will generally be less burdensome than having to negotiate them. But parties which seek to exercise such rights must appreciate the limits on their powers, which may be constrained, as with other contractual discretions, by considerations of rationality, good faith, etc. (see *Chitty on Contracts* 33rd Ed. at 22-039; and see also the judgment of Fraser J in *Bates v Post Office (No.3: Common Issues)* [2019] EWHC 606 (QB) at [756] to [759]).

If a party cannot achieve what it wishes unilaterally, co-operation will be needed. Indeed, in some contractual situations co-operation on the "way forward" will be expressly or impliedly required by the terms of the contract. As Lord Blackburn said in in *Mackay v Dick* (1881) 6 App Cas 251, 263 (referred to recently in the Privy Council case of *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531):

> "*I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.*"

The existence and extent of a duty to cooperate will depend on circumstances which include whether the contract is of a kind which ordinarily involves a duty of cooperation – or, more broadly, good faith. Thus a duty of good faith is an ordinary incident of a partnership agreement, and it would be unsurprising to find courts expecting high levels of cooperation between partners whose joint venture is affected by the pandemic. More broadly, a clear trend in recent cases since *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 All ER (Comm) 1321 has been to find duties of co-operation in contracts, apart from contracts such as partnership where duties of good faith are well established, which can be characterised as "relational": see e.g. *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216 and *Bates v Post Office (No.3: Common Issues)* [2019] EWHC 606 (QB). In the latter case, which was group litigation concerned with the contracts between the Post Office and sub-postmasters, Fraser J set out at [725] a helpful checklist of factors which on current state of the authorities point towards a contract being "relational", namely:

(1) no express terms preventing a duty of good faith being implied;

(2) a long-term contract, with a mutual intention of a long-term relationship;

(3) an intention for the parties' roles to be performed with integrity and fidelity to their bargain;

(4) a commitment for the parties to collaborate in performing the contract;

(5) the spirits and objectives of the venture being incapable of exhaustive expression in a written contract;

(6) the parties reposing trust and confidence in one another, but of a different kind to that involved in fiduciary relationships;

(7) a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty;

(8) a degree of significant investment by one or both parties; and

(9) exclusivity of the relationship.

Co-operation between the parties, whether or not mandated by the contract, may enable them to work through whatever problems the contract has got into and for the contract to be performed in accordance with its terms. Where, however, a party is unwilling or unable to maintain the current terms of a contract it may be necessary for the terms of the contract to be adjusted in some way if the relationship is to continue. The contract may contain machinery, for example in a *force majeure* clause or in a provision dealing with material adverse changes, which will enable one party to force the other to negotiate and agree the adjustment. Or it may be that both parties see adjustment as being in their separate commercial interests. In what follows the assumption is that the parties propose to agree an adjustment.

The most conceptually straightforward way in which the terms of the contract can be adjusted to the changed circumstances is a formal variation of the original contract. Whether the parties have agreed to a variation of their contract, i.e. a permanent adjustment to their contractual terms (subject to any future agreement) will depend principally on (i) whether, considered objectively, they intended permanently to change their terms (as opposed, for example, to temporarily suspending those terms) (ii) whether they have complied with any formal requirements which apply to variations of the particular contract and (iii) whether the adjustment to their terms is supported by what the law regards as consideration. If the parties in substance agree to dispense with the original contract and enter into a new contract then what has happened may be analysed as precisely that – not a variation but a new contract.

Sometimes the legal characterisation of the new arrangement will not much matter, although it may matter if there are any formalities (either under the terms of the original contract or as a matter of general law) which apply either to the valid variation of the original contract, to the termination of the original contract, or to the formation of a new contract. For example, the

contract may provide that the contract cannot be varied otherwise than in writing. It is clear that such contractual formalities will be effective (see *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119) and parties seeking to achieve a formal variation of a contract should therefore ensure that these are complied with.

Whether or not a contract requires formalities such as writing for variation, parties will be well advised to ensure that any variations are properly documented in order to minimise the risk of disputes. Otherwise they are at risk of leaving the relatively firm legal ground of a variation of contract for the murky waters of forbearance, waiver by estoppel and promissory estoppel. These doctrines have differing historical origins but for modern practical purposes they all mean that if the parties consensually depart from the terms of the contract it becomes difficult for one of the parties subsequently to perform a *volte-face* and insist that the original terms of the contract are performed. Generally, the parties' agreement to depart from the terms of the original contract (without meeting the formal requirements for variation) will only have the effect of temporarily suspending the contractual rights and obligations but reasonable notice will be required if a party subsequently wishes to revert the terms of the contract. But the ability of a party to insist that its counterparty should revert to the terms of the original contract may be lost forever if the circumstances have changed in the interim – for example, if in the interim it has become impossible or burdensome to perform the original contract.

3. When can a party rely on economic duress to challenge adjustments to contractual arrangements?

In response to the many challenges created by the pandemic, businesses may well be seeking to renegotiate the terms of their contracts. Some of these renegotiations will be taking place in circumstances where one of the parties may be struggling to survive and thus vulnerable to demands made by their counterparty to agree to certain changes in the contractual relationship.

In order to successfully challenge such changes by relying on economic duress, a party will need to show that an illegitimate threat has been made, and that it had no practical alternative to agreeing to the terms set out by the party making the threat.

There is some uncertainty about precisely how this doctrine operates in English law, but there are nonetheless a number of principles which can be drawn from the jurisprudence in this area.

The courts will take into account a range of factors in deciding whether there has been economic duress. These include the gravity of the threat, whether the alleged victim made any protest, and whether the alleged victim had any independent legal advice (see for example the words of Lord Scarman in *Pao On v Yau Liu Long* [1980] AC 614 at 635, and of Dyson J at [131] of *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 530).

For example, in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, the defendant shipbuilders were building a ship for the claimant. That ship was then going to be chartered to Shell, the oil company. The defendant shipbuilders demanded that the claimant pay a price increase of 10%. If the claimant did not pay the increased price, the shipbuilders would terminate the contract, and the charter with Shell would potentially be lost. It had only a few days to agree to this demand, and while it did pay the increased price, it did so under protest. The Court held that this represented a case of economic duress, although as explained below, it also found that the contract had been affirmed.

The first element of showing that there has been economic duress is to show that there has been an illegitimate threat. Whether this requirement is satisfied will of course depend on the facts of each case, and there is no rigid definition of the facts which may render a threat illegitimate. However, it seems that there must be a threat, as opposed to a mere warning of the potential consequences of refusing to agree to a demand.

In some cases, a threat to breach a contract unless a demand is complied with may be legitimate. A party may be experiencing genuine difficulties in performing its contractual obligations, due to increased costs as a result of complying with government guidance, for example. In those circumstances, further payment or some form of amendment to the contract may genuinely be necessary to keep the contract alive, and the party's threat to breach the contract if there is no such extra payment or amendment may be legitimate.

By extension, it seems that if a party is making a demand which it considers to be in some sense 'fair', that is unlikely to be considered illegitimate. Some caution should be exercised in this regard, though, given the uncertain role of good and bad faith in relation to economic duress.

More broadly, a threat to commit an act which is otherwise lawful is not in itself illegitimate, but it may be if it is accompanied by a demand which goes far beyond what would be normal or legitimate in commercial relationships (see in this regard *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216, where it was held that a demand coupled with a threat to commit a lawful act would be illegitimate if there were no reasonable grounds for the demand and reasonable people would not consider the threat to be a proper means of reinforcing the demand).

The second factor which needs to be addressed for a finding of economic duress is that of causation. This has been articulated in various contexts as meaning that the innocent party needs to show that it had no practical alternative but to agree to the demand in question, or that but for the illegitimate threat, it would not have agreed to the demand (*Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620; *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216). The precise interaction between these two articulations is not always clear, but it seems that absence of a practical alternative may be evidentially important for demonstrating causation. In any event, it appears to be the case that if the innocent party had a reasonable alternative to agreeing to the demand in question, it will not – or will rarely – obtain relief.

If there is a finding of economic duress, this will render the contract voidable – not void. in other words, a party which has entered into a contract under economic duress can either affirm or avoid the contract after the duress has ceased.

This means that if the innocent party has voluntarily acted in accordance with the contract, with a full knowledge of all the circumstances, it may be found that it has affirmed the contract. This was what happened in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; while the court found that there had been economic duress, it also found that because the claimant had paid the extra monies and taken delivery of the ship (and had not raised its objections at any later stage), it had affirmed the contract.

If the contract is to be avoided, it must be avoided as a whole.

It is not out of the realms of possibility that scenarios of potential economic duress may arise over the coming weeks and months as commercial parties struggle to stay afloat. However, the bar for successfully making a case of economic duress is high. There is a difference between economic pressure and economic duress, and it should not be presumed that there has been a case of the latter where commercial parties have simply been engaged in hard bargaining (see in this regard *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 530, and *Morley (t/a Morley Estates) v Royal Bank of Scotland Plc* [2020] EWHC 88 (Ch).

4. What are the key issues to be considered if parties wish to terminate due to the pandemic?

The economic disruption caused by the pandemic may be expected to prompt businesses to review their contractual arrangements. In rare situations, the disruption may lead the contract to be frustrated (as discussed at questions 9 and 10 below). Often parties will wish to keep a contract alive, if necessary (or advantageous) adjusted to the new circumstances. Options and risks for parties seeking to adjust their contractual arrangements are discussed at question 2 above. But bringing a contract to an end may also seem an attractive option, and the threat of bringing a contract to an end can bring focus to negotiations.

Parties therefore need to understand what termination rights may be available to them (and to their counter-parties) in the circumstances in which they find themselves, the remedies which may flow from their exercise, and how they can effectively be exercised. In doing so parties should seek legal advice. This section highlights some important aspects of these issues; it is not intended to be comprehensive or as a substitute for standard textbooks.

The common law will normally provide for a termination right in only limited circumstances (i.e. certain kinds of breach), with a right to damages for the "innocent" party to compensate him for the loss of bargain for which the law treats the party in breach as responsible. But parties are free to agree by contract a more or less comprehensive termination regime which

provides for a wider set of circumstances (e.g. reasonable notice, insolvency, one party making a certain assessment of how things are) in which termination may take place, for the formalities of termination, and for its consequences; and a well-drafted commercial contract will typically include such provisions. Parties should be aware of the impact that new legislation may have on insolvency-related termination rights: see the Corporate Insolvency section below.

The general principles of interpretation apply to termination provisions as much as to any other contractual provisions. There are also specific points relevant to termination provisions which need to be considered. For example:

The court is likely to be reluctant to conclude that one party is entitled to terminate a relatively long-term contract, unless the contract is clear as to the circumstances in which the party seeking to terminate is entitled to do so: see e.g. *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd* [2016] EWHC 1122 (TCC).

While provisions entitling a party to terminate in specified circumstances may be characterised as contractual discretions, the fetters which typically apply to the exercise of contractual discretions are less likely to apply, provided the specified circumstances apply: *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm); 167 Con LR 15; *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm). That is not to say that fetters cannot ever apply (see e.g. *Bates v Post Office Ltd (No. 3 Common Issues)* [2019] EWHC 606 (QB) [894]-[902]).

However, albeit the decision to terminate itself may not be subject to those usual fetters on contractual discretions, similar considerations of rationality, reasonableness, or good faith may nonetheless be in play, for example if (i) the availability of the termination provisions depend on the terminating party making a judgment on some issue before terminating (e.g. "If A concludes that X is the case he may terminate") or (ii) the contract gives the terminating party some choice about the manner in which it terminates. Thus in the *Bates* decision cited above the Post Office had a contractual right to terminate on notice of "not less than three months" (see [893]); this gave it a discretion to determine how long the notice period should be, which was fettered – it could not choose the notice period arbitrarily.

A party which is considering terminating needs to work out which rights may in the circumstances be available to it at common law and under the contract, how the rights need to be exercised, and what consequences would flow from exercising those rights. If the parties are using a standard form contract it may be reasonably clear what the termination options are under the contract and at common law. Thus the caselaw establishes at least certain features of termination under the ISDA Master Agreement, for example in relation to whether termination for anticipatory breach is possible and what notice must be given (see e.g. *Marme Inversiones 2007 SL v NatWest Markets plc* [2019] EWHC 366 (Comm) discussed in Firth, *Derivatives Law and Practice* at [11.122]).

But the task of working out what termination options are available may be less straightforward if a contract has bespoke termination provisions, which will require parties and their advisors

to undertake a careful iterative process, comparing the position at common law with the terms of the contract, and assessing the sometimes complex interplay between them. For example:

(1) On the one hand, the terms of the contract may affect the rights which would otherwise be available at common law (while it will be rare for the contract to exclude common law rights entirely: see e.g. *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27 at [28]-[29]). For example, the existence of a grace period to remedy a breach may prevent a common law right to terminate arising unless the grace period has been given: see e.g. *Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC* [2016] EWHC 525 (Comm) at [28]-[29].

(2) On the other hand, the common law, which is the inescapable background to whatever the parties may have agreed, may affect the interpretation of the terms of the contract. For example, express terms of the contract permitting termination for breach may be interpreted to apply only to breaches which would justify termination at common law: see e.g. *Dominion Corporate Trustees Ltd* [2010] EWHC 1193 (Ch), distinguished in *Looney v Trafigura Beheer BV* [2011] EWHC 125 (Ch).

Having determined what termination options are likely to be available, a party then needs to decide which of its rights can be deployed to greatest advantage. If a contractual termination regime regulates the situation in a sensible way which will allow the situation to be resolved amicably that may prove an attractive course. But if there is a potentially valuable damages claim if the party terminates at common law this course, albeit it may risk an expensive dispute arising, may overall be better.

At this point, it is critical to have well in mind the extent to which termination rights can or cannot be exercised in tandem. A recent case discussed below (*Phones 4u Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm); [2018] 2 All ER (Comm) 315) starkly illustrates how painful the consequences of getting this wrong can be. There is helpful guidance (from Leggatt J) on when contractual and common law termination rights can or cannot be exercised in tandem in *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm). Although the case concerned the interplay of, on the one hand, the common law right to terminate and, on the other, a contractual right, the guidance probably applies just as well to the exercise of different contractual rights:

(1) Where the consequences of the exercise of either right are inconsistent, an election is required, which means that the terminating party must "*clearly communicate its choice to exercise one of the rights rather than the other*": [53].

(2) Where the consequences of termination at common law and under a contractual provision are identical, "*it is not necessary to specify which right is being exercised to effect a valid termination*": [54].

(3) "*...in cases where the consequences of exercising two rights are different, but not inconsistent, it is necessary to make clear which right is being exercised or that both rights are being exercised; otherwise there will not be the certainty required for an effective termination*": [54].

Phones 4u Ltd (in administration) v EE Ltd [2018] EWHC 49 (Comm); [2018] 2 All ER (Comm) 315 illustrates what can go wrong when different termination options may be available but a party chooses to rely on one when terminating. EE's notice to Phones 4u that it was terminating under a contractual provision in a distributorship agreement which entitled it to do so if Phones 4u went into administration had the unwelcome consequence (for EE) of precluding EE from a very substantial damages claim which it might otherwise have had. In order to claim damages EE needed to allege a breach of contract on the part of Phones 4u before it terminated on grounds of the latter's entry into administration (which was not itself a breach). But Andrew Baker J decided that even if EE succeeded in establishing breach the substantial damages would not be available to it because the loss of the bargain for which EE claimed compensation was caused not by a breach by Phones 4u (as it would have been if EE had terminated at common law for repudiatory breach) but instead by EE's decision to terminate due to the administration under the contractual provision. The fact that on EE's case it could have terminated for repudiatory breach made no difference because as a matter of fact it had not done so. Instead, it had relied on a right to terminate which arose independently of any breach.

The analysis in *Phones 4u* (particularly at [73]-[76]) repays attention when termination options may be available. In that case the right to terminate if Phones4u went into administration was clearly a right which arose independently of any breach. Other rights to terminate will only arise if there is a breach, most obviously the right to terminate for breach at common law. But yet other rights to terminate provided for in a contract may arise in circumstances which may or may not involve a breach. For example, the contract may provide a party with a right to terminate if it concludes that the counterparty is in breach. If a party has so concluded, and its conclusion cannot be challenged on grounds of e.g. irrationality or bad faith, then it will validly have terminated under that provision whether or not the counterparty was in fact in breach. But can it also claim damages its loss of bargain? If the terminating party is entitled to terminate at common law and validly does so, in addition to relying on its contractual right, there is no reason why it should not also be able to claim those damages. But whether it is entitled to will depend on something different from the condition for the valid exercise of the contractual right (which was its own conclusion that there was a breach): it will depend on whether there was in fact a breach.

Having decided that one or more termination rights are available, and having decided which to rely on, the terminating party needs to get the formalities of termination right. This will involve complying with any contractual formalities which apply to the right being exercised. Although not all failures to follow formalities will make the termination invalid, they are all ammunition for the other side should a dispute arise. Notice of termination will always need to be clear,

and this is particularly important where different and inconsistent rights may be in play. At worst, a botched attempt by a party to terminate may itself amount to a repudiatory breach of contract entitling the counterparty to terminate at common law and claim loss of bargain damages: see e.g. *Regulus Ship Services Pte Ltd v Lundin Services BV* [2016] EWHC 2674; [2017] 1 All ER (Comm) 686 at [113] to [115].

5. What is a material adverse change clause?

Material adverse change ("**MAC**") clauses are aimed at addressing unforeseen or unpredictable events which may be difficult to capture specifically in documents. Such clauses are found in most types of lending transactions. They operate to relieve lenders of continuing obligations in circumstances where the borrower's financial circumstances have deteriorated to such an extent that its ability to repay is threatened. They are also often found in acquisition agreements, and mean that the purchaser can avoid proceeding with the acquisition if there is a material adverse change before the deal closes.

The definition of material adverse change is generally broad. As a result, its use in a particular agreement will depend on the nature of the transaction in question, where any MAC clauses will have been negotiated in specific terms. Generally speaking, however, a MAC clause may be concerned with material adverse changes in the business or operations of one of the parties, or market conditions more broadly. These in turn may affect the ability of the party to perform its obligations under the finance documents, or the validity or effectiveness of any security granted in connection with the finance agreement. It is perhaps not surprising that lenders will often wish to keep the definition of a material adverse change as broad as possible in order to protect their position, while borrowers may well desire the opposite.

There have been very few cases on MAC clauses before the English courts. Guidance on how such clauses will be treated is therefore limited. That said, the interpretation of a MAC clause will be undertaken in accordance with general principles of contract law.

Whether or not a material adverse change has taken place will be a question of fact.

The burden of proof in this regard falls upon the party which is seeking to rely on the MAC clause in question. It will often be difficult to be sure that a material adverse change has occurred, and so a party wishing to rely upon a MAC clause should exercise some caution; if it mistakenly asserts that a material adverse change has occurred when it has not, and acts on the basis of that mistaken assertion, it may be subject to a claim for breach of contract by the other party.

One case in which a MAC clause was considered was *Grupo Hotelero Urvasco SA v Carey Value Added SL & Anor* [2013] EWHC 1039 (Comm); [2013] Bus LR D45. That concerned whether a material adverse change had taken place in the financial condition of a borrower. If

it had, that would represent a default, which would entitle the lender to rescind a share purchase agreement and refuse to make further advances under a loan agreement.

The court noted that such a clause could not be triggered on the basis of circumstances of which the lender was aware at the time of the agreement – while it may seem self-evident, it is important to remember that there needs to have been a change in the borrower's circumstances. The change also needed to be material. It would be so only if it significantly affected the borrower's ability to repay the loan in question – that is, on more than a merely temporary basis. The borrower's financial condition was to be determined primarily by reference to its financial information, although other compelling evidence (such as a failure to pay bank debts) could be considered.

6. Might the pandemic entitle a party to rely on a material adverse change clause?

The answer to this question necessarily depends on the terms of the MAC clause and the specific circumstances of the parties. A MAC clause which refers to a deterioration in a company's business prospects may be more easily triggered by the pandemic and associated government measures than one which requires a proven deterioration in the company's financial position.

For MAC clauses in the latter category, it may well be the case that such a material adverse change is the result of the pandemic, especially for businesses in the retail and hospitality sectors, but simply citing the pandemic as a change will not suffice. In this regard, it is worth noting that the events which gave rise to the *Grupo Hotelero* case mentioned above took place against the backdrop of the 2007-2009 financial crisis. That crisis was only relevant, however, insofar as it played a part in the deterioration in the borrower's financial condition.

7. What is a *force majeure* clause?

Most modern commercial contracts contain a clause which aims to protect the parties from a claim for breach of contract if they are unable to perform their obligations as a result of an event or class of events, generally beyond their control. Such clauses are generally referred to as *force majeure* clauses, even if they are not expressly labelled as such, and typically provide that if a trigger event occurs the party seeking to rely on the clause can suspend performance for the duration of that event; and in some cases provide for the termination of the contract.

English law, as distinct from some other legal systems including French law, from which the term is derived, does not have a freestanding doctrine of *force majeure*: there is no statutory or common law basis for the operation of *force majeure* to protect a non-performing party. *Force majeure* clauses are simply a matter of contractual agreement. Consequently, their operation

and effect is to be determined by applying the normal principles of contractual construction to determine the parties' intention as to the true meaning and effect of the clause in question.

An example of a *force majeure* clause can be seen in the judgment in the recent case of *Entertain Video Limited v Sony DADC Europe Limited* [2020] EWHC 972 (TCC). In that case, the defendant sought (unsuccessfully) to rely on the following clause as a defence to a claim for breach of contract in circumstances where a warehouse owned and occupied by the defendant was burned to the ground during rioting and looting in August 2011:

> "*14.1 Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to industrial action (at either party), fire, flood, wars, armed conflict, terrorist act, riot, civil commotion, malicious damage, explosion, unavailability of fuel, pandemic or governmental or other regulatory action.*
>
> *14.2 The obligations of the party affected (but not the Term) will be suspended to the extent and during the time its ability to fulfil such obligations is affected by such force majeure.*
>
> *14.3 The affected party shall use all reasonable efforts to remedy the effects on its operations and resume normal operations as soon as is practicable.*" (see [25]).

The defendant claimed that the riots were the cause of the failure to perform, and were outside its reasonable control. That defence failed, the court holding that the cause of the inability to perform was not the rioting but the fire, and preventing the fire was within the reasonable control of the defendant. This case demonstrates that the court's chief concern is to construe the parties' agreement and hold them to it strictly.

The application of a *force majeure* clause will depend in every case upon the terms of the clause, and the specific factual circumstances. However, the following broad guidance can be given as to considerations and issues which arise.

In summary, a party seeking to rely on a typical *force majeure* must prove (the burden being on it): (a) that an event has occurred which is within the *force majeure* clause the parties have agreed; (b) that the party's non-performance was due to unforeseeable circumstances beyond his control; (c) that the trigger event prevented / hindered / delayed performance and was the sole cause of the non-performance; and (d) that there were no reasonable steps that the non-performing party could have taken to avoid or mitigate the event or its consequences.

Scope of the clause

The precise scope of a *force majeure* clause will depend on the contents of the agreement in question, and it should only be used in agreements when it is properly defined. Where it has been used by itself in an agreement, with no definition as to specific circumstances or reference to customary or trade usage, it may be void for uncertainty, and thus ineffective: *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR 280. For this reason, in practice modern commercial contracts will generally define the events or types of events which the parties have agreed will amount to *force majeure*.

Force majeure clauses are construed restrictively, since their effect is far-reaching, in that they allow a party to be excused from performance of its contractual obligations without any damages being payable. The event which is relied upon by the defaulting party must have been in the contemplation of the parties at the time of contracting. If it was not, even if the event falls within the literal meaning of the clause, it might be said that the clause has not been triggered, and that the contract has been frustrated (see e.g. *Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32).

Although *force majeure* clauses will be construed restrictively, recent Court of Appeal authority suggests that they are not to be construed *contra proferentem* (*National Bank of Kazakhstan v Bank of New York Mellon SA/NV, London Branch* [2018] EWCA Civ 1390; [2018] 2 CLC 103 at [50]). The wording used by the parties is therefore key. The court's priority will be to determine the meaning of the clause using ordinary principles of construction. It has been held that the proper approach to a *force majeure* clause is to interpret it by reference to the actual words used by the parties, not their general intention (*Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No 2) (The Marine Star)* [1996] 2 Lloyd's Rep 383).

Many phrases in *force majeure* clauses are boilerplate, and will have been subject to previous litigation, and so where there is a query about the scope of a specific phrase, it is worth checking whether that phrase has been the subject of a previous decision. This may provide useful guidance, although the factual matrix, the contemplation of the parties, and the circumstances of the inability to perform will always be important.

Unforeseeable events outside the control of the defaulting party

Force majeure clauses will often exclude foreseeable and/or foreseen events. The greater the foreseeability of an event, the greater the possibility that it was preventable or avoidable and thus within the control of the non-performing party. (see *Fyffes Group Ltd v Reefer Express Lines Pty Ltd* [1996] 2 Lloyd's Rep 171). Even where there is no express requirement to this effect, authority suggests that this principle of interpretation will be applied (see e.g. *Lewison on the Interpretation of Contracts*, 6th Ed., [13.04]).

Having said that, while the court will be astute to ensure that a party is not seeking to escape a bad bargain by contending for an interpretation that is, objectively speaking, commercially unrealistic, there is no reason in principle given the parties' freedom to contract on such terms as they wish why a *force majeure* clause could not be drafted to include within its scope a change in economic circumstances.

Force majeure clauses will be construed to exclude an event arising out to of the defaulting party's negligence, save where there are clear words evincing the contrary intent: *The Super Servant Two* [1990] 1 Lloyd's Rep 1.

Impact on ability to perform, and causation

In addition to defining the scope of the applicable trigger event or events, a typical *force majeure* clause will also state what the effect of the supervening event on the defaulting party's ability to perform needs to have been in order for the clause to be applicable. Typically some *force majeure* clauses will specify that the event in question must prevent performance; others will have the less onerous provision that it must hinder or delay performance.

Where the clause provides that the event must prevent performance, in order for the clause to apply, the non-performing party must show that performance is physically or legally impossible – not just that it is more difficult or onerous (*Tennants (Lancashire) Ltd v CS Wilson & Co* [1917] AC 495). This is a high threshold to meet, and "commercial impossibility" will not suffice. Hence a change in market or economic circumstances which affects the ease of performance or the profitability of a contract is very unlikely to be regarded as a *force majeure* event preventing performance, and the case law in this area shows that the court is wary of parties seeking to terminate a contract by way of *force majeure* when a change in economic conditions, the risk of which the parties are taken to have bargained for, simply mean that it is less commercially attractive (see *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm); [2010] 2 Lloyd's Rep. 668, *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm); [2019] 1 All ER (Comm) 34).

Where the clause provides that the event must hinder or delay performance, the threshold is lower, since those words have a broader scope, and may be satisfied if performance is simply substantially more onerous, but not impossible. So, a merchant who is "*unable to deliver unless he dislocates his business and breaks his contracts in order to fulfil one surely hinders delivery*" (*Tennants (Lancashire) Ltd v CS Wilson & Co* [1917] AC 495). A mere increase in the cost of performance is unlikely to be sufficient, although an "*astronomical*" increase might be (*Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] SGCA 1), although it should be emphasised that it is all a question of construction of the clause itself, and there is no reason in principle why parties could not agree that increased costs would be a relevant hindrance.

As to causation, on the current state of the authorities it seems it will be necessary to show that the supervening event was the sole cause of the non-performing party's inability to perform or its delay in performance (see *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018]

EWHC 1640; [2019] 1 All ER (Comm) 34). However, the Court of Appeal in *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102; [2019] 4 All ER 1145 suggested that a distinction might be drawn between the causation test applicable depending on the use to which the FM clause is being put: if it is being used as a defensive shield in relation to a claim for actual breach, then a "but for" test applies; however, where it is being used as a "contractual frustration clause" – i.e. in order to bring the contract to an end and prevent future obligations arising - then no such "but for" test applies.

The burden of proof in these situations will fall on the party which is seeking to rely on the *force majeure* clause. That party must first prove that the event in question falls within the scope of the clause, and secondly, that its non-performance was due to the trigger event relied upon.

Mitigation by non-performing party

There must also have been no reasonable steps which the non-performing party could have taken to avoid or mitigate the supervening event or its consequences. The contract will often include an express obligation to mitigate (such as clause 14.3 in the example from the *Entertain Video* proceedings quoted above), but this obligation may be implied in any case (see for example *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323). Therefore, a party will not be allowed to sit on its hands while relying on a *force majeure* clause – it will be expected to show that it took all reasonable steps to work around the supervening event, even if that renders performance significantly more costly and less profitable.

Notice or other procedural requirements

A party which wishes to rely on a *force majeure* clause may also need to comply with any formality/procedural requirements for doing so stated in the contract. Notice of its intention to rely on the clause may need to be given in a particular way, or it may have to append certification of the event or its consequences. It is important that such formalities are complied with (*Bremer Handels GmbH v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109), especially if they are articulated as a condition precedent rather than merely an intermediate term. However, if the notice or other procedural provisions are conditions precedent in relation to which failure to comply will deprive a party of the right to rely on the *force majeure* clause at all they will need to be brought sufficiently to the counterparty's attention; and if not conditions precedent the non-fulfilment may not necessarily deprive the party of their right to rely on the clause. Furthermore, the creditor seeking to rely on non-compliance in depriving the debtor of the right to rely on the *force majeure* clause may be held to have waived the breach by non-compliance, or be estopped from asserting non-compliance.

The Unfair Contract Terms Act 1977

It is arguable that s. 3(2)(b) of the Unfair Contract Terms Act 1977 applies to *force majeure* clauses. However, this is probably irrelevant because in almost all cases a *force majeure* clause

is likely to pass the reasonableness test (except, perhaps, in unlikely but theoretically possible circumstances such as where a clause allowed a party to rely on its own negligence as a relevant trigger event).

Consequences of successfully invoking a force majeure clause

The consequences of a *force majeure* clause, if successfully invoked, are most usually to suspend performance while the event continues or excuse liability for non-performance (usually while the event continues), rather than providing for automatic discharge of the contract. Clause 14.2 in the example from the *Entertain Video* proceedings quoted above is an example of such suspensory effect, albeit that the term of the contract itself was expressly not suspended, such that in practice, on that example, the continuation of the event for a sufficient period of time would in practice lead to the discharge of the obligation entirely. There may be an express right to terminate where a *force majeure* clause is invoked, and in theory there is nothing to prevent the parties from agreeing any consequences they so wish if the trigger event occurs.

Practical steps

In terms of practical steps which should be taken when advising a client in relation to the application of a *force majeure* clause, the following are particularly pertinent:

(1) Consider the precise wording of the clause, plus the contract as a whole and the circumstances which have arisen.

(2) Consider whether there are any alternative means of the defaulting party carrying out its obligations under the contract. Remember that increased costs of performance will not usually suffice to excuse non-performance or delay.

(3) Serve any notices as required in accordance with the provisions of the contract, and as soon as possible or (if advising a potential claimant) be alert to the consequences of the debtor of the obligation failing to do so and take steps to ensure no waiver or estoppel arguments could later be made.

(4) Keep a detailed contemporaneous documentary record: this may prove invaluable in relation to causation and mitigation in particular if the dispute ends in litigation.

8. Might the pandemic entitle a party to rely on a *force majeure* clause?

It follows from what has been set out above that the answer to this question is "possibly, depending on the terms of the *force majeure* clause, and the overall circumstances".

First, does the *force majeure* clause in question, on its true construction, encompass the pandemic? Some clauses refer expressly to pandemics, such as the clause in the *Entertain Video* proceedings referred to above. Where a clause does not refer expressly to pandemics, then there might be a "wrap up" provision which can be construed to cover a pandemic.

Secondly, when was the contract entered into? If it was entered into once it became apparent that the contracting parties could be affected by the pandemic, it might be argued that the pandemic was a foreseeable event, and that the parties accepted the risk that there would be disruption as a result. This argument may be all the stronger if no express provision was made, particularly if the word "pandemic" was not used at all in the *force majeure* clause.

Thirdly, what has the effect of the pandemic been? Depending on the clause in question, has it made performance of the party's obligations legally or physically impossible such that (if the clause so requires) performance has been prevented? The most obvious cause of impossibility is likely to be legal impediments which were introduced by the Government in response to the pandemic which in many cases will have rendered performance impossible because it would have been illegal. If the necessary test is a hindrance to performance, can that threshold be met? Could the debtor of the obligation have performed even if it was significantly more onerous or difficult to do so?

Fourthly, what mitigation steps has the non-performing party taken, and were they sufficient?

Fifthly, was the pandemic the sole cause of non-performance? For example, a business that was already in difficulties for other reasons and would not have been able to perform will not be able to rely on the pandemic as the cause of its breach.

Each case will, of course, be highly fact sensitive. However, some cases are likely to be relatively clear-cut: the social event, concert or party that has been cancelled because of the Government's social distancing rules being an obvious example. In those case, unfair as it may seem, unless performance can be made at a later date the consequence may well be that the paying party suffers a loss under the contract, not being able to sue for damages breach of contract as a result of the *force majeure* clause. Hence, in such circumstances, a payor may wish to consider whether an action based on frustration might be available so that restitution may be obtained under the provisions of the Law Reform (Frustrated Contracts) Act 1943 (see question 11 below), or to look to their business insurance policy to see whether the loss might be insured.

9. What is frustration?

Frustration of a contract is the contract's automatic discharge by reason of a supervening event for which neither party to the contract is responsible. What matters is that the supervening event makes fulfilment of the contract impossible, or radically transforms the performance obligation

from that undertaken at the outset. Where a contract is brought to an end in this way, the contracting parties will no longer be bound to perform their obligations and will thus be excused from liability for damages for any such non-performance.

The classic statement of the doctrine of frustration in English law is found in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696: "*frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.*"

This is a high threshold, and it is important to note at the outset that it is one which is often difficult to meet. In the words of Rix LJ in *The Sea Angel* [2007] EWCA Civ 547; [2007] 2 All ER (Comm) 634, the doctrine of frustration is "*not to be lightly invoked…there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances*".

This approach was reiterated in the recent decision in *Canary Wharf (BP4) T1 Limited v European Medicines Agency* [2019] EWHC 335 (Ch); 183 Con. LR 167, which also contains a helpful review of the authorities in this area.

When will a contract be frustrated?

The Court will take into account a range of factors in determining whether a contract has been frustrated. The need to adopt a multi-factorial approach to this question meant that the court in the recent case of *Natixis v Famfa Oil Ltd* [2020] 2 WLUK 330 was unwilling to summarily strike out a defence based on frustration.

Quite what these factors are will vary from case to case. However, they have been held to include: "*the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk as at the time of the contract, at any rate so far as these can be ascribed neutrally and objectively, and then the nature of the supervening event and the parties' reasonable and objectively ascertainable calculation as to the possibilities of future performance in the new circumstances*" (per Rix LJ in *The Sea Angel* [2007] EWCA Civ 547; [2007] 2 All ER (Comm) 634).

There is no limit to the different types of supervening event which may operate to frustrate a contract, although the case law has developed various categories of such events.

The first two of those mentioned below are perhaps most relevant for present purposes.

The first is where something has happened which renders the whole purpose of the contract obsolete. This was considered in the authorities known collectively as the 'coronation cases', which arose out of the postponement of King Edward VII's coronation at the beginning of the twentieth century, and which include *Krell v Henry* [1903] 2 KB 740, *Herne Bay Steam Boat*

Company v Hutton [1903] 2 KB 683, and *Chandler v Webster* [1904] 1 KB 493. Those authorities necessarily considered what the purposes of the contracts in question were, even though they had all been entered into against the backdrop of the coronation. Whether they were frustrated varied depending on whether the foundation of the contract was in fact the coronation or not. Therefore, where the sole purpose of a room hire was the letting and hiring of a view of the coronation procession, that contract had been frustrated by the postponement (*Krell v Henry*). By contrast, where a steamship had been hired both for the purpose of viewing a Royal Naval review and for "*a day's cruise around the fleet*", and the naval review was cancelled, the contract for hire was not frustrated (*Herne Bay Steam Boat Company v Hutton*): the postponement did not affect the substance of the hiring, but only the profit which the hirer hoped to make.

The second is sometimes known as supervening illegality, and arises where there has been a change in the law which makes it unlawful for one of the parties to perform their obligations under the contract. This was the case in *Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119. Shortly before the beginning of the First World War, the parties had entered into a contract for the construction of a reservoir within six years. In 1916, the contractors were required to cease work pursuant to a notice from the Ministry of Munitions, and did so. The water board argued that the contract was still binding, but the House of Lords held that the interruption created by the 1916 notice meant that the contract had become a different contract from that originally agreed, and that the contract had ceased to be operative.

In addition to these, a contract may be frustrated where its performance has become impossible due to the destruction of the contract's subject-matter, or where, in the case of a contract for personal services, the provider of those personal services has died.

However, the essential point as highlighted by the facts of these various cases is that in order for a contract to be frustrated, the supervening event must create the break in identity referred to by Rix LJ in *The Sea Angel* between the contract as entered into and its performance in the new circumstances. The established categories of supervening events simply provide examples of situations in which that has been the case. Frustration cannot be invoked either merely to relieve a party of a bad bargain, or where the contract itself provides in terms for the supervening event.

How does frustration interact with force majeure?

A *force majeure* clause which has been carefully drafted may displace the doctrine of frustration altogether. However, it is important to note in this regard that such clauses are interpreted narrowly by the court. Conversely, as we discussed above in this section, authority suggests that where an act occurs which, while falling within the wording of a *force majeure* clause, was not within the contemplation of the parties at the time of contracting, the contract may have been frustrated.

Provision for the event in question must be "*full and complete*" (*Bank Line Ltd v Arthur Capel & Co* [1919] AC 435), and it seems that it will be extremely difficult, if not impossible, to have a *force majeure* clause which completely excludes the operation of the doctrine of frustration.

In particular, if a *force majeure* clause provides that performance obligations set out in the contract will be suspended upon a particular event, the suspension may be expressed to apply only to temporary interruptions in performance, and so may not apply where performance is impossible or futile for the whole term of the contract.

10. Will the pandemic frustrate contracts?

In short – it will depend on the contract in question.

A sensible starting-point when considering whether a contract has been frustrated by the pandemic would be to consider the factors mentioned by Rix LJ in his judgment in *The Sea Angel* (quoted above), and whether the pandemic and its effects mean that performance of the contract is now something "*radically different*" from that envisaged at the time when the contract was entered into.

It will also be sensible to consider whether the situation maps onto one of the established categories of frustration set out above. For example, it may be the case that a hotel room was booked for a particular event, but the event was cancelled and the hotel closed, such that the purpose of the contract was rendered obsolete as in the 'coronation cases'. In this regard, however, it is important to note that the fact that one party no longer needs the services or product in the contract does not necessarily mean that the contract has been frustrated.

Alternatively, there may be a case of supervening illegality if performance of the contract was rendered unlawful by the provisions of the Coronavirus Act 2020 or the Health Protection (Coronavirus, Restrictions) Regulations 2020. Here, too, however, some caution will need to be exercised in order to determine whether performance would really have been unlawful in the circumstances.

Parties should remember that increased cost of performance or the hindering of performance does not mean that performance is impossible, and should also check the details of any *force majeure* clause in the contract, remembering that it will need to be "*full and complete*" in order to displace the doctrine of frustration.

11. What happens to a contract which has been frustrated?

Where a contract has been frustrated, it will be automatically brought to an end. The parties are excused from any further performance and are excused from liability for damages for any such non-performance, without any consideration of the parties' intentions or wishes. The severity of these consequences should not be underestimated, and it is unsurprising that the doctrine has been described as the "*nuclear option*".

What are the financial consequences on frustration?

This is addressed by the Law Reform (Frustrated Contracts) Act 1943 (the"**1943 Act**"), which effectively operates to prevent the unjust enrichment of either party to the contract at the other's expense.

Section 1(2) provides that sums which have been paid under the contract by one party before the frustrating event can be recovered, and that any sums which were payable before the frustrating event but unpaid do not need to be paid.

A party may also be able to recover expenses which it has incurred in performing its contractual obligations prior to the frustrating event, or to retain payment which it has received from the other party to the contract in order to reflect those expenses.

In addition, where a party has obtained a non-monetary 'valuable benefit' before the discharge of the contract, s. 1(3) provides that the other party may recover a sum to reflect that. Once the benefit has been identified, it will need to be valued by the court so that it can determine the appropriate sum to be recovered. In carrying out this exercise, the court will have regard to all the circumstances of the case.

Section 2(4) provides that where there is a part of the contract in question which can be severed from the rest of the contract and was wholly performed before the discharge, that part will be treated as though it were a separate contract which has not been frustrated.

Section 2(5) provides that the 1943 Act does not apply to four types of contract, namely charterparties, contracts for the carriage of goods by sea, contracts of insurance, and contracts for the sale of specific goods which perish.

It is in theory possible for parties to contract out of the 1943 Act by making provision for the consequences of a frustrating event, and it may also be possible to bring a common law claim in unjust enrichment where a payment has been made after the frustrating event.

12. Should you argue frustration?

The seriousness and permanence of the consequences of frustration, together with the need to show that the affected obligations are fundamental to the contract, mean that the courts will typically be reluctant to find that a contract has been frustrated. Parties should bear this in mind when considering whether to argue frustration, although it is inevitable that there will be circumstances where contracts have been frustrated by the pandemic and its effects.

More broadly, parties should bear in mind the serious consequences of frustration in circumstances where they may wish to maintain a commercial relationship with the other party to the contract. In this regard, it is worth noting the UK Cabinet Office note of 7 May 2020 mentioned at the beginning of this section (*Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*). That note asks parties to act responsibly and fairly in performing and enforcing contracts. While it has no legal force, it would be surprising if courts did not try to give some effect to the spirit of the note in relevant cases.

Section Two: Corporate Insolvency

Andrew de Mestre QC, Christopher Harrison, Nienke van den Berg, Edward Crossley, Albert Sampson, Guy Olliff-Cooper ©

Last full update: 2 September 2020
Interim update: 25 September 2020 *(to take account of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020)*

INTRODUCTION

The Corporate Insolvency and Governance Act 2020

The Corporate Insolvency and Governance Act 2020 (the "**Act**" or "**CIGA 2020**") is the most dramatic transformation of UK insolvency law since the Enterprise Act 2002. It effects important and fundamental changes in the corporate insolvency regime.

It can be found here.

Some of the provisions will not come as any surprise to practitioners. They have been on the cards since the Government consulted on its '*Review of the Corporate Insolvency Framework*' in May 2016 (here). However, the Government has accelerated the implementation of the review as part of its response to the coronavirus pandemic. These are permanent legal changes.

Other provisions are novel. The Government has created these as additional weapons to help businesses fight back against the pandemic's financial effects. These are temporary changes. These provisions were initially applicable until 30 September 2020, but have been extended (to a variety of dates between 30 December 2020 and 30 March 2021) by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020, which can be found here. It is noteworthy that the suspension of liability for wrongful trading has not been extended, and these provisions therefore cease to have effect on 30 September 2020.

The Act's overall aim and purpose is to support the development of the 'rescue' culture. Therefore, its specific and urgent objective, at this time of the pandemic, is to "*provide businesses with the flexibility and breathing space they need to continue trading … helping them avoid insolvency during this period of economic uncertainty*" (Explanatory Notes, para. 1: here).

CIGA 2020 has been brought to the statute books rapidly. The Bill was introduced to Parliament on 20 May 2020. It received Royal Assent just over a month later, on 25 June 2020, and the Act came into force on 26 June 2020.

Permanent changes and temporary changes

The permanent changes to the insolvency regime, implementing the 2016 review's proposals, are for:

(1) a new moratorium for financially distressed companies;

(2) a new restructuring plan; and

(3) provisions relating to termination clauses in supplier contracts.

The temporary changes are for:

(1) new rules relating to statutory demands and winding-up petitions; and

(2) the temporary suspension of the wrongful trading laws.

The topics addressed in this Corporate Insolvency section

Each of the topics referred to above is addressed in detail below.

The text below also addresses a number of additional topics that do not arise out of CIGA 2020, but which nonetheless will be important to companies facing financial difficulties.

By way of brief introduction to each topic:

(1) Moratorium: The Moratorium is a free-standing breathing space to enable companies to keep their creditors at bay while exploring the possibility of rescuing and restructuring their businesses. It does not have to be tied into any formal insolvency process such as an administration. CIGA 2020 creates the relevant provisions by inserting a new Part A1, with new Schedules ZA1 and ZA2, into the Insolvency Act 1986 ("**IA 1986**").

(2) Restructuring Plans: A Restructuring Plan enables a company in financial difficulties to enter into a court-sanctioned compromise or arrangement with its creditors or members with a view to surviving the difficulties. CIGA 2020 creates the relevant provisions by inserting a new Part 26A into the Companies Act 2006 ("**CA 2006**"). The provisions have some similarities to the current Part 26, CA 2006, dealing with schemes of arrangement, but also include important new concepts – including, notably, the ability to 'cram down' dissentient creditors and members.

(3) Termination clauses: CIGA 2020 prevents suppliers of goods or services from relying on the fact that a company has gone into an insolvency procedure for the purposes of terminating the contract under which the supply is made. The intention is to enable the company to carry on trading through the rescue and restructuring process, to increase the likelihood of a corporate rescue or a sale of the business as a going concern. The prohibition is not necessarily a blanket one. There is an attempt to strike a balance by allowing termination in some circumstances, particularly if hardship would be caused to the supplier. There is also a temporary exemption for 'small' suppliers during the circumstances of the pandemic.

(4) Statutory demands and winding-up petitions: The provisions in relation to statutory demands and winding-up petitions are temporary provisions, applying during the circumstances of the pandemic. They impose prohibitions on the use of statutory demands and restrictions on the presentation of winding-up petitions, mostly in

circumstances where the pandemic has had an adverse effect on the company's financial circumstances. The courts have already made important case law in this regard, even before CIGA 2020 came into force, by anticipating the legislation's retrospective effect. The cases are referred to below.

(5) Wrongful trading suspension: CIGA 2020 temporarily suspends the wrongful trading laws (i.e. s. 214 and s. 246ZB, IA 1986), during the immediate circumstances of the pandemic. Although the aim was that directors should not feel under pressure to close down a business when there might be a good chance that it can trade through its difficulties and survive, the Government has not extended the effect of these provisions, in contrast to certain other temporary parts of CIGA 2020 (which are addressed below).

(6) Administration: Some recent developments in the law relating to administrations have arisen out of the circumstances relating to the pandemic.

(7) Procedure: The courts have developed a number of procedural responses to the conduct of insolvency-related litigation in light of the pandemic.

Related materials

As noted above, CIGA 2020 can be found here.

The relevant page on the Parliamentary website (here) gives access to a wealth of related material, such as the Parliamentary debates, for those interested in the finer background.

For example, the Explanatory Notes are, as always, of some interest in identifying the Government's thinking, and are to be found here.

The Government has also published a series of Factsheets, here. These provide further detail and background to each of the matters that CIGA 2020 addresses, with a summary of what the Government intends the provisions to achieve.

A number of statutory instruments and practice statements have already been brought into operation to support some of the new provisions. These are referred to in the relevant parts of the text below. The main Insolvency Proceedings Practice Direction ("**Insolvency Practice Direction**") has been updated and can be found here. A new, supplemental, Insolvency Practice Direction relating to the Corporate Insolvency and Governance Act 2020 ("**CIGA 2020 Practice Direction**") deals with a few specific matters relating to winding-up petitions and moratoriums and can be found here. Finally, the Relevant Period (which is used in various provisions of the CIGA 2020) has been extended by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020, which can be found here.

Practical matters

Debtor companies, their creditors, their members, and their employees, are facing financial issues of great concern and complexity. CIGA 2020 seeks to ameliorate the situation where possible, but the complexity of the situation is heightened by the Act's attempt to strike a balance between the needs of debtors and creditors. As always, there is an inherent tension in a rescue culture. One company's rescue might be another company's downfall. Allowing debtor X a moratorium not to pay creditor Y might cause financial difficulties for Y who might in turn be debtor Y to creditor Z. If Y were driven to a moratorium too, that might cause difficulties for Z, and so forth. There is rarely an easy solution.

It is therefore essential that businesses understand how the law is changing and why, and how if possible they can use the new provisions to their advantage. The watchword is, of course, that forewarned is forearmed. Businesses should be planning ahead, with a knowledge of the provisions at their (or at least at their advisers') fingertips.

Indeed, businesses should note that 'insolvency' in the context of CIGA 2020 is something of a misnomer. CIGA 2020 aims where possible to prevent insolvency, for example by allowing some of its provisions to be invoked at the anterior (and undefined) stage of 'financial difficulties' that may affect a company's ability to carry on business as a going concern. Businesses should therefore be ready to deploy the Act's armoury at the earliest possible stage.

In particular, debtors and creditors should be alive to five matters:

(1) They should work alongside, and not against, each other from an early stage. The risk of a domino effect caused by the collapse of any one company in a chain is particularly high at present.

(2) If nonetheless there are likely to be problems, debtors and creditors must be on top of their contractual documentation. The termination clause provisions discussed below are particularly important. Debtors and creditors need to understand their contractual frameworks. There are likely to be fast-moving situations in which they must know immediately which provisions they can invoke and when.

(3) They must be on top of their financial position. They must have the relevant details close to hand in case they might need to produce evidence at short notice for any court hearing. For example, debtors applying for a restructuring plan will need to show the relevant 'financial difficulties'. Creditors wishing to invoke a termination clause might wish to show 'hardship'.

(4) Situations that might lead to a corporate collapse are likely to develop quickly. They must understand not only the substantive legal provisions but also the procedural provisions and the relevant timetabling. The necessary steps must be taken on time and correctly.

(5) Liquidity is crucial in periods of uncertain trading. Where at all possible, they should maintain an appropriate cash cushion.

Constitutional matters

Finally, it is to be noted that CIGA 2020 raises a number of important constitutional issues. Some of these were highlighted by the Constitution Committee's report on the Bill, here. In particular the Committee was concerned about: (i) the speed of the Parliamentary process, which allowed for little input from stakeholders and the public; (ii) the retrospective provisions, as to which the Committee was concerned that such provisions are generally regarded as inconsistent with the rule of law and are inherently constitutionally suspect; and (iii) the so-called 'Henry VIII' powers to modify the legislation.

The Government responded in part by removing some, but not all, of the Henry VIII powers (see e.g. here) but otherwise the Bill had a relatively straightforward passage through Parliament and so the Committee's concerns are largely likely to remain.

THE MORATORIUM

A moratorium is a period in which action by a debtor's creditors is restricted. Prior to the coming into force of CIGA 2020, UK law already contained moratoriums in the context of administration, and for small companies who wished to make a proposal for a voluntary arrangement. It did not, however, contain any 'free-standing' moratorium i.e. a moratorium that is not part of, or a gateway to, any particular insolvency procedure.

The purpose of the new moratorium is to fill this gap, allowing companies who are in financial difficulties but who stand a real chance of recovery the "*breathing space*" they require in which to "*explore* [their] *rescue and restructuring options*" (Explanatory Notes, para. 4).

CIGA 2020 aims to ensure that the moratorium is "*streamlined … keeps administrative burdens to a minimum, makes the process as quick as possible, and does not add disproportionate costs onto struggling businesses*" (Explanatory Notes, para. 6). The details of how this is achieved are set out below, but in summary:

(1) UK companies that are not subject to an outstanding winding-up petition (and during the immediate period of the pandemic, even those that are) will be able to obtain a moratorium simply by filing the relevant forms with the court.

(2) The initial period of the moratorium is 20 business days, but the directors are able to extend this by a further 20 business days using the relevant forms provided the company has been able to discharge all of its 'moratorium debts' and 'pre-moratorium debts' for which it does not have a payment holiday. Further extensions are available by court order, or with creditor consent.

(3) The moratorium is overseen by a 'monitor', but day-to-day responsibility for the running of the company remains with the directors (the so-called 'debtor-in-possession' model).

(4) The monitor is responsible for ensuring that the moratorium is continuing to serve its purpose, namely, the rescue of the company as a going concern. If it is no longer likely that this purpose can be achieved, or if it has already been achieved, the monitor must bring the moratorium to an end.

(5) Creditors and other affected parties can challenge the actions of the monitor or the directors on grounds of 'unfair harm'.

The majority of the relevant provisions have been inserted as a new Part A1 to IA 1986, which is supplemented by Schedules ZA1 and ZA2. Schedule 3 to CIGA 2020 contains further amendments to IA 1986. Schedule 4 contains temporary procedural rules relating to the new moratorium, the most important of which are highlighted in this chapter, but practitioners would be well advised before taking any steps in respect of a moratorium to check the up to

date position and take advice on Schedule 4 to ensure that all of the procedural details have been complied with.

Paragraph 3.3(6) of the Insolvency Practice Direction provides that applications for orders concerning moratoria may be listed before a High Court Judge or an ICC Judge, but not, ordinarily, before a District Judge Sitting in a District Registry or a District Judge.

For a concise summary of how to apply for a moratorium, see the Government's page here. Companies House have also provided a number of model forms, which may be found here.

1. Which companies are eligible for a moratorium?

Eligible and excluded companies

This is addressed by s. A2 and Schedule ZA1.

In summary, a company is eligible for the moratorium unless it is excluded under any of paras. 2-18 of Schedule ZA1. The key exclusions are:

(1) Companies that are, or have been subject to a moratorium within the last 12 months (Schedule ZA1, para. 2(1)).

(2) Companies that are subject to an insolvency procedure, or have been subject to a voluntary arrangement or administration within the last 12 months (Schedule ZA1, para. 2(2)).

(3) 'City companies' e.g. banks, insurance companies, electronic money institutions etc (Schedule ZA1, paras. 3-14). This includes companies that are party to a capital market arrangement under which they have incurred, or expected to incur, a debt of £10 million or more, and which involved the issue of a capital market investment. This may exclude some medium sized companies that might otherwise have hoped to benefit from a moratorium (Schedule ZA1, paras. 13 & 14).

Schedule ZA1, para. 20 empowers the Secretary of State to alter the circumstances in which a company is eligible. On 29 June 2020, this power was used to exclude private registered providers of social housing – see the Insolvency Act 1986 Part A1 Moratorium (Eligibility of Private Registered Providers) Regulations 2020 (SI 2020/652).

Temporary provisions

Like many of the provisions of CIGA 2020, these exceptions are subject to temporary modification as a result of the pandemic.

These temporary changes are applicable for a defined "**Relevant Period**" (for which, see Schedule 4, para. 1(b)). This Relevant Period was originally to come to an end on 30 September 2020. However, this is now being extended to 30 March 2021 by the Corporate Insolvency and Governance Act 2020 (Coronavirus (Extension of the Relevant Period) Regulations 2020. In particular:

(1) The list of excluded companies is extended to include companies that have permission under Part 4A of the Financial Services and Markets Act 2000 ("**FSMA 2000**") to carry on a regulated activity, and are not subject to a requirement imposed under FSMA 2000 to refrain from holding money for clients (Schedule 4, para. 5).

(2) A company is not ineligible for a moratorium by reason of its having been subject to a moratorium, a voluntary arrangement, or administration within the last 12 months (Schedule 4, para. 6(1)(c)).

Overseas companies

Overseas companies are only eligible for a moratorium if they could be wound-up under Part 5, IA 1986 (winding-up of unregistered companies).

For companies that have their centre of main interests (COMI) in an EU Member State, at least during the transition period, this question will be determined by reference to the Recast EU Regulation 2015 / 848, which provides that secondary or territorial proceedings may only be begun in another jurisdiction if the debtor "*possesses an establishment*" within that jurisdiction.

For companies outside the EU, the key question is likely to be whether the company has a "*sufficient connection*" with England & Wales, which may, but does not necessarily have to, consist of assets within the jurisdiction (*Stocznia Gdanska SA v Latreefers Inc* [2001] BCC 174 at 179).

Other entities

In addition to ordinary limited companies, the new moratorium is available to:

(1) Limited Liability Partnerships (Schedule 3, paras. 36-38, and the Limited Liability Partnerships (Amendments etc.) Regulations 2020 (SI 2020/643)).

(2) Charitable Incorporated Organisations, other than private registered providers of social housing or registered social landlords under Part 1 of the Housing Act 1996 (Schedule 3, para. 49, and The Charitable Incorporated Organisations (Insolvency and Dissolution) (Amendment) (No. 2) Regulations 2020 (SI 2020/856)).

(3) Co-operative and community benefit societies (Schedule 3, paras. 50-53, and The Co-operative and Community Benefit Societies and Credit Unions (Arrangements,

Reconstructions and Administration) (Amendment) and Consequential Amendments Order 2020 (SI 202/744)).

2. How does an eligible company obtain a moratorium?

UK companies not subject to a winding-up petition

A UK company that is not already subject to a winding-up petition may obtain a moratorium simply by filing the relevant documents at court (s. A3(2)). Schedule 4, para. 13 provides that, in this context, 'the Court' means "*a court having jurisdiction to wind up the company*". The relevant documents are:

(1) A notice that the directors wish to obtain a moratorium.

(2) A statement from the proposed 'monitor' that the monitor is: (i) qualified; and (ii) consents to act – the 'monitor' is a new concept, discussed further at question 4 below (who is the monitor?).

(3) A statement from the proposed monitor that the company is an eligible company.

(4) A statement from the directors that, in their view, the company is, or is likely to become, unable to pay its debts; and

(5) A statement from the proposed monitor that, in the monitor's view, it is likely that a moratorium for the company would result in its rescue as a going concern (s. A6).

Details of the procedural requirements of these forms are set out in Schedule 4.

There is, as yet, no standard form of notice. In the circumstances, companies have been advised by the Courts to use the standard Form IAA (here). This, however, is somewhat unsatisfactory, as the IAA proceeds on the assumption that the applicant is asking the Court for certain relief / orders / directions, whereas a moratorium may be obtained simply by the act of filing. Applicants may, therefore, wish to amend Form IAA to make clear that they do not require, and are not seeking, any order of the Court, and to ensure that the requirements of Schedule 4 are met.

The test of "*is, or is likely to become, unable to pay its debts*" has been drawn from Schedule B1, para. 11 and so, presumably, the same case law will be applied. It is not enough, therefore, that there is real prospect of insolvency; it must be "*more probable than not*" (*Re COLT Telecom Group plc* [2002] EWHC 2815 (Ch); [2003] BPIR 324 at [25]; *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch); [2005] 2 BCLC 8 at [21]).

Other companies

If a company is subject to a winding-up petition (s. A4), and / or is an overseas company (s. A5), then it must instead apply to court. The application must be accompanied by the relevant forms (as set out above). On an application by a company that is already subject to a winding-up petition, the court may only make an order for a moratorium if it is satisfied that it would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being subject to a moratorium).

Temporary modifications

During the Relevant Period (as defined at question 1 above), these requirements are being modified in two respects:

(1) The requirement that it be likely that a moratorium for the company would result in its rescue as a going concern, is amended by the addition of the words "*or would do so if it were not for any worsening of the financial position of the company for reasons relating to coronavirus*" (Schedule 4, paras. 6(1)(b) & 7(a)).

(2) Only overseas companies need to apply for a moratorium. UK companies, even if they are already subject to a winding-up petition, must use the filing procedure (Schedule 4, paras. 6(1)(a) & 6(2)).

3. What are the effects of obtaining a moratorium on creditors and the company?

The moratorium places restrictions on both the company's creditors and the company itself. It also enables the company, with the court's permission, to do certain things it would not ordinarily be able to do. Some of these provisions will be familiar to practitioners with experience of administrations.

Restrictions on creditors

As stated above, the primary purpose of the moratorium is to give the company some 'breathing space' from its creditors, whilst leaving control of the company in the hands of the directors. Accordingly:

(1) Only the directors may present a winding-up petition, and no winding-up order may be made except on such a petition (s. A20(1)(a) & (c); s. A20(2) & (3)). There are, however, exceptions for petitions by the Secretary of State and the Financial Conduct Authority ("**FCA**"). Where a petition (other than an FCA petition) has been presented before the moratorium begins, s. 127, IA 1986 (avoidance of

property dispositions) will cease to apply to dispositions made during the moratorium (Schedule 3, para. 12).

(2) The company may only be voluntarily wound up by special resolution, and only then if the directors recommend such a resolution (s. A20(1)(b) & (c)).

(3) Only the directors may make an administration application. Neither the company nor a qualifying floating charge holder may appoint an administrator (or an administrative receiver) (s. A20(1)(e)-(h)).

(4) Landlords may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company, except with the permission of the court (s. A21(1)(a)).

(5) No steps may be taken to enforce any security over the company's property without the permission of the court. This is subject to exceptions in respect of collateral security charges and securities created or arising under a financial collateral arrangement (s. A21(1)(c)).

(6) No steps may be taken to repossess goods in the company's possession under any hire-purchase agreement, except with the permission of the court (s. A21(1)(d)).

(7) No legal process may be instituted or continued against the company or its property without the permission of the court, except for certain employment proceedings (s. A21(1)(e)).

(8) The holder of a floating charge (except a collateral security, market charge, security financial collateral arrangement, or system-charge) may not give any notice which would have the effect of crystallising the floating charge, or, by virtue of any provision in the charge instrument, any restriction on the disposal of the property of the company, and no other event during the moratorium is to have that effect. If the time for giving notice expires during the moratorium, the chargee may instead give notice as soon as practicable after the end of the moratorium, or when notice is received thereof. Similarly, when a crystallisation event occurs during the moratorium, provided the chargee gives notice of the event as soon as practicable after the end of the moratorium or notice thereof, the event will be treated as if it occurred when the notice was given (s. A22).

Note that any provision in a floating charge (except a collateral security, market charge, security financial collateral arrangement, or system-charge) which provides that the obtaining of a moratorium, or anything done with a view to obtaining a moratorium, constitutes a crystallisation event, or an event causing restrictions on the disposal of property that would not otherwise apply, or gives grounds for the appointment of a receiver, is automatically void under s. A52.

(9) Security granted by a company during a moratorium may only be enforced with the consent of the monitor even if the court has given its permission (s. A23).

As set out above, the restrictions on enforcement and legal proceedings are expressed to be subject to the permission of the court. Sections A21(2) & (3), however, provide that no application for permission may be made with a view to obtaining the crystallisation of a floating charge, or for the purposes of enforcing 'a pre-moratorium debt for which the company has a payment holiday during the moratorium'. This is one of the key phrases in the CIGA 2020, and therefore requires careful explanation.

The Act draws a distinction between 'moratorium debts' and 'pre-moratorium debts'.

A 'pre-moratorium debt' is a debt or other liability which the company becomes subject to before the moratorium comes in to force, or which it becomes, or may become subject to during the moratorium by reason of any obligation incurred before the moratorium comes into force.

A 'moratorium debt' is a debt or other liability which the company becomes subject to during the moratorium (other than by reason of an obligation incurred before the moratorium came into force), or to which the company has become, or may become subject to after the end of the moratorium by reason of an obligation incurred during the moratorium (s. A53).

The wording used in the definition of 'pre-moratorium debt' is intended to bring in the distinction made in *Re Nortel GmbH (in admin.)* [2013] UKSC 52; [2014] AC 209 between provable debts and expenses in administration (Explanatory Notes, para. 144).

The phrase 'a pre-moratorium debt for which the company has a payment holiday' includes all pre-moratorium debts that have fallen due before the moratorium, or that fall due during the moratorium, except (s. A18(3)):

(1) The monitor's remuneration or expenses (which does not include remuneration in respect of anything done by a proposed monitor before the moratorium begins).

(2) Goods or services supplied during the moratorium.

(3) Rent in respect of a period during the moratorium.

(4) Wages or salary arising under a contract of employment.

(5) Redundancy payments;

(6) Debts or other liabilities arising under a contract or other instrument involving financial services.

Of these exclusions, it is the last that has proved most controversial. The expression 'contract or other instrument involving financing services' is broadly defined by Schedule ZA2, and

includes any form of lending. 'Excluded debts' therefore includes any debts arising under a loan agreement entered into before the moratorium came into force.

As set out below (question 4), s. A38 provides that a monitor must bring a moratorium to an end if the monitor thinks that the company is unable to pay any of its pre-moratorium debts for which the company does not have a payment holiday. Accordingly, all that a lender needs to do if it wants to bring a moratorium to an end is accelerate repayment of its loans, as few companies who meet the test for a moratorium will be able to pay such a liability immediately. The end result may be that companies enter a moratorium only to bounce back out again at the instance of their lenders.

Restrictions on the company

The moratorium is designed to enable the company to continue to trade in its ordinary course of business as it considers its options, whilst ensuring that stakeholders are sufficiently protected. This is reflected in the restrictions placed upon the company:

(1) The company may not obtain credit of £500 or more (including the payment in advance for the supply of goods or services) unless the person providing that credit has been informed that the moratorium is in force (s. A25).

(2) The company may grant security over its property only if the monitor consents (s. A26).

(3) The company may not enter into market contracts, financial collateral arrangements, or other specified financial services contracts (s. A27).

(4) The company may not make a payment in respect of a pre-moratorium debt for which the company has a payment holiday that exceeds £5,000, or 1% of its unsecured debts at commencement of the moratorium (whichever is greater) without the consent of the monitor, a court order, or as required by s. A31(3) (disposal of charged property with the permission of the court) or s. A32(3) (disposal of hire-purchase property with the permission of the court).

(5) The company may not dispose of its property outside of the ordinary course of business without monitor consent or a court order (s. A29).

In each case, the monitor may only consent if the monitor thinks the action will support the rescue of the company as a going concern.

If a company breaches these rules, it commits an offence, and any officer who authorised or permitted the breach without reasonable excuse commits an offence, but the transaction itself remains valid and enforceable (s. A33).

Disposals with the permission of the court

CIGA 2020 enables a company in a moratorium to do the following with the permission of the court:

(1) Dispose of property which is subject to a security interest as if it were not subject to the security interest (unless that property is subject to a financial collateral arrangement, a market charge, a system charge, or a collateral security) (s. A31).

(2) Dispose of goods which are in the possession of the company under a hire-purchase agreement as if all the rights of the owner under the agreement were vested in the company (s. A32).

Having done so, except in the case of property secured by a floating charge, the company must apply the net proceeds towards discharging the sums secured or payable, plus whatever is required to reach the net amount which would have been realised on a sale of the property in the open market by a willing vendor (as determined by the court). Where the property was subject to two or more security interests, the money must be applied in the order of priority of those interests.

Where the property was subject to a floating charge, then the charge holder enjoys the same priority in the property of the company which directly or indirectly represents the property disposed of.

Where the court makes such an order, the directors must, within 14 days, send a copy to the registrar. See form MT07 here. Failure to do so without reasonable excuse constitutes an offence.

4. Who is the monitor?

The monitor is an officer of the court (s. A34) and must be a qualified insolvency practitioner (although any defect in the monitor's appointment or qualifications will not invalidate any of the monitor's actions) (s. A41). The monitor has 4 responsibilities:

(1) Assessing the eligibility conditions at the commencement of the moratorium.

(2) Sanctioning asset disposals outside the normal course of business and the granting of any new security over the company's assets.

(3) Monitoring 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 (s. A35), or, during coronavirus, that it would do if one were to

disregard any worsening of the financial position of the company for reasons relating to coronavirus.

(4) Where appropriate, bringing the moratorium to an end.

To ensure that the monitor can meet their responsibilities, s. A36 CIGA 2020 provides that the monitor may require the directors of the company to provide any information the monitor requires for the purpose of carrying out the monitor's functions, and the directors must comply with these requests as soon as practicable. The monitor is then entitled to rely upon this information when making decisions, unless the monitor has reason to doubt its accuracy.

The monitor must bring the moratorium to an end by filing a notice with the court if:

(1) The monitor thinks that the moratorium is no longer likely to result in the rescue of the company as a going concern (subject to the normal relaxation of this test during coronavirus).

(2) The monitor thinks that the objective of rescuing the company as a going concern has already been achieved.

(3) The monitor thinks that, by reason of a failure by the directors to comply with a request for further information, the monitor is unable properly to carry out the monitor's functions; or

(4) The monitor thinks that the company is unable to pay any of its moratorium debts, or pre-moratorium debts for which the company does not have a payment holiday that have fallen due (s. A38), but for these purposes, the monitor must disregard (a) any debts that the monitor has reasonable grounds for thinking are likely to be paid within 5 days of the decision, and (b) any debts in respect of which the creditor has agreed to defer payment until a time that is later than the decision (Schedule 4, para. 37).

This notice must be filed with the court as soon as practicable. For the contents of the notice, see Schedule 4, para. 36(1).

The monitor may apply to the court for directions e.g. in cases of legal uncertainty (s. A37).

For further details on the role and responsibilities of the monitor, see the Government's guidance here.

5. When does a moratorium come into force?

The moratorium comes into force, in the case of a company who is using the filing procedure, when the relevant documents are filed, and in all other cases, when an order is made by the court (s. A7). Paragraph 10 of the CIGA 2020 Practice Direction provides that where directors file the relevant documents by means of electronic delivery for the purposes of obtaining a moratorium pursuant to s. A3, the documents are treated as being filed with the court at the date and time recorded in the automated notification acknowledging that the document has been submitted (see PD 51O, para. 5.3(1)).

Upon the coming into force of the moratorium, the proposed monitor(s) are formally appointed as the monitor(s).

As soon as reasonably practicable after the moratorium comes into force, the directors must notify the monitor of that fact. The monitor must then notify the registrar, every creditor of whose claim the monitor is aware, and, where applicable, the Pensions Regulator and / or the Board of the Pension Protection Fund. The notice must specify when the moratorium came into force and when it will come to an end. A model form (MT01) is provided here. Failure to comply with these notice requirements without reasonable excuse is an offence (s. A8).

6. What is the duration of a moratorium, including extensions?

Unless extended, a moratorium lasts 20 business days starting from the business day after the day it came into force. This is known as the 'initial period'.

There are five ways to obtain an extension, the first three of which may only be used once the first 15 business days of the initial period have passed:

(1) The directors may obtain a further 20 business days from the end of the initial period by filing:

  (a) A notice that the directors wish to extend the moratorium;

  (b) A statement from the directors that all 'moratorium debts', and all pre-moratorium debts for which the company does not have a payment holiday, that have fallen due, have been paid or otherwise discharged.

  (c) A statement from the directors that, in their view, the company is, or is likely to become, unable to pay its pre-moratorium debts; and

(d) A statement from the monitor that, in their view, it is still likely that the moratorium will result in the rescue of the company as a going concern (s. A10).

(2) The directors may seek the consent of the company's pre-moratorium creditors who are subject to a payment holiday, which have not already been paid or otherwise discharged (the 'relevant creditors') for a revised end date (which may be anything up to 1 year from the beginning of the moratorium). This is done using a qualifying decision procedure in accordance with Parts 15 and 16 of the Insolvency Rules 2016 ("**IR 2016**"), modified by Schedule 4, paras. 23-28. Note that the deemed consent provisions do not apply for the purposes of the new moratorium. If such consent is obtained, then the directors may extend the moratorium to the date agreed by filing the documents identified above with the court, together with a statement that creditor consent has been obtained and the date agreed (s. A11 & s. A12). Creditor consent may be provided more than once.

Under The Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) Regulations 2020 (SI 2020/693), where the company is an employer in respect of an eligible pension scheme, the right to participate in decisions as to whether to extend the moratorium is granted to the Board of the Pension Protection Fund to the exclusion of the scheme's trustees or managers, although the Board must consult the trustees or managers before exercising its rights.

(3) The directors may apply to the court for an extension. Any such application must be accompanied by the forms listed at (1)(b)-(d) above. Additionally, the directors must provide a statement as to whether the relevant creditors have been consulted about the application, and if not, why not. It is likely that in practice, if the directors apply to court without having consulted the relevant creditors, and there is no good reason for this, their application will not succeed. Further procedural requirements are set out in Schedule 4, paras. 29-30.

When assessing the application, the court must consider the interests of the relevant creditors, and the likelihood that the extension will actually result in the rescue of the company as a going concern. If the relevant creditors are opposed to an extension, this will weigh heavily in the court's mind. If the moratorium is not likely to result in the rescue of the company, then it is highly unlikely that the court would grant an extension, as the new moratorium is not designed to allow companies that are inevitably going to fall into liquidation to delay the inevitable.

It is notable that under s. A13(6)-(7), the mere making of an application will prevent the moratorium coming to an end. It may be, therefore, that directors will be tempted to make an application even where there is no real prospect of success to take advantage of this provision.

The moratorium may be extended by the court more than once.

(4) If, at any time, the directors make a proposal for a Company Voluntary Arrangement ("**CVA**"), then until that proposal has been disposed of, the moratorium will not come to an end (s. A14).

(5) If a moratorium is in force at the same time that an application under s. 896 or 901C(1), CA 2006 (arrangements and reconstructions: court order for holding of meeting) is before the court, then the court may extend the moratorium (s. A15).

As with the eligibility criteria, the requirements for obtaining an extension during coronavirus are being relaxed such that it need only be likely that the moratorium will result in the rescue of the company as a going concern, or would do, if it were not for any worsening of the financial position of the company for reasons relating to coronavirus (Schedule 4, para. 8).

If the moratorium is extended, the directors must notify the monitor in accordance with s. A17. Failure to do so without reasonable excuse is an offence (s. A17(7)). Once notified, the monitor must then notify the registrar of companies, every creditor of the company of whose claim the monitor is aware, and, in certain circumstances, the Pensions Regulator and / or the Board of the Pension Protection Fund (the 'relevant persons') (s. A17(8)). For the contents of these notices, see Schedule 4, paras. 31-34, and form MT02 here.

7. When does a moratorium terminate, and what are a director's and the company's duties of notification?

The moratorium will terminate in any of the following circumstances:

(1) The moratorium expires (s. A9(1)).

(2) The company enters into a relevant insolvency procedure (voluntary arrangement, administration, interim moratorium, or liquidation) (s. A16).

(3) The moratorium is terminated by the monitor (s. A38).

(4) The moratorium is terminated by the court (s. A42 or s. A44).

If the moratorium terminates early other than as a result of the intervention of the monitor, then the directors must notify the monitor in accordance with s. A17. The monitor must then notify 'the relevant persons' (as defined at question 6 above). For the relevant forms for notifying Companies House of the end of a moratorium, see here.

8. What must the company do to publicise the moratorium?

For as long as the moratorium lasts, any premises where the company carries on business or to which customers or suppliers of the company have access must display a notice stating that a moratorium is in force in relation to the company and the name of the monitor. This notice must be placed in a prominent position so that it may be easily read by customers and suppliers. The same information must be displayed on any website of the company, and every business document issued by or on behalf of the company (incl. invoices, orders, business letters, and order forms) (s. A19).

If the company breaches these rules it commits an offence. Further, any officer of the company who authorised or permitted the breach without reasonable excuse commits an offence. Ignorance of the rules is unlikely to be considered a 'reasonable excuse', and so any practitioners who are advising a client in respect of a moratorium would do well to draw this requirement to their client's attention.

9. Can I challenge a monitor's actions?

Under s. A42, a creditor, director, or member of the company, or any other person affected by the moratorium may apply to the court on the ground that an act, omission, or decision of the monitor during the moratorium (including a failure to bring the moratorium to an end) has 'unfairly harmed' their interests. Such applications may be made during the moratorium or after the moratorium has been brought to an end (s. A42(3)).

The concept of 'unfair harm' is also applied during challenges to the decisions of administrators under Schedule B1, para. 74, and so it is likely that the same case law will be invoked. This case law was recently considered by the Court of Appeal in *Lehman Brothers Australia Limited (in liquidation) v MacNamara* [2020] EWCA Civ 321. The following points were emphasised:

(1) Fairness is an objective test determined by reference to the standards which 'right-thinking people' would expect, not a subjective one determined by reference to the standards of the person whose actions are under scrutiny.

(2) What constitutes unfairness depends on the circumstances of the case. The office-holder's conduct may be in the interests of the creditors generally, but nonetheless it may still involve the infliction of unfair harm on a particular creditor.

(3) If an office-holder is acting in accordance with its statutory obligations, there can be no question that they are acting unfairly, even if by doing so they cause harm. The question of unfairness arises in the context of the office-holder's exercise of their discretion.

(4) Discriminatory conduct may be unfair, but it is not a necessary requirement.

(5) The court will adopt a cautious approach.

If this test is met, the court may confirm, reverse, or modify any act or decision of the monitor, give the monitor directions, or make such other order as it thinks fit (except for ordering the monitor to pay compensation). This may include bringing the moratorium to an end, or, where the argument is that the moratorium has been brought to an end prematurely, declaring that it shall not be taken into account when assessing the company's eligibility for a further moratorium. Whatever order the court thinks appropriate, it must have regard to the need to safeguard the interests of persons who have dealt with the company in good faith and for value.

CIGA 2020 contains no equivalent to Schedule B1, para. 75 (misfeasance by an administrator). This is presumably because the monitor, unlike an administrator, does not control the company's assets during a Part A1 moratorium, and so it should not be possible for a monitor to misapply, or become accountable for company property.

Where a moratorium is, or has been in force in relation to a company that is, or has been at any time during the moratorium, an employer in respect of an 'eligible pension scheme' (as defined by s. 126 of the Pensions Act 2004), and where the trustees or managers of the scheme are a creditor of the company, then the Board of the Pension Protection Fund may make any application under s. A42 that the trustees or managers could have been made in their capacity as creditor (s. A45). This provision was introduced by amendment in the House of Lords. The purpose of the Pension Protection Fund is to protect people with an eligible defined benefit pension when their employer becomes insolvent. Section A45 will help the Board of the Fund fulfil that responsibility when an employer enters a moratorium.

10. Can I challenge a director's actions?

Under s. A44, a creditor or member of a company may apply to the court on the grounds that:

(1) during the moratorium, the company's affairs, business, and property are being, or have been, managed by the directors in a manner which has unfairly harmed the interests of its creditors or members generally, or of some part of its creditors or members including at least the applicant; or

(2) any actual or proposed act or omission of the directors during a moratorium causes or would cause such harm.

Upon such an application, the court may make such order as it thinks fit, including:

(1) Regulating the management of the company's affairs by the directors.

(2) Requiring the directors to refrain from doing the acts complained of, or to do an act which the applicant has complained they have omitted to do.

(3) Bring the moratorium to an end.

This raises the same concept of 'unfair harm' as discussed at question 9.

Again, when considering what order to make, the court must have regard to the need to safeguard the interests of persons who have dealt with the company in good faith and for value.

The Board of the Pension Protection Fund will also be able to challenge the decisions of the directors in circumstances where the company is an employer in respect of an eligible pension scheme (s. A45).

11. Can the monitor be replaced?

The court may remove or replace an existing monitor, or may appoint a qualified person to act as an additional monitor, but only on the application of the directors, or the existing monitor himself (s. A39). This is presumably a reflection of the fact that the monitor does not have administrative control over the company, and so there is no need for creditors to have standing.

It is possible that creditors will seek to get around this restriction by invoking the court's inherent jurisdiction to control its own officers. In our view, this is unlikely to be successful. As Lord Neuberger said in *Re Lehman Bros International (Europe) (in admin.) (No.4)* [2017] UKSC 38; [2017] AC 465 at [13], given the "*full and detailed nature of the current insolvency legislation and the need for certainty, a judge should think long and hard before extending and adapting an existing rule, and even more before formulating a new rule*". Where, as here, the legislature has imposed explicit restrictions on who may apply to remove or replace a monitor, the court should be reluctant to exercise its inherent jurisdiction to undermine those restrictions.

For a helpful review of this area see *Zinc Hotels (Investment) Limited v Beveridge* [2018] EWHC 1936 (Ch); [2018] BCC 968 where Carr J rejected an argument that the court's inherent jurisdiction could be used to appoint an additional interim administrator after commencement of the administration.

Ultimately, these kinds of questions may be less important in the context of the new moratorium, as creditors will be able, under s. A44, to regulate the actions of the directors (who retain control of the company) directly.

When a monitor is appointed or removed by court order, the monitor must notify the registrar, every creditor of the company of whose claim the monitor is aware, and, where applicable, the Pensions Regulator and / or the Board of the Pension Protection Fund. See forms MT08 (here) and MT09 (here). Failure to do so without reasonable excuse is an offence (s. A39(8) & (9)).

12. Are there any criminal sanctions related to the new moratorium?

Sections A46 and A47, CIGA 2020 include a broad range of offences which aim to penalise officers of companies who obtain a moratorium through fraudulent means, or who remove or damage company property (including its documents) before or during the moratorium. The punishments for these offences are set out at Schedule 3, para. 33.

If it appears to the monitor that any past or present officer of the company has committed an offence in connection with the moratorium the monitor must report the matter to the appropriate authority, which for company's registered in England & Wales means the Secretary of State (s. A48). The monitor may be called upon to assist the Secretary of State in any subsequent investigation of the company under s. 431 or s. 432 of the Companies Act 1985.

13. Are there any additional rules applicable to regulated companies?

Additional rules apply to UK Companies that are regulated (s. A49):

(1) When seeking a moratorium, in addition to the ordinary documents, the company must provide the written consent of the appropriate regulator to their proposed monitor.

(2) The regulator must be informed when the moratorium comes into force, or comes to an end, or when there is a change in the monitor(s).

(3) The directors must give the regulator notice of any qualifying decision procedure sought from the company's creditors in respect of a request of an extension, or pursuant to an order of the court following a challenge to the directors' conduct.

(4) The regulator is entitled to be heard on any application to the court for permission to dispose of charged property, or property that is subject to a hire-purchase agreement.

(5) The regulator has standing to challenge the actions of the monitor or directors, and to apply for a change in the monitor, and to be heard on any such application brought by anyone else.

A regulated company is a company that is, or has been, regulated by the FCA and / or the Prudential Regulation Authority ("**PRA**") under FSMA 2000 (s. A48(13)).

14. Where do moratorium debts rank in priority if the company does enter an insolvency procedure?

Where a winding-up petition or a resolution for voluntary winding-up is passed within 12 weeks for the end of the mortarium, the moratorium debts, and 'priority pre-moratorium debts', rank in priority to all other claims save only the prescribed fees or expenses of the official receiver (s. 174A, IA 1986; inserted by Schedule 3, para. 13). This is a striking provision, as it grants affected debts (many of which would otherwise be ordinary unsecured liabilities) 'super-priority' over even the expenses of the winding-up (including the remuneration of the liquidator), preferential debts, and floating charge holders.

Priority pre-moratorium debts include the pre-moratorium debts for which the company did not have a payment holiday during the moratorium (see question 3 above) save that:

(1) Priority is only afforded to wages or salary arising under a contract of employment so far as relating to a period of employment before or during the moratorium;

(2) Similarly, priority is only afforded to redundancy payments that fell due before or during the moratorium;

(3) Debts that fell due between the monitor's statement that a moratorium would likely result in the rescue of the company and the last day of the moratorium by reason of an acceleration or early termination clause in a contract or other instrument involving financial services ('relevant accelerated debts') are excluded.

The exclusion of accelerated financial services debts was introduced upon the recommendation of the House of Lords so that lenders cannot obtain 'super priority' simply by accelerating their loans during the moratorium.

Where a company enters administration within 12 weeks of the end of the moratorium, the administrator must make a distribution to the creditors of the company in respect of the moratorium debts and the priority pre-moratorium debts (as defined in s. 174A), and the administrator must realise any property required to do so. This distribution is to be paid in priority to any security to which Schedule B1, para. 70 applies (floating charge holders' priority in respect of acquired property), and sums payable under Schedule B1, para. 99 (liabilities relating to former administrators) (Schedule B1, para. 64A; inserted by Schedule 3, para. 31(3)).

Where the assets of the company are insufficient to meet the moratorium and priority pre-moratorium debts in full, the order of priority is as follows (Schedule 4, paras. 42-43):

(1) Amounts payable in respect of goods or services supplied during the moratorium under a contract where, but for s. 233B (the new rules for protecting supplies of

goods and services, considered elsewhere in this chapter), the supplier would not have had to make that supply.

(2) Wages or salary arising under a contract of employment.

(3) Other debts or other liabilities apart from the monitor's remuneration or expenses.

(4) The monitor's remuneration of expenses.

15. What happens if the monitor's remuneration is excessive?

The remuneration of the monitor is a contractual matter between the company and the monitor, therefore, the parts of IR 2016 that relate to an office-holder's remuneration do not apply to the monitor's fees.

An administrator or liquidator of a company may apply to the court on the ground that the monitor's remuneration was excessive up to 2 years from the end of the moratorium. If made out, the court may order the monitor to repay some or all of their remuneration, or make such other order as it thinks fit (Schedule 4, para. 40).

ARRANGEMENTS AND RECONSTRUCTIONS FOR COMPANIES IN FINANCIAL DIFFICULTY

One of the long-term changes introduced by CIGA 2020 is the introduction (through s. 7 of, and Schedule 9, CIGA 2020) of new Part 26A (s. 901A to 901K), CA 2006, which establishes a process for entering into a compromise or arrangement (known as a "**Restructuring Plan**" in this context).

Such a Restructuring Plan enables a company to enter into a court-sanctioned restructuring in order to deal with financial difficulties. The process follows the well-established and highly-regarded template set by schemes of arrangement and reconstructions under Part 26, CA 2006. The new Restructuring Plan provisions have been introduced to provide companies with enhanced tools to effect a restructuring, particularly in the face of creditor or shareholder opposition.

The introduction of the Restructuring Plan provisions dates back to the Government's 2016 consultation, '*A Review of the Corporate Insolvency Framework*'. The consultation referred to the desirability of introducing a restructuring tool that could overcome creditor dissent. The proposal was also driven in part by the fact that CVAs under IA 1986 were (and are) unable to bind secured creditors without their consent and, in 2014, had a failure rate of 60%.

Although the Restructuring Plan is modelled on schemes of arrangement under Part 26, CA 2006, the Government consultation noted that such schemes often target specific groups of stakeholders and are often only part of a wider restructuring solution. The ability to combine a Restructuring Plan with the new moratorium introduced by CIGA 2020, for example, should allow for a more flexible and effective restructuring tool.

Part 26, CA 2006, remains. As set out under question 18 below, the new provisions in Part 26A, CA 2006, are only available where a company is in financial difficulties and must be implemented with a view to addressing those financial difficulties. Currently, schemes of arrangement under Part 26, CA 2006, can be used as a restructuring tool for financially distressed companies, but often they are also used to conduct mergers and acquisitions or group restructurings for solvent companies. Equally, as discussed under question 17 below, CVAs are likely to be cheaper than Restructuring Plans, and are therefore likely to remain as an option for companies going through a restructuring.

The Government has published a useful factsheet on Restructuring Plans here.

Practitioners should also refer to the Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) promulgated by Vos C, a copy of which may be found here (the "**Practice Statement**").

16. What do the new provisions on arrangement and reconstruction for companies in financial difficulty allow a company to do?

New Part 26A, CA 2006, provides for a "compromise" or "arrangement" with creditors or members. Inherent in both concepts is the idea that there will be some sort of accommodation or "*give and take*" between the company and its creditors or members (see e.g. *Re NFU Development Trust Ltd* [1971] 1 WLR 1548, at 1555 and, in relation to Restructuring Plans, *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch), at [38]), although the court will take a broad approach to these terms (see e.g. *Re Bluebrook Ltd* [2010] BCC 209 at [72]-[74]).

Under s. 901A, CA 2006, an "arrangement" includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

Schemes of arrangement under Part 26, CA 2006, have been used to carry out a wide range of legal transactions, including restructuring debt obligations, reorganising corporate structures, conducting mergers and acquisitions and returning capital to members. Given the high degree of overlap between new Part 26A and Part 26, CA 2006, it is anticipated that Part 26A will enable companies to enter into a wide range of transactions, provided that the tests discussed under question 18 below are met.

17. What are the main differences between the new Part 26A of the Companies Act 2006 and company voluntary arrangements under the Insolvency Act 1986?

As set out further under question 27 below, the new Restructuring Plan provisions enable companies to effect a restructuring that will be binding on creditors and members, even if certain classes of creditors or members dissent. Currently, CVAs only bind secured creditors if they consent.

Further, the majority required to obtain consent from creditors or members (or classes thereof) is 75% in value. By contrast, a CVA requires approval from 75% in value of a company's creditors, which must include half of the company's unconnected creditors by value (see r. 15.34, IR 2016).

However, the process for obtaining approval of a Restructuring Plan is likely to be more complicated and expensive than the process for obtaining approval of a CVA, not least because the process involves two court hearings.

18. Which companies can use the new provisions in Part 26A of the Companies Act 2006, and when can they do so?

The Restructuring Plan is available to companies that satisfy both the conditions set out in s. 901A, CA 2006, as follows:

(1) 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.

(2) A compromise or arrangement is proposed between the company and: (i) its creditors (or any class of them); or (ii) its members (or any class of them), with the purpose of eliminating, reducing, preventing or mitigating the effect of the company's financial difficulties.

The concept of "financial difficulties" is not defined in the new provisions. The High Court recently considered the meaning of this phrase in the first Restructuring Plan to receive judicial consideration, but the case was one where the company in question was "*on the brink of collapse*" and therefore clearly came within the statutory wording (see *Re Virgin Atlantic Airways Limited* [2020] EHWC 2191 (Ch), at [37]). However, it is unlikely that this will be a difficult test to satisfy, since the policy intention behind CIGA 2020 is to facilitate corporate rescues and to introduce greater flexibility in the insolvency regime. Further, the first condition embraces current, future and potential difficulties. Nonetheless, a significant factor is that the "financial difficulties" must affect, or will or may affect, the company's ability "to carry on business as a going concern". The combination of the two concepts – "financial difficulties" and impact on carrying on business as a "going concern" – may create interesting and important evidential issues on proposals for Restructuring Plans, with consequential legal issues to be tested in the courts.

The proposed Restructuring Plan must satisfy the purposive test contained in the second condition. This is also widely drawn, ranging from "eliminating" those financial difficulties to simply "mitigating" them. In *Re Virgin Atlantic*, the court confirmed that this is "*broad language which was intended to be expansively construed*" (see [39]).

Under new s. 901B, CA 2006, the Secretary of State has the power to make regulations excluding companies from the ambit of new Part 26A where the company is: an authorised person under the Financial Services and Markets Act 2000; an authorised person of a specified description in the regulations; or where the proposed compromise or arrangement is between the company, or a company of a specified description, and the company's creditors fall into any category prescribed by the regulations.

Pursuant to s. 901A(4), Part 26A, CA 2006, applies to "companies", which includes companies liable to be wound up under IA 1986. This includes overseas companies by dint of ss. 220 and

221, IA 1986, which give the English court power to wind up any association and any company other than those registered under CA 2006.

It is well established that a Part 26 scheme of arrangement may be sanctioned in relation to an overseas company, provided that the company has a sufficiently close connection to this jurisdiction and the scheme will have a substantial effect (see e.g. *Re Magyar Telecom BV* [2014] BCC 448 at [21]). As set out under question 20 below, it is expected that the case law developed in relation to Part 26 schemes of arrangement will apply to new Part 26A and, accordingly, overseas companies will be able to enter into Restructuring Plans. This was recently confirmed in relation to the issue of jurisdiction (see the comments in *Re Virgin Atlantic* at [36] and [58]-[59]).

It should, however, be noted that the court's powers under s. 901J, CA 2006 (discussed under question 29 below), are restricted to "companies" within the meaning of s. 1, CA 2006, which means companies formed and registered under CA 2006.

19. What is the process for entering into a compromise or arrangement under Part 26A of the Companies Act 2006?

In outline, there are seven stages in putting forward a Restructuring Plan and obtaining the court's approval:

(1) A compromise or arrangement must be proposed between the company and its creditors or members (s. 901A, CA 2006).

(2) The promoter of the Restructuring Plan should take all reasonable steps to notify any person affected by the Restructuring Plan of the matters set out in para. 7 of the Practice Statement.

(3) On the application of the company, a creditor or member (or, where relevant, a liquidator or administrator), a first hearing before the court takes place, where the court may order a meeting (or meetings) of creditors or members (or relevant classes thereof) for the purposes of voting on the proposed Restructuring Plan (s. 901C, CA 2006).

(4) A notice, including a statement setting out the effect of the compromise or arrangement, must be circulated to creditors or members, or instructions on how creditors or members entitled to attend meetings may obtain copies of such a statement (s. 901D, CA 2006).

(5) Meetings of creditors and members (or classes thereof) take place for the purpose of voting on the proposed Restructuring Plan.

(6) If the Restructuring Plan is approved by the relevant meetings, or at least one of them, a further hearing before the court takes place, where the court decides whether to sanction the proposed Restructuring Plan (s. 901F, CA 2006).

(7) The court's order sanctioning the Restructuring Plan must be sent to the registrar of companies (or, in the case of an overseas company that is not required to register particulars under s. 1046, CA 2006, published in the Gazette) (s. 901F(6), CA 2006).

Each of these steps is covered in more detail in questions 21 to 26 and 32 below.

20. Will the existing case law in relation to Part 26 of the Companies Act 2006 apply to Part 26A?

Since new Part 26A, CA 2006, is modelled on the existing Part 26, CA 2006, it is anticipated that the case law developed in relation to Part 26 schemes of arrangement will apply generally to Restructuring Plans, with any necessary modifications. The Government's Explanatory Notes to the Bill likewise envisage that this will be the case (see para. 16 of the Explanatory Notes) and, in the first Restructuring Plan to come before the court, Trower J applied many of the principles that have been developed in relation to Part 26 schemes of arrangement (see *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch)).

There are, nevertheless, differences between the new provisions contained in CIGA 2020 and existing Part 26, CA 2006, notably the 'cross-class cram down' (as to which, see question 27 below). The court will therefore have to develop additional principles that apply to the specific features of Part 26A, CA 2006.

21. The first court hearing: what are the responsibilities of the applicant and what matters should be dealt with?

Starting the Restructuring Plan process

Once a compromise or arrangement has been proposed, and subject to notifying persons affected by the Restructuring Plan, the next step is to make an application for a convening hearing under s. 901C, CA 2006 (see question 19 above).

Pursuant to the requirements of CPR Practice Direction 49A (the "**PD**"), the application under s. 901C, CA 2006, must be made using a Part 8 claim form (see para. 5 of the PD).

It is likely that para. 15 of the PD will be updated so as to apply to Part 26A, CA 2006. Assuming that this will be the case, the claim form will have to seek directions for: convening a meeting of creditors or members or both, as the case requires; the sanction of the court to the Restructuring Plan, if it is approved at the meeting or meetings, and a direction for a further hearing for that purpose; and a direction that the claimant files a copy of a report to the court by the chairman of the meeting or of each meeting.

Pursuant to para. 7 of the PD, if the company is not the claimant, the company should be made a defendant to the Part 8 claim.

Pursuant to para. 4 of the Practice Statement, an application under s. 901C, CA 2006, will be listed before a High Court Judge. Usually, the same Judge will then hear the application to sanction the scheme.

Purpose of the first court hearing

The primary purpose of the first court hearing is to consider whether to order meetings of creditors and members for the purpose of considering and voting on the Restructuring Plan, and the composition of those meetings. At this stage, the court is not concerned with the merits of the proposed scheme (see e.g. *Re Indah Kiat International Finance Co BV* [2016] BCC 418 at [39]).

However, there are several other important issues that will, if necessary, be dealt with at this stage (as to which, see the guidance in para. 6 of the Practice Statement):

(1) The court's jurisdiction to sanction the Restructuring Plan.

(2) Issues relating to the threshold conditions for using the Part 26A, CA 2006, process (see question 18 above).

(3) Any other issues not going to the merits or fairness of the scheme, but which might lead the court to refuse to sanction the scheme.

Evidence required at the first hearing

On the assumption that the PD will be updated so as to apply to Part 26A, CA 2006 (and in any event as a matter of good practice), the claim form will have to be supported by written evidence setting out statutory information about the company and the terms of the Restructuring Plan.

The court will consider the adequacy of the explanatory statement required under s. 901D, CA 2006, at the first hearing. The court will not approve the statement, but deficiencies at this stage may lead the court to decline to convene any meetings (see *Re Indah Kiat International Finance Co BV* [2016] BCC 418 at [42], and para. 15 of the Practice Statement); the explanatory statement must therefore be put before the court at this juncture. The evidence should also

describe how members and/or creditors will be given notice of any meetings convened by the court (see para. 13 of the Practice Statement).

In the evidence in support of the application for an order convening meetings of members and/or creditors, the applicant should also draw to the court's attention any issues in relation to: the constitution of any relevant meetings or anything that would affect the conduct of those meetings; the existence of the court's jurisdiction to sanction the scheme; the satisfaction of the threshold conditions under Part 26A, CA 2006; or the exclusion of members or creditors from meetings under s. 901C(4), CA 2006 (see para. 6 of the Practice Statement).

At the hearing, the court will decide whether to determine the issue, or to give directions for the resolution of that issue (see para. 9 of the Practice Statement).

Other obligations on the applicant

Before the first hearing takes place, where such issues arise and where there is no good reason for not doing so, the applicant must, take all reasonable steps to give notice to any person affected by the Restructuring Plan of the following matters (as to which, see para. 7 of the Practice Statement):

(1) that the Restructuring Plan is being promoted;

(2) the purpose of the Restructuring Plan and its effect;

(3) the meetings of members and/or creditors that will be required and their composition;

(4) any other issues that need to be addressed at the first hearing;

(5) the date and place fixed for the first hearing;

(6) that such persons are entitled to attend the first hearing and any subsequent sanctioning hearing; and

(7) how such persons can make further enquiries about the Restructuring Plan.

The purpose of giving such notice is to enable those who are affected by the proposals to consider them, to take appropriate advice and, if so advised, to attend the first hearing (see para. 8 of the Practice Statement).

What will constitute adequate notice will depend on all the circumstances. Where the proposals under a Restructuring Plan are novel or complex, a greater notice period will be required, although in the case of urgency it may be legitimate to depart from the requirements of the Practice Statement (see e.g. *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch) at [37], specifically in relation to the new Practice Statement).

This obligation is particularly important because, as set out above, the court will consider class, jurisdiction and threshold issues at the first meeting. Members or creditors who object to the scheme may raise such issues at the sanction hearing, but para. 10 of the Practice Statement indicates that they should give a good reason for not raising the objection earlier. The *quid pro quo* is that members and creditors should be given adequate notice of the first hearing in order to consider whether there are any points they should raise. If they have been given adequate notice and fail to raise an issue at the earliest opportunity, a costs sanction may follow. Making sure that relevant stakeholders are notified is part of the court's general oversight of the fairness of the process, and rigorous compliance with the process may be an important factor in obtaining international recognition of a Restructuring Plan (see *Re ColourOz Investment 2 LLC* at [44] and [46]).

At the first hearing, the applicant is under a duty of full and frank disclosure, whether or not there is any opposition to the Restructuring Plan (see *Re Indah Kiat International Finance Co BV* [2016] BCC 418 at [40]).

Determining classes of creditors or members

Although the principles in relation to convening class meetings were developed in the context of Part 26 schemes of arrangement, the court recently applied a number of those principles when considering a Restructuring Plan (see *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch), at [41]-[48]).

A class must be "*confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*" (*Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, at 583).

When defining classes, the court's focus is on legal rights, rather than commercial interests which may differ as between persons who have the same or similar legal rights.

In considering whether or not to make an order convening meetings of members and/or creditors, the court will consider whether more than one meeting of members or creditors is required and, if so, how those meetings should be composed (see para. 11 of the Practice Statement). The court's order may provide limited time for anyone affected by it to apply to vary or discharge the order (see para. 12 of the Practice Statement).

The trend in relation to schemes of arrangement under Part 26, CA 2006, is to avoid the proliferation of classes. The fact that different persons' legal rights are not identical will not necessarily prevent the court from putting them in the same class; if their rights are sufficiently similar so as to enable them to consult together, that is likely to point towards their inclusion in a single class (see e.g. *Re Hawk Insurance Co Ltd* [2002] BCC 300).

However, more recent authorities have also emphasised that it is necessary to consider the effect of the scheme on proposed members of the same class; if their rights after

implementation of the scheme will differ to such an extent that they cannot consult with a view to their common interest, then this will point towards their inclusion in different classes (see e.g. *Re Apcoa Parking (UK) Ltd* [2014] Bus LR 1358 at [28]). Moreover, conflicting interests may be taken into consideration at the second hearing when deciding whether to sanction the Restructuring Plan (see *Re ColourOz Investment 2 LLC* [2020] EWHC 1964 (Ch)).

The reason for this in the context of Part 26 schemes of arrangement is to avoid giving a veto to minority interests in the general body of stakeholders. Conversely, in the context of the new Restructuring Plan provisions contained in CIGA 2020, the incentive may be to create a greater number of classes, so that approval from at least one class may be obtained in order to enable use of the 'cross-class cram down' provisions (discussed under question 27 below). However, it would be reasonable to expect the court to be reluctant to allow the creation of additional classes simply to maximise the chances of pushing a restructuring through using the 'cross-class cram down'. This is therefore likely to be an area that will give rise to disputes. Companies seeking to implement a Restructuring Plan will look for ways to engineer the proposed class structures to enable a cram down. Creditors who wish to dissent from the proposed Restructuring Plan will look for ways to stymie a cram down.

22. What are the requirements for the statement required to be circulated under Part 26A of the Companies Act 2006?

The statement to be circulated under s. 901D, CA 2006, must explain the effect of the compromise or arrangement. The statement must also set out any material interests of the directors of the company, whether in their capacity as directors, members or creditors of the company, or otherwise, and the effect on those interests of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons.

If the compromise or arrangement affects the rights of debenture holders of the company, the statement must give the same explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

Assuming that the case law in relation to Part 26 schemes of arrangement will apply to Restructuring Plans with equal force (as to which, see question 20 above), the statement must set out the proposed Restructuring Plan and its purpose adequately and accurately, in order to enable those who are voting on it to be properly informed. This includes an explanation not just of the legal effect of the compromise or arrangement, but also its commercial effect (*Re Allied Domecq plc* [2000] BCC 582). There is also an ongoing obligation to explain any material changes in circumstances that would change the mind of a reasonable creditor or member (see e.g. *Re Minster Assets plc* (1985) 1 BCC 99299).

Complying with these common-law requirements is likely to be essential in order to obtain the court's approval of a Restructuring Plan: in the context of a Part 26 scheme of arrangement,

any deficiency in the explanatory statement may affect the court's discretion in deciding whether to sanction the proposed compromise or arrangement.

As a matter of practice, the explanatory statement should be in a form and style that is appropriate to the circumstances of the case, including the nature of the members or creditors involved, and it should be as concise as possible (see para. 14 of the Practice Statement). The court will consider the adequacy of the statement at the first hearing and, if it finds it deficient, it may refuse to make an order convening meetings of members and/or creditors (as to which see question 21 above).

The obligations imposed on directors and trustees for debenture holders by s. 901D, CA 2006, are serious ones. Any person who breaches them commits an offence (as does the company) and will be liable on conviction to a fine. Directors and trustees for debenture holders are also under a statutory requirement to give notice to the company of any matters concerning them that are necessary for the purposes of the explanatory statement (see s. 901E, CA 2006). Any person who fails to do so commits an offence and will be liable on summary conviction to a fine.

23. Does anyone other than the company's creditors or members need to be notified of a proposed Restructuring Plan?

In short, yes; certain companies may need to give notice to an appropriate regulator or the Bank of England, as set out below.

Pensions Regulator and Pension Protection Fund

New s. 901I, CA 2006, requires certain companies in relation to which a Restructuring Plan is proposed to notify the appropriate bodies with oversight over pensions:

(1) A company that is or has been an employer (within the meaning of s. 318(1) of the Pensions Act 2004) in respect of an occupational pension scheme that is not a money purchase scheme (within the meaning of the Pension Schemes Act 1993) must send any notices or documents that it is required to provide to creditors to the Pensions Regulator.

(2) A company that is an employer (within the meaning of Part 2 of the Pensions Act 2004) in respect of an eligible scheme (within the meaning of s. 126 of the Pensions Act 2004) must send any notices or documents that it is required to provide to creditors to the Board of the Pension Protection Fund.

Section 901I, CA 2006, also gives the Secretary of State the power to make regulations providing for the Board of the Pension Protection Fund to exercise the powers of the trustees

or managers of an eligible scheme in respect of which the company is an employer (within the meaning of Part 2 of the Pensions Act 2004), where the trustees or managers of the scheme are a creditor of the company.

FCA and PRA

Certain companies carrying on regulated activities are required to give notice to the appropriate regulator (the FCA or, in the case of PRA-regulated companies, both the FCA and the PRA) where they intend to make an application to the court under Part 26A, CA 2006, or where they believe that a creditor or member of the company has made or intends to make such an application in relation to the company (see generally new s. 335A, FSMA 2000, as inserted by para. 20, Schedule 9 CIGA 2020).

Further, where the company is regulated by the PRA, it may not make an application under Part 26A, CA 2006, without the PRA's consent (s. 335A(3), FSMA 2000).

The companies falling within the scope of this requirement are (s. 335A(1), FSMA 2000):

(1) Companies that are, or have been, authorised persons or recognised investment exchanges.

(2) Companies that are, or have been, electronic money institutions, authorised payment institutions, small payment institutions or registered account information service providers.

(3) Companies that are, or have been, appointed representatives.

(4) Companies that are carrying on, or have carried on, regulated activities in contravention of the general prohibition.

The appropriate regulator is entitled to be heard at any hearing of an application made under Part 26A (whether under s. 901C or s. 901F), CA 2006, in relation to the company (s. 335A(5), FSMA 2000).

In addition, the explanatory statement required under s. 901D, CA 2006, and any notice or other document that has to be sent to the company's creditors, must be sent to the appropriate regulator (s. 335A(6), FSMA 2000), and the regulator may appoint a person to attend any meeting of the company's creditors summoned by the court, and to make representations at such a meeting (s. 335A(7), FSMA 2000).

These requirements are serious and may be enforced under new s. 335B, FSMA 2000, through public censure statements or financial penalties.

Bank of England

CIGA 2020, through para. 49 of Schedule 9, also inserts new s. 124A into the Financial Services (Banking Reform) Act 2013 (the "**FSBRA 2013**"). This new provision confers similar requirements and rights in relation to the Bank of England (the "**BoE**"), where a proposed Restructuring Plan concerns an "infrastructure company", as defined in s. 112, FSBRA 2013.

In such a case, a "relevant applicant" (i.e. a company, or a liquidator or administrator) must give notice to the BoE of any application under s. 901C(1), CA 2006, that the relevant applicant intends to make, or of any application which the relevant applicant believes a creditor or member of the company has made or intends to make under that section (s. 124A(2), FSBRA 2013).

A relevant applicant may not make an application under s. 901C(1), CA 2006, without the consent of the BoE (s. 124A(3), FSBRA 2013). The BoE is entitled to be heard at any hearing of an application made under s. 901C or 901F, CA 2006, in relation to the company (s. 124A(5), FSBRA 2013).

Notices or other documents that are required to be sent to creditors must also be sent to the BoE (s. 124A(6) FSBRA 2013). The BoE may appoint a person to attend any meeting of the company's creditors summoned by the court, and to make representations at such a meeting (s. 124A(7), FSBRA 2013).

These requirements are serious and s. 124A(8), FSBRA 2013 allows the BoE to sanction any infrastructure company that fails to comply by publishing details of the non-compliance, imposing a penalty or by obtaining an injunction under s. 197, 198 and 202A of the Banking Act 2009.

24. Who is entitled to participate in a meeting summoned under Part 26A of the Companies Act 2006?

Every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be summoned by the court (s. 901C(3), CA 2006).

However, the court has express power to exclude any creditors or members (or class thereof) on an application, where it is satisfied that none of the members of that class has a genuine economic interest in the company (s. 901C(4), CA 2006).

Further, the court recently confirmed that the provisions in para. 3, Schedule 14, CIGA 2020, apply to Part 26 schemes of arrangement (and will therefore apply to Restructuring Plans): see *Re Columbus Energy Resources plc* [2020] 8 WLUK 20. Paragraph 3, Schedule 14, CIGA

2020, makes provision for holding and conducting meetings of "qualifying bodies" (e.g. companies) during a defined "relevant period" (see para. 2, Schedule 14, CIGA 2020). This "relevant period" began on 26 March 2020 and was originally to expire on 30 September 2020; however, that "relevant period" is now being extended to 30 December 2020 by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020. Pursuant to para. 6, Schedule 14, CIGA 2020, a member of a company does not have a right to attend such a meeting in person, to participate in such a meeting other than by voting, or to vote at such a meeting by particular means. As a result, for the time being, members do not have a right to consult with one another at a class meeting held for the purposes of Part 26A, CA 2006.

In *Re Columbus Energy*, the court observed that this was at odds with the principles set out in *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) to the effect that the essence of a meeting is that participants should be able to come together to consult (see further question 25 below). However, the court also explained that CA 2006 does not require consultation to take place; it simply requires that the statutory majority be fulfilled (see s. 901F, CA 2006). Nevertheless, the court stressed that, where the rights of members of a qualifying body to participate in a meeting other than by voting had been removed by para. 3(6), Schedule 14, CIGA 2020, it was particularly important for the qualifying body to take sufficient steps to ensure that the terms of the Restructuring Plan, and in particular those on which shareholders would wish to consult, had been fully and adequately explained. The court also commented that the provision does not apply to meetings of creditors, to which the principles set out in *Re Castle Trust Direct* continue to apply.

Where an application for an order convening meetings of creditors is made before the expiry of 12 weeks beginning with the day after the end of a moratorium under Part A1 of IA 1986, creditors in respect of moratorium debts or priority pre-moratorium debts may not participate in the meeting summoned by the court (s. 901H(3), CA 2006).

A moratorium debt is defined in new s. A53, IA 1986 (via s. 174A(11), IA 1986), as:

(1) any debt or other liability to which the company becomes subject during the moratorium, other than by reason of an obligation incurred before the moratorium came into force; or

(2) any debt or other liability to which the company has become or may become subject after the end of the moratorium by reason of an obligation incurred during the moratorium; or

(3) any liability in tort or delict, provided that it accrues during the moratorium, or all necessary elements to establish the claim exist before the moratorium comes to an end save for actionable damage.

A priority pre-moratorium debt is defined in new s. 174A(3), IA 1986. Such debts include:

(1) pre-moratorium debts payable in respect of the monitor's remuneration or expenses, goods or services supplied during the moratorium, rent in respect of a period during the moratorium, or wages or salary arising under a contract of employment, so far as relating to a period of employment before or during the moratorium;

(2) pre-moratorium debts that consist of a liability to make a redundancy payment and fell due before or during the moratorium; and

(3) any pre-moratorium debts that arise under a contract or other instrument involving financial services, fell due before or during the moratorium and is not a "relevant accelerated debt".

A pre-moratorium debt is defined in new s. A53, IA 1986 (via s. 174A(11), IA 1986), as:

(1) any debt or other liability to which the company becomes subject before the moratorium comes into force;

(2) 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; and

(3) any liability in tort or delict where the cause of action has accrued before the moratorium comes into force, or all the elements necessary to establish the cause of action exist before the moratorium comes into force except for actionable damage.

For the purposes of s. 174A, IA 1986, a relevant accelerated debt (as defined in s. 174A(4), IA 1986) is any pre-moratorium debt that fell due during the relevant period by reason of the operation of, or the exercise of rights under, an acceleration or early termination clause in a contract or other instrument involving financial services. The relevant period begins with the day on which the proposed monitor makes a statement in support of the filing or application for a moratorium, and ends on the last day of the moratorium.

Paragraph 35 of Schedule 9, CIGA 2020, makes amendments to the same effect in respect of Part 26 schemes of arrangement (see amended s. 896, 899 and 899A, CA 2006).

See also question 23 above in relation to the rights of regulators and the Bank of England to attend meetings.

25. What are the requirements for meetings of creditors or members to approve a proposed compromise or arrangement under Part 26A of the Companies Act 2006?

What constitutes a meeting?

As a matter of corporate law generally, a meeting is generally understood to be a coming together of more than one person, unless otherwise indicated by the relevant legal provision. In the context of Part 26 schemes of arrangement (and it is therefore likely to be the same for Part 26A, CA 2006), a meeting requires more than one member of a particular class to attend, unless the class has only one member or there are other exceptional circumstances (see *Re Altitude Scaffolding Ltd* [2006] BCC 904 at [18]-[19]).

The purpose of a meeting, in the context of schemes of arrangement (which is therefore likely to be the case in the context of Restructuring Plans), is to enable creditors or members to come together and to consult with each other in order to make a collective decision on the re-arrangement or compromise of their rights against the company (*Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) at [38]). This may involve debating the merits of the scheme and questioning the scheme's proponents (see *Re Altitude Scaffolding Ltd* at [7]).

Provided that something takes place which has those characteristics, it will be considered to be a meeting. It has been held that this is capable of being achieved by telephonic communication where those who are participating are able to hear and ask questions and express opinions in circumstances in which everybody else who is present at the meeting is also able to hear, ask questions and express opinions (*Re Castle Trust Direct plc* at [42]). There is no reason why such reasoning should not apply to a meeting sought to be convened over a video-conferencing platform.

However, the court will require evidence that the meeting did enable the necessary "*coming together*" to take place. In practice, this means that the court is likely to require evidence at the sanction hearing as to how the technology worked and whether or not there were any difficulties in relation to participation at the meeting. The court will require to be satisfied that there were no difficulties for participating creditors in their ability to hear, ask questions or express opinions at the meeting or otherwise have their ability to contribute to the business of the meeting impaired. It may be appropriate for this to be dealt with in the chairman's report (as to which, see below). Such difficulties, if sufficiently serious, may prevent the court from concluding that a meeting had properly taken place (see *Re Castle Trust Direct plc* at [43]-[44]).

What is the nature of a court-ordered meeting?

Meetings in the context of schemes of arrangement (and which is therefore likely to be the case in the context of Restructuring Plans) have been described as "*sui generis*", and consequently

the law in relation to the exercise of votes as set out in the context of companies' general meetings does not apply (*Re Dee Valley Group plc* [2018] Ch 55 at [27]).

Therefore, at a court-ordered meeting, when casting their votes, the participants should bear in mind that they are supposed to be fairly representing their class, and acting bona fide, and not coercing a minority in order to promote interests adverse to the class they purport to represent. In other words, participants must take care that they vote in the interests of the class as whole and not in their own specific interests if they are different from the interests of the class (see *Re Dee Valley Group plc* at [42]-[47].

What is the necessary majority for obtaining creditor or member approval?

In order to be approved, and subject to the effects of the 'cross-class cram down' discussed under question 27 below, a proposed Restructuring Plan must be approved by 75% in value or more of the creditors or members (or relevant class thereof) present and voting in person or by proxy at the relevant court-ordered meeting (although not a specific statutory requirement, this is assumed by s. 901F(1), CA 2006). There is no requirement for a simple majority by number, in contrast to the requirements for a Part 26 scheme of arrangement.

The company is then entitled to apply to the court for an order sanctioning the proposed Restructuring Plan.

The conduct of a meeting

A chairman will preside over the meeting. Generally, the chairman will address the meeting on the background to the proposed Restructuring Plan and its principal provisions, and will explain the voting procedure and any other administrative matters. The chairman will take questions in relation to the proposals, and those attending should be able to raise concerns or objections.

Once the meeting has had the opportunity to raise any questions and consult on the terms of the Restructuring Plan, the chairman invites the meeting to vote on the proposals. The chairman may admit or reject (if it appears that there is a legitimate reason for doing so) creditors' claims for the purposes of taking a vote, or the chairman may determine the value which their claims represent within the class.

The conduct and outcome of the meeting will be recorded in a report written by the chairman of the meeting. The chairman's report should identify any areas of concern in relation to the conduct of the meeting (particularly if it was convened through the use of technology, as to which, see above) or the way in which the relevant class was represented.

26. The second hearing: what are the requirements for obtaining the court's approval of a proposed compromise or arrangement under Part 26A of the Companies Act 2006?

Once the relevant meetings of creditors or members have approved the proposed Restructuring Plan, an application to the court may be made under s. 901F(1), CA 2006. This leads to a further hearing where the court will decide whether to approve the Restructuring Plan.

Given the similarities between existing Part 26, CA 2006, and new Part 26A, CA 2006, it is expected that the principles developed in the context of approving schemes of arrangement will apply in relation to the approval of Restructuring Plans (the High Court has already starting doing so: see further the answer to question 20 above). On this assumption, the likely key relevant principles may be summarised as follows:

(1) The court has discretion whether to sanction a Restructuring Plan, although it cannot sanction a Restructuring Plan where class meetings were not properly constituted in accordance with the court's directions or the requisite majorities were not obtained (*Re Dorman, Long and Company Ltd* [1934] Ch 635, at 655).

(2) The members in each class must have been fairly represented by those who attended the meeting, and the majority must be acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent (*Re Dee Valley Group plc* [2018] Ch 55).

(3) The court will not merely rubber-stamp the Restructuring Plan. It must consider whether the proposal is such that an intelligent and honest person, a member of the class concerned and acting in respect of their own interest, might reasonably approve the scheme (*Re Dee Valley Group plc*).

(4) The court will also look at the Restructuring Plan in the round and make sure that it is fair as between all the interests involved (*Re Lehman Brothers International (Europe)* [2019] Bus LR 1012 at [66]).

(5) Finally, the court will ensure that there is no "blot" on the proposed Restructuring Plan, such as any technical or legal defects or any reason why the scheme would not take effect as envisaged (*Re The Co-Operative Bank plc* [2017] EWHC 2269 at [22]).

27. What is the "cross-class cram down" and when can it be used?

The cross-class cram down is one of the most important provisions of new Part 26A. It is a mechanism (provided for by s. 901G, CA 2006) for binding creditors or members (or classes

thereof) who do not approve the proposed restructuring plan, provided that certain conditions are met:

(1) The court must be satisfied that, if the compromise or arrangement were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the "relevant alternative" (as to which, see below).

(2) The compromise or arrangement must have been approved by 75% in value of a class of creditors or members, present and voting either in person or by proxy at the court-ordered meeting, who would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative.

The "relevant alternative" means whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned.

The most likely alternative eventuality is likely to depend on the financial position of the company at the time that the court is considering the proposed Restructuring Plan. Sometimes, but certainly not necessarily, the likely alternative will be an insolvent liquidation. However, in other cases, for example if the company is seeking to mitigate potential financial difficulties that are some way off in the future, an insolvent liquidation may well not be the relevant comparator.

This is to be distinguished from the way in which a "cram down" operates in proceedings under Chapter 11 of the United States Bankruptcy Code, where the dissenting class of creditors must be paid in full before any junior claims are met. The way in which this provision has been implemented allows for a much greater degree of flexibility in considering how a proposed restructuring plan will impact dissenting creditors or members. However, it is expected that this aspect of the new provisions will lead to disputes over the extent to which dissenting creditors are left worse off when a proposed Restructuring Plan is considered by the court. The court's decision-making role will therefore be very important in relation to this aspect of the Restructuring Plan process where proposals are contested.

The new Restructuring Plan provisions that could also permit "cramming up" of senior dissenting creditors. However, in such a situation, it may be more difficult to show that those creditors are not worse off than in the case of the "relevant alternative".

For example, a company has realisable assets of £85 million but owes £100 million to its creditors, as follows:

Class	**Details**	**Debt (£)**
A	Maturity in 3 years Fully secured debt Payment in full upon liquidation	50 million

B	Maturity in 2 years Partially secured debt Payment of £30 million upon liquidation	40 million
C	Repayable immediately Unsecured debt Payment of £5 million upon liquidation	10 million

The "relevant alternative" in respect of this company is an insolvent liquidation.

Under the Restructuring Plan, the maturity of the debt instruments held by Classes A and B will be extended but the amount repayable will be written down in order to create £5 million more in realisable value for Class C. This is achieved by releasing £5 million of Class A's secured debt and writing down Class B's debt to £30 million (i.e. the amount it would currently receive upon an insolvent liquidation), in order to ensure that the released value is available to Class C:

Class	**Details**	**Restructured debt (£)**
A	Maturity in 5 years Fully secured debt	45 million
B	Maturity in 3 years Fully secured debt	30 million
C	Unsecured debt (but £10 million available in realisable value)	10 million

Class A considers that its interests are best-served by the company continuing to trade as a going concern and therefore supports the Restructuring Plan, as does Class C. Class B opposes the Restructuring Plan.

In such a scenario, Class B is not worse off under the Restructuring Plan than it would be in the event of the "relevant alternative". The 'cross-class cram down' should therefore be available in order to bind Class B and to implement the Restructuring Plan.

However, if Class A were the dissenting class, would Class A be left worse off under the Restructuring Plan than it would be upon an immediate liquidation? Would it be possible for Class A to be "crammed up" in circumstances where Classes B and C support the restructuring?

The answer is likely to depend on the value that Class A would receive from the extension to the maturity of the relevant debt instruments, and the anticipated performance of the assets over which the class has security over the additional 2 years by which those instruments are

extended. These are likely to be difficult questions involving expert financial and valuation evidence and a determination by the court at a contested hearing.

28. Are there any exceptions to who can be bound by a compromise or arrangement under Part 26A of the Companies Act 2006?

Moratorium debts are treated as a special case in Part 26A, CA 2006 (see s. 901H, CA 2006).

Where, in relation to a proposed Restructuring Plan, the application for meetings of creditors or members is made before the expiry of 12 weeks beginning with the day after the end of a moratorium under Part A1 of IA 1986, and the proposals make provision for creditors in respect of a moratorium debt or a priority pre-moratorium debt, the court may not sanction that Restructuring Plan unless those creditors consent.

See question 24 above for the definition of "priority pre-moratorium debt". Paragraph 35 of Schedule 9, CIGA 2020, makes amendments to the same effect in respect of Part 26 schemes of arrangement (see amended s. 896, 899 and 899A, CA 2006).

29. Are there special provisions in the event that a compromise or arrangement under Part 26A of the Companies Act 2006 involves the transfer of an undertaking or a company's property to another company?

Reflecting the flexibility of its corporate reconstruction powers, the court has wide statutory powers in respect of Restructuring Plans that involve the reconstruction of one or more companies, or the amalgamation of two or more companies, in which the whole or part of a company's undertaking or property will be transferred to another company (see s. 901J, CA 2006).

In such a scenario, the court may make a wide variety of orders to facilitate a reconstruction of that nature. Specifically, the court may make an order in respect of any of the following matters:

(1) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(2) the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(3) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(4) the dissolution, without winding up, of any transferor company;

(5) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement; and

(6) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

Where an order provides for the transfer of property or liabilities, the effect of the order is to vest property in the transferee company and the transferred liabilities become the liabilities of the transferee company.

In addition, the court has power to order that any transferred property vests free of any charges released by the compromise or arrangement.

As set out under question 18 above, it should be noted that the court's powers under s. 901J, CA 2006, are restricted to "companies" within the meaning of s. 1, CA 2006, which means companies formed and registered under CA 2006.

Practitioners should also note that para. 36 of Schedule 9, CIGA 2020, makes various consequential amendments to Part 27, CA 2006 (mergers and divisions of public companies), in order to take account of the existence of new Part 26A.

30. Are there special provisions applicable to the issue of new shares by a company entering into an arrangement or reconstruction under Part 26A of the Companies Act 2006?

CIGA 2020 amends s. 549, CA 2006, to avoid the restrictions on corporate authority for the allotment of shares. It also inserts s. 566A, CA 2006. in order to disapply existing shareholders' rights of pre-emption in relation to an allotment of equity securities that is carried out as part of a compromise or arrangement sanctioned under Part 26A, CA 2006.

31. What are a company's duties in respect of its Articles of Association?

Where an order sanctioning a Restructuring Plan amends the company's articles or any resolution or agreement affecting a company's constitution (as to which, see s. 29, CA 2006), and a copy of the order must be delivered to the registrar of companies, the order must be accompanied by a copy of the articles, or the resolution or agreement in question, as amended (see s. 901K(2), CA 2006).

Where new articles are issued by the company following the court's order sanctioning the compromise or arrangement, a copy of the articles must be accompanied by a copy of the court's order unless the effect of the order (including the effect of the compromise or arrangement itself) has been incorporated into the articles by amendment (s. 901K(3), CA 2006).

Failure to comply with this requirement is an offence on the part of the company and every officer of the company who is in default. A person guilty of such an offence is liable to a fine on summary conviction.

32. What is the effect of a court order sanctioning an arrangement or reconstruction under Part 26A of the Companies Act 2006 and when will it be binding?

A compromise or arrangement sanctioned by the court becomes binding on the company's creditors or members (or relevant classes thereof) and on the company (or, if the company is being wound up, on its liquidator and contributories) (see s. 901F(5), CA 2006).

However, the court's order itself is of no effect (and therefore the compromise or arrangement is not binding) until the order is delivered to the registrar of companies (or Gazetted for an overseas company not required to file particulars under s. 1046, CA 2006) (see s. 901F(6), CA 2006).

THE PROHIBITION OF TERMINATION CLAUSES

CIGA 2020 includes provisions that prevent suppliers of goods or services from relying on the fact that a company has gone into an insolvency procedure for the purposes of terminating the contract under which that supply is made. The intention behind these provisions is to enable the company to carry on trading through the rescue and restructuring process, with the aim of increasing the likelihood of a corporate rescue or a sale of the business as a going concern.

Evidently, such provisions could have a detrimental effect on the supplier, and CIGA 2020 therefore includes provisions which are intended to strike a fair balance by permitting the termination of a supply contract under certain circumstances, and by providing for certain exceptions to the operation of the new provisions particularly if they would cause "hardship" to the supplier.

CIGA 2020 also contains temporary exceptions, to operate in the immediate circumstances of the pandemic, which exempt "small" suppliers from the operation of the provisions. These are discussed under question 35 below.

Moreover, the new provisions do not deprive suppliers of any other contractual entitlement that arises while the company is going through an insolvency process.

The provisions are brought in by s. 14 and 15 CIGA 2020 and Schedule 12 to CIGA 2020, which, in particular, insert new s. 233B and 233C and Schedule 4ZZA into IA 1986.

The concept behind the provisions is not entirely new. Some restrictions on the cancellation of some so-called "essential" supplies, such as gas and electricity, have existed for some years (s. 233 and s. 233A, IA 1986). While the new provisions in CIGA 2020 extend the position much further, they have themselves been on the cards since the May 2016 '*Review of the Corporate Insolvency Framework*'.

The Government has published a useful factsheet on termination clauses here.

33. Can a supplier rely on a clause providing for the termination of a contract for the supply of goods or services where a company goes into an insolvency process?

In short, no, subject to some exceptions. The exceptions are discussed under questions 34 and 35 below.

New s. 233B, IA 1986, as provided for by CIGA 2020, will apply where a company becomes subject to a relevant insolvency procedure. For the purposes of new s. 233B, IA 1986, the relevant insolvency procedures are:

(1) The coming into force of a moratorium under Part A1, IA 1986.

(2) Administration.

(3) Administrative receivership.

(4) The entry into a CVA.

(5) Liquidation.

(6) Provisional liquidation.

(7) The commencement of the Restructuring Plan process (i.e. an order summoning a meeting for the purpose of considering and voting on a Restructuring Plan). The Restructuring Plan process is the new process created by CIGA 2020, by the insertion of new Part 26A into CA 2006, which is discussed above under questions 16 to 32.

The new termination clauses provisions apply to contracts for the supply of goods or services, subject to the exceptions discussed under question 35 below. Accordingly, the scope of the prohibition on termination clauses is very wide and is likely to apply to a broad range of business relationships (other than those specifically excepted).

The term "goods" is not defined by s. 233B, IA 1986, nor is it defined elsewhere in the IA 1986. Definitions of goods may be found in the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Consumer Rights Act 2015. Broadly speaking, these statutes define "goods" as personal chattels (i.e. tangible items) and not things in action (i.e. intangible items). However, it should be noted that the expression, as used in s. 233B, IA 1986, is not defined by reference to those statutes.

Similarly, the term "services" is not defined by s. 233B, IA 1986, nor is it defined elsewhere in the IA 1986. As above, definitions of "services" may be found in the Supply of Goods and Services Act 1982 or the Consumer Rights Act 2015. In these statutes, the expression means the provision of services other than employment or apprenticeship, with no further elaboration (although, as a matter of plain English, the supply of a service denotes the performance or carrying out work on behalf of another person). Again, it should be noted that the expression, as used in s. 233B, IA 1986, is not defined by reference to those statutes.

The new provisions contained in CIGA 2020 (see s. 233B(3) and (4), IA 1986) invalidate contractual terms that:

(1) Provide for the termination of the contract or the supply, or provide for any other thing to take place, because the company becomes subject to a relevant insolvency procedure.

(2) Enable the supplier to terminate the contract or supply, or to do any other thing, because the company has become subject to a relevant insolvency procedure.

(3) Enable the supplier to terminate the contract or supply in relation to an event that arose before the start of the insolvency period, but that entitlement has not yet been exercised. For these purposes, the "insolvency period" begins when the company becomes subject to the relevant insolvency procedure (see s. 233B(8), IA 1986).

34. Are there any circumstances under which a termination clause can be exercised notwithstanding the general prohibition?

Yes. New s. 233B(5) and (6), IA 1986, provide for the exercise of a termination clause in three situations, where consent, or permission, for the exercise of the clause is obtained.

First, where the company has entered administration, administrative receivership, liquidation or provisional liquidation, and the office-holder gives consent, the termination clause may be exercised.

Second, in any other case, the termination clause may be exercised where the company consents.

Third, the court may give permission for the exercise of the termination clause where it is satisfied that the continuation of the contract would cause the supplier hardship. The meaning of "hardship" is not clarified by the new provision. However, it is likely that this provision is intended to assist small businesses where an interruption to their cashflow, combined with an ongoing obligation to provide goods or services to an insolvent company, would cause them financial difficulties.

35. Are there any exceptions to the application of the new "termination clauses" provisions, so that the provisions do not apply at all?

Yes. There are some permanent exceptions and some temporary exceptions.

The permanent exceptions are brought in by Schedule 12 to CIGA 2020, which inserts new Schedule 4ZZA, IA 1986 (provided for by s. 233B(10), IA 1986). This excludes certain contracts and suppliers from the ambit of new s. 233B, IA 1986.

Where a termination clause is already caught by s. 233A(1), IA 1986 (protection of essential supplies in the case of administration or a company voluntary arrangement), it is excluded from the ambit of s. 233B, IA 1986.

The main exclusion relates to financial services. Accordingly, s. 233B, IA 1986 does not apply to suppliers involved in financial services, being: insurers; banks; electronic money institutions; investment banks and firms; payment institutions; operators of payment systems or infrastructure providers; recognised investment exchanges; and securitisation companies (see Part 2 of Schedule 4ZZA, IA 1986).

Similarly, s. 233B, IA 1986 does not apply to financial contracts (e.g. loans, financial leasing, guarantees or commitments, securities contracts, commodities contracts, futures and forwards, swaps, inter-bank borrowing agreements of 3 months or less, or master agreements), securities financing transactions, derivatives, spot contracts, capital market investment contracts, or public-private partnership contracts (see Part 3 of Schedule 4ZZA, IA 1986).

In addition, s. 233B, IA 1986 does not affect various other specific legislative provisions, namely provisions relating to: financial markets and insolvency (specifically, Part 7 of the Companies Act 1989, the Financial Markets and Insolvency Regulations 1996, the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 and the Financial Collateral Arrangements (No. 2) Regulations); set-off and netting arrangements within the meaning of s. 48(1)(c) and (d) of the Banking Act 2009; and interests in aircraft equipment under the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015).

The temporary exceptions are brought in by s. 15 CIGA 2020. This provides that s. 233B, IA 1986 shall not apply where the company becomes subject to a relevant insolvency procedure during the "relevant period" and the supplier is a "small entity" at that time. This is intended to strike a balance, for the benefit of small supplier businesses, in the immediate circumstances of the coronavirus pandemic.

For the purposes of these temporary provisions, the "relevant period" began on 26 June 2020 and was originally to expire on 30 September 2020. However, that "relevant period" is now being extended to 30 March 2021 by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020.

An "entity" in this context is a company, limited liability partnership, any other incorporated or unincorporated association or body of persons, or a sole trader.

An entity will satisfy the test for being a "small entity" by the reference to the following requirements.

If it is not in its first financial year at the time, it must satisfy two of the following three conditions:

(1) The supplier's turnover in its most recent financial year was not more than £10.2 million. If the supplier's most recent financial year was not 12 months, the maximum figure for turnover is to be adjusted proportionately.

(2) The aggregate of the amounts shown as assets in the supplier's balance sheet for the most recent financial year was not more than £5.1 million.

(3) The average number of the suppliers' employees over the most recent financial year was not more than 50. The average is to be determined taking the number of persons employed each month, adding together the monthly totals, and dividing by the number of months in the financial year.

If it is in its first financial year at the relevant time, the supplier must satisfy two of the following three conditions:

(1) The supplier's average turnover for each complete month in its first financial year is not more than £850,000.

(2) The aggregate of amounts which would be shown in the supplier's balance sheet at the relevant time is not more than £5.1 million.

(3) The average number of persons employed by the supplier in its first financial year is not more than 50. The average is to be determined in the way described above.

36. Is a supplier entitled to insist on payment of any outstanding sums upon the occurrence of an insolvency event?

No, but again with permanent and temporary exceptions.

Section 233B(7), IA 1986, as inserted by CIGA 2020, prevents a supplier from making it a condition of any supply of goods or services after the company becomes subject to the relevant insolvency procedure that any outstanding charges are paid.

The permanent exceptions are as follows.

First, s. 233B(7), IA 1986 does not apply in respect of the permanent exclusions discussed under question 35 above.

Second, s. 233B(7), IA 1986 does not apply in respect of essential supplies (gas, electricity, water, communications services, and in certain cases, specified IT equipment and services (see para. 1(2) of Schedule 4ZZA, IA 1986 as inserted by Schedule 12 to CIGA 2020)) where a company enters administration, an administrative receiver is appointed, a voluntary arrangement is approved and takes effect, the company goes into liquidation or a provisional liquidator is appointed.

The temporary exception is that the exclusion under s. 13(1) of CIGA 2020 for "small entities" discussed under question 35 above also covers s. 233B(7), IA 1986.

STATUTORY DEMANDS AND WINDING-UP PETITIONS

As mentioned above in the Introduction to this Corporate Insolvency section, CIGA 2020 creates breathing space for companies in financial difficulty. The exceptional circumstances of the pandemic are such that the Government takes the view that companies should be protected, for a limited time, from the risk of being driven into insolvency by unpaid creditors. This manifests itself in various ways. One way is the temporary suspension of the wrongful trading laws, addressed in a separate sub-section below. Another way, addressed here, is through temporary suspensions in relation to statutory demands and winding-up petitions.

Two points are to be emphasised at the outset:

First, the measures are temporary measures. CIGA 2020 does not amend the provisions of IA 1986 in relation to statutory demands or winding-up petitions, but is applicable alongside those provisions. It aims to avoid demands and petitions being issued against companies during the period of the coronavirus emergency. The Government's hope is that businesses can instead work through this period by reaching a realistic and fair agreement with their creditors. The measures therefore apply only for a designated period, as discussed below. Although, originally under the CIGA 2020 the relevant period in respect of statutory demands and winding-up petitions would end on 30 September 2020, the relevant period has subsequently been extended until 31 December 2021 by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020.

It should be noted, however, that s. 41, CIGA 2020, allows the temporary measures to be extended by up to six months, if the Secretary of State considers it reasonable to do so to mitigate an effect of coronavirus. Theoretically the relevant period could therefore be extended further, beyond 31 December 2021.

Second, the measures do not give a 'get out of jail free' card to every company that finds itself in financial difficulties during the relevant period.

In short, CIGA 2020 covers the following circumstances:

(1) It prohibits winding-up petitions from being presented (on or after 27 April 2020) where they are based on a statutory demand served between 1 March 2020 and 31 December 2020 (para. 1, Schedule 10, CIGA 2020).

(2) It prohibits winding-up petitions from being presented against a company (on or after 27 April 2020 and until 31 December 2020) on the ground that it is unable to pay its debts, unless the petitioning creditor has reasonable grounds to believe that the inability to pay is not the result of the coronavirus (paras. 2 and 3, Schedule 10, CIGA 2020).

(3) It prohibits a winding-up order from being made against a company (on or after 27 April 2020 and until 31 December 2020) on the ground that it is unable to pay its debts, unless the court is satisfied that the company would be unable to pay its debts even if coronavirus had not had a financial effect on the company (paras. 5 and 6, Schedule 10, CIGA 2020).

If a creditor's winding-up petition falls outside of these parameters the normal rules of the IA 1986 and IR 2016 apply.

The provisions in relation to statutory demands and winding-up petitions are largely contained in Schedule 10, CIGA 2020, which is incorporated via s. 10, CIGA 2020. An important feature of Schedule 10 is that many of its provisions will be applied retrospectively. This retrospectivity has been criticised by the Constitution Committee, but has nevertheless made it into CIGA 2020.

Finally, directors of companies threatened with a statutory demand or winding-up petition should consider the risk of personal liability, even where a company cannot for the time being be wound-up. This is discussed in detail in the Company Law section of this e-book below.

37. Can a creditor still rely on a Statutory Demand to prove a company's inability to pay its debts?

Under s. 122(1), IA 1986 there are seven circumstances in which a company may be wound up by the court. In ordinary circumstances, an unpaid creditor may invoke the sixth of these, i.e. that the company is unable to pay its debts (s. 122(1)(f), IA 1986).

Section 123, IA 1986, sets out the circumstances in which a company is deemed unable to pay its debts.

One way to prove a company's inability to pay its debts is by the statutory demand procedure under s. 123(1)(a). The creditor serves a statutory demand for the debt (which must exceed £750) on the company. If the company does not satisfy the debt within three weeks of having received the statutory demand, the company will be deemed unable to pay its debts. The creditor then has a strong, practically unassailable, basis for presenting and proceeding with a winding-up petition under s. 124, IA 1986.

In ordinary circumstances, the service of a statutory demand is therefore a powerful weapon for a creditor, to put pressure on the debtor company to pay up. The weapon is often deployed, often successfully.

The current extraordinary circumstances require a different approach.

Therefore, in light of the coronavirus crisis, s. 10 CIGA 2020 brings into operation Schedule 10 of CIGA 2020, which imposes the temporary restrictions referred to in the introductory comments above.

Specifically in relation to statutory demands, para. 1(1) of Schedule 10 stipulates that no petitions for the winding-up of a registered company may be presented on or after 27 April 2020, insofar as such a petition relies on a statutory demand served on the debtor company under s. 123(1)(a) between 1 March 2020 and 31 December 2020.

Paragraph 1(2) of Schedule 10 achieves the same result for unregistered companies (s. 222, IA 1986).

The provisions of CIGA 2020 relating to statutory demands and winding-up petitions have retrospective effect. CIGA 2020 will therefore be applicable to any petition presented on or after 27 April 2020 but before it came into force on 26 June 2020 (para. 1(4) of Schedule 10).

The answer to the question posed above is therefore, temporarily, 'no'. A creditor may not rely on a statutory demand as the basis for a winding-up petition if and so far as the demand is served between 1 March 2020 and 31 December 2020.

38. What are the practical consequences of the temporary inability to use a statutory demand?

The practical consequences of Part 1 of Schedule 10 are that creditors are not only prevented from succeeding on a winding-up petition, which is based on a statutory demand served between 1 March 2020 and 31 December 2020, but they will also now be prevented from presenting such a petition.

Therefore, a company whose creditors are threatening to present a winding-up petition based on a statutory demand which was served on or after 1 March 2020, should consider making an application to restrain the winding-up petition from being presented. Time-permitting, it is always advisable to request the creditor concerned for an undertaking not to present the petition, before issuing an application. However, where a creditor refuses to give such an undertaking or where presentation appears imminent, the court is likely to grant an application to restrain the presentation of a winding-up petition on the basis of the provisions of CIGA 2020. Indeed, the court has already shown a willingness to do so, even before CIGA 2020 came into force: *Re a company (Injunction to restrain presentation of petition)* [2020] EWHC 1406 (Ch).

It is important to note, however, that Schedule 10 does not necessarily prevent the presentation of a creditor's winding-up petition on the basis of an inability to pay debts where such inability is not based on a statutory demand served between 1 March 2020 and 31 December 2020, but

on some other ground listed in s. 123, IA 1986 (registered companies) or s. 223 and s. 224, IA 1986 (unregistered companies). However, such a petition can only be utilised in limited circumstances as there are other conditions that must be fulfilled before such a petition can be presented and can succeed. These are discussed in question 40.

The restrictions of Schedule 10 are designed to prevent pressure by creditors for non-payment of debts. Therefore, they do not appear to apply where the winding-up petition relies on some other non-debt related ground for winding-up (as listed in s. 122(1), IA 1986 (registered companies) or s. 221(5), IA 1986 (unregistered companies)).

39. Will a pending winding-up petition be adjourned?

Paragraph 4 of the Temporary Practice Direction Supporting the Insolvency Practice Direction ("**Temporary Insolvency PD**") makes provisions for the adjournment of pending applications and petitions. However, petitions for winding-up to be heard before an ICC Judge sitting in the Rolls Building in London are exempt from this provision, and are therefore not automatically adjourned.

As per para. 7 of the Temporary Insolvency PD, there is a temporarily amended listing procedure in place for winding-up petitions. This is addressed below, in the sub-section dealing with 'Procedure'.

If you have any questions or concerns about the listing of a winding-up petition, it is prudent to enquire with the Rolls Building ICC listing office:

Email: Rolls.ICL.Hearings1@justice.gov.uk

Tel: 020 7947 6731

For general queries relating to issues with cases in the ICC list, the contact details are:

Email: Rcjcompanies.orders@justice.gov.uk

Tel: 020 7947 6294

40. What other restrictions are in place in relation to the presentation of winding-up petitions by creditors?

The temporary prohibition on presentation of a petition based on a statutory demand has been addressed above at question 37. In short, as explained more fully there, paras. 1(1) and 1(2) of Schedule 10 provide that a winding-up petition cannot be presented on or after 27 April 2020

on the basis of a statutory demand served on the debtor company between 1 March 2020 and 31 December 2020. If a winding-up petition is nevertheless presented, in such circumstances, the petition should be dismissed.

The position is different for a creditor's winding-up petition presented that relies on:

(1) a statutory demand which was served on the debtor company outside the relevant period (1 March 2020 and 31 December 2020); or

(2) some other ground listed in s. 123, IA 1986 (registered companies) or s. 223 and 224, IA 1986 (unregistered companies), relating to a company's inability to pay its debts.

In such circumstances, a winding-up petition may not be presented between 27 April 2020 and 31 December 2020, unless the creditor presenting the petition has reasonable grounds for believing that:

(1) coronavirus has not had a financial effect on the company; or

(2) for petitions:

(a) under s. 123(1)(a)-(d), IA 1986: the facts by reference to which the relevant ground applies, upon which the petition is based, would have arisen in any event even if coronavirus had not had a financial effect on the company;

(b) under s. 123(1)(e) or 123(2), IA 1986: the relevant ground would apply even if coronavirus had not had a financial effect on the company.

(Paras. 2 and 3 of Schedule 10, CIGA 2020).

In order to comply with this condition, CIGA 2020 stipulates that a winding-up petition must contain a statement from the petitioning creditor that it considers that the condition described in paras. 2 or 3, Schedule 10, CIGA 2020 is met (para. 19(3), Schedule 10, CIGA 2020).

What is a "financial effect"?

CIGA 2020 defines that coronavirus has a "*financial effect*" on a company if (and only if) the company's financial position worsens in consequence of, or for reasons relating to, coronavirus (para. 21 of Schedule 10) ("**Financial Effect**"). There is no further guidance (either in CIGA 2020, the Explanatory Notes or case law) as to how 'Financial Effect' and a company's "*financial position*" will be interpreted.

If a creditor is threatening to present a winding-up petition in circumstances where the creditor's petition would not fulfil the criteria listed above (paras. 2 and 3 of Schedule 10) or relies on a statutory demand served on or after 1 March 2020, the debtor company should

consider making an application to restrain the creditor from presenting the petition. This is discussed below at question 45.

The restrictions, discussed above, are not apparently applicable to any winding-up petitions presented on other, non debt-related, grounds under s. 122, IA 1986 (registered companies) or s. 221(5), IA 1986 (unregistered companies) (i.e. other than a company's inability to pay its debts).

The provisions of CIGA 2020 in relation to statutory demands and winding-up have retrospective effect, being applicable to any petition presented on or after 27 April 2020 (paras. 1(4), 2(5) and 3(5) of Schedule 10). In order to avoid a redundancy of the Act's provisions, CIGA 2020 includes provisions to deal with any petitions presented on or after 27 April 2020, but before CIGA 2020 came into force on 26 June 2020. These are addressed below at questions 41 and 42.

41. What are the court's powers in relation to a winding-up petition presented by a creditor after 27 April 2020, but before the Corporate Insolvency and Governance Act 2020 came into force?

The court may make such order as it thinks appropriate to restore the position of the debtor company to what it would have been if the petition had not been presented, where:

(1) a creditor presents a winding-up petition on or after 27 April 2020, but before Schedule 10 of CIGA 2020 came into force on 26 June 2020;

(2) in circumstances where the court considers that the creditor did not have the reasonable belief necessary under paras. 2 or 3 of Schedule 10; i.e. the belief that coronavirus had not had a Financial Effect on the company or that the relevant debt issues would have arisen in any event, as discussed in question 40.

(Para. 4(1)-(2), Schedule 10, CIGA 2020).

The court's remedial powers appear to be discretionary and unlimited. It is likely that any remedial order may include an award for damages. This is important, because the presentation of a winding-up petition can have immediate financial consequences for a debtor company.

A public record is kept of all the winding-up petitions presented at the Companies Court. As a result, the public is in a position to find out against which companies winding-up petitions have been presented, even before the petition has been advertised in the London Gazette (but see further question 44 below). This can have serious consequences. For example, upon finding out about a winding-up petition, a bank may freeze the company's accounts. This could have consequences for the company's ability to continue trading or pay its employees. It can also

cause serious reputational harm. The presentation of a petition can also trigger defaults in a company's borrowing covenants and in other company contracts.

Consequently, for any winding-up petitions presented between 27 April 2020 and 31 December 2020, where such a petition is based on a company's inability to pay its debts (other than relying on a statutory demand served between 1 March 2020 and 31 December 2020), the petitioning creditor must carefully consider the strength of its belief necessary under paras. 2 or 3 of Schedule 10, and whether such belief is reasonably held.

If the court finds that the creditor did not have the reasonable belief necessary under paras. 2 or 3 of Schedule 10, the petitioning creditor risks being held liable for any financial harm suffered by the debtor company.

These sections of CIGA 2020 appear to be limited in scope. They do not appear to apply to creditors' winding-up petitions which are based on a ground other than the company's inability to pay its debts.

42. Are there any circumstances in which a winding-up order made on or after 27 April 2020, but before the Corporate Insolvency and Governance Act 2020 came into force, may be reviewed or avoided?

Upon the making of a winding-up order in England & Wales, an official receiver is appointed (often on an interim basis) to collect documents and investigate the affairs of the company being wound-up.

If, despite the restrictions included in Schedule 10, CIGA 2020, a company is wound-up on the basis of a petition presented on or after 27 April 2020 and before 26 June 2020 (the day on which CIGA 2020 came into force), the official receiver must refer the matter back to court if it appears to the official receiver that the petitioning creditor did not have the reasonable belief necessary under paras. 2 or 3 of Schedule 10 (para. 4(3), Schedule 10, CIGA 2020). The 'reasonable belief' is discussed at question 40.

Upon referral to the court, the court will consider whether it would be appropriate to make a remedial order under para. 4(2) of Schedule 10. This provision is discussed at question 41. As discussed above, it enables the court to make such order as it thinks appropriate to restore the position of the debtor company to what it would have been if the petition had not been presented.

The referral will be treated as if it were an application under s. 147, IA 1986; i.e. an application to stay the winding-up.

Similarly, the court is to be regarded as having had no power to make a winding-up order, where:

(1) the court made the winding-up order on or after 27 April 2020, but before Schedule 10 of CIGA 2020 came into force; and

(2) in circumstances where the court would not have made that order, had Schedule 10 of CIGA 2020 been in force. These circumstances are discussed at question 43. Essentially, they concern the question whether the court considers that coronavirus had a Financial Effect on the company.

The order will be regarded as void. The court may give such directions to the official receiver, liquidator or provisional liquidator as it thinks fit, for the purpose of restoring the company to the position it was in immediately before the petition was presented.

Similarly to para. 4(3) of Schedule 10, the official receiver must refer the matter to the court to determine whether remedial directions should be given, where it appears to the official receiver that:

(1) a winding-up order made by the court on the basis of a company's inability to pay its debts is void; and

(2) it might be appropriate for the court to give such directions.

(Para. 7, Schedule 10, CIGA 2020).

This reference, too, would be treated as if it were an application under s. 147, IA 1986.

It is, therefore, to be expected that any winding-up orders made on or after 27 April 2020, but before CIGA 2020 came into force, will be scrutinised. Any winding-up orders based on a company's inability to pay its debts are at risk of being considered void, with remedial directions or orders to follow.

43. Will additional restrictions be in place where the court considers a creditor's petition presented on or after 27 April 2020?

Any presented winding-up petitions will have to comply with the restrictions discussed at question 40.

In addition, the court's ability to grant a winding-up petition will be restricted where:

(1) a creditor presents a winding-up petition between 27 April 2020 and 31 December 2020;

(2) the company is deemed unable to pay its debts on a ground specified in s. 123(1) or (2), IA 1986 (registered companies) or s. 222, 223 or 224, IA 1986 (unregistered companies); and

(3) it appears to the court that coronavirus had a Financial Effect on the company, before the presentation of the winding-up petition.

In such circumstances, the court may only wind-up a company if it is satisfied that: (i) for petitions under s. 123(1)(a)-(d), IA 1986, the facts by reference to which the ground relied on for winding-up applies would have arisen even if coronavirus had not had a Financial Effect on the company; and (ii) for petitions under s. 123(1)(e) or s. 123(2), IA 1986, the ground relied on for winding-up would apply even if coronavirus had not had a Financial Effect on the company (s. 5 and 6 of Schedule 10).

In other words, if the court finds that coronavirus worsened the financial position of the company, but the ground upon which winding-up has been requested would have existed in any event, then the court will still make the winding-up order. Whether the coronavirus had a Financial Effect on the company is a question of fact.

An early example of the application of para. 5 of Schedule 10 can be found in the case *Re a company (application to restrain advertisement)* [2020] EWHC 1551 (Ch) at paras. 37 to 47. This judgment was handed down when CIGA 2020 was still a Bill. It appears that ICC Judge Barber's assessment of the case was highly dependent on the evidence.

Petitioning creditors must therefore carefully consider the contents of any evidence served in support of the winding-up petition. It will be important to convince the court that the petitioning creditor has the necessary belief that the grounds for petitioning would have arisen regardless of the Financial Effects of coronavirus, in compliance with paras. 2 or 3 of Schedule 10.

In *Re a company (application to restrain advertisement)* the petitioner was explicitly granted liberty to apply to lift the restraint on advertisement on production of further evidence demonstrating that s. 123(1)(e), IA 1986 would apply even if coronavirus had not had a financial effect on the debtor company.

These sections only limit the court's power in respect of winding-up petitions based on the debtor company's inability to pay its debts. As such, they are limited in scope, and do not appear to apply to creditor's winding-up petitions which are based on a ground other than a company's inability to pay its debts.

44. What is the procedure for obtaining a winding up order, including the requirements for giving notice of, publicising, advertising or inspecting a winding-up petition, during the relevant period?

Paragraph 19(2) of Schedule 10 provides that the normal rules regarding notice, publication and advertisement do not apply to winding-up petitions which are based on the ground that the debtor company is unable to pay its debts until the court has made a determination in relation to the question of whether it is likely that the court will be able to make a winding-up order.

It therefore appears that any provisions in the IR 2016 in relation to notice, publication and advertisement of the petition should not be complied with until the court has made such a determination, as discussed at questions 40 and 43.

No guidance as to how this is procedurally meant to operate was provided either in CIGA 2020 or in its Explanatory Notes. However, the new Practice Direction relating to the Corporate Insolvency and Governance Act 2020 (the "**CIGA 2020 Practice Direction**") (available here) has filled in this gap. The new Practice Direction, in force from 26 June 2020, sets out the following procedural requirements:

(1) A petition will not be accepted for filing unless it contains the statement required by r. 7.5(1), IR 2016, as amended by para. 19(3) of Schedule 10, CIGA 2020 (i.e. the statement that the petitioner has satisfied the conditions discussed at question 40 above). The petition must also contain a summary of the grounds relied upon by the petitioner for the purpose of satisfying the test referred to at question 43 above (the "**Coronavirus Test**") (see para. 3, CIGA 2020 Practice Direction).

(2) Upon presentation of the petition, the petition will be listed for a non-attendance pre-trial review ("**PTR**") with a time estimate of 15 minutes for the first available date after 28 days from the date of presentation. At the PTR, the court will give directions for a preliminary hearing in order to determine whether it is likely that it will be able to make an order under s. 122(1)(f) or 221(5)(b), IA 1986, having regard to the Coronavirus Test (see para. 4, CIGA 2020 Practice Direction).

(3) If the petitioner wishes to rely on evidence at the preliminary hearing, other than the evidence contained in the petition, it must file and serve on the company a witness statement containing such evidence at the same time as the petition. If the company wishes to rely on any evidence at the preliminary hearing, it must file and serve on the petitioner a witness statement within 14 days of service of the petition (see paras. 6.1 and 6.2, CIGA 2020 Practice Direction).

(4) At least two days before the PTR, the parties must file and serve a listing certificate stating the identity of their legal representatives (if any), their availability for the preliminary hearing and a time estimate for the preliminary hearing (see para. 6.3, CIGA 2020 Practice Direction).

(5) At the PTR, the court may: (i) list the petition for a hearing in the winding-up list, if the company does not oppose the position and the court is satisfied that it is likely to make a winding up order under s. 122(1)(f) or 221(5)(b), IA 1986, having regard to the Coronavirus Test; or (ii) list the preliminary hearing and give appropriate directions (see para. 7, CIGA 2020 Practice Direction).

(6) At the preliminary hearing, if the court is not satisfied that it is likely that it will be able to make an order under s. 122(1)(f) or 221(5)(b), IA 1986, having regard to the Coronavirus Test, it shall dismiss the petition. Alternatively, where the court is satisfied that it is likely that it will be able to make an order under s. 122(1)(f) or 221(5)(b), IA 1986, having regard to the Coronavirus Test, it shall list the petition for a hearing in the winding-up list (see para. 8.1, CIGA 2020 Practice Direction).

(7) Where the court makes a direction for the petition to be heard in the winding-up list, the relevant provisions in the IR 2016 as to giving notice of the petition and its further conduct take effect (see para. 8.2, CIGA 2020 Practice Direction).

(8) Where the court has determined that it is likely that a winding-up order will be made, and it appears that the same determination has been made in respect of another petition concerning the same company (whether by the same or by a different court), the court shall direct that both petitions shall be listed for a further hearing at the same time, with the petition presented first in time to be heard first and the second petition to be transferred to the court dealing with the first petition (if necessary) (see para. 8.3, CIGA 2020 Practice Direction).

Importantly, until the court has made a determination as to whether it is likely that it can make a winding-up order, having regard to the Coronavirus Test, any rights to inspect the court files (under r. 12.39, IR 2016) are not exercisable (para. 19(4), Schedule 10, CIGA 2020). As such, the petition shall remain private (save for being served on the company and delivered to such other persons as specified in r. 7.9, IR 2016). Accordingly, unless the court orders otherwise, the petition will not be available for inspection, and neither the petition itself, nor the fact of its presentation shall be revealed in response to a search by a member of the public of the court file (para. 5, CIGA 2020 Practice Direction).

Practitioners should also note that, pursuant to para. 9, CIGA 2020 Practice Direction, a winding-up petition within the scope of that practice direction is deemed to be other than 'Local Business' for the purposes of paras. 3.6 and 3.7 of the Insolvency Practice Direction (available here). Accordingly, if the petition is issued in a County Court hearing centre having insolvency jurisdiction, it shall be transferred to one or other of the hearing centres referred to in para. 3.6, Insolvency Practice Direction.

45. Can a debtor company restrain the presentation of a (new) petition?

Yes, a debtor company can restrain the presentation of winding-up petition where it does not meet the criteria of either IA 1986 or Schedule 10 of CIGA 2020.

Before the Government published the Corporate Insolvency and Governance Bill, Snowden J rejected an application for an injunction to restrain the presentation of a winding-up petition on the basis of the Government's announcement (dated 23 April 2020) that it was intending to enact emergency legislation relating to statutory demands and winding-up petitions. Snowden J considered that the court had to make a decision on the law as it stands, and that he could not be sure of the scope of the legislation. It did not help the applicant that its evidence in respect of the effects of coronavirus on its financial position was contradictory (see: *Re Saint Benedict's Land Trust Ltd* [2020] EWHC 1001 (Ch)).

However, Birss J came to a different conclusion two weeks later in *Travelodge Hotels Ltd v Prime Aesthetics Ltd* [2020] EWHC 1217. The applicant had received a confirmation from the Department of Business, Energy and Industrial Strategy that the intention was for the Corporate Insolvency and Governance Bill to cover high street shops and also other companies. Birss J considered that the court could take into account imminent changes in the law, considered it highly likely that the legislation would cover the situation at hand, and granted the application to restrain presentation of the winding-up petition. The court did not require a cross-undertaking in damages.

Subsequent to the Corporate Insolvency and Governance Bill having been published (but prior to its enactment), an injunction was also granted by Morgan J in *Re a company (injunction to restrain presentation of a petition)* [2020] EWHC 1406 (Ch). The application had been supported by a substantial body of evidence to the effect that the coronavirus had a Financial Effect on the company and that the facts on which the petition was based would not have arisen if coronavirus had not had a Financial Effect on the company. The court came to the conclusion that the petition would ultimately fail. Morgan J expressed a high degree of confidence that the Bill (as it then was) would be enacted in more or less its draft form. The Judge considered that the court could take into account the likelihood of a change in the law and granted the application. However, unlike *Travelodge*, the injunction was granted on terms that the company should provide a cross-undertaking in damages.

Consequently, despite the fact that CIGA 2020 had, at the time of these judgment, not yet entered into force, the courts have shown a willingness to restrain the presentation of winding-up petitions on the basis of prospective legislation.

46. If a winding-up order is made, when is the winding-up deemed to commence? What is the consequence of this?

Where:

(1) a creditor presents a winding-up petition under s. 124, IA 1986 between 27 April 2020 and 31 December 2020; and

(2) the court makes a winding-up order on the basis of a company's inability to pay its debts;

the winding-up of the company is deemed to commence on the making of the winding-up order (para. 9, Schedule 10, CIGA 2020).

This is an important change from the usual position where, by s. 129(2), IA 1986, the winding-up is deemed to commence earlier, at the time of the presentation of the petition.

A crucial consequence of this provision is that transactions entered into between the presentation of the petition and the making of the winding-up order will (contrary to the usual principle in s. 127(1), IA 1986) not be void. "*As a result of the change, the company will not need to seek permission from the court to engage in its normal trading once a petition has been presented*" (Explanatory Notes, para. 220).

It is clear from this provision of CIGA 2020 that it does not apply to companies wound-up on the basis of a ground other than the company's inability to pay its debts. In those circumstances s. 129(2), IA 1986 will remain applicable, and the winding-up will be deemed to have commenced at the time of the presentation of the petition for winding-up.

47. What are the time periods for bringing a transaction-avoidance application in relation to a winding-up order made on a petition presented during the relevant period?

Paragraphs 8 to 18 of Schedule 10 make provision for the adjustment of time limits in other provisions in IA 1986, which relate to a company's insolvency and the winding-up process. These adjusted time limits are applicable in relation to winding-up petitions presented between 27 April 2020 and 31 December 2020, insofar as such a petition is based on the debtor company's inability to pay its debts.

Paragraph 9 has been dealt with at question 46.

Liability as contributories of present and past members

Where a company is being wound-up, every present and past member is liable to contribute to a company's assets to an amount sufficient for payment of its debts and liability as well as the expense of the winding-up (s. 74, IA 1986). This provision is subject to subsection 74(2). Paragraph 10 of Schedule 10 provides that "*one year or more before commencement of the winding up*" in s. 74(2)(a), IA 1986 has to be interpreted to mean:

(1) one year or more before the day on which the petition was presented; or

(2) if the winding-up order was made more than 6 months after the day on which the petition was presented, 18 months or more before the day on which the winding-up order was made.

Fraud in anticipation of winding-up

Section 206, IA 1986 lists the circumstances in which an officer of a company is deemed to have committed an offence following the winding-up of a company. The circumstances are only deemed to be an offence where they occurred within the 12 months immediately preceding the commencement of the winding-up.

Paragraph 11 of Schedule 10 provides that the 12-month timeframe is amended to begin with whichever is the later of:

(1) the day 12 months before the day on which the petition was presented; and

(2) the day 18 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order is made.

Transactions in fraud of creditors

In accordance with s. 207(1), IA 1986 an officer of a company is deemed to have committed an offence where (summarily put) the officer made a gift or concealed or removed property of the company before it was wound-up. However, the offence is not committed where the conduct occurred more than 5 years before the commencement of the winding-up (s. 207(2)(a), IA 1986).

Section 207(2)(a), IA 1986 is amended by para. 12 of Schedule 10 with the effect that s. 207(1), IA 1986 is applicable to conduct occurring:

(1) more than 5 years before the day on which the petition was presented; or

(2) if the winding-up order was made more than 6 months after the day on which the petition was presented, more than 5 years and 6 months before the day on which the winding-up order was made.

Misconduct in the course of winding-up

Section 208(1), IA 1986 lists circumstances in which an officer of a company which is being wound-up commits an offence. Furthermore, by s. 208(2), IA 1986, an officer commits an offence if, after the commencement of the winding-up, he attempts to account for any part of the company's property by fictitious losses or expenses. The officer is deemed to have committed the offence if he has so attempted in connection with any qualifying decision procedure or deemed consent procedure of the company's creditors within 12 months immediately preceding the commencement of the winding-up.

Paragraph 13 of Schedule 10 seeks to amend this 12-month timeframe of s. 208(2) to begin with whichever is the later of:

(1) the day 12 months before the day on which the petition was presented; and

(2) the day 18 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made.

Adjustment of withdrawals (LLPs)

Section 214A, IA 1986 (as inserted by the Limited Liability Partnership Regulation 2001 (SI 2001/1090)) is concerned with a person who is or has been a member of an LLP, where such a person withdrew property of the LLP (whether in the form of profits, salary, interest or otherwise) within the period of two years ending with the commencement of the winding-up (s. 214A(2), IA 1986). In such circumstances the court may declare that member liable to make such a contribution as it thinks proper (s. 214A(3), IA 1986).

Paragraph 14 of Schedule 10 amends the period in s. 214A(2) to begin with whichever is the later of:

(1) the day 2 years before the day on which the petition was presented; and

(2) the day 2 years and 6 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made.

Transactions at an undervalue (s. 238, IA 1986) and preferences (s. 239, IA 1986)

In relation to challenges of transactions made at an undervalue (s. 238, IA 1986) or preferences (s. 239, IA 1986), CIGA 2020 amends the "*relevant time*" (as set out in s. 240(1)(a), IA 1986), so as to begin with the later of:

(1) the day 2 years before the day on which the winding-up petition was presented; and

(2) the day 2 years plus 6 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made.

But where the alleged preference is given to a person who is not connected with the company, CIGA 2020 amends the "*relevant time*" (as set out in s. 240(1)(b), IA 1986), so as to begin with the later of:

(1) the day 6 months before the day on which the winding-up petition was presented; and

(2) the day 12 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made (para. 15, Schedule 10, CIGA 2020).

Avoidance of certain floating charges

In accordance with s. 245, IA 1986 floating charges on a company's undertaking or property are invalid (to a certain extent (see: s. 245(2), IA 1986)) insofar as they were created at a "*relevant time*". Section 245(3), IA 1986 defines the 'relevant time' for the purpose of this provision. The time at which a floating charge was created by a company is dependent on the circumstances in which it was created.

Where a charge was created in favour of a person who is connected with the company (s. 245(3)(a), IA 1986), the relevant time begins with whichever is the later of:

(1) the day 2 years before the day on which the petition was presented; and

(2) the day 2 years and 6 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made.

Where a charge was created in favour of any other person (s. 245(3)(b), IA 1986), the relevant time begins with whichever is the later of:

(3) the day 12 months before the day on which the petition was presented; and

(4) the day 18 months before the day on which the winding-up order was made; and

ends with the day on which the winding-up order was made (para. 18, Schedule 10, CIGA 2020).

Reminder

It is important to remember that the above adjusted time limits are only applicable to winding-up petitions presented between 27 April 2020 and 31 December 2020, insofar as such a petition was based on the debtor company's inability to pay its debts (para. 8 of Schedule 10).

In respect of any other winding-up petitions, the usual time limits will apply.

SUSPENSION OF LIABILITY FOR WRONGFUL TRADING

48. What is wrongful trading?

Under s. 214 and s. 246ZB, IA 1986, where a director of a company knows, or ought to conclude, that there is no reasonable prospect that the company will avoid going into insolvent liquidation or insolvent administration, the director must take every step with a view to minimising the potential loss to the company's creditors as the director ought to take. The steps that the director ought to take are those that would be taken by a reasonably diligent person having both the knowledge, skill and experience that may reasonably be expected of a person carrying out the director's functions and the director's own knowledge, skill and experience.

If the director does not take those steps, and if the company does subsequently go into insolvent liquidation or insolvent administration, then the court, on the application of the company's liquidator or administrator, may order the director to make such contribution to the company's assets as it thinks proper.

In practice, the court will assess the amount that a defaulting director should contribute by reference to the extent to which the director's decision to continue trading contributed towards an increase in the company's 'net deficiency' i.e. the amount by which its liabilities exceeded its assets (*Re Main Realisations Limited* [2017] EWHC 3878 (Ch); *Re Ralls Builders Ltd, Grant v Ralls* [2016] EWHC 243 (Ch); [2016] BCC 293).

The law of wrongful trading therefore understandably makes directors nervous. If they continue trading for too long, they are at risk of hefty personal financial exposure. A cautious director might therefore close a business down sooner than is really necessary.

49. What does the Corporate Insolvency and Governance Act 2020 do?

CIGA 2020 recognises the problem mentioned above, i.e. that the wrongful trading laws create a powerful incentive for directors, who believe that the company is at risk of entering insolvent liquidation or administration, to cease trading. In the current circumstances of the pandemic, that, however, is exactly what the Government does not want them to do. It would prefer them to make greater efforts to continue in business, assisted if necessary by the current support schemes such as furloughing and the Business Interruption Loans.

CIGA 2020 therefore temporarily suspends the wrongful trading laws. Section 12(1) provides that:

> "*In determining for the purposes of section 214 or 246ZB of the Insolvency Act 1986 (liability of director for wrongful trading) the*

> *contribution (if any) to a company's assets that it is proper for a person to make, the court is to assume that the person is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period.*"

The 'relevant period' is defined as 1 March 2020 to 30 September 2020.

CIGA 2020 therefore temporarily removes the threat of personal liability arising from the wrongful trading laws for directors who continue to trade during the pandemic. It obliges the court to assume that the director is not responsible for any increase in the company's net deficiency during the relevant period.

Uncertainties

Three particular questions arise.

(1) First, is the court able to go behind the assumption in cases where it is clear that the director was responsible for a worsening of the financial position of the company during the relevant period? Judging by the Government's response to the Lords Constitution Select Committee (here), the answer appears to be 'no'. The court is to assume that the person is not responsible. The reason for this is that if there were any risk of directors being held liable under the wrongful trading laws during this period, some cautious directors might still choose to close the business down so as not to take that risk. This is exactly what the Government is trying to avoid.

(2) Second, if a company does eventually go into liquidation or administration sometime after the relevant period, how will it be possible to determine which element of the loss is to be excised from any claim as having arisen during the relevant period? There may be formidable evidential difficulties, particularly where, as often happens, a claim does not come to trial until several years later. Directors will seek to reduce their liability by arguing that the loss substantially occurred during the relevant period. Liquidators will seek to hike up the liability by arguing that the loss occurred mainly outside the relevant period. It will be a fruitful area for argument and for detailed accounting evidence. Directors who might need to show later that the loss did indeed occur mainly during the relevant period would be advised to keep detailed financial records and management accounts (as they should do anyway).

(3) Third, are liquidators still able to hold directors who are guilty of what would otherwise be wrongful trading during the relevant period accountable by bringing claims for breaches of duties and using the summary procedural remedy against delinquent directors in s. 212, IA 1986? For example, where directors know, or ought to know that their company is, or is likely to become insolvent, they are

obliged to take into account creditor interests as opposed to managing the company principally for the benefit of its shareholders (*BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112; [2019] 2 All ER 784). Failure to do so is a misfeasance, which, if the company is subsequently wound-up, is actionable under s. 212, IA 1986, to which no amendment has been made. In our view, there is nothing to prevent the liquidator from bringing such a claim (as discussed in detail in the Company Law section of this e-book below). There would be a tension between such a claim and the policy behind the suspension of the wrongful trading laws, which it would not be easy for the court to resolve.

50. To which companies does the 'suspension' apply?

The suspension does not apply to most of the 'City' companies that are excluded from the new moratorium, as stated in s. 12(3) of CIGA 2020. This includes companies that are parties to capital market arrangements (as defined by Schedule ZA1, paras. 13 & 14). Further specific exclusions are set out at s. 12(8), CIGA 2020.

ADMINISTRATION

51. How has the procedure for the filing of a notice of intention to appoint an administrator & a notice of appointment of an administrator been adjusted?

There has for some time been uncertainty in the rather niche area of notices of intention to appoint administrators and notices of appointment of administrators which are CE-filed outside the courts' opening hours. It has not been clear whether it is possible for such notices to be filed through the CE-filing system outside the courts' normal opening hours and, if so, whether such notices were immediately effective. This uncertainty has been considered judicially in a number of decisions, and in relation to notices of appointment (but not notices of intention to appoint) is the subject of guidance issued by the Chancellor on 29 January 2020 (available here).

That case law and guidance have now been overtaken to a large extent by the Temporary Insolvency PD for so long as it remains in force, i.e. the 'Temporary Practice Direction supporting the Insolvency Practice Direction' which came into force on 6 April 2020 and can be found here.

Paragraph 3 of the Temporary Insolvency PD provides that:-

(1) A notice of intention to appoint an administrator which is CE-filed by a company or its directors outside the courts' usual opening hours (i.e. outside 10am to 4pm when the courts are open for business) will take effect as at 10am on the day that the courts are next open for business, and the ten business day period in which to make the appointment provided by para. 28(2), Schedule B1, IA 1986 will start running from that date (para. 3.3, Temporary Insolvency PD).

(2) Similarly, a notice of appointment which is CE-filed by a company or its directors outside the courts' usual opening hours will take effect as at 10am on the day that the courts are next open for business (para. 3.4, Temporary Insolvency PD).

(3) By contrast, the CE-filing system may not be used to file a notice of appointment of an administrator by the holder of a qualifying floating charge outside the courts' usual opening hours (para. 3.6, Temporary Insolvency PD); such a notice may only be filed outside the usual opening hours by the procedure set out in r. 3.20-3.22, IR 2016.

Paragraph 3.5 of the Temporary Insolvency PD provides that any such notices shall continue to be reviewed by the court, as and when practicable, in accordance with para. 5.3 of Practice Direction 51O (i.e. the Electronic Working Pilot Scheme) but that the validity and time at which the appointment of an administrator is effective shall not be affected by reason only of any delay in acceptance of the notice under para. 5.3(1) of Practice Direction 51O.

For reasons which are not clear, the Temporary Insolvency PD does not apply to notices of intention to appoint an administrator by the holder of a qualifying floating charge (para. 3.1, Temporary Insolvency PD). It may be that this omission means that notices of intention to appoint an administrator by the holder of a qualifying floating charge can continue to be e-filed and to be effective outside court hours (reflecting the pre-Temporary Insolvency PD view expressed by HHJ David Cooke in *Causer v All Star Leisure Group Ltd* [2019] EWHC 3231 (Ch), [2020] BCC 100). Alternatively, it may be that the changes introduced by the Temporary Insolvency PD ought also to apply by analogy here too, such that such notices may only be filed by the procedure set out in r. 3.20-3.22, IR 2016 (as is the case for a notice of appointment of an administrator filed by the holder of a qualifying floating charge). Alternatively, it may be that such notices should be capable of being CE-filed, but only take effect as at 10am on the day that the courts are next open for business (as is now the case for notices of intention to appoint an administrator and notices of appointment filed by a company or its directors). Clarification would be welcome, either by the courts through case law or through permanent changes to the IR 2016.

52. Does furloughing employees have the effect of adopting employment contracts?

Administrators may consider that the purpose of the relevant administration, to rescue the company as a going concern, may be best furthered if the company's employees are furloughed, or remain on furlough, under the Government's job retention scheme.

A question which has arisen in that context is whether the administrators are taken to have "adopted" the relevant contracts of employment for the purposes of para. 99(5), Schedule B1, IA 1986 by paying the amounts claimed from the Government to furloughed employees. This is an important issue since the effect of the adoption of a contract of employment (for which, see para. 99, Schedule B1, IA 1986) is that the wages or salaries, together with some other amounts such as sick pay and holiday, for the period after adoption until termination of the employment or, if earlier, the end of the administration, are payable as expenses of the administration ahead of not only pre-administration unsecured liabilities but also many of the costs and expenses of the administration.

The issue has been considered by the High Court in *In re Carluccio's Ltd* [2020] EWHC 886 (Ch), and, more recently, by the Court of Appeal in *In re Debenhams Retail Ltd* [2020] EWCA Civ 600, [2020] Bus LR 788.

In short, the answer is 'yes': retaining furloughed employees or placing employees on furlough does involve the adoption of their employment contracts for the purposes of para. 99(5), Schedule B1, IA 1986 – see *In re Debenhams Retail Ltd*, [70]-[71].

In reaching such a conclusion, the Court of Appeal noted that this may cause difficulties to administrators in deciding whether to retain furloughed employees or to place employees on

furlough, and that there may be good reasons of policy for excluding action restricted to implementation of the furlough scheme from the scope of "adoption" under para. 99. However, the Court of Appeal concluded that such an exclusion could not be accommodated under the law as it stands (see [71]). If the law needs to be changed, it is a matter for Parliament.

PROCEDURE

53. What changes have been made to insolvency procedures as a result of the pandemic?

Temporary Insolvency PD

The key changes to insolvency procedures are brought about by the Temporary Insolvency PD, i.e. the 'Temporary Practice Direction supporting the Insolvency Practice Direction', which can be found here.

The Temporary Insolvency PD is effective from 6 April 2020 until 1 October 2020 unless amended or revoked by a further insolvency practice direction in the meantime.

Its stated aim is to "*provide workable solutions for court users during the Covid-19 pandemic*" and to that end introduces several changes to the ordinary procedure applicable to insolvency proceedings.

It describes itself as "*supporting the insolvency practice direction*", i.e. the Insolvency Practice Direction of 4 July 2018, although in order to be effective it presumably must take precedence over the earlier Insolvency Practice Direction to the extent of any conflict.

The Temporary Insolvency PD applies to "*all insolvency proceedings throughout the Business and Property Courts, subject to any variations outside London as directed by the relevant supervising judge*". As to this, para. 4.2, Temporary Insolvency PD explains that guidance notes for regional hearing centres will be published on the Insolvency List web page for the relevant hearing centre here. However, so far, the only regional guidance which seems to have been made available relates to the North and North Eastern Circuits, and, separately, the Midland, Western and Wales Circuit – and neither seems to have been made available at the website intended by para. 4.2. The guidance for the North and North Eastern Circuit can nonetheless be found here, and the guidance for the Midland, Western and Wales Circuit can be found here.

In addition, ICC Judge Briggs has made available additional guidance applicable to matters listed before an ICC Judge in the Rolls Building, which can be found here.

The changes made by the Temporary Insolvency PD are, in summary:

(1) Changes to the regime for filing notices of intention to appoint an administrator and notices to appoint an administrator (para. 3) – see question 51 above.

(2) An adjournment of all those cases listed for hearing prior to 21 April 2020 (para. 4).

(3) Arrangements for listing urgent hearings (para. 5) – see question 56 below.

(4) Arrangements for all insolvency hearings to be conducted remotely (para. 6) – see question 55 below.

(5) A temporary listing procedure for winding-up and bankruptcy petitions (para. 7) – see question 54 below.

(6) A listing procedure for all other insolvency hearings (para. 8) – see question 55 below.

(7) Changes to the statutory declarations regime (para. 9) – see question 57 below.

Update to the Insolvency Practice Direction

A minor procedural change has been brought into effect through an update to the main Insolvency Practice Direction (available, as updated, here). The update is to provide that applications for orders concerning moratoria, and applications for orders concerning the protection of supplies of goods and services may be listed before a High Court Judge or ICC Judge but not ordinarily before a District Judge: see the newly inserted paras. 3.3(6) and (7).

CIGA 2020 Practice Direction

The CIGA 2020 Practice Direction (available here), which came into force from 26 June 2020, makes provision for certain procedural points arising from CIGA 2020. The effects of these are explained above in:

(1) Question 44 (as regards winding up petitions); and

(2) Question 5 (as regards moratoria).

Virtual meetings

The IR 2016 permits creditors to make decisions without meeting physically: see r. 15.2ff, IR 2016. This is of obvious importance in the context of the pandemic.

The IR 2016 does not apply to schemes of arrangement, but in that context the courts are being flexible to allow virtual meetings to take place where meetings are required: see *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch) and *In Re African Minerals Ltd* [2020] EWHC 1702 (Ch).

These decisions which permit meetings otherwise than in person have arisen as a result of the pandemic, but it will be interesting to see the extent to which such virtual meetings continue to be permitted once the pandemic has abated.

54. How are winding-up and bankruptcy petitions currently being listed?

Paragraph 7 of the Temporary Insolvency PD brings into effect a temporary listing procedure for winding-up and bankruptcy petitions where (in summary):

(1) The court allocates time slots for groups of 2 or more petitions.

(2) Those petitions are given together a designated meeting link using Skype for Business, or such other video or telephone conferencing platform as the relevant court decides.

(3) Any person who intends to appear on the hearing of the petition must deliver a notice of intention to appear on the petition in accordance with r. 7.14, IR 2016, and provide an email address or telephone number for the purposes of being invited to join the hearing remotely.

55. How are other insolvency hearings currently being listed?

Paragraph 8, Temporary Insolvency PD explains how other insolvency hearings are currently being listed, and para. 6, Temporary Insolvency PD explains how such hearings will then be conducted.

In short, they are being listed for a remote hearing via Skype for Business or other video or telephone conferencing facility. The parties can make submissions to the court if they disagree with its proposed method of hearing, and the parties can propose some alternative. The court will then decide how best to hold and conduct the hearing. It is open to the court to fix a short remote case management conference in advance of the fixed hearing to allow for directions to be made if necessary, to determine matters such as the conduct of the hearing and the technology to be used.

56. How can urgent hearings be listed before a High Court Judge or ICC Judge?

Paragraph 5 of the Temporary Insolvency PD explains how to list an urgent hearing before a High Court Judge or ICC Judge:

(1) An urgent hearing can be listed by emailing the ICC Judges' clerks at rolls.icl.hearings1@justice.gov.uk, or the relevant High Court Judge's clerk, setting out:

(a) the nature of the application/claim form/petition;

(b) why the matter is urgent;

(c) the estimated time for hearing and pre-reading;

(d) the number of parties who will need to attend; and

(e) confirmation that the hearing can be conducted by Skype for Business, another stated remote communication application, or telephone.

(2) The clerk will allocate the hearing to a Judge and send a Skype (or other application) meeting invitation or dial-in details to the parties. The clerk will also deal with matters relating to the issue of the application/claim form/petition via CE File, its endorsement by the court, and the payment of the necessary fee.

(3) The applicant/claimant/petitioner must send only those documents which are essential for the hearing by PDF (or by sending a link to an online data room) to the clerk for forwarding to the Judge, confirming the pre-reading time required.

(4) The Judge will join the hearing by Skype or other means at the allotted time and, after the hearing, will make directions for the filing of a draft minute of order which, as soon as practicable, will be sealed and returned to the serving party in the usual way.

Guidance as to what constitutes urgent business for matters listed before an ICC Judge in the Rolls Building; on the North and North Eastern Circuit; and for matters on the Midland, Western and Wales Circuit can be found in the promulgated guidance noted under question 53 above. In short:-

(1) The following are deemed urgent business before an ICC Judge in the Rolls Building:

(a) Applications made pursuant to s. 17, Company Directors Disqualification Act 1986;

(b) Applications made pursuant to s. 216, IA 1986;

(c) Petitions to wind up a company in the public interest;

(d) applications to convene a meeting for a members' scheme of arrangement;

(e) capital reduction claims; and

(f) cross-border merger claims.

(2) The following are presumed urgent on the North and North Eastern Circuit, and on the Midland, Western and Wales Circuit:

(a) Matters which of their nature are urgent;

(b) Applications for relief from the consequences of s. 127 or s. 284, IA 1986;

(c) Petitions to wind up a company in the public interest;

(d) Applications made pursuant to s. 17, Company Directors Disqualification Act 1986;

(e) Applications made pursuant to s. 216, IA 1986.

As can be seen, the matters which are deemed to be urgent are a somewhat incoherent collection; it is not immediately obvious why all capital reduction claims should be deemed to be urgent in all cases, nor why applications for relief from the consequences of s. 127 or s. 284, IA 1986 (i.e. for validation orders) are presumed urgent in some regional circuits, but not before an ICC Judge. However, importantly the lists of what is deemed / presumed to be urgent are not exclusive, and it will therefore be possible to argue that genuinely urgent matters which are not in the relevant lists are nonetheless urgent.

57. What changes have been made to the statutory declarations regime?

Paragraph 9.1 of the Temporary Insolvency PD notes that where Schedule B1, IA 1986 requires a person to provide a statutory declaration, a statutory declaration that is made otherwise than in-person before a person authorised to administer the oath may constitute a formal defect of irregularity. Paragraph 9.1 continues to note that the Court may, pursuant to r. 12.64, IR 2016, declare that such a formal defect or irregularity shall not invalidate the relevant insolvency proceedings to which the statutory declaration relates, unless the court considers that substantial injustice has been caused by the defect or irregularity which cannot be remedied by any order of the court.

Given the circumstances as described by para. 9.1, and the risk of a formal defect or irregularity where statutory declarations are provided otherwise than in-person, para. 9.2 provides that where a statutory declaration is made in certain prescribed circumstances, then the defect or irregularity (if any) arising solely from the failure to make the statutory declaration in-person before a person authorised to administer the oath shall not by itself be regarded as causing substantial injustice. Those prescribed circumstances are where:-

(1) The person making the statutory declaration does so by way of video conference with the person authorised to administer the oath;

(2) The person authorised to administer the oath attests that the statutory declaration was made in the manner referred to in (1) above; and

(3) The statutory declaration states that it was made in the manner referred to in para. (1) above.

The Temporary Insolvency PD thus enables statutory declarations to be provided by way of video conference without there being a risk that those statutory declarations may be defective or invalid. It therefore limits the need for in-person contact and facilitates the kinds of social distancing and remote working which are required by the pandemic.

Section Three: Personal Insolvency

Andrew Clutterbuck QC, Tiran Nersessian, Joseph Wigley, Emma Horner ©

Last updated: 2 September 2020

INTRODUCTION

Thus far, legal developments involving personal insolvency during the pandemic have been largely procedural. However, it is anticipated that there is likely to be an increase in personal insolvency proceedings from at least the end of 2020 and onwards in circumstances where employees currently on furlough schemes are earning less than they usually would, others may be made redundant and many of the self-employed have had their income significantly reduced but do not necessarily qualify for the Self-Employed Income Support Scheme. In any event, the government furlough and self-employed schemes are time-limited and, as they are rolled back, many individuals will be facing extreme financial difficulties. In the first few months of the pandemic, individuals have been able to benefit from mortgage holiday payments and to freeze loan or credit card repayments, however those payment holidays are also time-limited. We therefore expect to see a rapid development of the case law in this area, as the courts react to the effect of the pandemic on individuals. This section will be updated as legal developments unfold.

SPECIFIC ISSUES

1. Can individuals benefit from the moratorium in the Corporate Insolvency and Governance Act 2020?

No, CIGA 2020 only applies to companies and not to individuals (see the discussion in the Corporate Insolvency section above). Individuals will therefore not be able to benefit from the

moratorium in respect of their personal insolvency position (for information on the moratorium for companies see the Corporate Insolvency section above).

Individuals affected by the pandemic may, however, be able to obtain payment holidays from (probably mainly) institutional creditors by applying on an individual basis to the relevant creditor. Many mortgage providers have been willing to provide mortgage payment holidays, and in early June 2020 the FCA announced that mortgagors can make an application for a mortgage payment holiday until 31 October 2020: see https://www.fca.org.uk/consumers/mortgages-coronavirus-consumers. Further, the FCA has required most banks to offer a freeze on repayments of loans and credit cards for three months if requested before 31 October 2020, and this can be requested for a further three months: https://www.fca.org.uk/consumers/coronavirus-information-personal-loans-credit-cards-overdrafts.

2. Does the temporary ban on statutory demands in the Corporate Insolvency and Governance Act 2020 apply to personal insolvency proceedings?

No, CIGA 2020 only applies to companies and not to individuals see the discussion in the Corporate Insolvency section above). Under the new legislation, creditors are not prohibited from serving statutory demands, and statutory demands can continue to be used as a basis for presenting a bankruptcy petition (for information on the ban on the use of statutory demands as the basis of a winding-up petition against a company see the discussion in the Corporate Insolvency section above).

If an individual debtor is served a statutory demand they can, in the usual way, make an application to set aside the statutory demand within 18 days of service in accordance with r. 10.4, IR 2016. The grounds for making an application to set aside a statutory demand are set out in r. 10.5(5), IR 2016. If an application to set aside a statutory demand is made, the creditor cannot present a bankruptcy petition while the application is outstanding: r. 10.9(2)(b)(ii), IR 2016. However, if the court later dismisses the application the court is required to make an order authorising the creditor to present a bankruptcy petition as soon as possible or at a date specified by the court.

The court has a discretion under r. 10.5(5)(d), IR 2016, to set aside a statutory demand if the court is satisfied that the demand ought to be set aside. There is some support in the authorities for the proposition that courts should not place too restrictive a construction on this discretion (see Court of Appeal in *Budge v AF Budge (Contractors) Ltd (In Receivership and Liquidation)* [1997] BPIR 366) and that the court must ultimately decide whether in all the circumstances it would be unjust for the matter to proceed to the presentation of a bankruptcy petition. However, it is questionable whether debtors will be able successfully to deploy that argument on grounds that relate to consequences of the pandemic, save perhaps in cases which are very fact specific.

In circumstances where the legislature has taken a deliberate decision to extend protections concerning statutory demands only to corporate debtors, it would be very difficult for a bankruptcy court to accede to a more general argument that the same protections should be read across to personal insolvency law through the mechanism of r. 10.5(5)(d), IR 2016.

3. Can bankruptcy petitions be presented against debtors during the pandemic?

At the time of writing there is no change to a creditor's ability to present a bankruptcy petition against a debtor during the pandemic.

4. What is HMRC's approach to enforcement activity during this period?

On 27 March 2020 HMRC issued a guidance document entitled '*Coronavirus — Insolvency Guidance*' in which HMRC set out its approach to enforcement activity. In the document, HMRC explained, among other things, that:

(1) it had paused the majority of all insolvency activity for the time being with the effect that HMRC would not petition for bankruptcy (or winding up) orders unless it was deemed to be essential, i.e. in cases of fraud, criminal activity;

(2) it would continue to consider and deal with new Individual Voluntary Arrangements ("**IVA**") (and CVA and administration) proposals;

(3) where a trustee representing an individual already subject to an IVA (or a supervisor representing a business already subject to a CVA) considers that his/her client is unable to maintain the IVA (or CVA) payments:

  (a) where the terms of an arrangement allow the trustee (or supervisor) discretion, HMRC would expect that discretion to be exercised to its maximum, with reference to creditors only if essential;

  (b) HMRC would support a variation to allow a three-month break from contributions and there is no need to contact HMRC to request this deferment; and

  (c) it considered that, after such deferral period, from 1 July 2020, the trustee representing the individual (or supervisor representing a business) should be able to resume payments per the terms of any IVA (or CVA) or, in the event that he/she is not able to, should contact HMRC's Enforcement and

Insolvency Service to discuss a recovery 'Time to Pay' arrangement depending on the circumstances.

HMRC has also set up a telephone helpline to support businesses and self-employed individuals concerned about not being able to pay their tax due to Covid-19, allowing them to obtain practical help and advice. For individuals who are actually unable to pay due to Covid-19, HMRC have indicated that they will discuss the individual's specific circumstances to explore agreeing an instalment arrangement, suspending debt collection proceedings, cancelling penalties and interest where you have administrative difficulties contacting or paying HMRC immediately. The relevant telephone number is 0800 024 1222.

Pursuant to the Protocol for Insolvency and Company Work at Central London dated 24 March 2020, from that date until 6 September 2020 there was a standing arrangement with HMRC, whereby no bankruptcy order would be made on HMRC petitions listed for hearing in the Central London County Court. Rather, on the hearing date, and without attendance of HMRC or the debtor, the Judge would order the petition to be relisted after 12 weeks, unless HMRC is seeking a dismissal or withdrawal of the petition where the debt has been paid, which will be dealt with on the papers. There was no equivalent arrangement for HMRC petitions listed in the High Court, or at least no dissemination of any such arrangement to the extent it may have existed.

However, pursuant to the Protocol for Insolvency and Company Work at Central London dated 1 September 2020, the original Protocol dated 24 March 2020 is replaced with effect from 7 September 2020. In accordance with the Protocol for Insolvency and Company Work at Central London dated 1 September 2020, from 7 September 2020 HMRC petitions will be listed for remote hearing, with two HMRC petitions listed for each 15-minute time slot. HMRC will supply to other parties the link for Skype hearings of HMRC petitions.

5. Is personal service of a bankruptcy petition still required during the pandemic?

Yes, a bankruptcy petition must be served personally on the debtor unless the court has directed that the petition can be served by alternative methods.

Under r. 10.14(1) and Schedule 4, IR 2016, the service requirements of Part 6 of the CPR are modified such that a bankruptcy petition must be personally served on the debtor by the petitioner, unless the court approves or directs otherwise. Further, the bankruptcy petition must be served on the debtor at least 14 days before the hearing of the petition in accordance with r. 10.21(1), IR 2016.

While some process servers stopped attempting personal service at the outset of the lockdown, many continued to work throughout the lockdown, and it is expected any difficulties process servers may have faced earlier in the lockdown will be reduced as the restrictions ease. In any

event, it is well established that 'personal service' is not restricted to physically handing over documents, but that it is also satisfied where the person being served is told what the document contains and it is left 'with or near' him (see *Tseitline v Mikhelson* [2015] EWHC 3065 (Comm) citing *Kenneth Allison Ltd (In Liquidation) v AE Limehouse & Co* [1992] 2 AC 105). It follows that there is no reason in principle why personal service of a bankruptcy petition could not be effected whilst observing the government's guidelines on social distancing, provided the serving party is able to make contact with the debtor.

If, however, the debtor cannot be served personally, the creditor can apply to the court for permission to effect service in an alternative manner (formerly known as substituted service, which for convenience is the shorthand used below). The court can grant an order for substituted service pursuant to para. 1(5) of Schedule 4, IR 2016 which provides: "*If for any reason it is impracticable to effect service … then service may be effected in such other manner as the court may approve or direct*."

Paragraph 12.7.1 of the Practice Direction - Insolvency Proceedings ("**PDIP**") provides that in most cases evidence of the relevant steps in para. 12.7 having been taken will suffice to justify an order for service of the bankruptcy petition other than by personal service. Furthermore, the evidence in support of an application for an order permitting substituted service should include an explanation of the reasons why such an order is necessary.

If the creditor is seeking to rely on the pandemic as the basis for an order for substituted service, the evidence should explain the specific difficulties that have been encountered in attempting service as a result of the pandemic. Provided there is clear evidence in support of the application, we expect the court will be amenable to granting an order for substituted service during the pandemic given the social distancing guidelines, particularly if the individual debtor is self-isolating or shielding.

Ideally, an application for substituted service should be made in advance of service of the petition on the debtor in an alternative manner. In light of the requirement under r. 10.21(1), IR 2016 that a bankruptcy petition must be served on the debtor at least 14 days before the hearing, an application for substituted service may need to be coupled with an application for postponement of the hearing of the petition pursuant to r. 10.22(1), IR 2016.

If permission for substituted service cannot be sought prospectively, a petitioner could make a retrospective application for substituted service. Under the old Insolvency Rules 1986, an order for permission for substituted service could not be made retrospectively: see *Ardawa v Uppal and Jordan* [2019] EWHC 456 (Ch); [2019] BPIR 475. However, there appears to be scope under IR 2016 to make a retrospective application. This has not yet been the subject of a reported decision, but the wording of r. 10.14(1) and Schedule 4, IR 2016 appears to be sufficiently broad to make a retrospective application for substituted service.

Further, if a petition has been served on a debtor by a means other than personal service, a creditor could seek to rely on r. 12.64, IR 2016 which gives the court a discretion to waive a

defect or irregularity provided that no substantial injustice has been caused. However, the general reluctance of the court to waive defects relating to service of bankruptcy petitions is likely to be heightened during the pandemic, particularly when proper service of the petition is such a fundamental feature going to the fairness of the proceedings.

If a creditor does need to apply for an order permitting substituted service of a petition, they will need to serve the debtor with a copy of the application, the evidence in support, and a copy of the court order granting substituted service. Usually this can be served on the debtor at the same time as the bankruptcy petition itself.

6. Are bankruptcy petitions being heard or adjourned during the pandemic?

Initially bankruptcy petitions were adjourned as a matter of course – for example, on 25 March 2020 all bankruptcy petitions scheduled for hearing in the Insolvency and Companies List at the Rolls Building that day were adjourned generally with liberty to restore only on an urgent basis or, in the absence of urgency, after 18 June 2020. However, as explained below, in the Insolvency and Companies List at the Rolls Building at least, bankruptcy petitions are now being listed for hearing and heard, usually remotely, pursuant to the procedure set out below.

The Rolls Building and other relevant hearing centres of the Business and Property Courts

On 6 April 2020 the Temporary Insolvency PD came into force and is applicable to all insolvency proceedings throughout the Business and Property Courts, subject to any variations outside London as directed by the relevant supervising Judge. Accordingly, the Temporary Insolvency PD should be read together with the relevant guidance notes for the various circuits/regions, which currently include:

(1) a Variations and Guidance Note for the North and North Eastern Circuits issued by Snowden J dated 6 April 2020;

(2) a Variations and Guidance Note for the Midland, Western and Wales Circuits (No 1) issued by Marcus Smith J dated 8 April 2020; and

(3) a Guidance Note issued by Chief ICC Judge Briggs dated 7 April 2020 which is applicable to work listed before an ICC Judge in the Rolls Building.

The Temporary Insolvency PD will expire on 1 October 2020 unless revoked or amended.

Pursuant to para. 4 of the Temporary Insolvency PD, all bankruptcy petitions (save for bankruptcy petitions to be heard before an ICC Judge sitting in the Rolls Building) listed for hearing prior to 21 April 2020 were to be adjourned, to be re-listed either:

(1) where one or other of the parties considered that the matter was urgent, on their application to have it re-listed pursuant to the listing procedure set out at para. 5 of the Temporary Insolvency PD; or

(2) according to the temporary listing procedure for bankruptcy petitions set out at para. 7 of the Temporary Insolvency PD (which applied, immediately in the case of petitions to be heard before an ICC Judge sitting in the Rolls Building, and as from the date that it is brought into effect for each other relevant hearing centre of the Business and Property Courts by a further guidance note to be issued by the supervising Judge for that hearing centre (to be published on the Insolvency List web page for the relevant hearing centre(s) (see www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/insolvency-and-companies-courts/)).

Pursuant to para. 7 of the Temporary Insolvency PD, the court is to list for hearing all bankruptcy petitions through:

(1) the allocation of time slots for groups of 2 or more petitions with each time slot being given a designated meeting link using Skype for Business, or such other video conferencing technology as the relevant court decides, or BT MeetMe, or such other telephone conferencing technology as the relevant court decides, the relevant links to be published on the daily cause list;

(2) in the event that one or more of the parties is unable to use the link designated by the court, subject to the Judge's availability, the arrangement of an alternative link via the court clerks; and

(3) any person who intends to appear on the hearing of the petition delivering a notice of intention to appear on the petition in accordance with r. 7.14, IR 2016, providing an email address or telephone number for the purposes of being invited to join the hearing remotely.

Pursuant to para. 6 of the Temporary Insolvency PD, unless ordered otherwise, all insolvency hearings are to be conducted remotely by way of Skype for Business or such other technology as the parties and the court agree in advance of the hearing.

From 30 March 2020, hearings listed in the Rolls Building have proceeded remotely, including bankruptcy petitions, with priority given to urgent cases. Since 1 June 2020, while the general practice in the Rolls Building remains for cases to be heard remotely, physical hearings (with parties in court, subject to social distancing) and hybrid hearings (with some parties in court and some attending remotely) can also be held (the decision as to which sort of hearing is appropriate in a given case will be a judicial decision).

The County Court at Central London

For the period 24 March 2020 to 6 September 2020, pursuant to the Protocol for Insolvency and Company Work at Central London dated 24 March 2020:

(1) as noted at question 4 above, under a standing arrangement with HMRC, no bankruptcy order would be made on HMRC petitions currently listed for hearing, which would be adjourned and relisted after 12 weeks without the need for attendance;

(2) unless a request for a remote hearing was made by email to RCJBankCLCCDJHearings@justice.gov.uk, all other bankruptcy petitions would similarly be adjourned and relisted after 12 weeks without the need for attendance.

Pursuant to the Protocol for Insolvency and Company Work at Central London dated 1 September 2020, the Protocol dated 24 March 2020 is replaced with effect from 7 September 2020. From 7 September 2020, the Central London County Court is listing bankruptcy petitions for remote hearing, currently via Skype for Business or BT MeetMe:

(1) HMRC petitions will be listed in 15-minute slots with two petitions listed in each slot and HMRC shall supply the link for Skype hearings of HMRC petitions to the other parties;

(2) All other petitions will be listed in 30-minute slots with only one petition heard in each slot;

(3) For all non-HMRC petitions, the parties will be requested in advance of the hearing to supply the court with their email or telephone number for the purpose of being linked to the remote hearing;

(4) The petitioner should send the certificate of continuing debt and of compliance with r. 10.23, IR 2016 to RCJBankCLCCDJHearings@justice.gov.uk;

(5) Any other creditors intending to appear on the hearing of the petition must give notice in accordance with r. 7.14, IR 2016 and should make a request by email to RCJBankCLCCDJHearings@justice.gov.uk to be joined to the remote hearing.

The County Court elsewhere

There has not been dissemination of any general guidance that might exist as to how other County Court hearing centres are dealing with bankruptcy petitions. HM Courts & Tribunals Service are, however, maintaining a tracker which provides a list of which courts are open, staffed or suspended during the pandemic: see https://www.gov.uk/guidance/courts-and-tribunals-tracker-list-during-coronavirus-outbreak. If the hearing of a petition had been listed and the court has not yet informed the parties that the petition has been adjourned, the parties

should contact the relevant County Court hearing centre to confirm whether the petition will be heard.

7. Can the hearing of a bankruptcy petition be avoided if an individual cannot attend the hearing of the petition as a result of the Government's guidance to self-isolate?

If a petitioner or a debtor is unable to attend a hearing as a result of the need to self-isolate, the court should be contacted as soon as possible. Even if an individual petitioner or debtor cannot attend the hearing, they should make every effort to have a legal representative appear on their behalf.

As noted at question 6 above, most bankruptcy petitions in the Insolvency and Companies Court in the Business and Property Courts are proceeding by way of video link, and the individual should still be able to attend a hearing from their home even if they are self-isolating. Even if the individual does not have internet access, participants can join a video link hearing held on Skype for Business by dialling in by telephone. Likewise, from 7 September 2020, bankruptcy petitions in Central London County Court will be dealt with by remote hearing via Skype for Business or BT MeetMe and therefore an individual should still be able to attend a hearing from their home even if they are self-isolating.

If, however, the hearing is proceeding in person and the individual petitioner or debtor is unable to attend due to the requirement to self-isolate, they should seek to instruct a legal representative to appear on their behalf: see the decision of Swift J in *Agba v Luton* [2020] EWHC 2008 (Admin). In that case the court accepted (at [7]) that the applicant had a good reason for non-attendance due to the guidance to self-isolate, but it did note that the applicant could theoretically have acted sooner to instruct a lawyer on her behalf. The applicant's appeal (in respect of her standing to challenge liability orders which had formed the basis of a bankruptcy order) had been dismissed in her absence. The applicant applied to set aside the order made in her absence, but despite having a good reason for not attending the hearing (due to self-isolating), the court refused the application because the applicant had no reasonable prospect of successfully challenging the liability orders (see [8]).

If shortly before the hearing of the petition the debtor falls ill with Covid-19 symptoms and would be unable to attend a hearing in person or via video link as a result, an adjournment could be sought on that basis in appropriate circumstances. Evidence, if available, should be adduced, however a failure to produce formal evidence will not be fatal: see *Lambert v Forest of Dean District Council* [2020] EWHC 1728 (Ch), whereby Trower J granted an adjournment where the applicant had been admitted into hospital with Covid-19 symptoms. In that case, the applicant was applying to renew permission to appeal liability orders which had been the basis for a bankruptcy order made against the applicant in 2016. The day before the hearing, the applicant emailed the court seeking an adjournment as he had been admitted to hospital with

suspected Covid-19 symptoms, providing a letter from the hospital confirming his admission. The local authority opposed an adjournment on the basis that the applicant had allegedly been suffering with Covid-19 symptoms for over two months and there was no evidence as to why counsel could not attend on the applicant's behalf. The court, however, reluctantly granted the application for an adjournment as it considered the matter could not be disposed of justly if an adjournment was not granted. The court indicated that it was "*just, but only just, satisfied*" that the applicant could not attend due to matters beyond his control (i.e. the fact he appeared to be suffering from Covid-19) but laid down a marker that he should make full and complete arrangements for representation if he was unable to represent himself at the adjourned hearing.

The courts appear to be taking a flexible approach with regard to an individual's ability to attend a hearing during the pandemic, which is not surprising in the current circumstances. However, applicants must bear mind that individual circumstances are being carefully considered by the courts and, as with all applications to adjourn, the courts are scrutinising the specific factual grounds of each application carefully when deciding whether the adjournment is justified in the context of the Overriding Objective. There is no indication of the courts taking a general or standardised approach to all applications for adjournments that relate to consequences of Covid-19.

8. Can the dismissal or withdrawal of bankruptcy petitions be sought on paper e.g. upon payment of the petition debt in full?

Yes. The PDIP makes provision at para. 14 for orders to be made without attendance. While sub-paras. 14.1 and 14.2, PDIP, provide for various orders under Part VIII of the Act (Individual Voluntary Arrangements) to be made without attendance, para. 14.3, PDIP, permits the court to make consent orders without attendance by the parties in suitable cases, including on petitions where there are no supporting or opposing creditors (see r. 10.19, IR 2016), and there is a statement signed by or on behalf of the petitioning creditor confirming that no notices have been received from supporting or opposing creditors, orders:

(1) dismissing the petition, with or without an order for costs as may be agreed; or

(2) if the petition has not been served, giving permission to withdraw the petition (with no order for costs).

During the period 24 March 2020 to 6 September 2020 when the Protocol for Insolvency and Company Work at Central London dated 24 March 2020 was in force Central London County Court was dealing with all bankruptcy proceedings on the first occasion on the papers. Further, that Protocol provided that HMRC would continue to seek the dismissal or withdrawal of a bankruptcy petition on the papers where the debt has been paid.

From 7 September 2020, remote hearings of bankruptcy petitions in Central London County Court will be listed pursuant to the Protocol for Insolvency and Company Work at Central London dated 1 September 2020. It is anticipated, however, that in appropriate circumstances, outlined above, orders will be able to be made without attendance in accordance with the PDIP.

9. What changes have been brought in by the Temporary Insolvency Practice Direction to bankruptcy proceedings?

As explained above, the Temporary Insolvency PD came into force on 6 April 2020 and is due to expire on 1 October 2020 unless revoked or amended. It is applicable to all insolvency proceedings in the Business and Property Courts, subject to any regional variations as directed by the relevant supervising Judge.

Relevant to personal insolvency, the Temporary Insolvency PD makes provision:

(1) by para. 4 for the adjournment of all pending applications, petitions and claim forms (other than winding-up and bankruptcy petitions to be heard by an ICC Judge in the Rolls Building listed for hearing prior to 21 April 2020) (addressed in further detail at question 6 above);

(2) by para. 5 for the process for listing urgent hearings in the High Court upon the application of one of the parties by email to the ICC Judges' clerks at Rolls.ICL.Hearings1@justice.gov.uk, or the relevant High Court Judge clerk;

(3) by para. 6 for all hearings to be conducted remotely unless otherwise ordered;

(4) by para. 7 for a temporary listing procedure for bankruptcy petitions (addressed in further detail at question 6 above); and

(5) by para. 8 for the process by which all other hearings are to be conducted remotely by Skype for Business or other technology as agreed by the parties and the court.

10. Can creditors rely upon personal guarantees provided by individuals to enforce a company's debts, and pursue bankruptcy proceedings in respect of those debts, when the company's debts would otherwise be subject to a moratorium under the Corporate Insolvency and Governance Act 2020?

Creditors who are unable to pursue a company for debts which are subject to a moratorium under CIGA 2020 may wish to pursue the outstanding debt by turning to any personal guarantees which have been provided by individuals (e.g. company directors) in respect of that

debt. A creditor's ability to successfully pursue a guarantor in those circumstances will be dependent on the terms of the personal guarantee.

It is possible that creditors may be prevented from being able to enforce a personal guarantee provided by an individual to recover debts owed by a company if such debts are subject to a moratorium under CIGA 2020. However, whether the creditor is so prevented will be dependent upon the specific terms of the relevant personal guarantee. For example, the personal guarantee may provide that it can only be enforced after specified steps have been taken to enforce against the principal debtor which may include steps which are prohibited by the effect of the moratorium under CIGA 2020.

Furthermore, in circumstances where a guarantee, as a secondary obligation, will generally have the benefit of any defences available to the principal debtor, a guarantor would generally be entitled to raise the principal debtor's defences to the underlying debt. Dependent on the terms of the relationship between the creditor and the principal debtor, such defences may include that the debt is not due because the principal debtor has the benefit of a payment holiday during a moratorium.

This is likely to be a controversial area, and, inevitably, specific advice should be sought.

11. To what extent can debtors rely upon their current inability to enforce debts against corporate debtors in support of an application for an adjournment of a bankruptcy petition presented against them on the basis that there is a reasonable prospect of payment in full in a reasonable time?

Debtors can of course seek to rely on their inability to enforce debts owing to them from corporate debtors as a result of a moratorium under CIGA 2020. However, in order for an application for an adjournment of a bankruptcy petition on this basis to succeed, it will still be necessary to establish to the court's satisfaction that there is a reasonable prospect of payment in full in a reasonable time according to usual applicable principles (see e.g. *Sekhon v Edginton* [2015] EWCA Civ 816; [2015] 1 WLR 4435). As such, any application on this basis must in the usual way be supported by credible evidence of the debtor's ability to pay and the likely timescale in which payment will be made. The question of what is a 'reasonable time' for payment will inevitably involve considerations of the likely timescale of the moratorium, alternative sources of funding available to the debtor and the willingness and ability of the debtor to seek permission to institute proceedings to enforce the debt, the latter not being a matter of which the bankruptcy court is seized. That said, while the bankruptcy court would not be able to hear any application by the debtor to seek such permission itself, we consider it likely that the court will view a debtor in such a predicament sympathetically. Indeed, debtors in such circumstances may wish to consider inviting the court to adjourn the petition for a sufficient period to allow them to make such an application.

12. As landlords are unable to pursue possession of property from individual tenants under Part 55 due to the stay of possession proceedings under PD 51Z and CPR r. 55.29, can landlords pursue rent arrears by way of statutory demand and bankruptcy proceedings?

Yes, landlords could pursue bankruptcy proceedings against individual tenants if they owe in excess of £5,000 (the bankruptcy threshold). This may give some landlords an additional means of redress against individual tenants in circumstances where possession proceedings have been stayed.

Practice Direction 51Z ("**PD 51Z**") was introduced in response to the pandemic to stay proceedings for possession and came into effect on 27 March 2020 (with subsequent amendments coming into force on 20 April 2020 and 11 June 2020). Pursuant to para. 2 of PD 51Z, all proceedings for possession brought under CPR Part 55 and all proceedings to enforce an order for possession by warrant or writ of possession were stayed for 90 days to 25 June 2020. While PD 51Z suspended possession proceedings brought under CPR Part 55, para. 3 of PD 51Z (as amended on 11 June 2020) clarified that it did not preclude the issue of a claim for possession.

PD 51Z has already been the subject of a number of judicial decisions (see the decisions of Court of Appeal in *Arkin v Marshall* [2020] EWCA Civ 620 and *London Borough of Hackney v Kevin Okoro* [2020] EWCA Civ 681) which confirm that it places a blanket ban on CPR Part 55 possession proceedings.

PD 51Z ceased to have effect on 25 June 2020, and was replaced by a new rule which extends the stay on possession proceedings for a further 8 weeks, to 23 August 2020. The Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020 came into force on 25 June 2020, amending CPR Part 55 to introduce CPR r. 55.29 which stays all possession proceedings under Part 55 brought after the rule comes into force until on or before 22 August 2020. This was extended for a further 4 weeks, until 20 September 2020, by the Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020 which came into force on 22 August 2020.

A new Practice Direction 55C ("**PD 55C**") has been introduced by the Civil Procedure (Amendment No. 4) Coronavirus Rules 2020, providing temporary modification of CPR Part 55 during the period 20 September 2020 (the end of stay imposed by CPR r. 55.29) and 28 March 2021. In order to continue possession proceedings after the expiry of the stay, a claimant is required to provide a "*reactivation notice*" informing the court and the defendant of this in writing: paras. 2.1 and 2.3, PD 55C. A reactivation notice is not required if the claim was brought on or after 3 August 2020 or if a final order for possession has been made: para. 2.2, PD 55C. Failure to provide a reactivation notice by 4pm on 29 January 2021 will result in the claim being automatically stayed: para. 2.6, PD 55C.

In addition to the stay of possession proceedings, notice periods for repossession in respect of certain tenancies have been extended. This includes assured shorthold, assured, secured and flexible tenancies. Pursuant to Schedule 29 of the Coronavirus Act 2020, notices served between 26 March 2020 and 28 August 2020 required a minimum notice period of three months. The new Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2000 SI 2020/914 came into force on 28 August 2020. This extends the minimum notice period for certain tenancies to six months for notices served between 29 August 2020 and 31 March 2021, subject to certain exceptions. One exception includes where at the time the notice is served there is over six months' accumulated rent arrears, whereby the notice period will be four weeks (reg 3 of the Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2000 SI 2020/914).

As a result of a stay of all CPR Part 55 possession proceedings from 27 March 2020, and the extended notice periods, landlords may seek to use statutory demands and bankruptcy proceedings as a means to pursue rent arrears.

Landlords can seek payment of outstanding rent arrears owed by individual tenants by way of statutory demand. The statutory demand should be served on the tenant personally. If the tenant fails to pay the sums sought in the statutory demand within 21 days of service, and the debt is in excess of £5,000, the landlord can use the unpaid statutory demand as a basis to show the tenant's inability to pay and can present a bankruptcy petition against the tenant.

The position, however, differs where the tenant is a company rather than an individual, as the use of a statutory demand served between 1 March 2020 and 30 September 2020 to pursue the winding-up of a company is prohibited under CIGA 2020 (see the discussion in the Corporate Insolvency section above).

Before presenting a bankruptcy petition, landlords may wish to consider whether it is likely that the petition will be heard in the near future, and more particularly, if it will be heard before the stay on possession proceedings has ended. Landlords should also bear in mind that a bankruptcy petition does not have any effect on a tenant's possession of a property, unless expressly provided for in the terms of the lease.

Bankruptcy petitions presented in the Insolvency and Companies List in the Business and Property Court are likely to be listed and heard by video link in accordance with para. 7 of the Temporary Insolvency PD. Landlords who issue the petition in the High Court may, therefore, have a bankruptcy petition dealt with more quickly than if they waited for the stay of possession proceedings to be lifted.

Likewise, from 7 September 2020 bankruptcy petitions in Central London County Court will be proceeding by remote hearing pursuant to the Protocol for Insolvency and Company Work at Central London dated 1 September 2020. There may, however, be a delay in having a bankruptcy petition listed for hearing in circumstances where all petitions listed in Central

London County Court between 24 March 2020 and 6 September 2020 were adjourned for 12 weeks unless a request for a remote hearing was made by email in accordance with the Protocol for Insolvency and Company Work at Central London dated 24 March 2020 (which has been replaced with the Protocol for Insolvency and Company Work at Central London dated 1 September 2020 with effect from 7 September 2020). As a result of the earlier adjournments of petitions, and the likely knock-on effect that will have on the listing of new petitions, the presentation of a bankruptcy petition in the county court may not provide landlords with a speedier resolution to receive unpaid rent than if they waited for the stay on possession proceedings to be lifted.

The disparity between regional county courts, the Central London County Court and the High Court in their treatment of bankruptcy petitions in the early months of the pandemic could lead to some arbitrary effects for creditors because the question of where a bankruptcy petition must be presented is not a matter of their free choice. Pursuant to r. 10.11(1), IR 2016 where proceedings are allocated to the London Insolvency District pursuant to r. 12.5, IR 2016, the creditor must present the petition to the High Court where the debt is £50,000 or more. If the debt is less than that amount the petition must be presented to the Central London County Court. Pursuant to r. 10.11(3), IR 2016 where the petition is not allocated to the London Insolvency District the creditor must present the petition to the "debtor's own hearing centre", which is defined in r. 10.11(4), IR 2016. It follows that the amount of the debt and the location of the debtor by reference to where he has resided or carried on business in last six months will have an important bearing on how much progress a creditor might expect to make on pursuing his petition so long as there continues to be a degree of disparity between the courts on hearing petitions during the pandemic.

13. Can a trustee-in-bankruptcy still seek an order for possession under s. 363 of the Insolvency Act 1986 despite the stay of possession proceedings?

Yes, a trustee-in-bankruptcy can still obtain an order for possession under s. 363, IA 1986; however, they will not be able to enforce the order by a warrant or writ for possession pursuant to PD 51Z (27 March 2020 to 25 June 2020) and CPR r. 55.29 (from 25 June 2020 to 20 September 2020).

Pursuant to para. 9 of Schedule 5, IA 1986, a trustee-in-bankruptcy has the power to sell the bankrupt's property. This power is often used to sell real property owned by the bankrupt, but in order to do so the trustee-in-bankruptcy usually requires vacant possession. A trustee-in-bankruptcy can seek an order requiring a bankrupt to deliver up possession of a property pursuant to s. 363(2), IA 1986, or where the property is held on trust pursuant to s. 335A, IA 1986 and ss. 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996 (or in particular circumstances pursuant to ss. 336 or 337 IA 1986).

A trustee-in-bankruptcy remains able to obtain an order requiring delivery up of possession of a property pursuant to s. 363, IA 1986 (or ss. 335A, 336 or 337) despite the stay of possession proceedings under PD 51Z and CPR r. 55.29. The wording of PD 51Z expressly applied to stays of possession proceedings brought under CPR Part 55 and did not encompass possession proceedings brought pursuant to s. 363 IA 1986: see e.g. *London Borough of Hackney v Kevin Okoro* [2020] EWCA Civ 681 at [5]-[6]. Equally, the new CPR r. 55.29, which has replaced PD 51Z with effect from 25 June 2020 until 20 September 2020, expressly applies to possession proceedings brought under CPR Part 55.

However, para. 2 of PD 51Z stayed all proceedings to enforce an order for possession by warrant or writ of possession for 90 days to 25 June 2020 and all such enforcement proceedings will continued to be stayed pursuant to the new CPR r. 55.29 from 25 June 2020 to 20 September 2020. The Court of Appeal, in *obiter* comments in *London Borough of Hackney v Kevin Okoro* [2020] EWCA Civ 681 at [27] stated that para. 2 of PD 51Z "*undoubtedly prevents enforcement of possession orders made under rules other than CPR Part 55*".

Therefore, while a trustee-in-bankruptcy can properly obtain an order for possession under s. 363, IA 1986 during the pandemic, it appears that they will not be able to enforce the order of possession obtained by writ or warrant of possession during the period of the stay under PD 51Z and CPR r. 55.29.

One reason a trustee-in-bankruptcy may wish to pursue an order for possession under s. 363, IA 1986 during the pandemic, despite not being able currently to enforce it, is to ensure they have applied for an order for possession of a bankrupt's family within the prescribed three-year period from the commencement of the bankruptcy pursuant to s. 283A, IA 1986.

14. What guidance has been issued to insolvency practitioners for the supervision of existing IVAs and the drafting of new IVAs?

On 17 April 2020 the Insolvency Service published 'Coronavirus (COVID-19) Guidance for the Straightforward Consumer IVA Protocol'. From 20 April 2020 until 20 October 2020, the Straightforward Consumer IVA Protocol, which is a voluntary framework for dealing with relatively simple consumer-based IVAs, should be read in conjunction with this guidance. Recognising that the pandemic may cause individuals difficulty in meeting their obligations under the existing terms of their IVA and may affect the sustainability of any new arrangements, the guidance allows for flexibility to be applied to IVAs which are already being supervised and were drafted in accordance with the current protocol or previous versions by the IVA Standing Committee and new IVAs that are drafted from 20 April 2020.

Section Four: Company

Anna Markham, Gregory Denton-Cox, Nicholas Wright ©

Last updated: 2 September 2020

INTRODUCTION

Company law has not yet seen the extensive alterations to the statutory scheme which the pandemic has prompted in the insolvency context. This does not mean, however, either that nothing has changed or that companies and their directors do not face new considerations in conducting their affairs in light of the pandemic.

This section deals first with directors' duties, providing guidance on how directors can seek to avoid pitfalls which may arise as a result of the pandemic and explaining the risks which remain if they do not constantly assess whether they are fulfilling their duties in changeable and unpredictable circumstances.

It then proceeds to consider aspects of corporate governance which the pandemic has impacted and, in some cases, prompted the relaxation of certain formal requirements upon companies and their directors.

DIRECTORS' DUTIES

Directors' duties, as set out in ss. 171 – 177, CA 2006 and supplemented by duties at common law and in equity, remain applicable to directors during the pandemic. Directors must therefore continue to, *inter alia*: act within their powers (s. 171, CA 2006); act so as to promote the success of the company (s. 172, CA 2006); exercise independent judgment (s. 173, CA 2006); exercise reasonable care, skill and diligence (s. 174, CA 2006); avoid conflicts of interest (s. 175, CA 2006); not accept benefits from third parties (s. 176, CA 2006); and declare any interest in a proposed transaction or arrangement of the company (s. 177, CA 2006).

Change may be on the horizon for directors' underlying obligations and liabilities in some respects however. CIGA 2020 includes provisions which would in principle enable such alterations. In particular, s. 20, CIGA 2020 provides that:

> "*20. (1) The Secretary of State may by regulations amend or modify the effect of corporate insolvency or governance legislation so as to –*
>
> *…*
>
> *(c) change or disapply any duty of a person with corporate responsibility or the liability of such a person to any sanction.*"

Section 21(2), CIGA 2020 sets out the considerations to which the Secretary of State must have regard in deciding whether to make such regulations:

> "*21. (2) The Secretary of State may only make regulations under section 20(1)(c) if satisfied that the regulations are expedient for the purpose of securing that the duties of persons with corporate responsibility, or the liability of those persons to any sanction, take due account of the effects of coronavirus on businesses or on the economy of the United Kingdom.*"

Whilst it remains more likely that this provision will be used to further alter directors' responsibilities or liabilities contained in IA 1986, it is possible that this could be used in the

context of directors' duties in future and particularly in relation to directors' duties which arise in connection with the potential insolvency of a company.

1. What liability could directors incur if they cause a company to trade whilst insolvent despite the changes to the law on wrongful trading and insolvency as a result of the pandemic?

As explained elsewhere (see the section on Corporate Insolvency above), the liability of directors for wrongful trading under s. 214, IA 1986 has effectively been retrospectively suspended, backdated to 1 March 2020, in light of the pandemic, by s. 12(1), CIGA 2020, which requires the court to assume that directors are not responsible for any worsening of the financial position of the company or its creditors that occurs during the period 1 March 2020 to 30 September 2020.

This does not give directors *carte blanche* in such a situation, however. In addition to the continuing liability under various other provisions of IA 1986, notably for fraudulent trading under s. 213, IA 1986 and misfeasance under s. 212, IA 1986 (see above), they continue to have potential exposure to personal liability for breach of their directors' duties or being pursued under the Company Directors Disqualification Act 1986 ("**CDDA 1986**") by the Secretary of State, or, in some limited circumstances, others. We now deal with each of these risks in turn.

Directors' duties

As explained in further detail below, in circumstances where a company is in the situation envisaged by the wrongful trading provisions of IA 1986, i.e. it has no reasonable prospect of avoiding an insolvent liquidation or administration and the director(s) know or ought to know this, the duty of directors to promote the success of the company under s. 172, CA 2006 is likely to be subject to a duty to consider the interests of its creditors (preserved in s. 172(3), CA 2006), the so-called "creditors' interests duty" (see *BTI 2014 LLC v Sequana SA & Ors* [2019] EWCA Civ 112 at [118]).

Consequently, if a company continues to trade in circumstances where the wrongful trading provisions would ordinarily be engaged, and suffers loss as a result, directors may be liable for breach of the creditors' interests duty or for breach of their duty to act with reasonable care, skill and diligence under s. 174, CA 2006. It may also be said that continuing to trade, particularly in a risky manner, in such a case may amount to a breach of the duty under s. 172, CA 2006. Indeed, a breach of duty may form the basis of an application under s. 212, IA 1986, which applies where it appears that a person has "*been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company*". As a result, if a subsequent insolvency officeholder is determined to pursue directors for their actions in the lead up to a company entering into an insolvency process, it may be that the suspension of the wrongful trading

provisions simply denies them one mechanism for doing so rather than providing a robust safety net for directors.

Disqualification

Turning to disqualification, directors may still be pursued in disqualification proceedings, generally by the Secretary of State. The only change to disqualification proceedings due to the pandemic is consequential upon the suspension of wrongful trading. Section 10, CDDA 1986 provides that where a person is found liable for wrongful trading, the court may, if it thinks fit, also make a disqualification order against that person. The effect of the suspension of the wrongful trading provisions will be to reduce the scope for a finding of liability, and thus of a disqualification order being made at the same time. However, s. 10, CDDA 1986 also empowers the court to make a disqualification order where a director is found liable for fraudulent trading, in respect of which there is no suspension.

The more general grounds for disqualification contained in CDDA 1986 however remain unchanged. These include the specific instances given in ss. 2-5A, CDDA 1986 (notably criminal acts or regulatory failings) and the general ground of "unfitness" under ss. 6 (mandatory disqualification for unfit directors of insolvent companies) and 8 (discretionary disqualification on a finding of unfitness of any director (without the requirement that the company be insolvent)).

Of the specific grounds for disqualification proceedings, s. 3, covering persistent defaults in relation to legislation requiring "*any return, account or other document to be filed with, delivered or sent, or notice of any matter to be given to the registrar of companies*", may raise particular issues in the context of the pandemic. It is important for directors to be aware that the unique circumstances do not excuse them from their obligations when it comes to reporting and filing as required by the relevant companies legislation, although, as set out further below, certain requirements have been subject to limited relaxation. Despite the "three strikes" policy in s. 3(2), CDDA 1986 giving some wiggle room for those with a good history of compliance, this raises a particular risk for those with a less satisfactory record.

The pandemic may also raise particular risks for directors surrounding disqualification for those "*unfit*" to be concerned in the management of a company. In determining whether a person's conduct makes that person "unfit", the court is to have regard in particular, but without limitation, to the matters set out in Schedule 1, CDDA, including, where the person is a director, whether there has been any misfeasance or breach of duty by the director. The potential grounds for disqualification under this head are thus broad, but considerations of unfitness can be divided into those concerned first with incompetence (underscoring the need for directors to keep abreast of legal and regulatory developments as the pandemic unfolds) and second with "*commercial morality*" which includes, but is not limited to, dishonest conduct.

What will be regarded as a breach of "*commercial morality*" is always fact-sensitive and it is unhelpful to attempt expansive predictions of what might constitute a breach. The novel context

may however give rise to new questions surrounding what sort of conduct will amount to a breach of "*commercial morality*" by a director. Just as the suspension of the wrongful trading provisions will not obviate the need to have regard to the interests of creditors (where otherwise appropriate to do so), so too may a director who is regarded as breaching that duty or otherwise trading at the expense of creditors (in a broad sense which may not be co-extensive with liability for wrongful trading) still be at risk of a subsequent finding of unfitness, potentially resulting in disqualification.

One situation in which the issue may arise could be where a director causes a company to participate in a Government-backed furlough scheme, thereby causing the taxpayer to incur considerable expense, but after the scheme ends dismisses a number of the employees covered. If such a dismissal was always inevitable, or the company itself was hopelessly insolvent, there may be questions about whether the director acted improperly in simply "*delaying the inevitable*" at the taxpayers' expense, especially if the result is a worse outcome for creditors in a subsequent liquidation. It is notable by comparison that administrators may only make use of the furlough scheme where "*there is a reasonable likelihood of rehiring the workers*".[1] This may indicate that a director who puts the taxpayer to the expense of the furlough scheme for their company's employees with no intention of retaining them could be regarded as having breached standards of commercial morality or otherwise acted improperly so as to open up the possibility of disqualification on the ground of unfitness.

Takeaway message

Whilst the suspension of the law on wrongful trading removes one weapon in the arsenal of an insolvency practitioner which may be invoked against the former director of a company in an insolvency procedure, it by no means leaves directors in general immune from liability either at the hands of insolvency practitioners, the company or its shareholders (if it remains solvent), or the Secretary of State. Directors of companies in difficulty and those advising them should be under no illusions about this whilst remaining ready to take advantage of any further relaxations in the law implemented as result of the powers in CIGA 2020.

2. How should directors decide when they are obliged to have regard to the interests of the company's creditors over the interests of its shareholders?

Section 172(1), CA 2006 requires directors to act in the way most likely to "*promote the success of the company for the benefit of its members as a whole*". However, as set out in s. 172(3) this is "*subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company*" including the

[1] https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

common law creditors' interests duty to take account of the interests of creditors where the company is in the vicinity of insolvency.

It is important to note that although concerned with the interests of the company, this duty is not owed by directors to the creditors but remains owed to the company and actionable only by it (albeit, in practice, usually by a future liquidator or administrator) (see e.g. *Bilta (UK) Ltd (in liquidation) and others v Nazir* [2015] UKSC 23; [2016] AC 1 at [125] – [127]).

Test for triggering the creditors' interests duty

Precisely what degree of proximity to insolvency will trigger the creditors' interests duty, or indeed whether actual insolvency is required, has posed difficulties in the past given the somewhat inconsistent authorities. Directors are now assisted in determining when the duty will be triggered however by the recent decision of the Court of Appeal in *BTI 2014 LLC v Sequana S.A. & Ors* [2019] EWCA Civ 112; [2019] Bus LR 2178. In this case, the Court of Appeal held at [216] that the duty "*may be triggered when a company's circumstances fall short of actual, established insolvency*" and the circumstances in which it will be triggered can best be summarised (at [220]) as where "*the directors know or should know that the company is or is likely* [in the sense of probable] *to become insolvent*".[2]

It is important for directors to be aware that such a test means that the duty will apply even in circumstances which would fall short (and potentially some way short) of those engaging the wrongful trading provisions ("*likely to become insolvent*" in the case of the creditors' interests duty, as opposed to there being no reasonable prospect of avoiding entry into an (insolvent) insolvency procedure in the case of wrongful trading).

Whether the interests of creditors become "*paramount*" once the creditors' interests duty has been triggered or whether the directors must simply take them into account alongside those of the shareholders of the company has also been the subject of debate and is an issue which the Court of Appeal did not need to decide in *Sequana*. It may be however, as indicated in *Sequana* at [222], that the weight to be given to the interests of the creditors will differ depending on the degree of proximity to insolvency such that the creditors' interests will be paramount where the company is actually insolvent but may have to be weighed more equally with those of the shareholders where insolvency remains only "*likely*".

Practical implications and considerations for directors

Directors should thus be careful to have regard to the interests of the company's creditors in circumstances where insolvency appears likely. It would be prudent to consider the potential

[2] It should be noted that the decision in *Sequana* is presently under appeal to the Supreme Court. A decision is unlikely for some time, however if the appeal is successful it may extend yet further the circumstances in which the duty is engaged to include where there is a "*real risk*" of insolvency rather than a probability of it.

for insolvency, and the impact on and interests of creditors even if the director considers that insolvency is not "likely" but that the company's prospects are uncertain. Indeed, the line between the creditors' interests duty being engaged or not may be a fine one, particularly in rapidly changing circumstances caused by the pandemic. Having said this, where the company is likely to remain solvent if trading is continued the interests of the creditors and other stakeholders are more likely to align, as it will be in the interests of creditors that insolvency be avoided (and, for example, an attempt to wind down the business could lead to an insolvent liquidation). Directors should therefore engage in careful consideration when adopting courses of action with the potential to put the interests of creditors at risk whilst at the same time not allowing the risk of personal liability for breach of the creditors' interests duty to exert a chilling effect on taking rational commercial decisions, especially where the duty is not yet engaged. These are all fact specific questions for the judgement of individual directors.

As the creditors' interests duty may arise where a director ought to know that insolvency is likely (even if the director does not have actual knowledge), directors should keep a close eye on the potential impact of the pandemic on the company's prospects, lest they be held to have failed to have due regard to the interests of creditors in circumstances where they failed to appreciate that insolvency was likely when they ought to have.

Directors would be well advised to seek legal advice on whether a particular course of action which risks prejudicing the position of the company's creditors, or the effects of the pandemic on the company, could leave them exposed to personal liability. Seeking advice may be particularly important because if directors are concerned by the risk of personal liability, it may cause them to go too far in the other direction by adopting a policy of excessive caution, or by winding a company down early rather than take the risk of later being adjudged to have traded whilst insolvent. Whether or not the company enters into an insolvency process, this may in itself lead to the directors being exposed to claims by shareholders or an insolvency officeholder for a failure to act so as to promote the success of the company (s. 172, CA 2006) or without reasonable care, skill and diligence (s. 174, CA 2006), by "*throwing in the towel*" too early or causing the company to suffer loss as a result of their excessive caution (e.g. as occurred in *Odyssey Entertainment Limited (in liquidation) v Ralph Kamp and Ors* [2012] EWHC 2316 (Ch), albeit in a situation where the director had acted in bad faith and misled the board).

Finally, given the relative similarity in the content of the creditors' interests duty and the wrongful trading provisions, it should be noted that the duty may be a likely candidate for change or disapplication by the Secretary of State under the powers contained in s. 20, CIGA 2020 in light of the test for doing so set out in s. 21(2), CIGA 2020.

3. How do directors' duties when the company is in the vicinity of insolvency interact with the protections from formal insolvency procedures introduced for companies as a result of the pandemic?

As discussed elsewhere (see the section on corporate insolvency above) certain protections from the instigation of formal insolvency procedures have been, or are in the process of being, put in place as a result of the pandemic. However, the temporary restrictions on the use of statutory demands and winding up petitions against companies do not mean that directors can act with impunity. Indeed, the risk is that the breathing room afforded by these provisions may simply result in companies digging themselves into deeper and deeper holes (and directors increasing their own exposure) as they seek to avoid formal insolvency processes once the temporary protections are removed. Those acting for creditors may therefore be well-advised to adopt a robust approach when dealing with a company which is temporarily out of reach for the purposes of winding up by pointing out this fact.

Directors will, as set out above, remain personally liable for breaches of their duties or potentially subject to disqualification proceedings for actions taken whilst the company's creditors are kept at bay by the temporary legal changes. Indeed, it is likely that a dim view will be taken by the courts and the relevant authorities where companies are regarded as having abused the temporary measures put in place to ameliorate the impact of the pandemic by trading to the detriment of their creditors with no realistic hope of recovering the position.

Directors should therefore take a pragmatic long-term view of the position of the company. Where appropriate, they should recognise that the company's difficulties may not have been caused by the pandemic or that the pandemic makes the eventual entry of the company into an insolvency process likely. In such cases, they should consider all their duties and options, including, notwithstanding the temporary barriers to compulsory liquidation at the behest of creditors, whether the best option for a company in difficulties may be to place it into administration or creditors' voluntary liquidation thereby protecting the company's creditors (and the position of the directors themselves).

4. What duties do directors need to consider when making decisions on furloughing staff and when, or if, to bring them back to work?

Two primary considerations are likely to arise for directors when making decisions on furloughing staff and their return to work. These are safety and the position of the company in the long term.

Whilst employment issues fall outside the scope of this work, it is entirely possible that directors may incur personal liability for breach of duty, or even attract the interests of the relevant authorities for the purposes of disqualification, where they decide upon a return to

work for employees in circumstances where it is unsafe for them to do so. This could arise for example where the company's business is adversely impacted by an outbreak of Covid-19 amongst its staff or if the company incurs liability to its staff for personal injury arising from a failure to take reasonable precautions against spread of the disease. Indeed, in addition to liability under s. 174, CA 2006, it is notable that one of the factors set out in s. 172(2), CA 2006 to which directors must have regard when considering how best to promote the success of the company is "*the interests of the company's employees*".

Decisions about whether to furlough staff will be fact-sensitive to the situation of each specific company and directors will need to consider both the present and future needs of the business. In particular, it is likely that they will have to anticipate what employees the business may need to retain for work during the pandemic and whether, once the furlough scheme has ended, they will in fact be able to afford to pay them. A failure to do so is likely to give rise to questions about whether they have acted in the manner most likely to promote the success of the company (s. 172, CA 2006) or with reasonable care, skill and diligence (s. 174, CA 2006).

5. How should directors decide whether it is in accordance with their duties to borrow in the short term to help companies survive the pandemic whilst potentially incurring substantial long-term liabilities in doing so?

Directors will need to give careful consideration to whether they cause companies to borrow in an attempt to survive the pandemic, whether via the Government guarantee schemes in place or on freestanding commercial terms. The most important factor in making this decision is likely to be the long-term prospects of the company. If a loan will keep the company solvent in the short term but will only delay an inevitable entry into an insolvency process, taking on further borrowing may amount to a breach of the creditors' interests duty (if triggered) or the more general duties under ss. 172 and 174, CA 2006. Even where it is considered that continuing to trade temporarily may result in a better outcome for creditors, it may be that placing the company into administration is the wisest course.

Personal liability is likely to be a particular issue where the creditors' interests duty described above is engaged. Where a company adds to its body of creditors by borrowing money in an attempt to continue in business, which it cannot ultimately repay, this is likely at least to lead to a greater deficiency as regards creditors, and a corresponding dilution of potential creditor recoveries, in a future insolvency and may, if security has been granted over the company's assets in support of the new borrowing, leave the unsecured creditors with little or nothing to recover.

This is not to say however that directors should not borrow money to help the company over short-term difficulties even if its long-term prospects are far from certain, as may be the case given the generally uncertain economic outlook. Indeed, an overly cautious decision not to

borrow money may also be a breach of duty under ss. 172 or 174, CA 2006 and render the director personally liable for losses caused to the company as a result. It is even conceivable that a failure to borrow in order to avoid insolvent liquidation, which will inevitably result in creditors suffering loss, may amount to a breach of the creditors' interests duty.

Ultimately such decisions will be highly fact sensitive and reliant upon the judgement of individual directors. So long as directors are not overly optimistic or unduly timid, and act in the manner they believe will best promote the success of the company in relation to its members or creditors as appropriate (s. 172, CA 2006 / the creditors' interests duty) and reasonably (s. 174, CA 2006), they are likely to be protected from personal liability.

Directors should also be careful to ensure that when seeking to borrow they accurately present the financial position of the company to the party providing or guaranteeing the finance. If they fail to do so, they will, in the usual way, be at risk of personal liability to the lender / guarantor for negligent misstatement or even fraudulent misrepresentation / deceit and/or liability to the company for breach of duty where the company incurs liability in relation to any presentation of its financial position by them.

6. Could directors be criticised for deciding not to participate in Government schemes to support businesses adversely affected by the pandemic and what use can legitimately be made of money received under the Government schemes?

In short, yes. The Government loan schemes which have been introduced as a result of the pandemic afford unusual protections to lenders, providing, depending upon the particular scheme concerned, partial or complete guarantees in the event that the company is unable to make repayments, initial payment holidays and preferential rates of interest in comparison to market rates.

Consequently, where a company suffers loss as a result of a failure to participate in a Government loan scheme the directors may be open to criticism for breach of their duties under ss. 172 and 174, CA 2006.

The various schemes, and restrictions on use of proceeds (where applicable) are as follows:

The Bounce Back Loan Scheme (BBLS) covers loans from £2,000 to 25% of a business's turnover, up to a maximum of £50,000, at an interest rate of 2.5% and for a period of up to 6 years. The scheme provides the lender with a 100% government-backed guarantee against the outstanding principal and interest. The borrower does not have to make any repayments, and the government will cover interest payments, for the first 12 months. The business must have been carrying on business on 1 March 2020 and must have been adversely affected by the pandemic. So far as restrictions on use are concerned:

(1) The borrower must confirm to the lender that the loan will only be used to provide an economic benefit to the business, for example providing working capital, and not for personal purposes.

(2) If the business was a "business in difficulty" on 31 December 2019 then a loan under the scheme cannot be used for export-related activities.

(3) There are no limits on the amount of the facility that can be used for refinancing.

The Coronavirus Business Interruption Loan Scheme (CBILS) covers loans from £50,001 to £5 million, and is available to businesses based in the UK with an annual turnover of up to £45 million, and which were not "businesses in difficulty" on 31 December 2019. Loans may be provided in the form of term loans, overdrafts, invoice finance or asset finance. The lender is provided with a government backed guarantee of 80% of the outstanding balance (principal only), and the government will cover interest payments and fees for the first 12 months. If a term loan, the maximum term is up to 6 years. For overdrafts and invoice finance facilities, terms are up to three years. Businesses must have a borrowing proposal that the lender would consider viable were it not for the pandemic, and self-certify that they have been adversely affected by the pandemic. Refinancing is limited to a maximum of 20% of a lender's total CBILS lending.

The Coronavirus Large Business Interruption Loan Scheme (CLBILS) covers loans to businesses based in the UK with a group turnover of more than £45 million that have been impacted by the pandemic. The maximum amount available is £200 million, although the maximum size for invoice finance and asset finance facilities is £50 million. Loans are available for three months to three years, and lenders are provided with a government guarantee of 80% of the outstanding finance. The business must have a borrowing proposal which, were it not for the current pandemic, would be considered viable by the lender and for which the lender believes the provision of finance will enable the business to trade out of any short-to-medium term difficulty. It must not be a "business in difficulty" on 31 December 2019.

Entities borrowing in excess of £50 million under the Coronavirus Large Business Interruption Loan Scheme must agree that they and their group will not, until the facility has been paid in full:

(1) declare or pay dividends or make other distributions to shareholders (save for limited exceptions including that the dividend was declared prior to entry by the borrower into the facility);

(2) pay any cash bonuses to senior management, or award any pay rises to senior management, except where such pay rise was (i) agreed in writing before the facility was taken out, or (ii) is in keeping with similar payments made in the preceding 12 months, and (iii) does not have a material negative impact on the borrower's ability to repay the facility.

For facilities of up to £50 million, dividend payments may continue but are not to be increased for as long as any facility under CLBLIS remains outstanding.

Start Up Loans from £500 to £25,000 at an interest rate of 6% may also be available under the British Business Bank's Start Up Loans programme. Businesses that were trading prior to 1 March 2020, are less than two years old and have been negatively impacted by the pandemic, may apply for both a Start Up Loan and Bounce Back Loan. Start Up Loans cannot be used to fund (i) debt repayment, (ii) training, qualifications or education programmes, or (iii) investment opportunities that do not form part of an on-going sustainable business.

The Future Fund issues convertible loans to innovative UK companies with good potential that typically rely on equity investment and which are currently affected by the pandemic. The application is to be made by an eligible investor (or lead investor of a group of investors) in connection with an eligible company. The Future Fund will match up to 100% of the amount provided by the investor(s), from £125,000 to £5 million, by way of convertible loans with a minimum interest rate of 8%. Funding must not be used to (a) repay any borrowings, (b) pay any dividends, (c) pay any bonuses, or (d) pay any advisory fees.

7. What considerations for directors arise in relation to corporate groups dealing with the pandemic?

Where companies are part of a corporate group, directors will continue to owe their duties to the individual company (or companies) of which they are a director rather than to the broader corporate group or the company's parent.[3] This is so even in the case of a wholly-owned subsidiary. There is a risk therefore that directors of group companies may act in ways which may be detrimental to the interests of the individual company, even though in the interests of the group more broadly. Such potential breaches of duty by directors rarely cause difficulties where a company is solvent since the shareholders, who are generally likely to be one or more other group companies, can ratify any breach.

Shareholders are not however in position to ratify breaches of the creditors' interests duty (see e.g. *Official Receiver v Stern and another* [2001] EWCA Civ 1787; [2002] 1 BCLC 119 at [32]). Consequently, acting in a way which is prejudicial to the interests of the creditors of an individual group company, even where this is in the overall interests of the group and its creditors, for example by using one company to guarantee or give security for the liabilities of another group company, puts directors at risk of personal liability for breach of the creditors' interests duty (as was found to have occurred in the leading Australian case in the development of the creditors' interests duty *Walker v Wimborne* [1976] 137 CLR; [1976] 3 ACLR 529).

[3] They may of course owe other duties to their appointer arising from a contractual relationship and/or the law of agency but these are beyond the scope of this discussion.

Directors should therefore carefully consider whether, and if so how, to provide support for other group companies in distress in order to minimise the risk of liability.

Directors should also consider how best the group companies can avail themselves of government support: which companies are eligible to (and should) seek loans under the various government schemes, and the extent to which the group as a whole may be subject to restrictions whilst any facility is outstanding.

8. Are there any protections for company directors if they fail to act in accordance with their duties as a result of the issues raised by the pandemic?

Directors may be relieved from liability for breaches of duty where they have "*acted honestly and reasonably and ... having regard to all the circumstances of the case ... ought fairly to be excused*" under s. 1157, CA 2006. Directors and companies are operating in unique circumstances as a result of the pandemic and are facing issues which they will not have previously encountered and may not have planned for. Those circumstances will likely be taken into account in determining whether directors have breached their duty to act in the way that they consider to be most likely to promote the success of the company. But they may also be relevant to the question whether, even if a director has breached a duty to the company (including the creditors' interests duty), the circumstances are such that they ought fairly to be excused from liability by operation of s. 1157, CA 2006.

9. Are there any other specific steps which directors should take or give consideration to in light of the pandemic in order to ensure that they comply with their duties?

It goes without saying that directors should be astute to keep the developing situation, and its impact on their companies, under constant review. It would be prudent to seek to ensure that their consideration of the issues (in board deliberations or otherwise) are well-documented, and to keep abreast of the developments in the legal framework in which their companies operate and in the attitudes of the government and other organisations.

Avoiding or mitigating business disruption

Directors should assess key-person risks and ensure that the company has in place a clear succession/disruption plan identifying steps to be taken if senior managers are incapacitated or unavailable due to illness, self-isolation or caring responsibilities.

In ensuring that the company has a robust business interruption/disruption plan, directors should also consider the following:

(1) Employees – assess staffing levels, arrangements for remote working (if applicable), and arrangements covering sickness, self-isolation and parental/carers' leave.

(2) IT – assess the impact of remote working; review the disaster recovery plan; review data protection protocols to identify any changes needed as a result of altered working practices such as remote working and virtual meetings.

(3) Supply chain – review contracts in place with suppliers; identify any necessary modifications including alternative suppliers.

(4) Customer/client base – review contractual terms and identify a strategy for communication with customers or clients about any pandemic-related disruption.

(5) Lenders – review relevant contractual provisions including as to events of default.

(6) Insurance – review existing insurance policies for business interruption cover and, if relevant, follow developments in the FCA's test case on insurer liability in relation to business interruption claims (*FCA v Arch Insurance (UK) Limited and Ors*, the trial of which concluded on 30 July 2020).[4] Consider the implications for renewals of cover or new insurance policies.

Executive remuneration

Sensitivities may well arise, especially in large companies, in relation to any discretionary or performance-based remuneration for executives in circumstances where the company faces financial difficulties in the light of the pandemic, which may lead to a reduction in dividends or employees being furloughed or taking pay cuts. The Investment Association (the trade body representing investment managers) has published its expectations as to how remuneration committees of UK listed companies should be reflecting the impact of the pandemic on executive pay. They recognise that the impact of pandemic will be different for each company, and that remuneration committees will need to sensitively balance the need to continue to incentivise executive performance at a difficult time with the need to ensure that the executive experience is commensurate with that of shareholders, employees and other stakeholders.

[4] See https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-witness-statement.pdf (FCA witness statement), https://www.fca.org.uk/news/statements/non-damage-bi-settlements-deductions-relation-government-support (latest FCA update on progress of case) & https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-fca-skeleton-argument.pdf (FCA skeleton argument). The transcripts of the hearing can be found here: https://www.fca.org.uk/firms/business-interruption-insurance#latest-updates.

FURTHER ISSUES OF CORPORATE GOVERNANCE AND REPORTING

10. Will the pandemic alter whether or how companies declare dividends?

Dividends can only be paid out of distributable profits (see s. 830, CA 2006). Companies that have faced financial difficulties as a result of the pandemic may be less able to pay dividends going forward, even if distributable profits have been generated by a company's operations prior to the onset of the pandemic. In addition, and as noted above at question 6, companies participating in government loan schemes may be restricted in their ability to pay dividends whilst the facility is outstanding.

In any case, directors must of course consider whether a dividend can and should be declared. In making such a determination, directors must have regard to the interests of the company and whether, if the company has sufficient distributable reserves to pay a dividend, it is in the interests of the company for a dividend to be declared or for the company to conserve cash, especially if income is declining or likely to decline as a result of the pandemic. Directors should consider carefully the future solvency of the company and the potential impact on the company's operations of any dividend payment. Indeed, if the company is experiencing financial difficulties it may be that directors should have regard to the interests of the company's creditors as a whole (see question 2 above): it is likely to be in the interests of creditors that the company choose not to pay a dividend.

The FRC's '*Guidance for companies on Corporate Governance and Reporting*' (updated 20 May 2020) notes that many companies have already adjusted their approach to dividends. The Guidance emphasises that directors need to consider the position of the company when a dividend is paid, not just when it is proposed, and that the assessment of whether a dividend is appropriate should include consideration of current and likely operational and capital needs, contingency planning, compliance with directors' duties and the need to ensure that the capital maintenance rules of Part 23 of the Companies Act 2006 are complied with.

In this regard, the Chartered Governance Institute has published guidance on the withdrawal or amendment of resolutions to pay final dividends in the event that a board concludes that it is no longer appropriate to recommend or declare a dividend that is due to be put to shareholders for approval at the AGM (or concludes that a dividend should still be paid but the amount of the dividend should be reduced).

11. What accounting issues arise?

Going concern

Careful consideration may need to be given to whether the company is a going concern, and whether it is necessary to disclose "material uncertainties" in financial statements.

IAS 1 requires financial statements to be prepared on a going concern basis unless management intends to liquidate the entity or to cease trading or has no realistic alternative but to do so. It may be necessary to consider whether the impact of the pandemic leaves management with no realistic alternative but to liquidate or cease trading.

If management is aware of material uncertainties which may cast significant doubt on the entity's ability to continue as a going concern, the uncertainties must be disclosed. The FRC has stated in its Guidance for companies on Corporate Governance and Reporting (updated 20 May 2020) that it thinks it more likely that companies will disclose material uncertainties relating to going concern in the current circumstances. The FRC encourages boards to consider the impact of different potential scenarios (e.g. different time periods for the continuation of social distancing) on their company's revenues, costs and cash flow requirements, and if a material uncertainty does exist, to disclose it in terms that are as specific to the company as possible. The FRC also encourages companies to provide as much context as possible for the assumptions and predictions underlying the amounts recognised in financial statements, including (i) the availability and extent of support through government support measures, (ii) the availability, extent and timing of sources of cash, including compliance with banking covenants or reliance on those covenants being waived, and (iii) the duration of social distancing measures and their potential impacts.

Strategic report

The directors of all companies other than those entitled to the small companies exemption are required to prepare a strategic report for each financial year, which must contain a fair review of the company's business and a description of the principal risks and uncertainties facing the company (ss. 414 & 414C, CA 2006). Similar considerations to those identified above will apply in identifying risks and uncertainties in the strategic report. The FRC's Guidance suggests that a company should consider the specific resources, assets and relationships that are most under threat and the steps being taken to protect them.

Viability statement

Companies with a premium listing are required by the UK Corporate Governance Code to include in their annual reports a viability statement: a statement whether the board has a reasonable expectation that the company will be able to continue in operation and meet its liabilities as they fall due over a period of assessment (provision 31 of the Code). Again, the FRC has recognised that many boards will be less confident in making the viability statement

in the current circumstances, and stresses the importance of being clear on the company's specific circumstances and the degree of uncertainty about the future, and drawing attention to qualification or assumptions as necessary.

The FRC Reporting Lab has published a report ('*Covid-19: Going concern, risk and viability: reporting in times of uncertainty*' (15 June 2020)), providing further guidance and practice examples in relation to going concern, risk reporting and the viability statement.

12. How can companies hold meetings and pass resolutions without in-person meetings?

Electronic meetings and voting are already facilitated by CA 2006, and in particular s. 360A, CA 2006 (inserted with effect from 3 August 2009), which provides as follows:

> "*360A Electronic meetings and voting*
>
> *(1) Nothing in this Part is to be taken to preclude the holding and conducting of a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it.*
>
> *(2) In the case of a traded company the use of electronic means for the purpose of enabling members to participate in a general meeting may be made subject only to such requirements and restrictions as are—*
>
> *(a) necessary to ensure the identification of those taking part and the security of the electronic communication, and*
>
> *(b) proportionate to the achievement of those objectives.*
>
> *(3) Nothing in subsection (2) affects any power of a company to require reasonable evidence of the entitlement of any person who is not a member to participate in the meeting.*"

These provisions have, to date, taken effect subject to the constitution of the relevant company. Many companies have included in their articles of association specific provision for telephone or video conferencing, and the constitutions of others are silent on the issue, but some sets of articles may contain express barriers to virtual or hybrid meetings.

Legislation

Time-limited changes to the legislative regime have now been effected by means of provisions in CIGA 2020, which came into force on 26 June 2020.

Section 37, CIGA 2020 incorporates Schedule 14, which makes provisions about meetings of companies and other qualifying bodies held between 26 March and 30 September 2020 inclusive (though these dates are subject to amendment by regulation). A company (as defined at s. 1(1), CA 2006) is a qualifying body for these purposes, under Schedule 14, para. 1(g).

Under para. 3(2) of Schedule 14, a meeting is within the scope of the provisions if it is:

(1) a general meeting of a qualifying body;

(2) a meeting of any class of members of a qualifying body; or

(3) a meeting of delegates appointed by members of a qualifying body.

The new provisions contained in the Schedule in relation to these categories of meetings are, in summary, as follows:

(1) the meeting need not be held at any particular place (Schedule 14, para. 3(3));

(2) the meeting may be held, and any votes may be permitted to be cast, by electronic means or any other means (Schedule 14, para. 3(4));

(3) the meeting may be held without any number of those participating in the meeting being together in the same place (Schedule 14, para. 3(5));

(4) a member of the qualifying body does not have a right –

  (a) to attend the meeting in person (Schedule 14, para. 3(6)(a));

  (b) to participate in the meeting other than by voting (Schedule 14, para. 3(6)(b)), or

  (c) to vote by particular means (Schedule 14, para. 3(6)(c)).

These provisions take effect notwithstanding the terms of any enactment or of the company's constitution, by Schedule 14, para. 3(8).

Schedule 14 also includes general rule-making powers for appropriate national authorities to make provisions about the form and timing of notices, as well as (more broadly) to make further or different provision by regulation in relation to the holding of meetings of qualifying bodies.

Good practice / guidance

If an AGM is scheduled to be held while pandemic restrictions are in place, companies should consider whether in the particular circumstances of the relevant company it is possible and appropriate to postpone or (in the case of a private company) dispense with the AGM.

In some companies an EGM may be required during the pandemic, for example if shareholder approval is required for the raising of emergency financing.

If a hybrid meeting is proposed, best practice while pandemic restrictions are in force will generally be to restrict in-person attendance to the minimum number of people in order to satisfy quorum requirements, with a clear message to all other shareholders that attendance is to be by remote means. Unless shareholders have consented to receive electronic communications, notices and accompanying documents will need to be sent in hard copy in the usual way until such time as any provisions to the contrary are made by regulation under the powers in Schedule 14, para. 4(2). Voting by proxy should be actively encouraged.

Boards and board committees are more likely than the shareholder body to be accustomed to meeting virtually, and directors still have the option to use the written resolutions process if circumstances make that the most convenient method for decision-making. Particular care is needed to protect the security of board packs circulated electronically, which can be addressed by the use of secure board portals.

The following good practice guidelines on virtual meetings will apply to shareholders' meetings and to board and committee meetings.

(1) Notices of meetings should be very clear as to access arrangements, and meeting protocols should be circulated well in advance.

(2) Attendance numbers (including by reference to the quorum) should be monitored and recorded by the host, and the security of the virtual meeting protected by the use of means such as access passwords and virtual waiting rooms.

(3) Those in attendance should be muted whilst not speaking (if necessary by the host) but have clear instructions as to how to communicate with others during the meeting, whether by messaging within the virtual space or otherwise. Clear rules should be set and communicated as to the appropriate content of any in-meeting messaging, which should be monitored by the host.

(4) Screen-sharing should be used wherever possible in order to ensure that all in attendance are able to follow the use of documents.

(5) Adequate time should be provided for questions after any presentations have been concluded, in order that all in attendance have a full and fair opportunity to contribute views and ask questions.

(6) Virtual meetings should be minuted in the usual way, and as a general rule should not be recorded. Recording is likely to involve the collection of personal data, and a digital recording may be a disclosable document.

(7) Where possible, hosts should ensure that there is IT support on standby in case any problems arise during the virtual meeting.

13. Have any other formal requirements on companies been relaxed as a result of the pandemic?

Temporary extension of period to hold AGM

Schedule 14, CIGA 2020, at para. 5, extends the time for holding an annual general meeting for those companies and other qualifying bodies which, absent these provisions, would have been required to hold one after 25 March 2020 and before 30 September 2020. The effect of the provisions, which are subject to further broad rule-making powers, is to allow all such qualifying bodies until 30 September 2020 to hold their AGM.

Temporary extension of time for filing accounts – public companies

Section 38, CIGA 2020 extends the time for filing accounts with the registrar under s. 441, CA 2006 for those public companies which, absent these provisions, would have been required to file them after 25 March 2020 and before 30 September 2020. The effect of the provisions is to allow all such public companies until 12 months after the end of the relevant accounting period (or 30 September 2020, if earlier) to comply with the relevant filing requirements.

Temporary extension of time for other filings

Section 39, CIGA 2020 provides powers for the Secretary of State to extend time for a number of other filing requirements.

Under s. 39(2), CIGA 2020 where the existing period for filing is 21 days or fewer, the substituted period cannot exceed 42 days. Where the existing period is 3, 6 or 9 months, the substituted period cannot exceed 12 months. The provisions exclude, by s. 39(3), any power to extend a period which is already 12 months.

Regulations providing for temporary extensions of time pursuant to s. 39, CIGA 2020 (The Companies etc. (Filing Requirements) (Temporary Modifications) Regulations 2020) were laid before Parliament on 26 June 2020 and came into force on 27 June 2020. The explanatory memorandum explains that the regulations were laid as soon as practicable after the Royal Assent of CIGA 2020, subject to the negative resolution procedure and in breach of the 21-day rule, in order that relevant entities are given immediate help to comply with their filing deadlines at a time when they may be struggling to meet them because of the significant pressure they are being put under because of the pandemic. The modifications made by the Regulations will expire at the end of the day on 5 April 2021 (s. 39(8), CIGA 2020).

The Regulations provide for the following extensions applicable to companies, by way of amendment to the Companies Act 1985 and CA 2006:

(1) registration of alteration of a floating charge (s. 466(4C)(a), Companies Act 1985) – from 21 days to 31 days;

(2) notice of change of address of registered office (s. 87(4)(b), CA 2006) – from 14 days to 42 days;

(3) notice of place where register of members is kept (s. 114(5), CA 2006) – from 14 days to 42 days;

(4) notice of place where register of directors is kept (s. 162(6), CA 2006) – from 14 days to 42 days;

(5) notice of change in directors, etc. (s. 167(1), CA 2006) – from 14 days to 42 days;

(6) notice of place where register of secretaries is kept (s. 275(6), CA 2006) – from 14 days to 42 days;

(7) notice of change in secretaries, etc. (s. 276(1), CA 2006) – from 14 days to 42 days;

(8) period allowed for filing accounts (s. 442(2), CA 2006) – the period for private companies is extended from 9 months to 12 months, and the period for public companies is extended from 6 months to 9 months. (For public companies whose original accounts filing deadline fell on or after 30 June 2020 before it was extended by CIGA 2020, this extension will apply and supersede the extension under CIGA 2020);

(9) register of people with significant control (s. 790M, CA 2006) – from 14 days to 42 days;

(10) notice of place where PSC register is kept (s. 790N(4), CA 2006) – from 14 days to 42 days;

(11) notice of change to the PSC register (s. 790VA(2), CA 2006) – from 14 days to 42 days;

(12) confirmation statements (ss. 853A(1) and 853L(1), CA 2006) – from 14 days to 42 days;

(13) registration of charge (s. 859A(4), CA 2006) - from 21 days to 31 days;

(14) registration of charge contained in debentures (s. 859B(6), CA 2006)- from 21 days to 31 days;

(15) notice of place where copies of instruments creating charges are kept (s. 859Q(5), CA 2006) – from 14 days to 42 days.

Companies House guidance in relation to the regulations (with examples) has been published at https://www.gov.uk/government/publications/the-companies-etc-filing-requirements-temporary-modifications-regulations-2020/temporary-changes-to-companies-house-filing-requirements.

In addition to the statutory changes, it is important for companies to note that the registrar has the power to grant an extension of time for filing accounts as a concession, and an application for such an extension can be made online before the normal filing deadline expires. See https://www.gov.uk/guidance/apply-for-more-time-to-file-your-companys-accounts.

Temporary changes to strike-off activity – Companies House

Companies House has published guidance at https://www.gov.uk/guidance/coronavirus-guidance-for-companies-house-customers-employees-and-suppliers#changes-to-strike-off-policy-and-late-filing-penalties concerning temporary changes to its policy relating to strike-off activity.

The changes to strike-off activity depend on the basis of the proposed strike-off. In the case of applications for voluntary strike-off, a notice will be published in the Gazette as normal in order to place the proposed strike-off in the public domain. However, until 10 September 2020 any further action to strike off and dissolve the company will be suspended, in order to protect creditors and any other interested parties who may wish to object to the company being struck off.[5] An exception to this suspension policy, applicable from 1 June 2020, applies in cases where the registrar has evidence that the relevant company is no longer in operation following an investigation. In such a case, the registrar will continue with strike-off action.

In cases where a proposed strike-off is due to filing defaults, the registrar would ordinarily proceed towards striking off a company by sending two letters to the company and then publishing a notice in the Gazette. Under the temporary concessionary policy, the registrar will continue to write to companies if their annual accounts or confirmation statement are overdue but will not publish the Gazette notice. This is intended to give businesses an opportunity to file any outstanding documents and bring their record up to date.

Temporary changes to policy on late filing penalties – Companies House

The new Companies House guidance also covers some aspects of policy relating to late filing penalties. The registrar has very limited discretion not to impose a late filing penalty, so concessions are focused around managing penalties which are imposed.

[5] https://www.gov.uk/government/news/companies-house-to-restart-the-voluntary-strike-off-process

The temporarily revised policy includes commitments to:

(1) treating late filing penalty appeals sympathetically, if the late delivery of accounts was caused by the pandemic;

(2) providing a break for companies to pay late filing penalties; and

(3) providing additional support with payment plans for late filing penalties.

Detailed guidance papers covering these policies, as well as information about lodging an appeal online, are available at: www.gov.uk/government/publications/late-filing-penalties.

The Companies House contact centre has been closed, so credit card payments can no longer be made online, but payment of a late filing penalty incurred on or after 30 March 2020 can be made online using a link included on the penalty notice.

Stock transfer forms and stamp duty

HMRC has announced at https://www.gov.uk/guidance/stamp-duty-on-shares temporary changes to the way it deals with stamp duty. Stock transfer forms must be emailed in electronic form to stampdutymailbox@hmrc.gov.uk. HMRC has indicated that it will accept e-signatures while pandemic-related measures are in place.

Any refunds of stamp duty which are due can only be paid electronically, and the guidance provides details of how this will be processed.

Section Five: Banking and Financial Services

Richard Hill QC, Andrew de Mestre QC, Sharif A Shivji QC, Charles Marquand, Gregory Denton-Cox, Tom Gentleman, Lara Hassell-Hart, Karl Anderson

Last updated: 2 September 2020

INTRODUCTION

The effects of the pandemic on banking and financial matters will be far reaching. The pandemic has resulted in an enormous shock both to the financial markets and the real economy. By March 2020, the FTSE 100 had fallen by 35% from the start of the year and the

Office of National Statistics was reporting that the UK economy had contracted almost as much in March 2020 as in the 18 months following the 2008 financial crisis.

In this section, we consider the legal issues arising in the current business environment in the sector of banking and financial services. These issues cover a range of legal disciplines and commercial relationships which can be broadly categorised as follows:

(1) Lenders and Borrowers. The current circumstances and regulatory guidance have placed lenders under significant pressure to forbear from enforcing their strict legal rights under lending agreements, especially where borrowers request payment holidays (question 2). Lenders must, however, be cautious not to waive their rights (question 1), and may still be compelled to lend where they have previously agreed to do so (question 3). The pandemic raises questions about whether Material Adverse Change (MAC) or Material Adverse Event (MAE) clauses, which are often found in facility agreements, are triggered (question 4). We also consider the termination provisions in the CIGA 2020 in the context of financial services contracts (question 5), whether the new moratorium and restructuring plan regime under CIGA 2020 could constitute an event of default (question 6), and the impact of CIGA 2020 more generally on financial services transactions (question 7). Issues of frustration and *force majeure* are addressed in our Contracts section (see questions 7 to 12 of that section).

The relationship between the new Bounce Back Loans Scheme (BBLS) and the Coronavirus Business Interruption Loan Scheme (CBILS) and the consumer credit regulatory regime are considered in question 8.

(2) Mergers and Acquisitions. In terms of mergers and acquisitions, we analyse the impact of the pandemic on earnouts in corporate acquisitions (question 9).

(3) Issuers / Trustees. For the issuers of securities, the pandemic has brought into focus their obligations to disclose inside information in accordance with the Market Abuse Regulation and to report "*significant events*" in respect of securitisations which are governed by the EU Securitisation Regulation (questions 10 and 11). We also consider the convening of meetings notwithstanding the constraints of social distancing (question 12).

(4) The Financial Markets. The considerable volatility in the financial markets has led brokers to impose higher margin calls. This is addressed in question 13.

(5) Customer Complaints. In relation to complaints, we examine the Financial Ombudsman Service's approach to complaints arising from firms' actions during the pandemic and complaints relating to lending under the BBLS and the CBILS (question 14).

(6) Business Interruption Insurance. As explained in further detail in the Introduction to our Contract analysis above, the Financial Conduct Authority (as the conduct regulator for insurance) has brought a test case in relation to business interruption insurance which was heard in July 2020. Flaux LJ has indicated that he hopes to be able to hand down judgment in mid-September. We intend to publish an analysis of the court's decision in a future edition of this e-book.

We refer below to a number of sources that readers may find useful. In addition, readers may find it useful to refer to the FCA's website, which has a specific section dedicated to the pandemic: https://www.fca.org.uk/coronavirus.

LENDERS AND BORROWERS

1. In what circumstances will a lender be taken to have waived their rights in respect of a breach of a loan covenant?

The pandemic is likely to have a severe impact on the ability of many borrowers to meet repayment obligations in the short to medium term. Cash flow for many businesses has suffered as a result of the lockdown regulations, with many firms having to try to meet their usual liabilities without recording any earnings. In those circumstances, the risk of formal defaults under loan contracts is rising. Lenders will have to consider whether they should refrain from exercising their strict contractual rights, such as enforcing security or accelerating the loan balance, following a breach of covenant in the current circumstances. However, they should do so with one eye to the future: once the pandemic is over, borrowers may argue that lenders have waived their rights to enforce those terms.

Is there any obligation to waive a breach of covenant caused by the pandemic?

Whilst the UK government is enacting substantial legislation to address the insolvency-related consequences of the pandemic, there is currently no proposal to introduce legislation to assist contractual counterparties who find themselves in breach of contract as a result of the current situation. There is therefore no obligation, either present or contemplated, for lenders to excuse breaches of covenant which were caused by the pandemic and its effects.

There is, however, regulatory guidance. The CEO of the PRA sent a "Dear CEO" letter on 26 March 2020 to UK banks in which he advised that lenders should distinguish between "normal" (i.e. borrower-specific) breaches of loan covenants, and breaches which arise as a result of the pandemic and its consequences. In the latter case, the PRA will expect lenders to consider in good faith whether to waive any resultant covenant breach and not impose any new charges or restrictions.

In light of this guidance, and the potential reputational consequences which would follow if a lender were to insist upon its contractual rights where a borrower had defaulted due to the pandemic and through no fault of their own, it seems likely that lenders will in many cases choose not to exercise their rights where a default occurs.

The question is then whether this will prevent the lender from invoking those same rights once the pandemic is over, because they will be deemed to have waived them. English law does not recognise a unified doctrine of "waiver" but instead applies other contractual principles to determine whether a party should be prevented from relying on a contractual right as a result of its failure to exercise that right on a previous occasion. The two main principles are election and estoppel, but it is also possible (although less common) for a waiver to amount to a variation of the terms of the contract.

Election

Election occurs where a party is entitled to exercise one of several rights which are inconsistent with and mutually exclusive of one another. Thus, in response to a breach of contract, the innocent party may be faced with option 1 (e.g. accepting repudiation of the contract) or option 2 (affirming the contract) and only one option can be chosen. The binary nature of election distinguishes it from estoppel and makes it the less flexible of the two types of waiver: *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147; [2008] 2 All ER (Comm).

Because election requires a choice between two mutually exclusive options, it will arise in fewer situations than estoppel. For example, there is unlikely to be an election where a lender provides a borrower with further time to make a repayment, or reduces the rate of default interest, because such actions do not involve choosing between rights which are incompatible with one another.

The situation may be different where the lender is considering whether to exercise an express contractual right of termination in response to the borrower's breach, accelerating the payment of the balance of the loan. Contractual rights of termination can give rise to an election: *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548. An express statement by the lender that they will not exercise their right to terminate and accelerate the loan is likely to amount to an election to affirm the contract, preventing the lender from revisiting that decision. Similarly, the lender may be held to have elected by conduct in treating the contract as still on foot, for example by continuing to perform its side of the bargain for an extended period or by asserting a right to be paid for sums which became due after the date on which the contract would otherwise have been terminated. In both cases, there is what Rix LJ described in *Kosmar Villa Holidays* (above) as a choice between whether the contract "lives or dies".

Estoppel

A lender may be taken to have waived a contractual right where the borrower has relied to its detriment on a representation from the lender that it would not enforce such rights, such that it would be inequitable for the lender to renege on its representation. This is promissory estoppel, which differs in several respects from election.

First, unlike election, the lender does not need to know or have obvious means of knowing the facts giving rise to the right being waived. The borrower will be entitled to rely on the representation even where the lender has no knowledge of it. For example, if a lender inexplicably fails to charge default interest for several months, that may amount to an implied representation in the current circumstances that default interest will not be charged. Second, if the borrower seeks to rely on estoppel, they must demonstrate that they relied on the representation to such an extent that it would be inequitable for the lender to go back on their representation. This usually requires proof of a detrimental change of position as a result of the representation. A borrower might seek to demonstrate this by showing that they had spent funds relying on the representation which would otherwise be available to pay default interest or pay the loan balance under an acceleration. Third, unlike election, waiver by estoppel may only be temporary, in that the lender may only be prevented from relying upon their strict legal rights for as long as it would be inequitable for them to insist upon them. Hence, a party may be able to withdraw its waiver by giving reasonable notice: *PM Project Services Ltd v Dairy Crest Ltd* [2016] EWHC 1235 (TCC) at [39] to [40], [43]. These points are particularly relevant for lenders in the current climate. Once the pandemic begins to ease, for example, lenders might argue that it is no longer inequitable for them to be held to a representation made during the height of the pandemic that they would not insist upon their legal rights.

Variation

Conduct which is said to amount to a waiver may prevent a party from asserting their contractual rights because such conduct actually varies the bargain between the parties. However, it is unlikely that the type of waivers discussed here will be capable of varying the parties' bargain, for two reasons. First, any variation to a contract must be supported by adequate consideration: *Williams v Roffey Bros* [1991] 1 QB 1 (CA). It is unlikely that consideration will pass where, for example, a lender is agreeing not to charge default interest or not to enforce its security. Second, many loan agreements will contain clauses that variations are only binding if agreed in writing (known as a "no oral modification" clause). Such clauses will prevent the contract from being varied orally, even where consideration is provided (although note that the lender may still be estopped from reneging on an oral waiver): *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119 at [10] to [16].

It is also worth noting that there is nothing to prevent the lender and borrower from executing a formal, written agreement recording the extent of the lender's agreement to waive its

contractual rights. Such agreements must conform to any formality requirements set out in the original loan agreement. The obvious advantage of entering such an agreement is that it would reduce the risk of a borrower raising waiver arguments in the months following the pandemic and would allow the lender to put a defined time limit on the extent to which its rights are waived.

Can a lender rely on a "no waiver" clause or similar contractual protections?

Even if a borrower could demonstrate an election or estoppel which amounted to a waiver, could the lender nevertheless still assert its contractual rights on the basis that the parties' contract excludes the borrower's ability to raise a waiver defence? The contract might include a term stating that any waiver, such as an election, will only be effective if recorded in writing. It might also state that a delay in or failure to exercise a contractual right will not amount to a waiver. What are the effects of such terms?

The answer will depend on the term in question. For example, in the face of a term which states that delay or forbearance in enforcing a provision of the agreement will not amount to a waiver, a borrower might struggle to demonstrate an unequivocal indication that the lender has waived its rights if all it has done is acquiesced in the breach. However, the Court of Appeal considered in *Tele2 International Card Co SA v Post Office Ltd* [2009] EWCA Civ at [54] to [56] that such clauses do not apply to the question of fact of whether a party has elected to affirm the contract, meaning that acquiescence which indicates an election to abandon a contractual right can still be effective in the face of a "no waiver" clause. On the facts, the innocent party's continued performance of the agreement was an unequivocal communication that it had affirmed the contract. Similarly, in *MWB Business Exchange Centres Ltd* (above) at [16] it was expressly recognised by Lord Sumption that a "no oral variation" clause may be ineffective because a party is estopped from relying on it, although he considered that there would have to be something more than the informal promise itself, and that the representation would have to unequivocally confirm that the variation to the parties' rights was valid notwithstanding the informality. Lenders therefore cannot simply fall back on such clauses without properly considering whether their conduct amounts to an election or gives rise to an estoppel.

In the consumer context, lenders must also consider whether such clauses cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer, such that they are unfair and not binding under the Consumer Rights Act 2015.

2. What rights do borrowers have to request payment holidays?

Many borrowers are currently struggling to generate enough cashflow to meet recurring payment obligations under credit agreements, because of the marked fall in economic activity caused by the pandemic. As a result, many lenders are being met with both informal and formal requests to restructure loans. In many cases, borrowers are requesting that their payment

obligations be deferred in the short-to-medium term. Such deferrals, known as payment holidays, are often a contractual feature of mortgages and unsecured loan agreements. Several regulatory changes have been made since March 2020 to encourage lenders to accede to requests for payment holidays. These new measures have been introduced in respect of both secured and unsecured lending.

Mortgages

On 17 March 2020, the Chancellor announced that, following discussions with the mortgage industry, mortgage lenders would offer at least a three month mortgage holiday to borrowers to help reduce the burden of outgoings in a time of reduced cash flow. That announcement was followed by the publication of FCA guidance on 20 March 2020. The FCA guidance applies only to the exceptional circumstances arising out of the pandemic. It states:

> "*Where a customer is experiencing or reasonably expects to experience payment difficulties as a result of circumstances relating to coronavirus, and wishes to receive a payment holiday, a firm should grant a customer a payment holiday for 3 monthly payments, unless it can demonstrate it is reasonable and in the customer's best interest to do otherwise.*"

It is therefore not compulsory for a firm to grant a payment holiday of 3 months; but any alternative arrangement must be concluded to be in the customer's best interest. No fees should be charged for providing a payment holiday, but interest can continue to accrue on the remaining unpaid sums.

The FCA's guidance was updated on 16 June 2020 to coincide with the date at which the first payment deferrals began to come to an end. This guidance builds upon the FCA's previous publication and confirms that payment holidays can be extended for a further three months. The key points are:

(1) Lenders should not have regard to their own interests when considering whether to offer a payment holiday. There is no expectation that the lender should investigate the circumstances surrounding a borrower's request for a payment holiday; to the extent that it does, this should not cause undue delay.

(2) Lenders should, where possible, provide personalised information to the borrower on the impact of a payment holiday on the borrower's monthly payments and / or the terms of their mortgage. The aim is to ensure that the borrower can make an informed decision.

(3) The borrower should be told that any payment holiday will not affect their credit file but may be taken into account by lenders in making future lending decisions.

(4) Towards the end of the term of the payment holiday, the lender should take reasonable steps to contact the borrower to assess whether they will be likely to resume full payments.

(5) If the borrower can resume full repayments, they should be given the option of paying the sums covered by the deferral period by way of a lump sum payment or by extending the term of the mortgage. The lender should give the borrower personalised information on the effects of capitalising the sums covered by the payment holiday if this option is being considered.

(6) If the borrower cannot resume full payments, they should offer a payment deferral for a further 3 months.

The FCA has also recently published draft guidance to build on these previous two sets of guidance. Although only in draft form, the guidance confirms that firms will be expected to adopt flexible and appropriate forbearance measures for customers who continue to suffer from difficult financial circumstances. There is, importantly, no express expectation that further payment holidays should be granted. It therefore appears that, once the 16 June 2020 guidance expires, firms will be expected to treat customers fairly and adopt a flexible approach, but it will not be compulsory to grant the borrower a (further) payment holiday. The guidance also confirms that after the 16 June 2020 guidance expires, possession proceedings may be commenced or resumed, although not until all other options have been exhausted.

It is important that mortgage lenders abide by the above guidance. The FCA has confirmed that non-compliance could form the basis of enforcement action on the grounds that conduct had fallen below the standards required under the Principles for Businesses and Mortgages Conduct of Business rules in the FCA Handbook. It stated that there is likely to be a breach of these rules if the guidance is not followed. It also stated that failure to comply could amount an unfair practice under the Consumer Protection from Unfair Trading Regulations 2008.

Other forms of secured and unsecured credit

Mortgages are not the only form of lending impacted by the pandemic. Borrowers are also finding it increasingly difficult to service repayment obligations on a wide range of forms of borrowing, such as: personal loans, motor finance agreements, overdrafts, credit cards and high-cost short-term credit agreements ("**HCSTC**"). Guidance has been published in relation to each type of credit agreement.

In relation to personal loans, the position is similar to that of mortgages. The FCA published guidance on 9 April 2020 for regulated firms that issue personal loans i.e. regulated credit agreements which are either secured (other than on land) or unsecured. The guidance confirms that the FCA will expect regulated firms to provide, for a temporary period, exceptional and immediate support to customers facing payment difficulties as a result of the pandemic. This principally involves the grant of a 3-month payment holiday unless the firm reasonably

determines that it is "obviously not in the customer's interest to do so" (note that the word "obviously" does not appear in the above-mentioned guidance on mortgages). The borrower will not be considered to be in arrears and the payment holiday will not negatively impact a borrower's credit score. This guidance was reviewed in June 2020 and updated, finalised guidance was published by the FCA on 1 July 2020. The updated guidance confirms that customers who have not yet had a payment deferral should still be offered a 3-month payment holiday unless obviously not in their interests. If customers can resume full payments after an initial deferral period, but cannot repay the deferred amounts in full immediately, firms should allow them to repay the deferred amounts over the remaining term of the agreement or allow a longer period for repayment. If the customer is still experiencing temporary payment difficulties, the firm should offer a full or partial payment deferral to reduce payments for a period of 3 months to a level the customer indicates they can afford.

Motor finance loans have also received separate treatment by the FCA. Guidance published on 24 April 2020 confirms that in relation to these agreements, firms will again be expected to grant 3-month payment holidays where a borrower is experiencing or reasonably expects to experience temporary payment difficulties as a result of the pandemic. It is expressly stated that firms may consider granting longer payment holidays, although they should consider the customer impact of depreciating asset values. Although no fees should be charged, the firm may still charge interest during the deferral period. A specific warning is given that regulated firms should not recalculate the Guaranteed Minimum Future Value or PCH Residual Value of the vehicle based on temporarily depressed market conditions, in order to recover more of the original car value through the borrower's monthly repayments. Seeking to terminate the agreement or recover possession of the vehicle will be "very likely" to contravene the Principles of Business, absent exceptional circumstances. The FCA published a press release in relation to motor finance loans and HCSTC facilities on 15 July 2020. The press release confirmed that the FCA was introducing new measures to provide further support for motor finance and high-cost credit customers, to take effect from 17 July 2020. The new measures for motor finance customers are contained in updated guidance, which was finalised after a period of consultation with stakeholders. For motor finance customers who are still facing temporary payment difficulties as a result of the pandemic, regulated firms should provide them with support by freezing or reducing payments to a level they can afford for a further 3 months, up until 31 October 2020.

The FCA has published guidance in relation to overdraft facilities. The guidance recognises the fact that for many borrowers, overdraft facilities are likely to be the easiest and quickest way to access emergency funds to cover shortfalls in income caused by the pandemic. For that reason, and upon a borrower's request, firms should not charge interest in respect of up to £500 of the balance of an arranged overdraft (i.e. the first £500 will be interest free). Borrowers can make such request for the 3 months beginning on the date of the guidance (i.e. from 9 April 2020), although this timeframe has now been extended (see below). Further, from 14 April 2020, firms must review their overdraft prices to ensure that they set at a level which is consistent with the obligations to treat customers fairly, in light of the exceptional

circumstances caused by the pandemic. Again, this guidance was updated and finalised on 1 July 2020. The updated guidance confirms that the guidelines set out above now apply until 31 October 2020.

In relation to credit cards debts, the FCA published guidance on 9 April 2020. 3-month payment holidays should be granted unless obviously not in the customer's interests; and longer periods may be granted if deemed appropriate. These will not affect a borrower's credit rating. CONC rules which set minimum repayment amounts equal to at least the interest, fees and charges applied to the borrower's account will not apply to the extent that the firm's contracts are varied to comply with the FCA's guidance. The persistent debt provisions of CONC are also disapplied for the duration of the payment holiday. As with overdraft facilities, credit card providers should review the rate of interest charge to ensure that they are treating customers fairly in line with the Principles of Business. Updated guidance, published on 1 July 2020, confirms that additional 3-month payment holidays should be offered to customers who are still experiencing temporary payment difficulties. The updated guidance also emphasises the fact that firms should treat customers fairly, for example in relation to the practice of charging higher interest rates on products offered to low income customers, in light of the exceptional circumstances arising out of the pandemic.

Finally, separate guidance was published on 24 April 2020 in relation to HCSTC facilities (such as payday loans). Unlike the guidance in relation to mortgages and personal loans, firms providing HCSTC facilities will only be expected to agree to a payment holiday of at least one month. The FCA has stressed that, in relation to these types of loan, lenders should not pressure customers to pay a debt in very few repayments or in unreasonably large amounts, or in an unreasonably short period of time; or to sell their property or increase their existing borrowing to repay the balance due. As set out above, further guidance was published by the FCA on 15 July 2020, to take effect from 17 July 2020. The further guidance, which was finalised after a period of consultation with stakeholders, confirms that HCSTC customers can only apply for a payment freeze under the guidance once up to 31 October 2020 in respect of each HCSTC agreement. For those customers who have had a payment freeze and are still experiencing payment difficulties, firms should provide a range of support – including formal forbearance – in accordance with the FCA Handbook. The Consumer Credit sourcebook has been amended to reflect this guidance.

3. Can a borrower enforce a lender's contractual obligation to provide loan facilities?

Businesses across the country are suffering cash flow issues as a result of a general fall in trade caused by the pandemic. Credit has therefore become even more important to businesses that still have outgoings to meet notwithstanding the drop in general commercial activity. In the week to 6 May 2020, for example, UK Finance reports that small and medium sized enterprises borrowed £1.4 billion from lenders under the Coronavirus Business Interruption Loan Scheme

(CBILS). The sudden increase in demand for credit is likely to leave many lenders wary of exposing themselves to higher risks of default and will encourage them to reduce their supply of credit. It might even lead some lenders to refuse to honour contractually agreed access to credit facilities. In those circumstances, is there anything the borrower can do to compel the lender to make credit available?

The manner by which a contracting party can compel its counterparty to perform its contractual obligations is the equitable remedy of specific performance. Specific performance is an exceptional remedy which lies in the discretion of the court. The court will exercise its discretion to order specific performance where damages at common law are not an adequate remedy: *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

English law has traditionally adopted the position that specific performance is not available to compel a lender to advance sums which were agreed to be loaned: *The South African Territories Limited v Wallington* [1898] AC 309. This general rule seems to have been based on the notion that there is no "mutuality" in such cases; the borrower could not be compelled to accept the loan if they had refused it in breach of contract, so commensurately the lender could not be compelled to advance the loan: *Sichel v Mosenthal* (1862) 54 ER 932; 30 Beav 371. However, the general rule is more readily explicable as an application of the principle that specific performance will not be ordered where damages are an adequate remedy. For example, specific performance will rarely be ordered in an action for an agreed sum because damages will almost always be an adequate alternative to the payment of a liquidated sum of money. Likewise, applying general principles of compensation, a borrower will be expected to mitigate their loss by going into the market and replacing the original loan by contracting with another lender. If the borrower can obtain this loan at a cheaper rate of interest, they have suffered no loss. If on the other hand the new loan facility is more expensive, or if the borrower loses out on a business opportunity as a result of the delay in obtaining the loaned funds, the borrower can claim damages for those losses, subject to those losses being in the reasonable contemplation of the parties at the time of contracting.

That being said, just as there are circumstances where, unusually, damages will not be an adequate alternative to an action for an agreed sum (see e.g. *Beswick v Beswick* [1968] AC 58), so too might borrowers argue that the current climate means that an award of damages will not adequately compensate them and do justice between the parties. That might be the position, for example, where the borrower cannot mitigate their loss by finding an alternative source of credit, because other lenders have restricted their supply in response to the pandemic. Further, the borrower might be relying on the availability of promised credit to continue its business as a going concern, in circumstances where the business will become insolvent if no credit is obtained. Such examples are stark, and a borrower would need to put forward strong evidence to convince the court that damages are truly inadequate.

4. Will the pandemic constitute a Material Adverse Change (MAC) or Material Adverse Event (MAE)?

MAC and MAE clauses are a common feature of facility agreements. Similar to Event of Default ("**EOD**") clauses (see further question 6 below), MAC and MAE clauses allow one party to exercise certain rights in response to contractually pre-defined events which alter the balance of the bargain struck between the parties. In the context of facility agreements, an MAC or MAE usually entitles the lender to protect their position by, for example, accelerating the balance of the loan. Note that serving a notice of acceleration where an event of default has not occurred will merely invalidate the notice and will not amount to a breach of contract by the lender: *Concord Trust v Law Debenture Trust Corporation plc* [2005] UKHL 27.

Such clauses are also found in the corporate acquisition context where, prior to closing, a significant event occurs which undermines the original pricing arrangement agreed upon between buyer and seller. In those circumstances, the buyer is given the right to walk away from the transaction.

The effect of the pandemic on these clauses is a matter of contractual interpretation, and is therefore dealt with above in the Contracts section.

5. Do the new "termination clause" provisions of the Corporate Insolvency and Governance Act 2020 apply to financial services contracts?

CIGA 2020 includes provisions that prevent suppliers of goods or services from relying on the fact that a company has gone into an insolvency procedure for the purposes of terminating the contract under which that supply is made.

However, there are exceptions to these provisions. The permanent exceptions are brought in by Schedule 12 to CIGA 2020, which inserts new Schedule 4ZZA, IA 1986 (provided for by s. 233B(10), IA 1986). This excludes certain contracts and suppliers from the ambit of new s. 233B, IA 1986.

Where a termination clause is already caught by s. 233A(1), IA 1986 (protection of essential supplies in the case of administration or a company voluntary arrangement), it is excluded from the ambit of s. 233B, IA 1986.

The main exclusion relates to financial services. Accordingly, s. 233B, IA 1986 does not apply to suppliers involved in financial services, being: insurers; banks; electronic money institutions; investment banks and firms; payment institutions; operators of payment systems or infrastructure providers; recognised investment exchanges; and securitisation companies (see Part 2 of Schedule 4ZZA, IA 1986).

Similarly, s. 233B, IA 1986 does not apply to financial contracts (e.g. loans, financial leasing, guarantees or commitments, securities contracts, commodities contracts, futures and forwards, swaps, inter-bank borrowing agreements of 3 months or less, or master agreements), securities financing transactions, derivatives, spot contracts, capital market investment contracts, or public-private partnership contracts (see Part 3 of Schedule 4ZZA, IA 1986).

In addition, s. 233B, IA 1986 does not affect various other specific legislative provisions, namely provisions relating to: financial markets and insolvency (specifically, Part 7 of the Companies Act 1989, the Financial Markets and Insolvency Regulations 1996, the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 and the Financial Collateral Arrangements (No. 2) Regulations); set-off and netting arrangements within the meaning of s. 48(1)(c) and (d) of the Banking Act 2009; and interests in aircraft equipment under the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015).

For more information on the impact of CIGA 2020 on termination clauses, please see the where the Corporate Insolvency section deals with this above.

6. Will a moratorium or restructuring plan under the Corporate Insolvency and Governance Act 2020 constitute an event of default?

CIGA 2020 introduces two new rescue measures for companies suffering financial hardship: the moratorium and the restructuring plan. The central features of these two rescue measures are set out in questions 3 and 16 of the Corporate Insolvency section of this e-book. Broadly, the moratorium is available where a director of a company confirms that it is or is likely to become unable to pay its debts and an independent, third-party "monitor" confirms that a moratorium is likely to result in the rescue of the company as a going concern. The moratorium generally stays enforcement and insolvency proceedings against the company and provides the company with a payment holiday in relation to pre-moratorium debts (although, importantly, not in respect of debts arising under contracts involving financial services: see the Corporate Insolvency section, question 3). The restructuring plan is similar to a scheme of arrangement, in that it allows a debtor to enter into a compromise or arrangement with its creditors which is then approved by the court.

The introduction of these new methods of corporate rescue is likely to be relevant to institutional lenders who are continuing to monitor the increased risk of borrower default. In particular, lenders will be looking carefully at whether the actions taken by borrowers in response to the pandemic will amount to an EOD under their facility agreements. EOD clauses generally allow lenders to exercise certain rights in response to events which prejudice the borrower's ability to meet their obligations under the facility agreement. For example, the lender might be entitled to accelerate the loan and demand early repayment; to cancel any future or outstanding commitments; and to enforce any security. EODs may also grant the lender the

right to terminate the facility agreement, although in those circumstances lenders will need to consider the new *ipso facto* provisions of CIGA 2020, dealt with in more detail above in the Corporate Insolvency section of this e-book. In the case of a simple loan agreement between a lender and borrower, EODs will apply to the borrower. However, where the loan facility is syndicated, or where there are multiple obligors, EOD clauses can be triggered by the defaults of members of the syndicate other than the borrower.

EOD clauses are usually drafted widely by listing numerous different types of defaults. Such drafting ensures that lenders are protected as far as possible against the risk of the borrower failing to make repayments, by allowing the lender to take steps to protect their position before the facility is irreversibly prejudiced. Thus, defaults qualifying as an EOD might include: cross-defaults under related agreements; material misrepresentations by the borrower; non-payment; and Material Adverse Changes.

Many facility agreements will also list insolvency as a default under an Insolvency Event of Default ("**IEOD**") clause. If such clauses are drafted to define as a default only formal events of insolvency (such as the presentation of a winding-up petition by the borrower, or a vote by the members to put the borrower into members voluntary liquidation), there is a significant risk that it will be too late for the lender to protect its position. For example, the lender could not accelerate the loan and demand immediate repayment of the balance where a winding-up petition has been presented against the borrower, because any repayments would be void (unless validated) pursuant to s. 127, IA 1986 if a winding-up order is subsequently made. For that reason, in many cases an IEOD clause will be drafted more broadly to include events which occur prior to the formal insolvency process beginning, such as the process of negotiating with creditors to restructure debts. In *Grupo Hotelero Urvasco SA v Carey Value Added SL* [2013] EWHC 1039 (Comm), for example, the credit agreement provided at clause 21.6 that an event of default occurred if:

> "*Any of the following occurs in respect of a Material Company:*
>
> *(a) it is, or is deemed for the purposes of any law to be, unable to pay its debts as they fall due or insolvent;*
>
> *(b) it admits its inability to pay debts as they fall due;*
>
> *(c) it suspends making payments on any of its debts or announces an intention to do so;*
>
> *(d) by reason of actual or anticipated financial difficulties, it begins negotiations with any creditor for the rescheduling of any of its indebtedness; or*
>
> *(e) a moratorium is declared in respect of any of its indebtedness.*"

Blair J held that the condition in clause 21.6(d) had been satisfied: the "Material Company" had begun formal rescheduling discussions, because it was experiencing substantial financial difficulties (and not because those discussions were simply in the ordinary course of business).

It seems that such a clause would be capable of capturing a moratorium or restructuring plan under CIGA 2020. Even notwithstanding the express mention of a moratorium, a formal moratorium under CIGA 2020 would in many circumstances amount to a rescheduling of indebtedness by reason of actual or anticipated financial difficulties. "Rescheduling" is arguably broad enough to cover the payment holidays and stays of enforcement which characterise the moratorium. The same can be said for the restructuring plan, which is almost by definition a formal rescheduling of debts by reason of actual or anticipated financial difficulties. This is because, unlike an ordinary scheme of arrangement, it is a requirement for a restructuring plan under CIGA 2020 that 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: para. 901A of Schedule 9, CIGA 2020, inserting Part 26A to CA 2006. Lenders may also begin to make express reference to these types of corporate rescue in future draft facility agreements now that CIGA 2020 has received Royal Assent.

An IEOD clause may also be drafted to include as an IEOD a situation where a borrower is (or is deemed) unable to pay its debts. This may be the case where the borrower cannot pay its debts as they fall due ("cash flow" insolvency) or where the value of the borrower's assets is less than the amount of its liabilities ("balance sheet" insolvency). These clauses are useful for lenders, because they allow them to exercise IEOD rights where the borrower is insolvent (such that their ability to service repayment obligations is compromised), but where formal insolvency proceedings have not yet commenced and restricted the borrower's ability to dispose of its property. Such a clause was in issue in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28; [2013] 1 WLR 1408, where the contractual documentation governing a series of loan notes included an IEOD in the following terms (see [5]):

> "*The issuer, otherwise than for the purposes of such amalgamation or reconstruction as is referred to in sub-paragraph (iv) below, ceasing or, through or consequent upon an official action of the board of directors of the issuer, threatens to cease to carry on business or a substantial part of its business or being unable to pay its debts as and when they fall due or, within the meaning of section 123(1) or (2) (as if the words 'it is proved to the satisfaction of the court' did not appear in section 123(2) of the Insolvency Act 1986 (as that section may be amended from time to time), being deemed unable to pay its debts ...*"

If a clause of this nature is included in a facility agreement, lenders may ask whether the clause is invoked because the borrower has entered into a moratorium or restructuring plan.

In relation to cash flow insolvency, a borrower which enters into a moratorium will probably satisfy these requirements: it is a condition precedent to a moratorium that a director provides a statement that, in their view, the company is or is likely to become unable to pay its debts (s. 1, A6(1)(d), CIGA 2020). This is clearly very similar to (although not exactly the same as, given the wording "is likely to") the test for cash flow insolvency set out in s. 123(1)(e), IA 1986. However, the fact that a borrower has entered into a restructuring plan will probably not of itself mean that the requirements of cash flow insolvency are satisfied. For a restructuring plan, it is a condition precedent that 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 pre-condition is broader than that applicable for a moratorium, given that it refers to "financial difficulties" which may affect a company's ability to continue as a going concern. It is therefore unlikely that a lender could rely without more on the borrower having entered into a restructuring plan as demonstrating that it is cash flow insolvent.

In relation to balance sheet insolvency, moratoriums and restructuring plans are likely to be less relevant. The Supreme Court confirmed in *Eurosail* that the relevant question is whether the creditor can show, on the balance of probabilities, that the borrower has insufficient assets to meet all its liabilities (including prospective and contingent liabilities). A lender will therefore not simply be able to rely on a borrower entering into a moratorium or restructuring plan. Whilst these rescue packages might demonstrate that the borrower is suffering financial distress, they will not prove that the borrower has insufficient assets to meet all its liabilities.

Whether a borrower has triggered an IEOD clause will always depend on a proper construction of the terms of the contract.

7. What impact does the Corporate Insolvency and Governance Act have on financial services transactions?

CIGA 2020 effects important and fundamental changes in the corporate insolvency regime. Several of these changes raise matters concerning financial services transactions in particular.

One of the new rescue measures introduced by CIGA 2020 is the moratorium. There are restrictions on the types of companies which may make use of the new moratorium procedure. For example, banks, insurance companies, electronic money institutions etc. are unable to take advantage of the moratorium. For more information, see the Corporate Insolvency section above, at question 1. Further, contracts involving financial services are exempted from the rule that companies which have entered a moratorium enjoy a payment holiday in relation to pre-moratorium debts (see the Corporate Insolvency section above, at question 3).

Pre-moratorium debts in respect of instruments involving financial services also enjoy enhanced priority when a winding-up petition or a resolution for a voluntary winding-up is passed within 12 weeks of the end of the moratorium. They are included as "priority pre-

moratorium debts" which rank in priority to all other claims save only the prescribed fees or expenses of the official receiver (s. 174A, IA 1986; inserted by Schedule 3, para. 13). For more information, see the Corporate Insolvency section above, at question 14. Their status as priority pre-moratorium debts also affects the ability of financial service institutions to participate in meeting summoned under Part 26A, CA 2006 where an application for an order convening meetings of creditors is made before the expiry of 12 weeks beginning with the day after the end of a moratorium under Part A1 of IA 1986. In such circumstances, financial service institutions are unable to participate in the meeting summoned by the court (s. 901H(3), CA 2006) (see question 24 of the Corporate insolvency section above).

Finally, as explained above in question 5 of this section, there are specific rules as to the applicability of the new "termination clause" provisions to financial services contracts.

8. Are credit agreements entered into under the Bounce Back Loans Scheme (BBLS) and the Coronavirus Business Interruption Loan Scheme (CBILS) subject to the consumer credit regulatory regime?

The rules which regulate the provision of credit to consumers in England and Wales are principally found in the Consumer Credit Act 1974, FSMA 2000, and the FCA's Consumer Credit sourcebook ("**CONC**"). Whether a particular agreement between a firm and a customer falls within this regime depends on whether it can be characterised as a "regulated credit agreement" (or a regulated consumer hire agreement, although these are not relevant for present purposes). The answer to that question is provided by Articles 60B to 60M of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 ("**RAO**"). Regulated agreements are defined in the negative: they are agreements for the provision of credit which are not exempted under Articles 60C to 60H, RAO.

The UK government has launched two loan guarantee schemes to help small to medium-sized businesses which have been impacted by the pandemic. The CBILS was launched in March 2020. Under this scheme, the government guarantees 80% of the finance provided by the lender and pays the interest and fees on the loan for the first 12 months. Businesses can borrow up to £5 million. The BBLS was launched on 4 May 2020 and allows businesses to borrow up to £50,000, at an interest rate of 2.5% per annum. The government guarantees 100% of the loan and covers interest for the first 12 months.

There are several differences between the BBLS and the CBILS. Under the BBLS, the interest rate is fixed at 2.5% and there are no fees payable by the borrower. The business may borrow up to £50,000, capped at 25% of turnover. Lenders cannot insist on personal guarantees being provided and are prohibited from taking enforcement action over the borrower's personal assets such as their main home or car. BBLS loans are intended to act as "microloans" and should be quicker to obtain than CBILS funding.

A key question for lenders is whether loans which are provided under either of these schemes fall within the consumer credit regulations.[6] That depends on whether such loan agreements are exempt credit agreements under RAO.

There is a clear answer in the case of loans advanced under the BBLS. On 4 May 2020, the Financial Services and Markets Act 2000 (Regulated Activities) (Coronavirus) (Amendment) Order 2020/480 ("**RACAO**") was passed. The explanatory memorandum to RACAO states that the RAO needed to be amended to "urgently remove loans made under BBLS from a highly prescriptive consumer credit regulatory regime which is currently inhibiting lenders from granting loans to small businesses." RACAO therefore amends Article 60C, RAO by inserting new subparas. 4A to 4C as follows:

> "*(4A) A credit agreement is an exempt agreement if—*
>
> *(a) the lender provides the borrower with credit of £25,000 or less,*
>
> *(b) the agreement is entered into by the borrower wholly for the purposes of a business carried on, or intended to be carried on, by the borrower, and*
>
> *(c) the agreement is entered into by the lender and the borrower under the Bounce Back Loan Scheme.*
>
> *(4B) For the purposes of paragraph (4A), "Bounce Back Loan Scheme" means the scheme of that name operated from 4th May 2020 by the British Business Bank plc on behalf of the Secretary of State.*
>
> *(4C) An agreement exempt under paragraph (4A) may not also be an article 36H agreement by virtue of paragraph (4) of that article.*"

Thus, loans of £25,000 or less which are taken out under the BBLS are exempt from the consumer credit regime. Any loans for more than £25,000 taken out under the BBLS, and all loans taken out under the CBILS, are not exempted under this new provision and therefore must comply with all elements of the consumer credit regime unless the lender can show that the agreement is exempt under another provision of RAO.

BBLS loans of £25,000 or under are therefore not subject to the rigorous rules of the consumer credit regime. Usually, even an exempt agreement is subject to the unfair relationship provisions of ss. 140A to 140C, CCA. However, the Chancellor wrote a letter to lenders on 1 May 2020 in which he indicated that the government will introduce primary legislation to "*disapply ss. 140A to 140C of the CCA for BBLS lending*" with retrospective effect, thus curtailing a borrower's ability to complain about their treatment by a lender. It appears from

[6] Outside of the consumer credit context, the PRA has also published guidance as to the application of credit risk approaches under the CBILS and the Coronavirus Large Business Interruption Loan Scheme ("CLBILS").

the Chancellor's wording that such legislation would apply to all BBLS loans (not just loans for £25,000 or less). BBLS loans for £25,000 or less will therefore fall outside the scope of the consumer credit regime entirely; and all other BBLS loans will be subject to all aspects of the consumer credit regime other than the unfair relationship provisions.

MERGERS AND ACQUISITIONS

9. How will the pandemic effect earnouts in corporate acquisitions?

The pandemic raises particular concerns for sellers in acquisitions where part of the consideration is to be determined via an earnout mechanism. By their nature, earnout clauses depend on a business's earnings in a relevant period, and accounting policies and the method of calculation of the earnout are areas that frequently given rise to post-acquisition disputes. Should a relevant period include the first half of 2020, in which the relevant business ceased to trade for a period or saw reduced income, sellers are likely to see their anticipated consideration from the sale dip significantly and may wish to know what can be done about it.

Much will depend on the wording of the acquisition agreement. At one end of the spectrum, an acquisition agreement that specifies the relevant period by date, refers to the business's "income" rather than "trading" in that period, and does not provide for an amendment to the calculation of the earnout in the present circumstances, is likely to leave little room for arguing that the earnout period should be extended or the income adjusted to negate the effect of the pandemic. At the other end of the spectrum, a seller might have scope to argue that an earnout mechanism drafted by reference, say, to "five years' trading" should be calculated by excluding any period in which the business was not trading.

The reality is that most cases will fall somewhere in between these scenarios, perhaps because the business has undertaken some trade during the pandemic but it did not constitute what the sellers consider "normal trading", or because the decision to cease trading was one taken by the purchasers in order to benefit from the Government's Coronavirus Job Retention Scheme. In such cases, the terms of the acquisition agreement will have to be carefully examined to ascertain the seller's rights.

Sellers may also wish to consider engaging with the buyer to discuss the issue where practicable. Where earnout mechanisms are drafted to cover a significant length of time – several years or more – and are deployed to incentivise the seller to stay engaged with the business, buyers may well be open to renegotiating the terms of the earnout mechanism so that the seller stays motivated to achieve performance targets, which will benefit the business as a whole. Buyers who are concerned about the negative impact of the pandemic on the seller's engagement can likewise consider approaching the seller earlier rather than later to discuss

extending the term of the earnout period, or lowering the earnout target for the same period to take account of the pandemic's impact on the business.

ISSUERS / TRUSTEES

10. What effect has the pandemic had on issuers' obligations to disclose inside information in accordance with the Market Abuse Regulation?

Article 17 of the Market Abuse Regulation (Regulation 596/2014) requires issuers of certain financial instruments to publicly disclose inside information as soon as possible. It applies to issuers with financial instruments admitted to trading, or in respect of which a request for admission to trading has been made, on a regulated market in an EU Member State. It also applies to issuers who have financial instruments traded only on a multilateral trading facility (MTF) or organised trading facility (OTF), or have requested admission to trading of their financial instruments on an MTF in a Member State.

An issuer is obliged to ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public (Article 17(1)). Guidance on meeting this obligation is contained in, *inter alia*, guidance published by the European Securities and Markets Authority (ESMA) and Chapter 2 of the Disclosure Guidance and Transparency Rules (DTR) of the FCA Handbook.

The pandemic has not affected this broad obligation. However, both ESMA and the FCA, in statements dated 11 March 2020 and 17 March 2020 respectively, have addressed the interaction of this obligation with the impact of the pandemic on an issuer's business. In particular, they have underlined that issuers should disclose relevant significant information concerning the impact of the pandemic on their business, and should provide transparency on the actual and potential impacts of the pandemic in their 2019 year-end report (if not yet finalised), or otherwise in their interim financial reporting disclosures. The FCA has stated that, while conscious of the challenges posed by the current situation, it continues to expect listed issuers to make every effort to meet their disclosure obligations in a timely fashion. It has also said that an issuer's operational response to the pandemic may meet the requirements for disclosure under the Market Abuse Regulation.

There are also particular situations of which companies, advisors and others should be aware in the context of the pandemic.

Recapitalisation and other capital raising events

Firms should be mindful of their obligations to disclose inside information in the context of recapitalisation and equity raising through the issuance of shares. In a statement dated 8 April 2020, the FCA made it clear that a business's policy response to the pandemic might alter the

nature of information that is material to a business's prospects and in relation to market recapitalisation.

Guidance has been given by the FCA as to how issuers and advisors should assess what information a reasonable investor would be likely to use as part of their investment decisions in the context of the pandemic (see Market Watch issue 63 dated May 2020). Information that could have a significant effect on a company's share price includes detail on future financial performance, such as access to finance and funding (which may in turn include government grants in response to the pandemic) and the company's ability to continue or resume business (including arrangements for staff returning to work). In addition, issuers should consider whether any information is materially different from previous disclosures such that previous disclosures would now be rendered misleading; if so, issuers should consider whether the new information is inside information and whether disclosure is required.

Accordingly, a firm undertaking a recapitalisation or other equity raising program should carefully consider whether action taken in response to the pandemic will have an effect on business prospects and ought to be disclosed accordingly.

For those preparing to raise equity finance, the FCA published a 'Dear CEO' letter on 28 April 2020 intended to ensure the fair treatment of corporate customers preparing to raise equity finance and to discourage banks from using their lending relationship "*to exert pressure on corporate clients to secure roles on equity mandates that the issuer would not otherwise appoint them to*". The FCA reminded banks of their obligations concerning the identification, handling and disclosure of inside information received in connection with renegotiating a corporate client's existing facilities (including details of a potential equity capital markets transaction) and noted that sharing such information within a lending bank might be inconsistent with that bank's obligations under the Market Abuse Regulation.

Financial reporting

The FCA has given listed companies an extra month to complete and publish their half yearly financial reports (so that listed companies have four, rather than three, months in which to publish them), reflecting capacity concerns as a result of the pandemic (see Primary Market Bulletin Issue No. 28 dated 27 May 2020). Notwithstanding the extension, both ESMA and the FCA have nonetheless reiterated that issuers should comply with their obligations to disclose inside information that directly concerns them as soon as possible (see ESMA's statement of 27 March 2020 on financial reporting deadlines in light of Covid-19 and the FCA's Market Watch newsletter, issue 63). The FCA has also reminded issuers to take care to maintain contemporaneous and complete records of decisions reached and actions taken in respect of inside information in the event that the FCA has questions.

Dividends

In light of the pandemic, some companies will have concluded that it is no longer appropriate to recommend or declare a dividend and will have withdrawn or amended resolutions tabled for the Annual General Meeting. The Chartered Governance Institute has published guidance to the effect that such decisions are likely to constitute inside information (see p. 4 of the guidance).

Handling of inside information in the context of altered working arrangements

In issue 63 of its Market Watch newsletter dated May 2020, the FCA reiterated the importance of ensuring that systems and controls are in place for the handling of inside information. It noted that the movement to alternative worksites or working from home might create challenges for existing arrangements, and that market participants are obliged to consider whether their systems and controls continue to mitigate effectively against risks. In the same newsletter the FCA also suggested that changed working arrangements mean that issuers should be extra vigilant about the possibility of leaks and rumours, and identify whether there has been a breach of confidentiality. Companies should prepare holding announcements to be used in the event that there is a breach or likely breach.

11. What effect has the pandemic had on issuers' obligations to report "significant events" in respect of securitisations which are governed by the EU Securitisation Regulation?

Notwithstanding the UK's departure from the EU on 31 January 2020, securitisations remain subject to the transparency requirements set out in Regulation (EU) 2017/2402 (the "**Securitisation Regulation**") until the end of the transition period. Article 7 sets out the ongoing transparency requirements which apply to the "*originator, sponsor and SSPE [securitisation special purpose entity, i.e. the issuer]*". The aim of these requirements is to ensure that regulators and investors have easy access to relevant information which would impact the overall quality of the underlying debt, for securitisations which fall outside the scope of the Market Abuse Regulation. It is important that originators, sponsors and SSPEs comply with the terms of these transparency requirements; failure to do so could amount to breach of terms of the underlying contractual documentation and may attract regulatory penalties.

In those circumstances, originators, sponsors and SSPEs will be keen to know how the pandemic might affect their obligations under Article 7. In particular, the severe economic and financial impact of the pandemic will potentially lead to the occurrence of "significant events" which must be disclosed pursuant to Article 7(1)(g) of the Securitisation Regulation. Article 7(1)(g) of the Securitisation Regulation provides:

> "*The originator, sponsor and SSPE of a securitisation shall, in accordance with paragraph 2 of this Article, make at least the following information available to holders of a securitisation position, to the competent authorities referred to in Article 29 and, upon request, to potential investors:*
>
> *…*
>
> *(g) where point (f) does not apply, any significant event such as:*
>
> *(i) a material breach of the obligations provided for in the documents made available in accordance with point (b), including any remedy, waiver or consent subsequently provided in relation to such a breach;*
>
> *(ii) a change in the structural features that can materially impact the performance of the securitisation;*
>
> *(iii) a change in the risk characteristics of the securitisation or of the underlying exposures that can materially impact the performance of the securitisation;*
>
> *(iv) in the case of STS securitisations, where the securitisation ceases to meet the STS requirements or where competent authorities have taken remedial or administrative actions;*
>
> *(v) any material amendment to transaction documents.*"

The list set out in Article 7(1)(g) is non-exhaustive. Thus, there are several circumstances in which originators, sponsors and SSPEs may have to make disclosures as a result of the impact of the pandemic. The most obvious example is Article 7(1)(g)(iii), which requires disclosure of a change in the risk characteristic of the securitisation or of the underlying exposures that can materially impact its performance. This is likely to be particularly relevant for mortgage-backed securities (both commercial and residential) in circumstances where cash flow is likely to have been severely restricted since global lockdown measures were put in place in March 2020, and in circumstances where borrowers are being provided with payment holidays by lenders. Other types of security are likely to suffer as a result of a sudden increase in defaults on the underlying assets: Collateralised Loan Obligations are a good example.

There is a marked risk that the pandemic may also lead to breaches of the terms of the securitisation documents, which itself may constitute a significant event. Article 7(1)(g)(i) defines as a significant event "*a material breach of the obligations provided for in the documents made available in accordance with point (b)*". Article 7(1)(b), in turn, refers to "*all underlying documentation that is essential for the understanding of the transaction*". That definition is wide, and there are therefore several types of breaches which may be caused by the pandemic and which in turn require disclosure as significant events. One obvious example

is breach of any covenants in the securitisation documents concerning ratios of debt-service coverage and loan-to-value. Although the pandemic has not yet caused a fall in asset values equivalent to the position after the 2008 financial crisis, debt-service coverage ratios are likely to worsen in circumstances where the cash flow available to pay debt obligations has stalled as a result of global lockdown measures. Other examples of material breaches might include Events of Default, including Insolvency Events of Default which can occur prior to a borrower entering into a formal insolvency process (for more information on Events of Default, see the answer to question 6, above).

In what circumstances might the above examples constitute a "significant" event, such as to engage the transparency requirements? ESMA has provided guidance on what constitutes a significant event in its Opinion on amendments to its draft technical standards on the disclosure requirements. According to ESMA, the transparency requirements necessitate:

> "*the disclosure of information following an event that would be likely to materially impact the performance of the securitisation as well as have a significant effect on the prices of the tranches/bonds of the securitisation. In this regard, ESMA considers that changes to the underlying exposures and investor report information constitute such an event and that, in order to thoroughly update their assessments of the securitisation, investors, potential investors, and other entities listed in Article 17(1) of the Securitisation Regulation, require additional information in particular on the securitisation itself, the programme, the transaction, the tranches/bonds, the accounts, the counterparties, as well as additional features of relevance for synthetic and/or Collateralised Loan Obligation securitisations*" (underlining added).

Originators, sponsors and SSPEs will therefore need to consider carefully on a case-by-case basis whether the examples of pandemic-related events given above, or indeed any other events caused by the pandemic, will materially impact the performance of the securitisation and have a significant effect on the prices of the tranches or bonds.

12. Can a virtual meeting of bondholders be convened during the pandemic?

Lockdown measures introduced by the UK government have severely restricted the ability of groups of people to convene in one place. These measures have potential ramifications for meetings of bondholders or other creditors.

In *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch),[7] the court considered the question of whether a meeting, in the context of a scheme of arrangement under Part 26, CA 2006, required the creditors to all attend a physical meeting in one place. In the case, three group companies had applied for an order convening a meeting of the companies' creditors to consider and approve four linked schemes of arrangement. The companies sought special directions as to how the meeting should be convened, in circumstances where social distancing measures had already been implemented by the UK government, and where more than half of the companies' creditors were over the age of 70 so that many of them fell within one of the vulnerable groups identified by the government.

In those circumstances, the directions proposed by the companies for the convening of the meeting were: (a) directions for the conduct of the scheme meetings by telephone, (b) directions to provide a facility for scheme creditors to dial into the meeting in order to consult with one another at the meeting and ask questions in relation to the schemes, having received an opening address from the chairman and representative of the companies, (c) directions that the opening address be transmitted on a webinar or by other electronic video means available for access and viewing by all scheme creditors, (d) directions for the provision of a further telephone facility for the conduct of the meeting to be paused in order for a vote to be taken, including the creditors registering their votes by telephone and, if necessary, overriding any previous proxy, if that is what they wish to do, and (e) directions for the resumption of the telephone meetings after the votes have been cast and tallied in order to declare the results.

In considering whether these directions were permissible on a proper construction of Part 26, CA 2006, Trower J observed at [38] that:

> "*the word "meeting" has to be construed in the context of the purpose for which it is used. The purpose is the mechanism by which creditors or shareholders are able to come together and consult with each other, should they choose to do so, in order to make a collective decision on the rearrangement or compromise of their rights against the company. It follows that the question is whether what is proposed enables that to happen by a process which has the essential characteristics of a meeting. In my judgment those essential characteristics are a coming together sufficient to enable a consultation to take place.*"

Applying those considerations, Trower J held that the meeting could be convened in the manner proposed by the companies.

[7] Applied in *Re Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch) and *ED&F Man Treasury Management Plc* [2020] EWHC 2290 (Ch).

In short, the key element appears to be that the mechanism adopted must be sufficient to amount to a "*coming together*" of participants with the ability to consult. The participants must be able to hear and ask questions and express opinions between each other.

In circumstances where the formal requirements of scheme meetings can be met through a virtual meeting, there seems no reason why the court would not view bondholder meetings in the same way. In this respect, it is worth noting that in the first reported decision to consider the new restructuring plan provisions of Part 26A, CA 2006 (introduced by para. 901A of Schedule 9, CIGA 2020), *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch), the High Court had no issue in applying the principles of *Re Castle Trust* to conclude that a virtual meeting was appropriate in that different legislative context.

Naturally, conducting a meeting either partially (through a part physical, part virtual meeting) or wholly in a virtual environment raises various logistical issues including ensuring that participants are genuinely entitled to attend, have a right to vote and establishing the size of their holding.

Trustees convening such meetings will need to put in place procedures to ensure their smooth running. Although each case will turn on the precise construction of the trust deed, it is usual practice for the deed to give the trustee power to make rules regarding the conduct of bondholder meetings. As a result, bondholder and issuer consent will not ordinarily required to hold a virtual meeting.

THE FINANCIAL MARKETS

13. In what ways will the pandemic affect brokers' abilities to make margin calls?

The effect of the pandemic on stock markets is understood to have triggered widespread urgent margin calls by brokers. The Bank of England has reported that daily variation margin calls by UK central counterparties (CCPs) in derivatives markets at the height of the pandemic's disruption in March were around five times the average daily margin calls for January and February.[8]

Prior to the pandemic, the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) were in the process of implementing the final phases of compulsory margin requirements for non-centrally cleared derivatives which were due to commence in September 2020. This has been deferred by a year

[8] https://www.bankofengland.co.uk/bank-overground/2020/what-role-did-margin-play-during-the-covid-19-shock

due to the pandemic (see their announcement dated 3 April 2020). In broad terms, the pandemic has not affected brokers' abilities to make calls.

In the context of derivatives subject to the ISDA Master Agreement, there are clear methods for calculating when a margin call will be trigged, set out in the 1995 Credit Support Annex, the 2016 Credit Support Annex for Variation Margin, the 2016 Phase One Credit Support Deed for Initial Margin and the 2018 Credit Support Deed For Initial Margin.

Borrowers, under such arrangements, should be aware of their rights to dispute margin calls. Disputes tend to arise most often in relation to the calculation of the margin, either by reference to the collateral already posted (i.e. that the lender has calculated it to be less than the borrower believes it to be) or to the 'Delivery Amount' (i.e. the borrower believes that the exposure of the lender is less than the lender has calculated it). However, under the 2016 Credit Support Annex any dispute must be raised by no later than the close of business on the day that the transfer of collateral is due, meaning that borrowers must act quickly. Further, they are obliged to transfer any undisputed amount of margin: raising a dispute will not necessarily act as a holding measure so as to permit a borrower to avoid posting extra collateral altogether. In any event, under the dispute resolution procedure of the 2016 Credit Support Annex, such disputes are likely to be resolved quickly; if the outcome of the process is a requirement to post further collateral, borrowers are obliged to do so or to face an Event of Default for failure to pay. Events of Default will, of course, permit a lender to terminate the agreement early which may lead to heavy losses for the borrower in a volatile market.

As to margin calls outside the ISDA context, much will depend on the wording of the relevant contractual provisions. There may, however, be scope for challenging a margin call, depending on the calculation method set out in the agreement and the nature of the asset, but decisions will need to be taken quickly if a call is to be disputed to avoid the lender closing out the position.

Investors would be wise to be familiar with the precise terms of their margin agreement with their counterparty in the current climate and to ensure that they are able to post margin on their trading activities even in the most volatile trading conditions. Whilst brokers may have permitted a grace period for posting margin in more benign conditions, investors should expect that in the current conditions, brokers are likely to rely on their strict rights and to act quickly if margin payments are missed.

If margin payments are missed, any close out is likely to be exercised swiftly and with limited regard to the investor's (rather than the broker's) interest. A broker owes no duty of care in tort or by implied contractual term when closing out a defaulting borrower's position and is only obliged to act rationally (*Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm); [2013] 1 BCLC 125, *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm); [2014] 1 All E.R. (Comm) 122).

CUSTOMER COMPLAINTS

14. What approach is the Financial Ombudsman Service taking to: (1) complaints arising from a firms' actions during the pandemic; and (2) complaints relating to lending under the Bounce Back Loans Scheme and the Coronavirus Business Interruption Loan Scheme?

Complaints arising from a firm's actions during the pandemic

The powers of the Financial Ombudsman Service ("**FOS**") are set out in Part XVI and Schedule 17 of FSMA 2000. The Financial Ombudsman must determine complaints by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case (s. 228(2), FSMA 2000). Further guidance as to the exercise of the FOS's powers are set out in the DISP section of the FCA Handbook.

The FCA and the FOS exchanged letters on 15 and 16 April 2020 in which both entities sought to clarify the approach the FOS would be taking during the present circumstances. In its letter, the FOS noted that in deciding what is fair and reasonable in each case, it takes into account relevant law, regulators' rules, guidance and standards, codes of practice, and what the ombudsman considers to have been good industry practice at the time relating to the relevant complaint. It reiterated that it does not make decisions with the benefit of hindsight. Thus, there has been no change in the FOS's approach to complaints, but it has confirmed that it will take account of the FCA's revised expectations of what constitutes compliance with its rules, guidance and standards, as well as good industry practice during the pandemic.

Complaints relating to lending under the Bounce Back Loans Scheme and the Coronavirus Business Interruption Loan Scheme

Both the BBLS and the CBILS were introduced by the Government as part of its response to the pandemic.

As noted above, the BBLS allows small and medium-sized businesses to borrow a sum of up to 25% of their turnover (up to a maximum of £50,000) from a range of accredited lenders, at an interest rate of 2.5% per annum. The government covers interest repayments for the first 12 months. In tandem with this scheme, the Government also made changes to RAO so that some lending under the BBLS that would otherwise have resulted in regulated credit agreements (i.e. loans of £25,000 or under to sole traders, certain small partnerships and other relevant small businesses) will fall outside of regulated lending activity (see RAO, Art. 60C(4A)). There is also an intention to introduce legislation disapplying sections 140A-140C of the Consumer

Credit Act 1974 with retrospective effect for BBLS lending.[9] As such, there is no requirement in BBLS for lenders to conduct creditworthiness or affordability checks.[10]

Loans of more than £50,000 are available under a different scheme, the CBILS. This scheme helps small and medium sized businesses with turnover of less than £45 million to access loans and other finance up to £5 million, with the Government guaranteeing 80% of the finance to the lender as well as paying interest and any fees for the first 12 months.[11] In contrast to the BBLS, lending under the CBILS is likely to be a regulated activity. However, provided that they comply with the requirements of the CBILS, the FCA has confirmed that lenders will not be expected to comply with CONC 5.2A.4-34 (i.e. the provisions of the FCA Handbook dealing with the assessment of creditworthiness).[12] Under CBILS, the central requirement around creditworthiness and affordability assessment is that the lender considers that the business (or its group) has a viable business proposition. This is to be determined without regard to any concerns over the business's short-to-medium term business performance due to the uncertainty and impact of the pandemic (although forecasts on expected levels of income and expenditure in a period post the stresses connected to the pandemic may be relevant). For smaller value facilities (e.g. those of £30,000 or below), in determining the eligibility of the applicant, lenders may decide to determine the business's creditworthiness based on its internal credit scoring models from time to time.[13]

The FCA and the FOS exchanged letters on 4 May 2020 clarifying the FOS's approach to complaints arising from lending under the scheme. The FOS has acknowledged that it will take account of the changes in approach to lending under the scheme, and will take into account and give due weight to, the need for firms to comply with the relevant scheme's requirements as part of what is "*fair and reasonable*" under the rules applicable the FOS's resolution of disputes in the FCA Handbook (DISP 3.6.4R).

---

[9] See HM Treasury's announcement dated 1 May 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882875/01052020_CX_Letter_to_banks_-_pricing_and_CCA_.pdf.

[10] See the confirmation from the FCA at: https://www.financial-ombudsman.org.uk/files/273434/FCA-letter-to-Financial-Ombudsman-Service-about-CBILS-and-BBL-04052020.pdf.

[11] https://www.gov.uk/guidance/apply-for-the-coronavirus-large-business-interruption-loan-scheme

[12] https://www.fca.org.uk/news/statements/uk-coronavirus-business-interruption-loan-scheme-cbils-and-new-bounce-back-loan-scheme-bbl

[13] As confirmed by the FCA in its letter to the FOS dated 4 May 2020: https://www.financial-ombudsman.org.uk/files/273434/FCA-letter-to-Financial-Ombudsman-Service-about-CBILS-and-BBL-04052020.pdf. See also the guidance on the website of the British Business Bank: https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-scheme-cbils-2/.

Section Six: Civil Procedure and ADR

Sharif A Shivji QC, Nicholas Cox, Adam Holliman, Nicola Timmins, Eleanor Holland, Daniel Kessler ©

Last updated: 31 August 2020

INTRODUCTION

On 17 March 2020, the Lord Chief Justice made a statement about the latest guidance from government on how to respond to the pandemic. He said there was an urgent need to increase the use of technology to hold remote hearings where possible.

In the six months since then, litigation has been conducted almost exclusively remotely. Our experience is that although the High Court moved onto video-conferencing quickly, the County Court has faced technological problems and a greater percentage of hearings are heard via teleconference or simply adjourned. Temporary practice directions and emergency regulations have changed the court's approach on extensions of time (see questions 6 and 7 below), relief from sanctions (question 9), and enforcement (question 15). Some of these temporary changes have been extended: it remains to be seen for how long. No specific guidance has been given on the practicalities of remote evidence (questions 16 and 17), perhaps on the understanding that the CPR was already flexible enough to cope with the move. There are signs that parties are returning to in-person hearings in the High Court for non-essential matters (question 2) but there is no clarity about how widespread this is, or what will happen to the tens of thousands of adjourned hearings (question 5). MOJ civil statistics show the 'workload' (including possession claims) falling from a baseline of 38,521 claims per week to as few as 8,991 claims in the week ending 21 June 2020. In that week, only 7,933 claims were listed compared to a weekly baseline of 14,815 hearings. The statistics for the most recent week (ending 26 July

2020) show that only 187 hearings were adjourned due to the pandemic, but they also state that just 7,453 hearings were listed. This suggests a significant number of claims and hearings are being delayed and will, presumably, be returning to the courts in the coming months.

On 19 July 2020, the Lord Chancellor announced the locations of 10 "Nightingale courts", intended to tackle the impact of the pandemic on the justice system. These courts are now operational.

At the same time, the Cabinet Office has issued guidance encouraging "*responsible contractual behaviour*" and promoting the use of ADR. Mediation (questions 19 to 22), early neutral evaluation (question 23), arbitration (questions 24 to 27) and adjudication (question 28) have also had to adapt to avoid face-to-face contact. This chapter sets out the primary considerations for preparing for ADR remotely, bringing together advice from ADR institutions and our own personal experience from the past few months.

Practical guidance for remote hearings can be found in Section Seven of this e-book (Litigation in a Virtual World).

COURT OPERATION

1. What cases will be heard by courts?

The County Court is operating on a priority based system and so even listed cases which could be heard remotely may be adjourned for lack of resource. The most recent listing priorities (as of 31 August 2020) can be found here. Work that must be done ('priority 1') includes freezing orders, injunctions, trials deemed to be 'urgent' and applications where there is a substantial hearing in the next month or a trial in the next three months. Whether the remaining work will be heard, either partly or fully remotely, is a matter for the Judge. Cases will be listed for triage to consider whether in principle the hearing should be listed, and whether in practice all arrangements can be made to enable it to take place safely.

The High Court list is presently operating as 'business as usual'. The QBD, the Administrative Court, the Central London County Court and the Senior Courts Costs Office have produced recent updates for court users on their current practice. The Court of Appeal now states in its weekly business priorities update (w/c 31 August 2020) that it 'continues to prioritise urgent applications'. 'Urgent' is defined as an application where it is essential in the interests of justice that there be a substantive decision within the next 7 days.

The Supreme Court and Privy Council are operating normally, albeit remotely. Lord Reed has issued a Practice Note with arrangements during the coronavirus period. One important change is that the parties are required to file agreed cases, core volumes and bundle of authorities four weeks before the hearing (as opposed to two). Parties are not permitted to amend this bundle

in the two week period before the hearing. Further, time limits will be applied flexibly, parties are encouraged to avoid unnecessary disputes over procedural matters, and there is no need to make a formal application for an extension of time of less than three weeks (an email to the Registry, copied to the parties, will suffice).

There is a helpful collection of Covid-19 related advice and guidance on the Judiciary.uk website here.

2. When will a case be heard in person?

The courts are beginning to resume in-person hearings on a discretionary basis. However, parties still should expect the default position to be for a hearing to be carried out remotely, certainly in relation to interlocutory hearings. In *Surrey Heath Borough Council v Robb & Ors* [2020] EWHC 1650 (QB) (24 June 2020) Freedman J said "*the onus is on a party to draw attention to a requirement to have a hearing in Court and to provide reasons why it would not be just for the hearing to take place remotely*" at [5]. Since he held it was not "*necessary*" for the parties to be all in one court room, he ordered a video hearing.

This is consistent with the Queen's Bench Division guidance from 15 June 2020 which provides that all hearings before masters will be heard remotely unless the master considers that legal representatives and parties should be present. A party with a "good reason" can apply for the hearing to be in person. A hearing will only take place in person in the master's room if no more than two people intend to attend. Otherwise it will be heard in a larger courtroom. All attendees must sit two meters apart. Documents and skeleton arguments must still be sent electronically and, by implication, will not be handed up to the Judge.

Much, of course, will depend on the relative importance of the hearing in the proceedings (interlocutory hearing or trial), the nature of the material before the court at the hearing (live witness evidence or on papers) and the parties (their sophistication and resources). Two recent cases provide illustrations of what may be considered a "good reason".

Firstly, in *SC (A Child) v University Hospital Southampton NHS Foundation Trust (Rev 2)* [2020] EWHC 1445 (QB) (3 June 2020) the claimant applied to adjourn a clinical negligence trial, involving expert witness evidence, which they said could not be fairly conducted remotely. Johnson J considered that the hearing could be conducted fairly, because all parties were legally represented and were able to access and utilise the technology necessary to conduct the hearing. His view was that there was no reason to think that the disadvantages of having a remote hearing would have an unequal impact on the parties.

However, Johnson J held that even though a remote hearing could be conducted fairly, it was undesirable to do so having regard to the likely length of hearing, the nature of the issues, the volume of written material and the complexity of the lay and expert evidence. He noted that

(a) a hearing that is wholly remote lacks many of the features and benefits of a hearing that takes place in court (b) the solemnity, formality and focus of the courtroom is not easily replicated by a remote hearing (c) the complex multi-layered human communications and observations that take place during a substantial witness trial are significantly impeded when the hearing is conducted remotely (d) a video-conference is necessarily two-dimensional and permissive only of bilateral communication and observation. In the event, the Judge was able to hold the trial in person and ordered it to commence on 15 June 2020, with case management directions in order to reduce the number of people who have to be in court at any one time.

Secondly, in *Ameyaw v McGoldrick* [2020] EWHC 1741 (QB) (2 July 2020), the claimant was acting in person. Warby J had previously made an order that the hearing should proceed remotely, although he permitted the claimant to make further representations. Steyn J heard the claimant's application for the hearing to be in person. She decided that due to the claimant's perceptions that she would be disadvantaged by a remote hearing, although she considered that a remote hearing could be conducted fairly, she would permit the hearing to be in person.

During the height of the pandemic, the court heard contempt proceedings remotely. For example, *Yuzu Hair and Beauty Ltd v Selvathiraviam* [2020] EWHC 1209 (Ch) (13 May 2020) was initially heard remotely via video link. We expect that the seriousness of these hearings would now likely justify them being held in person.

Finally, parties should be aware of the possibility of a hybrid hearing. In *Re S (Vulnerable Parent: Intermediary)* [2020] EWCA Civ 763 (16 June 2020) the Court of Appeal criticised the first instance Judge for failing to consider the possibility of holding a hybrid hearing to address the difficulties faced with remote hearings. Parties should be aware of the possibility to overcome a particular difficulty with a remote hearing. An example would be where counsel attend court, but a witness who is self-isolating gives evidence remotely. The court also considered the impact on remote hearings on vulnerable persons. In those circumstances, it will be necessary to make changes to ensure that the procedure is fair: "*Where a party or a witness has a learning disability, the adaptation needs to be sufficient to ensure that they are genuinely able to participate effectively in the hearing, both in and out of the witness box*" [26].

3. What courts are physically open?

HMCTS has now re-opened most of its courts. It has stopped publishing a tracker detailing which courts are open, but the status of each court is displayed along with its contact details here.

HMCTS has also published its risk assessments for those entering into its buildings. Current guidance (10 August 2020) is that court users are asked to wear a face covering inside, unless they are exempt. Users are requested to bring their own face coverings.

4. What rules apply to remote hearings?

As a general rule, the Court of Appeal in *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)) (6 August 2020) has said *"[W]hether a court hearing is a remote hearing or a hybrid hearing, that is one that is partially face to face and partially remote, or a conventional face to face hearing, it must be conducted in a way that is as close as possible to the pre-pandemic norm*": [50].

Prior to the pandemic the CPR contained video conference guidance in Annex 3 to PD 32. This guidance continues to apply. There is a change to the CPR in respect of remote hearings concerning when hearings will proceed in private when they would normally have been public proceedings. Pursuant to PD 51Y paras. 2 and 4, where it is not practicable for a remote hearing to be broadcast in a court building, the court may direct that a hearing must take place in private where it is necessary to do so to secure the proper administration of justice; and such a hearing must be recorded, where practicable, in a manner directed by the court. (Unofficial recording or transmission is not permitted; see s. 55 and Schedule 25, Coronavirus Act 2020, amending the Courts Act 2003.) The recording can be listened to or watched by request with the consent of the court (no formal application is required: para. 5 of PD 51ZA).

The Judiciary's Civil Justice in England and Wales: Protocol Regarding Remote Hearings (revised on 26 March 2020) states that remote hearings should, so far as possible, still be public hearings. This can be achieved in a number of ways: (a) one person (whether Judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorised in legislation (such as the new s. 85A recently inserted into the Courts Act 2003 by s. 55 and Schedule 25, Coronavirus Act 2020). The principles of open justice remain paramount.

Practitioners should be alive to the possible implications for collateral use rules if hearings proceed in private.

Practical guidance for remote hearings can be found in Section Seven of this e-book (Litigation in a Virtual World).

5. What about the backlog?

The backlog of cases is constituted by hearings which were adjourned, and claims which were not made due to the pandemic.

Adjourned cases

MOJ statistics from 13 August 2020 show a total of 29,099 civil hearings were adjourned due to the pandemic from the week ending 8 March 2020 to 26 July 2020. The number of adjourned cases has, however, fallen from a peak of 3,915 in the week ending 5 April 2020 to 187 in the week ending 26 July 2020.

It is understood that in the Business and Property Courts adjournments have been limited. In a Chancery Bar Association seminar on 3 June Vos C stated that, consistent with the "business as usual" approach, the Business and Property Courts had undertaken nearly 85% of their usual business. Based on the principles of when a hearing is likely to be adjourned, it is assumed that these adjournments will be in respect of the more difficult or substantial hearings. We speculate that the backlog of hearings in the Business and Property Courts will be longer than the average hearing, and potentially therefore more difficult to relist in the near future.

Claims not brought

HMCTS statistics from 14 August 2020 show that the Chancery Division of the High Court received 77 cases between April and June 2020, a 93% fall from the same quarter last year when 1099 cases were received. 103 cases were disposed of in that quarter, compared to 686 in the same quarter in 2019. One would expect this to be impacted by the changes which impede corporate and personal insolvency proceedings: see Sections Two and Three of this e-book. The Queen's Bench Division, by contrast, saw a 25% decline in the 'writs and originating summons' received.

On 1 July 2020 HMCTS provided some limited guidance on the backlog of cases. It said that it is planning a range of measures, including exploring options for extended operating hours, using other buildings as courts, installing screens, and further rollout of "cloud video platform".

CHANGES TO THE CIVIL PROCEDURE RULES

6. When can parties agree an extension of time?

CPR r. 3.8(3) and 3.8(4) provides that where a rule, practice direction or court order a) requires a party to do something within a specified time and b) specified the consequence of failure to comply, the time for doing so may be extended by prior written agreement of the parties up to a maximum of 28 days, provided that the extension does not put at risk any hearing date.

The powers of the parties to extend time under this rule is increased to 56 days by para. 2 of the temporary PD 51ZA (in force until 30 October 2020). By para. 3 of PD 51ZA an extension of time beyond 56 days (whether agreed or at the request of one party) requires permission of the court.

We consider that r. 3.8(3), 3.8(4) and PD 51ZA do not apply to extensions of time to file a defence. This is because under the regime for filing a Defence, the rules do not specify a "consequence of failure to comply" (see the White Book notes at paras. 15.4.2 and 15.5.2). Since there is no specified consequence of a failure to file a defence on time, the r. 15.5 time limit cannot be extended by r. 3.8. It follows then PD 51ZA has not allowed parties to agree a further extension of time.

In the circumstances, extensions of time to file a defence continue to be governed by CPR r. 15.5 (which provides that parties can agree an extension to the period for filing a defence by up to 28 days).

It is also worth checking whether an existing directions order makes specific provision enabling the parties to agree an extension of time.

7. Will there be a hearing for an application for an extension of time?

In ordinary times, where a party applies for an extension of time under CPR r. 3.1(2)(a) they would typically receive a hearing.

Paragraph 2 of PD 51ZA states that an application beyond 56 days (whether agreed or on application by a party) will be considered by the court on the papers, however, any order made on the papers must, on application, be reconsidered at a hearing. Although the PD does not expressly address contested applications for extensions of less than 56 days, we consider that it would be strange for a contested application for an extension of less than 56 days to go straight to a hearing in light of this temporary practice direction. Instead, we assume all applications for an extension of time will be considered on the papers initially.

8. When will the court order an adjournment of a hearing?

In so far as compatible with the proper administration of justice, the court will take into account the impact of the pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions (para. 4 of PD 51ZA). HMCTS guidance on adjournment applications (including as to the information required, the importance of trying to compromise, and the waiving of application fees) is here.

The courts have now been operating remotely for six months. Judges will assume that where the parties are well-resourced, a remote hearing will offer equal disadvantages to both sides and refuse to order an adjournment purely on the grounds that the hearing cannot take place in

person (see for example *SC (A Child) v University Hospital Southampton NHS Foundation Trust (Rev 2)* [2020] EWHC 1445 (QB) (3 June 2020) at [20]).

The decision of Kimbell QC sitting as a Deputy High Court Judge in *In Re Blackfriars Limited* [2020] EWHC 845 (Ch) (6 April 2020) is likely to set the tone for applications to adjourn a commercial trial due to concerns about the conduct of a remote hearing:

(1) The Judge reviewed the applicable regulations and held that the legislature is sending a very clear message that it expects the courts to continue to function so far as they able to do safely by means of the increased use of technology to facilitate remote trials.

(2) The parties are expected to work with available technology to overcome the challenges of hearing live witness evidence.

(3) Where both sides are well-resourced, there is no potential unfairness due to the challenges of a remote hearing.

The consequence was that the five-week trial took place remotely.

In Re Blackfriars Ltd was applied by HHJ Eyre QC in *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928 (TCC) (20 April 2020). The Judge identified the following principles which govern whether a particular hearing should be adjourned if the case could not be heard face-to-face or whether instead there should be a remote hearing. We have concluded that the following principles govern the question of whether a particular hearing should be adjourned if the case cannot be heard face to face or whether instead there should be a remote hearing.

(1) Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.

(2) There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.

(3) The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of months ago.

(4) There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.

(5) Inevitably the question of whether there can be a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-

examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing.

The Judge held that applications for extensions of time in the context of the pandemic are to be determined by having regard to the overriding objective; para. 4 of PD 51ZA; and the protocols and guidance referred to in the judgment. In addition, regard is to be had to the approach to the adjournment of trials. He summarised the following principles against which to assess the application for an extension of time:

(1) The objective if it is achievable must be to be keep to existing deadlines and where that is not realistically possible to permit the minimum extension of time which is realistically practicable. The prompt administration of justice and compliance with court orders remain of great importance even in circumstances of a pandemic.

(2) The court can expect legal professionals to make appropriate use of modern technology. Just as the courts are accepting that hearings can properly be heard remotely in circumstances where this would have been dismissed out of hand only a few months ago so the court can expect legal professionals to use methods of remote working and of remote contact with witnesses and others.

(3) While recognising the real difficulties caused by the pandemic and by the restrictions imposed to meet it the court can expect legal professionals to seek to rise to that challenge. Lawyers can be expected to go further than they might otherwise be expected to go in normal circumstances and particularly is this so where there is a deadline to be met (and even more so when failing to meet the deadline will jeopardise a trial date). So the court can expect and require from lawyers a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective use of remote technology.

(4) The approach which is required of lawyers can also be expected from those expert witnesses who are themselves professionals. However, rather different considerations are likely to apply where the persons who will need to take particular measures are private individuals falling outside those categories.

(5) The court should be willing to accept evidence and other material which is rather less polished and focused than would otherwise be required if that is necessary to achieve the timely production of the material.

(6) However, the court must also take account of the realities of the position and while requiring lawyers and other professionals to press forward care must be taken to avoid requiring compliance with deadlines which are not achievable even with proper effort.

(7) It is in the light of that preceding factor that the court must be conscious that it is likely to take longer and require more work to achieve a particular result (such as the production of evidence) by remote working than would be possible by more traditional methods.

(8) In the same way the court must have regard to the consequences of the restrictions on movement and the steps by way of working from home which have been taken to address the pandemic. In current circumstances the remote dealings are not between teams located in two or more sets of well-equipped offices with fast internet connexions and with teams of IT support staff at hand. Instead they are being conducted from a number of different locations with varying amounts of space; varying qualities of internet connexion; and with such IT support as is available being provided remotely. In addition, those working from home will be working from homes where in many cases they will be caring for sick family members or for children or in circumstances where they are providing support to vulnerable relatives at another location.

(9) Those factors are to be considered against the general position that an extension of time which requires the loss of a trial date has much more significance and will be granted much less readily than an extension of time which does not have that effect. That remains the position in the current circumstances and before acceding to an application for an extension of time which would cause the loss of a trial date the court must be confident that there is no alternative which is compatible with dealing fairly with the case.

Practical issues can be addressed by directions being given: *SC (A Child) v University Hospital Southampton NHS Foundation Trust (Rev 2)* [2020] EWHC 1445 (QB) (3 June 2020). The court can also be asked to allow more time when giving directions: *Jalla v Shell International Trading and Shipping Co Ltd* [2020] EWHC 738 (TCC) (27 March 2020) at [16]. Vos C's view (expressed extra-judicially to the Chancery Bar Association) is that remote hearings are unsuitable where there are a) vulnerable or technologically challenged parties or witnesses, b) witnesses accused of dishonesty where it may be suggested that their evidence will be interfered with if not in the same room as the court, c) committal hearings with a likelihood of an immediate term of imprisonment, or d) hearings with such public interest that large numbers of people may seek to join the call or disrupt the hearing. In these circumstances, a Judge's default position would be to order an adjournment unless or until the hearing can be held in person.

The courts may be reluctant to allow a litigant to derive a separate benefit from the delay caused by a pandemic-related adjournment (see for example *Ludlow v Buckinghamshire Healthcare NHS Trust and another* [2020] EWHC 1720 (QB) (6 May 2020) at [26]).

The general rule in CPR r. 2.11 is that parties can agree to extend time for compliance with a rule or direction without applying for a court order. An exception in r. 29.5(1) is that an

application is necessary to vary the date for a CMC, PTR, the trial or the trial period. The Queen's Bench Guide at paras. 20.1.4 and 20.1.5 emphasise that changes to the trial window, even by consent, must be considered by the Judge in charge of the Queen's Bench Civil List and not a Master. This is not the position in the Chancery Guide (see para. 14.4). In any event, we expect the court will amenable to an adjournment of a hearing by consent.

9. How does the pandemic affect applications for relief from sanctions?

PD 51ZA para. 4 provides that "*In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions*".

This catchall provision implies that parties are likely to have to be patient when litigants fail to comply with obligations since the start of the pandemic. A case which illustrates this is *Agba v Luton Borough Council* [2020] 6 WLUK 59 where the applicant failed to attend a bankruptcy hearing. She said she felt unwell that morning and followed the guidance to self-isolate. The court accepted this was good reason for not attending, although she failed in her application due to having no reasonable prospect of success at the restored hearing.

10. How does the pandemic affect service?

In Johnson J's *ex tempore* judgment *Serious Fraud Office v Karimova* [2020] 6 WLUK 383 (26 June 2020), he granted an extension of time for the SFO to serve proceedings against two respondents, the daughter of the former President of Uzbekistan and her partner. Although the SFO had previously been given an extension of time, the Judge held that the SFO had made efforts to effect service and had a good reason for not having served them. The Judge accepted the SFO's submission that service had been hampered by the pandemic, in both the UK and in Uzbekistan. Johnson J held that the justice of the case merited a further six month extension.

A different situation occurred in *Stanley v Tower Hamlets London Borough Council* [2020] EWHC 1622 (QB) (26 June 2020), where a solicitor served particulars of claim by post on 25 March 2020, two days after the "lockdown". The local authority did file an acknowledgment of service, and the claimant applied for judgment in default successfully. The local authority then applied to set aside default judgment under r. 13.3 both on the grounds that it had a real prospect of successfully defending the claim, and for some other good reason, namely it was unreasonable to effect service by post when the claimant knew the local authority's offices would be closed. Julian Knowles J agreed there were real prospects of success, but also held that he would have also granted relief on the 'some other good reason' limb. He held at [34]

that: "*The world shifted on its axis on 23 March 2020 and it was incumbent on him as a responsible solicitor and an officer of the court to contact the Council to acknowledge that the situation had changed, and to discuss how proceedings could best and most effectively be served*". Having found that the jurisdictional requirements were met, the Judge applied CPR PD 51ZA to the three stage Mitchell/Denton test, and granted relief.

Both of these cases illustrate that the court is unlikely to impose the standard CPR sanctions for technical breaches when the failure to adhere to the rules can be attributed to the impact of the pandemic. We are not aware of problems effecting personal service during the pandemic. The Personal Insolvency section of this e-book discusses the requirement for personal service in bankruptcy proceedings.

11. How will the pandemic affect applications for security for costs?

The economic disruption which is anticipated and already felt as a result of the pandemic, may be expected to result in more defendants seeking to secure their costs in actions brought by claimants whose financial future is consequently uncertain.

A relevant gateway to interim relief for these purposes is CPR r. 25.13(2)(c). This applies to a claimant company where there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.

In *International Pipeline Products Ltd v IK UK Ltd* [2020] EWHC 1602 (Ch) (24 June 2020), David Stone (sitting as a Deputy Judge of the Chancery Division) considered evidence as to the likely impact of the pandemic on the business of the claimant. The Judge regarded the following dictum of Nicolls VC in *Re Unisoft Group (No 2)* [1993] BCLC 532, at 534, as particularly apposite: *"Thus the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met? That is a question to be judged and answered as matters stand when the application is heard by the court, although the court will take into account and give appropriate weight to evidence about what is expected to happen in the interval before the costs order would fall to be met*."

Security for costs was not granted in that case, since the evidence of economic down turn before the court was not from the same industry as the claimant's. The claimant's business was successful and the impact it had seen as a result of the pandemic (although negative) had not harmed the trading outlook so as to cast doubt on its ability to pay costs. The court decided that it was simply too early to tell about the effects of the apprehended economic downturn.

Courts may therefore be expected to approach evidence in support of an application relying on CPR r. 25.13(2)(c) as follows: (1) the focus of assessment will be on the financial position and outlook of the particular company, (2) it will take into account the effect of the pandemic on the company so far as it is known, (3) the court will be cautious in applying evidence of the

effect of the pandemic on one industry to a company operating in another industry, and (4) the court will be wary of making pessimistic assumptions about the general economic effects of the pandemic, at least while these are uncertain. A defendant's approach to evidence should therefore focus closely on the financial position of the claimant, supported where possible by targeted evidence about the negative effects of the pandemic upon the relevant industry and the claimant in particular, and how this will affect the particular company's capacity to pay costs.

In circumstances where a case has been stayed to allow time for ADR to be pursued, a court may be inclined to adjourn an application for security for costs, given the uncertain effects of the pandemic. That was the decision reached by Roger Ter Haar QC sitting as a Deputy Judge in *Accessible Orthodontics (O) Ltd v NHS Commissioning Board* [2020] EWHC 785 (TCC) (21 April 2020), who noted that the effects of the pandemic were so fast moving and uncertain that the factors relevant to an order for security could only be considered at that later time, since it seemed unlikely that the claimants would be in the same position then.

12. What provision has been made for limitation periods?

As yet no measures have been taken in response to the pandemic on the issue of limitation periods. In these circumstances, litigants should take every step to ensure they are within the applicable periods provided for in the Limitation Act 1980. Whilst Part II of that Act provides for the extension or exclusion of limitation periods in defined circumstances, none of these appear readily applicable to general business causes of action, the expiry of which has been caused by matters relating to the pandemic (absent specific circumstances which might engage particular provisions).

13. When will the court vary its previous orders?

The court has the power under CPR r. 3.1(7) to vary or revoke its previous orders. There is a distinction between interim and final orders.

Interim orders may be varied if there is something out of the ordinary to lead to variation or revocation of an order. The inclusion of "liberty to apply" in an interim order is judicial recognition that further applications are likely to be necessary. However, the absence of such a provision does not preclude an application to vary an interim order.

Final orders are generally only varied or revoked where either a) the original order was based on erroneous information, or b) there have been subsequent events unforeseen at the time the order was made, which have destroyed the basis on which the order was made: see the White Book at 3.1.17 and following.

In *Dinglis v Dinglis & Ors* [2020] EWHC 1363 (Ch) (1 June 2020), the applicant wished to vary an order which valued shares as at July 2019. The shares had fallen in value, and the applicant sought a new order which reflected this. Adam Johnson QC held that the earlier order was a final order and was not prepared to vary it. He held at [44]: "*it seems to me that the interest in the finality of litigation is a, if not the, primary concern. True it is that the world has moved on since December 2019, and I accept it is fair to describe the impact of the Coronavirus pandemic as something out of the ordinary. But I do not think that in the circumstances of this case it justifies any variation to the terms of the final order made*".

In contrast, in *Kingsley v Kingsley* [2020] 7 WLUK 59 (6 July 2020), the defendant applied for an extension of time in respect of a final order to complete the purchase of certain farm land within 2 months. The original order had been made on 1 May 2019. This decision was appealed, and by agreement the order was stayed. The appeal judgment was handed down on 3 March 2020 and it upheld this part of the order. The defendant had difficulty raising finance during the pandemic. Therefore, she applied for a variation of the 2 month period. The Judge granted an extra 10 days because the pandemic had been a material change in circumstances and the claimants had not demonstrated that there would be any prejudice from the delay.

14. When will the court vary an undertaking?

The test for varying an undertaking is the same as varying an interim injunction: the threshold is not lower due to the fact it was voluntarily given. In the absence of liberty to apply, a party typically has to show "good cause", typically a significant change in circumstances which makes the continuation of the undertaking unnecessary, oppressive or unjust: *Emailgen Systems Corpn v Exclaimer Ltd* [2013] EWHC 167 (Comm); [2013] 1 WLR 2132.

We consider it possible that the consequences of the pandemic might, in some cases, have caused a significant change in circumstances which would justify an undertaking being varied. We are not aware of any reported cases on this issue.

15. How does the pandemic affect the enforcement of judgments or orders?

Where there is no human interaction, the pandemic will have a limited impact on enforcement. Enforcement of judgments requiring bailiffs is, however, affected by the pandemic.

As regards enforcement by bailiffs, the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 have made various changes:

(1) The time limit for taking control of goods, which is typically 12 months beginning with the date of notice of enforcement, is extended to cover the emergency period.

(2) An enforcement agent may not take control of goods where located at premises which include a dwelling-house or on a highway.

(3) There is no right of entry and re-entry to premises including a dwelling-house.

(4) An action for recovery of unpaid commercial rent must be for a minimum of 189 days rent.

The 'emergency period' for taking control of goods, where the address contained in the notice of enforcement is in England, is any time during which a restriction or requirement is in place under regulation 6(1) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. The relevant period for an action for recovery of unpaid commercial rent is now defined by reference to s. 82 of the Coronavirus Act 2020, and is presently due to end on 30 September 2020.

Whilst not strictly enforcement of a judgment or order, it should be noted that by virtue of CPR r. 55.29, most possession proceedings are automatically stayed and no writ of possession can be issued until 21 September 2020.

FORMALITIES OF SWORN EVIDENCE

16. What documents can be witnessed remotely?

In the context of civil litigation, the only document which requires witnessing is an affidavit. Affidavits are required in applications for search orders, freezing orders and for contempt of court: PD 32, para. 1.4.

Pursuant to PD 32, para. 5.2(2), an affidavit must be sworn before someone authorised to witness affidavits (as set out in para. 9.1, PD 32). A solicitor from the firm acting for the client cannot witness an affidavit. This means that during the pandemic it may be difficult to find a witness, particularly on an urgent basis.

It is unclear whether witnessing can be done remotely: there are no express words to limit "*before whom*" to an in-person oath or affirmation. However, para. 25.1, PD 32 provides that where an affidavit does not comply with the practice direction, the court may refuse to admit it as evidence. It seems to us that in light of PD 51ZA, para. 4, which states that the court will take into account the impact of the pandemic in applications for relief from sanctions, there is a reasonable likelihood that a court will show some flexibility. It will be prudent to do all that one can, but (depending on the circumstances of the particular case) the court may be willing

to admit an unsworn affidavit or an affidavit sworn remotely as evidence. An undertaking to swear as soon as practicable could be offered, or perhaps the deponent could attend by video link and swear to the document orally. The Temporary Insolvency Practice Direction permits remote witnessing of a statutory declaration: see question 57 of the Corporate Insolvency section of this e-book.

As regards committal applications, the court has the express power to waive any procedural defect in the commencement or conduct of the application if it is satisfied that no injustice has been caused to the respondent by the defect by virtue of para. 16.2 of PD 81. This may be a solution to an inability to have an affidavit witnessed in this context.

17. Can a witness give sworn testimony remotely?

Yes. This is something that was already provided for prior to the pandemic: Annex 3 to PD 32 at para. 3.

Guidance from the Commercial Bar Association (dated 23 June 2020) has generally helpful points on witness evidence, including recommending that counsel ask the witness during examination-in-chief to confirm under oath/affirmation that they are alone in the room and that they are not receiving assistance from any third parties during the course of the hearing. It also recommends that a question at the PTR be whether appropriate steps been taken to have the appropriate holy book (if required) at the place from which the witness of fact gives evidence.

In *Navigator Equities Ltd & Anor v Deripaska* [2020] EWHC 1798 (Comm) (17 July 2020), Andrew Baker J indicated that if a witness is to give evidence remotely, then the parties should discuss in advance where the witness will be, who (if anyone) will be with them, and (if relevant) why the witness would not be alone. An arrangement other than the witness being alone would require approval by the court: [9].

ALTERNATIVE DISPUTE RESOLUTION (ADR) AND THE PANDEMIC

18. Is ADR encouraged during the pandemic?

On 7 May 2020 the Cabinet Office issued a Guidance Note on responsible contractual behaviour in both the public and private sectors in the performance and enforcement of contracts impacted by the pandemic. The guidance encourages 'responsible and fair' performance and enforcement of contracts, and at para. 17 "*strongly encourage[s] parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation*

or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes".

19. How is mediation affected by the pandemic?

With the relaxation of physical distancing requirements introduced on 4 July 2020 in The Health Protection (Coronavirus, Restrictions) (No 2) (England) Regulations 2020/684 mediations can now be conducted in person, provided the organiser has carried out an appropriate risk assessment and taken all reasonable measures to limit the risk of transmission of the virus (see reg. 5(3)(a)). However, we anticipate that parties to a dispute will continue to consider conducting any mediations remotely where possible.

Remote mediation has been possible for some years, but its practice has been limited. Given the clear encouragement of ADR in the CPR and Pre-Action Protocols it is unlikely that practical or procedural differences in the practice of remote mediation would be treated by the courts as excusing, in the context of the exercise of its costs and case management powers, a failure by a party or its advisers to consider or to participate in mediation in an appropriate case. There may be some latitude in terms of courts' willingness to grant or extend stays for this purpose, for example where unrepresented parties are involved, or there is evidence that reasonable efforts have failed to find a suitable mediator capable of working remotely. But unless particular circumstances apply, given the courts' expectations on the adjournment of hearings referred to in *In Re Blackfriars Limited* [2020] EWHC 845 (Ch) and *Municipio De Mariana v BHP Group PLC* [2020] EWHC 928 above at question 8, parties should prepare to consider and engage in ADR as before.

20. How is remote mediation conducted?

The conduct of remote mediation via Zoom, Skype, Microsoft Teams or similar providers is in outline very similar to a physical mediation.

Physically separated teams of parties and their advisers will be placed together in electronic rather than physical private 'Breakout Rooms' by the mediator at the outset. This permits private communication within teams. Mediators are invited or may enter into parties' individual 'Breakout Rooms' to progress discussion. Open sessions are typically conducted by the Mediator closing separate 'Breakout Rooms' and returning all participants to the main conference call hosted by the mediator.

21. How does remote mediation differ from 'normal' mediation?

Experience and anecdotal reports confirm consistently that the process of remote mediation remains highly effective. There are intuitive concerns about loss of the ability to read body language, difficulty in building rapport with the mediator, greater levels of participant distraction/disengagement and the lack of pressure to settle created by the 'lock in' at a physical mediation.

However, experience suggests that these concerns are not serious impediments and can be effectively managed. Close up video streaming of parties' faces is proving to be an effective (if not complete) way of reading emotions and reactions and capable mediators can begin to build confidence and trust through pre-mediation contact (see below) and see the observations of the Government's IT adviser on the experience of remote hearings.

Further, remote/video mediation offers significant countervailing advantages: (i) the involvement of technology can encourage greater participant focus – this manifests itself in a somewhat faster movement through the stages to offers and a more rapid engagement in mutual problem solving (ii) a less intimidating environment in the absence of opposing parties benefits clients in some cases and may encourage clear thinking (iii) the venue is always neutral.

Aside from the 'soft' considerations remote mediation offers hard-edged advantages:

(1) cost savings in the form of travel, accommodation and room hire costs can be significant, particularly where the dispute involves international clients;

(2) clients can save fees, and advisers can be freed up to do other work during 'down time' in the mediation simply by advisers muting and turning off video connections temporarily;

(3) complex mediations can be far more easily broken down into shorter, sequential sessions, allowing parties/experts to rest (remote mediation is mentally tiring), carry out investigations or take time over the formulation of detailed offers which can lead to better informed and drafted settlements.

22. What do I need to do to prepare for a remote mediation?

The key practical considerations are summarised below. Detailed guidance has been prepared by a number of bodies, e.g.: The Centre for Dispute Resolution (CEDR); The Civil Mediation Council; and The International Council for Online Dispute Resolution in the USA .

In advance of the meditation

The usual considerations for preparation for a physical mediation – agreement as to exchange of position statements, preparation and exchange of materials, attendee lists, signing of the mediation agreement etc. apply. Parties to remote mediation should discuss and agree the following in addition:

(1) Appoint a mediator who offers remote mediation: the mediator's chambers will likely indicate their preferred video conferencing software. Mediators should have appropriate GDPR compliant file sharing policies in place.

(2) Agree video conferencing software: for mediations the video conferencing software which has waiting room and breakout room facilities and screen sharing facilities is helpful. A whiteboard function and stylus interface should be considered.

(3) Critical practical considerations mirror those required for remote court hearings: stable, secure and fast internet; paid video service account for the host; effective audio and microphone; suitable venue/background/lighting etc; large or double screens for document sharing.

(4) Rest and engagement: experience has shown that remote court hearings can prove more tiring than physical hearings and that rest breaks may need to be built in – the same is true of remote mediations. In longer mediations (e.g. those expected to last a full day or more) consider agreements as to periodic breaks, or sequential 'half day' sessions with half day breaks.

(5) Working environments and timetables for participants and the implications for privacy, absences from the conference call, time zones, etc.

(6) Logistics of communication of information and documents: for example, screen sharing allows other parties to see but not to have copies of documents. Document sharing applications (such as DropBox Pro) and emails allow parties to exchange documents, drafts and signed settlements agreements. These must be GDPR compliant. Practitioners should consider the logistics of document access and exchange between participants on their own side as well as with opponents and the mediator.

(7) 'Plan B': back up methods of participating in the mediation should be considered and agreed in the event that any of the participants lose the video conferencing functionality – back up devices or telephone might be suitable options.

(8) Privacy: agree that no participant shall record video, chat and shared screen information. Protocols for ensuring no 'eavesdroppers' or attendees who have not signed the mediation agreement.

(9) Mediation agreement: ensure that the mediation agreement reflects the remote context. See CEDR's sample remote mediation agreement here.

Practitioners should be familiar with the chosen video conferencing software and ensure that their clients are too. Technical IT assistance should be considered if there are concerns.

Pre-Meetings

One or more pre-meetings with the mediator should be envisaged – bear in mind that the mediation commences when the first such meeting takes place so the mediation agreement must have been signed by all participants beforehand. All communications from this point will be governed by confidentiality and without prejudice privilege. These meetings enable the mediator to begin to build rapport and confidence and to demonstrate competence with and control over the chosen remote format. Pre-meetings should double as 'dry runs' for the use of the technology.

At the mediation

The mediator will be expected to manage the process.

To ensure continued engagement:

(1) Parties should expect to be set tasks during periods when the mediator is with the other party.

(2) Time in breakout rooms in the absence of the mediator is likely to be shorter.

(3) There will likely be rest breaks. These should be clearly indicated and all participants encouraged to take time away from the computer screen.

The mediator should make a clear statement at the end of the process informing the parties that the mediation process has ended and that privacy, confidentiality and without prejudice provisions have come to an end.

After the mediation

Post mediation correspondence should be for limited purposes and appropriately marked as private, confidential or without prejudice.

If no settlement has resulted, or new issues arise, parties should keep the mediation open and reconvene rather than conduct negotiations in post mediation correspondence.

23. How is Early Neutral Evaluation approached during the pandemic?

ENE may be a Judge-led process or conducted by a senior practitioner at the request of parties – sometimes (if agreed) as part of a mediation process. The process is best suited to cases which turn on disputed issues of pure law or the likely exercise of judicial discretion rather than when a Judge has to decide between competing factual accounts.

The court has a discretion to order ENE in an appropriate case as part of the case management process: CPR r. 3.1(2)(m); *Lomax v Lomax* [2019] EWCA Civ 1467. There is some anecdotal evidence that lower courts are exercising this discretion during the pandemic. However, because the evaluator expresses a preliminary, non-binding view on the merits of the case, the matter will still progress to trial if not settled. A court ordered ENE process therefore involves parties in delay and additional costs.

A particular advantage of voluntary ENE in the present circumstances is that it avoids the need for the attendance of witness or participants, and consequent remote working complications, and if adopted early (and settlement results) can result in significant cost savings.

There are few if any impacts of the pandemic on the parties' preparation for and conduct of ENE.

24. How are arbitration disputes being conducted during the pandemic?

This is a large topic, with a plethora of new guidance issued by global arbitral bodies. Most bodies continue to operate. This note focusses on the impacts on and responses of the arbitral bodies commonly adopted in domestic arbitration clauses.

A group of arbitral bodies (including the LCIA) are co-operating to formulate coordinated and collaborative responses to the virus, including the best use of digital technologies for working remotely which can be found here.

The ICC has issued a detailed Guidance Note on possible measures aimed at mitigating the effects of the Covid-19 pandemic on 9 April 2020.

The inherent flexibility of arbitration enables parties to agree to determination, or partial determination, of their dispute on the basis of written submissions only. Disputants might usefully consider whether the nature of their particular dispute makes this appropriate. Obvious instances will be where the dispute concerns an agreed and documented factual context and matters of law are in dispute. A halfway house may be to agree that certain issues be determined on the basis of written submissions first, leaving other matters to be dealt with through remote hearings as necessary.

The LCIA's new rules, in force from 1 October 2020, include an express provision in article 19.2 to grant an arbitrator discretion to direct a virtual hearing.

25. How do I serve new notices to arbitrate?

Most arbitral bodies are continuing to operate, but now require service of notices referring new disputes to arbitration electronically, e.g. see the LCIA and the SCC. It must be doubted whether many users were not doing so already.

26. What should parties do if an ADR hearing is already scheduled?

The Paris-based DELOS independent arbitral body has published a checklist of considerations of when / whether to proceed with an existing arbitral (or mediation) hearing during the pandemic.

In deciding whether to proceed with physical hearings the checklist currently recommends considering (amongst other things):

(1) the hearing location;

(2) the hearing participants and who needs to attend, and their risk profiles;

(3) restrictions on their ability to travel from home and to the hearing location; and

(4) costs and time implications of maintaining or postponing the hearing.

If the hearing is to proceed:

(1) carrying out a general check of the hearing venue;

(2) greeting etiquette;

(3) masks;

(4) logistics of coffee and lunch breaks;

(5) online hearings;

(6) what to do if a participant develops coronavirus symptoms; and

(7) follow up checks to see if participants develop symptoms within 14 days.

Similar considerations are addressed in the ICC Guidance Note referred to above.

27. How are remote arbitration hearings conducted?

The conduct of remote arbitration hearings requires early consideration between the parties' advisers and the proposed arbitrator of a range of matters including participants, venues, safety and security, timetabling, video conferencing facilities, technical protocols, security protocols, rehearsals and testing, logistics of document transmission and presentation, electronic bundles.

Guidance on the conduct of remote hearings including helpful checklists has been published by the Chartered Institute of Arbitrators.

The ICC guidance includes draft clauses for cyber protocols and pro-forma procedural orders.

28. What is the approach to an adjudication during the pandemic?

By its nature adjudication only relatively rarely requires physical meetings (site visits perhaps being the major exception). Experienced practitioners can expect to be able to use existing practices to send electronic referral notices and relevant documents and submissions to appointed adjudicators. Adjudicators likewise will typically transmit awards electronically in the usual way. This is unlikely to need to change in the current circumstances.

Where meetings between the parties is necessary, this can readily be done by telephone or by remote video conferencing. In the case of the latter, similar preparatory work will be needed to establish and operate safe, secure and robust communications as with other forms of remote hearing.

Where physical distancing requirements may impact adjudication is in the ease with which parties can obtain the necessary physical documents and witness evidence and conduct expert investigations and analysis on site or of physical items. This issue, which is of general concern, is highlighted in the case of adjudication which is typically required to be completed within tight timescales.

Where one party claims that these matters make it unable to prepare its case, adjudicators must consider whether, having regard to the requirements of natural justice, it is possible for them to conduct the adjudication. If the adjudicator concludes that he cannot do so, he is obliged to resign his appointment.

In a recent decision of the TCC the court observed that there may be circumstances in which an injunction could be granted to restrain the continuation of an on-going adjudication, but

followed existing authority to the effect that an injunction to restrain an on-going adjudication would be granted only "*very rarely and in very clear cut cases*": *Millchris Developments Ltd v Waters* [2020] EWHC 1320 (TCC) (2 April 2020). The court also found that the real reason the contractor had not been able to obtain evidence in time was not due to the pandemic.

Given the prospect of widespread disruption to contractual arrangements and insolvency, the Supreme Court's recent decision in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25 (17 June 2020) is significant. The court held unanimously that an adjudicator retains jurisdiction to determine a dispute referred to him by the liquidators of an insolvent company. The claims referred to adjudication retained their separate identity notwithstanding the operation of insolvency set-off and adjudication in insolvency was not futile but remained a potentially useful exercise for the liquidators. It is possible that at the time of enforcement the court may not enforce an adjudicator's decision but that does not deprive adjudication of its potential usefulness to liquidators and appropriate undertakings as regards security could be given. The judgment enthusiastically endorsed adjudication as offering every party a prescribed, speedy and relatively low cost dispute resolution mechanism by an independent person with relevant subject matter expertise.

Section Seven: Litigation in a Virtual World

Orlando Fraser QC, Paul Greenwood, Hermann Boeddinghaus, Eleanor Holland ©

Last updated: 1 September 2020

INTRODUCTION

This Section is intended to provide some practical pointers for remote litigation in the courts of England and Wales. The reader is also referred to Section Six: Civil Procedure and ADR and Section Eight: Offshore Litigation, which contain closely related information.

SPECIFIC ISSUES

1. What is the general approach being taken by the courts?

This is a rapidly evolving area, as best practice develops, reflecting also the different stages of the pandemic and of the Government's (and people's) reaction to it. Broadly, our own

experience is that whilst matters continue ultimately to proceed according to established rules and principles, practitioners need to be flexible in their approach to litigation, and will be expected to co-operate and communicate clearly both with one another and with the courts, in order to ensure that as far as possible the litigation process continues, for the benefit of its users and other stakeholders; and they need to embrace the use of technology, some of which will be unfamiliar.

In the Rolls Building, Business and Property Courts, there are 4 possible types of hearing:

(1) fully remote hearings, held without the people involved coming to court in person, instead joining by telephone or video link, with the Judge at home;

(2) remote hearings, with the Judge in their chambers or in a court in the Rolls Building;

(3) "hybrid" hearings – a mixture, with the Judge and some participants in court, and some participating remotely;

(4) normal physical hearings, in which all the participants attend court in person.

It is a matter for the Judge to decide which type of hearing will take place. Our understanding is that the Judges of the Business and Property Courts are likely to begin returning to the Rolls Building soon, and physical and hybrid hearings are likely to increase.

A good deal of guidance has been published – examples of useful, relevant documents are here (the Remote Hearings Protocol, as defined in question 2 of this section), here (COMBAR Guidance Note, see especially paras. 5-6), and here (guidance for Circuit and District Judges from the Lord Chief Justice, Master of the Rolls and President of the Family Division, which in many respects has wider application).

Certainly, at its best, remote litigation can work very well. It may well be that in certain circumstances, it will become the norm – for example, there may be savings of cost and time (although anecdotally it has been suggested remote hearings can take longer). In the recent trial of *CMA v Martin* [2020] EWHC 1751 (Ch), which lasted 4 days (the first contested disqualification application under s. 9A, CDDA 1986), the Judge sat from home, and the hearing was fully remote. At short notice, shortly before the trial, the court fixed a remote PTR to deal with an adjournment application, and also with various practical matters concerning the conduct of the trial. At the trial itself, four counsel appeared, and three witnesses were cross examined – certain issues of fact were hotly contested. ICC Judge Jones commented that the remote hearing "*worked extremely well*". In particular, he noted that "*the absence of the formalities of the court room environment and immediate proximity of counsel appeared to create a more relaxed environment for the witnesses and was beneficial*", and that the defendant's denials and evidence were received "*with the same force/impact as it would have done in a physical courtroom*". We have personal experience of a month-long witness trial that

took place in June and July 2020, in which similar comments were made by the trial Judge (this was a BVI matter, with counsel, witnesses and experts participating from five continents, but it naturally gave rise to similar practical challenges as remote hearings in England and Wales). Although, inevitably, not every court or Judge will find the process to be as efficient, practitioners should be prepared to accept that from this period, lasting changes will emerge.

Readers are also referred to Vos C's view (expressed extra-judicially to the Chancery Bar Association), referred to in question 8 of the Civil Procedure and ADR section above.

2. What sort of technology is used for remote hearings?

In each case, the means by which the hearing is conducted is a matter for the Judge, taking into account the interests of justice, and considering matters such as the nature of the issues to be determined at the hearing, any practical problems that the use of technology may present for participants, and importantly, any questions concerning public access to the hearing.

Remote hearings (or hybrid hearings, to the relevant extent) can proceed by way of telephone conference or video conference, although for the simple and obvious reason that participants cannot see one another, telephone hearings tend to be more difficult, and should if possible be avoided for anything other than the most straightforward matters.

As to video hearings, HMCTS has indicated that they will take place *via* Skype for Business and (more recently) the "*cloud video platform*" or "CVP" (see here (a helpful guide on CVP hearings that also includes a link to training for advocates at the end), here and here), but the Judiciary's *Civil Justice in England and Wales: Protocol Regarding Remote Hearings (revised on 26 March 2020)* (the Remote Hearings Protocol) states that available methods for remote hearings include (non-exhaustively) BT conference call, Skype for Business, court video link, BT MeetMe, Zoom and ordinary telephone call. It is beyond the scope of this work to identify the specific features and possibilities of these different technologies.

In our own recent experience in the Chancery Division (before Judges and ICC Judges) and the Commercial Court, the courts have in fact used Skype for Business, and the Judge's clerk has circulated by email either a link for the whole hearing, or separately a new link for each day. It may be necessary to download Skype for Business software (or other software) on the device you will use to join the hearing. We understand that Skype for Business (which is operated by Microsoft) will be phased out in favour of Microsoft Teams by around July 2021.

We understand anecdotally that Zoom has emerged as the other principal platform for remote hearings. Although we do not have personal experience of the use of this platform in hearings in England and Wales, we have extensive recent experience using Zoom for the BVI trial mentioned above.

Although the specific features and possibilities of these two technology platforms are markedly different, our assessment is that neither is materially preferable to the other – both fulfil the essential functions.

3. What issues should be considered or might arise?

In all cases, the parties should cooperate so far as possible in agreeing arrangements (this is to be regarded as being in accordance with the parties' duty to help the court further the overriding objective, and it is particularly important when the courts and parties are grappling with unusual circumstances). However, decisions in respect of case management are for the court, and the court's permission for particular arrangements must be sought where necessary (see for example *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)). Generally, hearings "*must be conducted in a way that is as close as possible to the pre-pandemic norm*".

A useful specimen PTR checklist for remote hearings (to be considered in addition to existing checklists) is contained in the COMBAR Guidance Note. As to the technology to be used, in many cases it will be possible for the court or a participant to host the hearing on one of the platforms identified above (and a great number of participants can be accommodated). However, in a more complex case, the parties might consider engaging a consultant to advise on, and assist with setting up, the platform and hardware to be used; to host the hearing and manage testing, access and any technical issues; to establish a webcast or livestream platform for the purpose of meeting open justice requirements for hearings held in open court (see further question 4 of the Civil Procedure and ADR section above); and to provide document hosting services.

It is important to contact and liaise closely with the court and all participants to test the technology thoroughly before the hearing, to establish whether the parties and witnesses are able to access the hearing satisfactorily and locate documents from the bundle. It may be possible in part to use the PTR for this purpose. For the purposes of any test, the aim should always be to set things up to reflect as closely as possible the circumstances that will exist during the hearing itself. As a minimum, the Judge's clerk should be requested to host and run a short test session – in our experience, they are always happy to do so.

Thought should be given to each participant's facilities, and the creation of an appropriate, fitting environment. Overall, one should keep firmly in mind that despite not being physically present in a court, participants are nonetheless engaging in a formal, important process, and must act accordingly and as far as possible, do so from an appropriate place and be properly equipped.

Consider the following:

(1) Ascertain at an early stage whether the court and participants will be using electronic or hard copy bundles (or both); and if electronic, whether simple (bookmarked) PDF files or more complex e-bundles. (Further guidance on bundles is set out below – see question 6.)

(2) How many devices and screens will be required to discharge one's responsibilities comfortably? It can be useful to have one device/screen to view the video feed, one for the bundles (another may be required if a document management provider will be "pushing" pages to participants), another for submissions and/or note taking, another for communicating with other participants (see question 4 below), and yet another if there is a live transcript.

(3) Has proper provision been made for speakers/headphones, microphones and webcams?

(4) Do all participants have sufficient bandwidth (upload and download speeds)? Bandwidth constraints can sometimes be addressed by non-active participants turning off their video (and of course microphones should always be switched onto mute by everyone other than the Judge, the advocate addressing the court, and any participating witness).

(5) Think about the practical environment. What arrangements need to be made to minimise the chances of interruption? Is the lighting appropriate – neither too dim nor too dazzling; is the background distracting; might there be any noise disturbances (a funny example being the flushing toilet apparently heard during a live-streamed US Supreme Court hearing), and what might be done to minimise or avoid them? All of these things might affect the impression given not only by an advocate but (just as importantly) by a witness, which might affect their credibility, and the outcome of the case. For reasons of this sort, might it be sensible for parties and witnesses to participate from a room at the solicitor's offices, where, in addition, technical assistance and assistance with bundles is likely to be more readily at hand? If so, consideration should be given either to using a neutral firm, or alternatively agreeing that a solicitor nominated by the opposing party may attend to observe (subject to suitable precautions being taken).

(6) Where the expense can be justified, it may be appropriate to seek permission (usually at the PTR) for a live transcript, to enable everyone to follow oral evidence and submissions and to minimise disruption where there are minor connection issues or where participants might find it more difficult to follow proceedings (for example because they are not fluent in English or they are hard of hearing). The transcriber should also be able to provide the parties with a daily transcript at the end of each day. The transcriber will be able to join the remote hearing and provide login details for each of the legal teams to access the live transcript. In practice, we have found a live transcription service to be invaluable, especially for witness

hearings. Ensure the correct formalities are observed (see for example the discussion in *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)).

(7) If the parties do not engage a transcriber, and if the hearing is recorded, the parties may be able to access a copy of the recording.

(8) Consider whether it will be of assistance to provide for screen sharing.

(9) Do not forget to make arrangements (similar to those made for witnesses) for any interpreters. If possible, the interpreter will be in the same physical location as the witness. However, it is also possible for interpreters to operate remotely.

(10) Experience suggests that participants can find remote hearings to be especially tiring – there is some additional strain or effort involved in communicating in this way; possibly for some, heightened anxiety. Remote hearings also introduce the possibility of witnesses and others participating from a wide range of different time zones. To deal with this, we have found courts have been flexible in starting and ending days at different times (although this depends on availability of court staff as well as judges), and building into the day regular short breaks. (See for example *SC (A Child) v University Hospital Southampton NHS Foundation Trust (Rev 2)* [2020] EWHC 1445 (QB).)

(11) Consider the specific circumstances of the participants, and if necessary, raise them with the other side, and the court. For example, some may have caring responsibilities meaning that they are unavoidably unavailable at certain times.

(12) Consider arrangements for the hearing to be held in public (see further question 4 of the Civil Procedure and ADR section above).

(13) As an aside – bear in mind that some clients are very concerned that a remote hearing is "second best". This is something that is sensibly raised and discussed with them well before any hearing, and tends to mean that early preparation and discussion of skeleton arguments or oral submissions will be particularly important in providing a good service.

Of course, despite best efforts, technical or practical problems may arise – be prepared for that, and so far as possible, be in a position to mitigate or deal with them. Points to consider include the following:

(1) Participants should log in at least 15 minutes early, to allow time for any technical issues to be remedied before the start of the hearing.

(2) Do participants have back-up internet connections (for example, a mobile phone data connection) and hardware to deal with an unexpected loss of connection?

(3) Would it be sensible to download and/or print the bundle (or a core bundle, if agreed) or at least, to have hard copies of the most important documents – for all participants? Cross-examination of witnesses is substantially impossible (or at best, significantly slowed down) if they cannot readily access the documents – sometimes moving quickly between documents, or back and forth, or even comparing them – all of which might be difficult or possibly even beyond some witnesses.

(4) How will notification be provided to other participants if a technical issue occurs – perhaps by email or text message, or by using the chat function, or by means of a phone call? Who will be responsible for this?

(5) When they are not speaking, participants should mute their microphones, and ordinarily, when not directly involved in what is happening, solicitors and parties/witnesses should turn off their cameras. It is, in the usual way, not permissible for a participant to record or transmit the hearing – see CPR r. 39.9(2) and Schedule 25, Coronavirus Act 2020. To use unofficial recording equipment in any court or Judge's room without the permission of the court constitutes a contempt of court under s. 9, Contempt of Court Act 1981. Legal practitioners must take particular care in this respect (see *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB)).

(6) Useful guidance on advocacy at remote hearings (and some discussion of common technological mistakes) has been published by the Inns of Court College of Advocacy, which can be accessed here.

Increasingly, the courts are conducting "hybrid" hearings, in which some participate physically present in a courtroom, and others do so remotely. We have had experience of one such trial recently in the Commercial Court, in which two counsel and two solicitors were in a room at the Rolls Building, and the parties/witnesses (and one of the solicitors) participated/watched remotely (including from India and Dubai). Appropriate preparation for the hearing (insofar as partly remote) was much as it is in respect of a fully remote hearing, though with certain points of practical difference:

(1) Counsel and their solicitors took their laptops to court and were connected to the hearing by means of the same link as those who were participating remotely – so that, for example, it was by these means that cross-examination took place, and the witness was able to see and engage with counsel. At the same time, there was a screen in the court which also displayed that which was taking place.

(2) In some respects, the presence of a number of people in one place made matters much simpler and more comfortable – for example, communication between counsel and solicitor during cross-examination, and the greater scope for more

lively and natural interaction between Judge and counsel (a reminder of why debate between people physically present with one another is not to be casually discarded).

(3) In other respects, matters were made more complicated – for example, the presence of both the Judge and the screen in court meant that counsel would often not look directly into the camera on his laptop, and would therefore become less clearly or only partially visible to those accessing the hearing remotely. In addition, the presence in one place of a number of participants meant greater scope for interference between the operation of their different computers, and of the court's facilities – in particular in respect of sound, where the microphones and loud speakers of all but the person talking had to be turned off to prevent feedback.

(4) Where any part of the hearing is taking place in person, ensure you have checked what procedures apply. For example, those participating in legal proceedings are exempt from quarantine restrictions; and current HMCTS guidance (10 August 2020) provides that court users are asked to wear a face covering inside, unless they are exempt, and are expected to provide their own face covering.

Opportunities for counsel to communicate with their opponent will not arise naturally ahead of the hearing, and so thought should be given to whether a direct approach should be made (in an attempt to narrow the issues or explore opportunities for settlement). In our experience Judges recognise this, and may leave counsel to attempt to resolve issues that have arisen during short adjournments or transcribers' breaks.

4. How should participants communicate during the hearing?

If a hearing is fully remote, or hybrid, arrangements must be made for individuals (on the same side – clients, solicitors and counsel) to communicate with one another as quickly as possible during the hearing. This aspect of remote litigation does present obvious difficulties, but essentially, do as much as is possible to reproduce the traditional personal experience. A number of steps can help:

(1) commonly, a WhatsApp group is created for team members (if at a hybrid hearing, to be used from within the court with the Judge's permission); it is worth bearing in mind that although WhatsApp desktop can be quicker to type on than using a phone, one disadvantage is that while muted messages on a phone will not disturb you, muted messages on WhatsApp desktop will still flash to the top of the pile and can be a distraction;

(2) it may be sensible to create more than one group – for example, counsel only, whole legal team, and solicitors/client;

(3) take particular care, of course, not to communicate inadvertently with the wrong person;

(4) it is sensible to ensure that the advocate is not bombarded with too many messages from numerous sources; where there are a number of team members, this can be achieved by designating one team member (preferably the junior barrister, if there is one) as the gatekeeper for messages that are passed to the advocate;

(5) Judges can simply be asked whether a moment can be taken to speak privately – our experience is that Judges have been extremely accommodating in this respect; all members of the legal team must be prepared to liaise quickly where time is allowed, and it can help to agree in advance when it might be helpful for counsel and solicitors to liaise;

(6) it is critical to ensure that the client is fully included in the process, which might otherwise seem to be continuing without any reference to them – particularly so if the hearing is "hybrid". To manage this, schedule conference calls to be held directly before and/or after the hearing, or for example, on breaking for lunch.

Three other points are also worth keeping in mind.

(1) However participants choose to communicate with one another, the manner in which they do so must not interfere with conduct of the hearing itself – for example, by producing noisy and distracting notifications.

(2) Whatever method is chosen, care must be taken avoid any "*unauthorised transmission of an image of, or sound made by, another person while the other person is viewing or listening to a broadcast*" of a remote hearing, contrary to s. 85B, Courts Act 2003 (as amended by the Coronavirus Act 2020).

(3) As noted above, care must be taken not to communicate inadvertently with the wrong person. (Readers will no doubt be aware of recent media coverage of inadvertent sharing of communications intended to be private.) If possible, use a separate device (or at the very least a different technology platform) to communicate privileged messages (and if not, take care to ensure your cursor is in the appropriate place before typing; it is very easy to type a quick message and send it using the return key before noticing it is going to the wrong recipient). Take care to check your microphone is muted when necessary. The need to guard against inadvertent communications applies as much (if not more) to communications during short breaks in the hearing (during which the live audio and video feeds will normally continue) as during the hearing itself: invariably these breaks are used for calls between leading and junior counsel and/or between counsel, solicitors and client, one of whom will often just have been addressing the court – so great care must be taken to ensure that that person's microphone has been muted and that his

or her video connection turned off before any post-mortem discussion takes place. The same applies at the end of the hearing: ensure the session has been closed (or that you are properly disconnected) before communicating.

Data protection considerations must of course be borne in mind. The Bar Council has provided some thoughts on the question here.

5. What role do written submissions play in a remote hearing?

Our experience suggests that skeleton arguments, and other written arguments or summaries of evidence or submissions produced during hearings (for example, written closing submissions, or an *aide memoire* for closing or to deal with specific points arising) have assumed increased importance in the context of remote hearings. Judges have tended to be less interventionist (for practical reasons) but have, in return, expected advocates to take particular care to make succinct and well directed submissions – and if possible, to do so by reference to a shared document. That being so, it may be appropriate in some cases to depart from the page number limits that apply in certain courts (for example, under para. J6.5 of the Commercial Court Guide) and/or to ensure that the written submissions are provided earlier than the dates usually provided for (for example, under para. J6.2 of the Commercial Court Guide).

One practical consequence of this is that the time required to prepare written submissions may increase, which given also the particular desirability of sharing documents with clients well in advance of remote hearings, means that there is a premium on agreeing, creating and delivering bundles as promptly as possible. (Bundles are discussed further at question 6 immediately below.)

6. How should the parties approach bundles for a remote hearing?

In a hearing proceeding wholly or partly remotely, it is even more important than normal that bundles are easy to use. This requires thought about their content, their structure, and their delivery.

Detailed Guidance has been provided by Mann J (with the President of the Family Division and the Senior Presiding Judge; note it is not for use in the tribunals). For Supreme Court and Privy Council hearings, the reader is referred to Practice Direction 14 and Practice Direction 9 respectively. Guidance is also provided in *Re TPS Investments (UK) Ltd* [2020] EWHC 1135 (Ch); [2020] BCC 437 (also known as *Re Tailby*; this case will be of general assistance even though it considers guidance issued in the Business and Property Courts in Manchester).

The reader is encouraged to look at that guidance; this section is confined to adding further comments from our experience.

Thought should be given to limiting the documents in the bundles to those necessary. Involve the advocate who will be appearing at the hearing in this process as early as possible, so that their input can be sought on what will be required.

Ask the court whether it would prefer hard copy or electronic bundles. If the intention is to use electronic bundles only, it is prudent to have hard copies of the key material (for example, pleadings, witness statements, expert reports, the core bundle (if any), written submissions, and notes for submissions or cross-examination).

For the purposes of preparing electronic bundles and for working with them, it is advisable to use professional PDF software. Familiarise yourself with the functionality of the software. For example, in addition to equipping you to meet the guidance identified above (for example, compiling bundles, paginating, and using bookmarks), it can also be very useful (for example) to be able to extract pages or passages, and to highlight them.

If the bundles are voluminous and resources permit, it can be useful to engage a document management provider, who can host the bundles, "push" documents to the court and witnesses, and deal with any technical problems. Participants may need an extra screen to facilitate this.

Ensure that any documents handed up during the course of the hearing make their way into an electronic bundle. Cooperate with the other parties to ensure that the court has clearly navigable supplementary bundles and duplication is avoided. In a recent matter, we used supplementary bundles with the index organised to reflect the main corpus of the hearing bundles, and used continuous pagination and tab numbering throughout these bundles.

It is worth emphasising – because it can make a substantial difference to the ease of the hearing and the mood of the Judge – that the page numbering of the electronic bundles should match the page numbering of the hard copies (so that a user can simply type the relevant number in and be taken directly to the correct page).

To send electronic bundles to the court, parties should use CE-file (if available), or send a link to an online data room (preferred) or an email; they should not use USB sticks (see para. 26 of the Remote Hearings Protocol).

Where there is a litigant in person who would ordinarily be responsible for preparation of bundles, represented parties are encouraged to offer their assistance.

7. How does oral evidence (cross-examination in particular) work in practice?

Some of the issues surrounding cross-examination by video are not of course entirely novel – it has long been possible for witnesses to be examined in this way, with the court's permission: see CPR r. 32.3, and *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10; [2005] 1 WLR 637. What has changed is that this method has become, for the time being at any rate, entirely commonplace, and that in the context of a fully remote hearing, all participants are taking part by video link, rather than the witness alone. The practice has become everyday rather than exceptional.

Preparation and prior testing of the witness's technology, appropriate environment and ready access to documents (in particular, help in navigating the witness through the hearing bundle) is critically important – as explained above at questions 2 and 3. Unquestionably, whether fairly or not, a failure to attend properly to these aspects can affect the quality of a witness's evidence and the weight attached to it by a Judge (if for no other reason than that anxiety is unlikely to enhance quality).

Unless the court gives permission, there should not be anyone in the room with a witness when they are participating in the hearing, and they must not consult any notes or other documents during the hearing, other than the trial bundles. This must be explained to the witness ahead of time, and it is good practice, in examination in chief, to ask the witness to confirm these circumstances. In some cases, it might be appropriate for one or more people to be physically present with the witness for certain purposes, for example, to assist with the trial bundle or with technical management. In those circumstances, it may also be appropriate to allow for a legal representative of the other side to be present, to ensure that only permitted assistance is given. Useful guidance has very recently been given by Andrew Baker J in *Navigator Equities Ltd & Vladimir Anatolevich Chernukhin v Oleg Vladimirovich Deripaska* [2020] EWHC 1798, at [9] of the judgment.

It is often (when it happens) reasonably obvious that a witness is being assisted in some way, for example, looking down or to one side of the camera regularly or in a way that suggests there may be someone else in the room or that they may be reading from sources other than the trial bundle. For example, in *CMA v Martin* [2020] EWHC 1751 (Ch), at an early point of Mr Martin's cross-examination, Judge Jones explicitly asked him whether he was relying on extant notes in answering questions (and instructed him not do so). The question was prompted by Mr Martin's fluent recitation of page references to documents relevant to a given issue, which plainly caused the Judge some concern.

In cases of real sensitivity, it may be necessary to ask the witness to turn their camera to give a complete view of the room where they are giving their evidence, or even to ask them to use a mirror enabling everyone to see the whole (or at least most) of the room, or to arrange for a solicitor to be with the witness while they give their evidence.

As to taking an oath or making an affirmation at the commencement of examination, the HMCTS guidance on telephone and video hearings during the coronavirus outbreak provides that if a witness is joining remotely and is required to take an oath or to make an affirmation, and they would like to take an oath using a sacred object, they must provide their own Holy Book or Scripture. Alternatively, they can take an oath without a sacred object, if they consider it will still be binding on them. They can of course still choose to make an affirmation rather than take an oath. Regardless of how the witness chooses to approach this, they are still bound legally to tell the truth. In practical terms, provide your client's witness(es) with a copy of the oath or affirmation for their use. The same principles will apply to interpreters (who will of course always be sworn in or affirmed in advance of the witness).

Questions are often asked about the ability of the Judge to assess a witness's credibility at a remote hearing. That concern can cut both ways – some clients worry that the Judge will not receive their evidence with its genuine force, that their evidence will be undermined; others worry that it will prove impossible to attack the other side's witnesses with sufficient vigour and undermine their evidence. It can be important for a Judge to see a witness in person. However, many Judges consider observation of a witness's demeanour to be the "lowest" of the court's tools – an unreliable guide to truth – and indeed, experience tells one that confidence and fluency are not necessarily hallmarks of honesty. Lieven J in *A Local Authority v Mother* [2020] EWHC 1086 (Fam), noted at [27]-[29] that the ability to observe a witness's demeanour in the courtroom was not a reliable way to judge credibility. See also *R (SS (Sri Lanka)) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [36]-[41].

In practice, the use of a video link may enable some witnesses to give more truthful and complete evidence, because they may feel less defensive than when in a courtroom. And on the other side, many counsel seem to have relished the proximity afforded by the appearance of the witness on a screen placed immediately in front of, and quite close to, the examiner. There seem therefore to be some benefits both ways, and overall, our view – based on our recent experience – is that it is not possible to generalise that a remote hearing is less good at getting to the truth than a courtroom hearing. As noted above, in *CMA v Martin* [2020] EWHC 1751 (Ch), Judge Jones explicitly noted in his Judgment that that "*the absence of the formalities of the court room environment and immediate proximity of counsel appeared to create a more relaxed environment for the witnesses and was beneficial*", and that the defendant's denials and evidence were received "*with the same force/impact as it would have done in a physical courtroom*".

It is any event worth remembering that in cases of acute evidential conflict, the documents (and indeed, the inherent probabilities) are often treated by the court as a far more reliable guide to truth than oral evidence – see for example, Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, at 57: "*It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives,*

and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth".

8. How should participants dress?

Remote hearings remain court hearings and the solemnity of the occasion should be observed as closely as it is in a courtroom. It follows that advocates and others who may appear in some way, or be visible, should dress precisely as if they were attending court physically – subject of course, as ever, to the Judge's permission (for example, in respect of robes, which have been dispensed with in most cases of which we have had recent experience – for example, *CMA v Martin* [2020] EWHC 1751 (Ch) and *Fine Care Homes v NatWest* [2020] EWHC 874 (Ch), where business suits were worn).

HMCTS has also published its risk assessments for those entering into its buildings. Current guidance (10 August 2020) is that court users are asked to wear a face covering inside, unless they are exempt. Users are requested to bring their own face coverings.

9. What about costs hearings?

Guidance for the conduct of remote costs hearings is here and here (this is directed, in large part, at detailed assessment hearings, but also contains guidance of more general application). Aside from this guidance, unless it is a detailed assessment hearing, we would expect remote hearings at which costs and other consequential matters are argued to proceed in accordance with the principles outlined above, and indeed this has been our experience.

Section Eight: Offshore Jurisdictions

Jonathan Crow QC, Donald Lilly, Alexander Cook, Joseph Wigley ©

Last updated: 2 September 2020

INTRODUCTION

We at 4 Stone Buildings have long enjoyed a close and collaborative relationship with clients and practitioners in many offshore centres, including both well-established jurisdictions such as Bermuda and the British Virgin Islands, and also more recent ones such as the Dubai International Financial Centre. Many members of Chambers appear regularly in the courts and tribunals of these jurisdictions, and/or provide advice in relation to proceedings and transactions there. The inclusion of this section in the e-book reflects the importance we attach to our overseas practices.

The chapters that follow explore a range of different issues, dealing both with substantive legal developments and also with the procedural and logistical considerations which have come into play in recent months. We deal in turn with issues arising in relation to our core practice areas of company law, corporate insolvency, personal insolvency and civil procedure. More generally, we also discuss the wider impact which the pandemic has had on civil litigation in these jurisdictions, and we consider some of the possible longer-term consequences that may flow from the practices that have developed and the experience that has been gained in recent months.

This section of the e-book will continue to be revised and expanded in future editions. If you would like to receive a notice by email when new editions are released, please email us at ebook@4stonebuildings.com.

Bermuda

Donald Lilly ©

Last Updated: 7 July 2020

INTRODUCTION

Bermuda entered into lockdown relatively swiftly and strongly, with flights being grounded in late March through the Quarantine (Travel Ban) Order 2020. On 21 March 2020, specified meeting places, such as swimming pools and places of worship, were closed pursuant to s. 88 Public Health Act 1949 and a rolling curfew was put in place on 27 March. A full lockdown of Bermuda took effect on 4 April, after a state of emergency under s. 14(3) of the Constitution of Bermuda had been declared three days earlier. The lockdown has been referred to as the "Shelter in Place", and it took effect through the Occupational Safety and Health (Covid-19) Temporary Regulations 2020 and the Emergency Powers (Covid-19 Shelter in Place) Regulations 2020. From 1 July 2020, Bermuda has entered 'Phase 4' re-opening, which means that a curfew continues to operate between 12pm and 5am, but that restrictions upon (among other activities) grocery shopping, retail stores and restaurants have greatly eased. Working from home is no longer mandated, although "those who can, should continue to work from home".

During the crisis, the courts in Bermuda have operated on a reduced basis, but have not closed entirely. On 17 March 2020, the court implemented a number of precautionary measures to reduce its operations and to reduce direct interactions between court staff and members of the public. These measures were increased on 23 March 2020 by way of Circular No. 6 of 2020, including an administrative adjournment of all matters listed before the Supreme Court during the period of 23 March and 3 April 2020. Facilities did remain operational for new applications that were "urgent or time sensitive", or responses on "urgent active applications" within the Probate Division. By Circular No. 07 of 2020, the administrative adjournment was extended to 17 April 2020, and the court remained active only for applications of "extreme urgency". Although the period of the administrative adjournment has not been extended, the earliest listing date for adjourned matters is 2 July 2020.

The court has subsequently issued the further Circulars No. 08 to 15 of 2020, which provide guidance as to the conduct of electronic hearings and the transition for the re-opening of the courts. The latest Circular No. 15 provides the presently in force guidance for the Supreme Court, which includes (among other things) that: (i) the court continues to "prioritize" the listing and hearing of "urgent" business; (ii) for non-urgent matters, any case that was administratively adjourned will be given priority for re-listing over new matters; and (iii) the court "may" require the parties to attend at court or via telephone or "alternative form of audio

visual technology" in accordance with Circular No. 8. The court has adopted what appears to be a broad approach to the meaning of urgent (see for example *Marshall Diel & Myers Limited v Crisson* [2020] SC (Bda) 27 Civ, at [11], an urgent listing regarding *Angel Bell* exceptions under a *Mareva* injunction).

Unlike the United Kingdom, Bermuda has not yet sought to implement statutory measures to alleviate the economic effects of the "Shelter at Home" lockdown or the impact of the pandemic generally. The Government of Bermuda has issued "Covid-19 Rent Relief Guidelines", which provide suggestions to landlords as to how they may assist their tenants to cope with rental payments despite the loss of income during the pandemic. The document is merely guidance and is dependent upon a mutually agreed variation of the lease, for which a *pro forma* addendum agreement is appended to the guidance. The Ministry of Home Affairs has also established an online "Price Gouging Complaint Form" for individuals to raise complaints in relation to vendors who have increased the prices of goods, services or commodities "*to a level much higher than is considered reasonable or fair, and is considered exploitative, potentially to an unethical extent*". This is a similar service that has historically been available in other times of national crisis, such as in the wake of a hurricane.

CORPORATE INSOLVENCY

1. Can Bermudian companies be wound up during the pandemic?

Due to the administrative adjournment of all matters, including those involving the winding up of companies, the non-urgent insolvency work of the Supreme Court was effectively suspended. Although the courts are now in a phased re-opening, adjourned matters have been re-listed, at their earliest, on 2 July 2020, so it is likely that the courts will face a significant amount of work in the short- to medium-term. The consequence of this is that non-urgent insolvency matters may not be heard as swiftly as could have been expected prior to the 'Shelter in Place' lockdown. However, up to 17 April 2020, urgent insolvency work continued, and thereafter, the court remained open for extremely urgent insolvency work.

Unlike the United Kingdom, there has not been any contemplated prohibition on the presentation of a winding-up petition. Whilst winding-up petitions in the normal course may not be heard as quickly as could normally be expected, at least in the short term, the court remains open for appropriate applications for the appointment of provisional liquidators, including so-called 'light touch' provisional liquidators, appointed for the purposes of restructuring rather than winding-up (established by Ward CJ in *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69 and recently commented upon by Kawaley CJ in *Re Z-Obee Holdings Limited* [2017] SC (Bda) 16 Com, at [6] and Hargun CJ in *Raswant v Centaur Ventures Ltd* [2019] SC (Bda) 55 Com, at [7] to [11]). Indeed, the availability of 'light touch' provisional liquidation has meant that the court has had the discretion to deal with

insolvent companies during the lockdown flexibly. Since provisional liquidators may be appointed in Bermuda for the purposes of rescuing a company as a going concern, as well as for the more orthodox reasons for appointment, such as preservation of assets, provided that the court is satisfied that a matter is urgent, it has been, and remains, available to wind up companies on a provisional basis, even if for restructuring purposes.

Indeed, only three days after the first administrative adjournment of matters before the Supreme Court, George's Bay Limited, one of the companies involved in the construction of the Ritz Carlton Hotel and residential development on Morgan's Point, was placed into provisional liquidation after an *ex parte* telephone hearing before the Chief Justice. The appointment was then confirmed at an *inter partes* hearing on 3 April 2020, also conducted by telephone before the Chief Justice.

Appointments of this type, in the midst of the pandemic, may present provisional liquidators with the unusual difficulty that whilst the court may be available to effect their appointment, it may not be as readily available to assist in the actual administration of such provisional liquidations (e.g. orders for examination under s. 195, Companies Act 1981). Moreover, given the international nature of many of the companies incorporated in Bermuda, there is a significant prospect that key directors, officers and assets will not be located in Bermuda. Thus, the actual job of winding-up a company, including the identification and protection of its assets, is likely to face significant delays in at least the short term. Not only will the Bermudian courts need to open for business generally (and resolve any backlog of work created by the administrative adjournments), but also lockdowns in other jurisdictions will need to be lifted or eased to enable the provisional liquidators to obtain judicial assistance from the courts in the jurisdictions in which key directors, officers and assets of the company are located.

Having said that, the court may be available to deal with such matters on the papers, without a hearing, where the circumstances of the case justify it doing so. This might in some cases alleviate the difficulties of listing matters pursuant to Circular No. 15. Furthermore, the same difficulties may not arise in respect of provisional liquidations for restructuring purposes sought at the instigation of the company itself, since the directors will have already necessarily been in a position to co-operate with the provisional liquidators in order to obtain their consent to act and thereafter their appointment. The recent judgment of *Re Agritrade Resources Limited* [2020] SC (Bda) Com is a good example of how a 'light touch' provisional liquidation has remained an effective means of restructuring an insolvent company, even when the restructuring concerns cross-border elements (in that case, Hong Kong and Singapore, in relation to which letters of request for recognition were issued by the court).

2. How can a creditor establish that a Bermudian company is insolvent?

The "Shelter in Place" lockdown presented logistical difficulties in serving a demand compliant with s. 162(a), Companies Act 1981. Moreover, if a company's registered office is the premises of their corporate agents, often associated with Bermudian law firms, even if the demand could be served there, the closure of those offices as part of the "Shelter in Place" lockdown is likely to result in delays in the demand coming to the attention of the directors.

There may be an increased tendency of creditors to rely upon evidence of insolvency other than a statutory demand (such as in *Re CTRAK Ltd* [1994] Bda LR 37 and *Re Gerova Financial Group Limited* [2011] Bda LR 20, in particular at [31] to [32]).

3. Can counterparties argue that the 'Shelter in Place' has frustrated a contract, or is a *force majeure* or material adverse change?

The Contract section above already addresses these topics and it is likely that Bermuda will follow the English approach, perhaps save in relation to one potential difference between the lockdown measures in the United Kingdom and those in Bermuda.

Unlike in the United Kingdom, Bermuda has a written constitution which has express provisions under s. 14(3) in relation to declarations of national emergencies. Once a national emergency has been declared – as occurred on 1 April 2020 – laws may be passed by the Bermuda legislature which are not subject to the constraints of ss. 5 to 12 of the Constitution (save for ss. 6(4) and 6(6)), provided that such laws are "reasonably justifiable" in the context of the national emergency. In particular, s. 11, which normally guarantees the freedom of movement in Bermuda, would not apply to laws passed under a state of emergency.

The ability of the Bermuda Government to pass its Covid-19 related legislation in pursuance of these Constitutional provisions means that the actions taken by the Bermuda Government may be less susceptible to challenge and also take on a more mandatory character than those in the United Kingdom. The British Government has already taken the position that at least some of the lockdown measures – for example, the closure of schools – were not mandatory requirements, but merely 'requests': see the Defence of the Secretary of State for Health & Social Care and the Secretary of State for Education at para. 73 in the *Dolan v Secretary of State for Health and Social Care* judicial review proceedings. Although permission in respect of these judicial review proceedings was refused by Lewis J on 6 July 2020 ([2020] EWHC 1796 (Admin)), the ramifications of the British Government's stance as to the non-mandatory nature of at least some of the lockdown provisions remains to be seen in the context of private disputes. Whether a particular measure amounts to, for example, a *force majeure,* could turn on such fine distinctions.

4. Does the pandemic cause complications to recognition of winding-up proceedings in other jurisdictions?

Insolvencies in Bermuda are, on the whole, more likely to take on an international character than insolvencies in some other jurisdictions due to the fact that Bermuda companies often have businesses (and therefore assets) that are not solely located within the jurisdiction. This poses additional complications for provisional liquidators and liquidators of Bermuda companies, since their ability to conduct the work of the winding-up may be hampered not only by the pandemic measures adopted by the Bermudian Government, but also those in other jurisdictions. Liquidators of companies that have foreign assets may need to investigate the abilities of the relevant foreign courts to handle recognition requests (e.g. Chapter 15 requests in the United States) at an early point in the liquidation, and likely will also need to account for delays, at least in the near future, as many courts in various jurisdictions continue to operate below 2019 capacities and face substantial backlogs of work once restrictions have been lifted.

5. Has there been a suspension of wrongful trading as in the United Kingdom?

The Bermudian Government has not passed or proposed legislation equivalent to s. 12, CIGA 2020.

PERSONAL INSOLVENCY

6. Is there expected to be a surge in the number of personal insolvencies in Bermuda?

Although Bermuda has not put in place equivalent support schemes such as furloughing in the United Kingdom (save for the Bermudian Covid-19 unemployment benefit), that is not an indication that the economy of the country has been unaffected by the pandemic. In particular, any industry linked to tourism or travel has necessarily been hardest hit, and a number of Bermudians rely upon jobs in those sectors.

Personal insolvencies may therefore be expected out of the crisis, although Bermuda is an affluent country with a high GDP, so personal wealth may be sufficient to see many individuals through the crisis.

7. What will the court's approach to bankruptcy petitions be?

As noted above, the administrative adjournment means that any bankruptcy petitions are unlikely to be heard before 2 July 2020, unless there are grounds for urgency. There is no equivalent to the 'light touch' provisional liquidation in the personal insolvency context, so the scope for seeking such an urgent hearing is more limited than in the corporate context.

Once bankruptcy petitions are heard in the normal course, it is unclear whether any leniency will be shown to individuals facing economic ruin due to the pandemic. No statutory safeguards have been placed before the legislature and the guidance to landlords, referred to in the introduction section, merely encourages landlords to find bespoke solutions on a case by case basis with tenants to help them through the crisis.

Bermuda may be guided to some extent by the approach adopted in England & Wales, insofar as it concerns the exercise of discretion, rather than statutory intervention (see the Personal Insolvency sub-section above).

COMPANY

8. Are directors of Bermudian companies protected from the consequences of a company becoming insolvent during the pandemic?

Unlike in the United Kingdom, there is no proposal in Bermuda to suspend wrongful trading, or otherwise diminish the obligations of the directors during the pandemic. However, as observed in the Company section above, the suspension of wrongful trading merely removes one source of liability for directors, and even directors of UK incorporated companies remain susceptible to claims, for example, for breaches of their fiduciary duties.

Therefore, directors of Bermudian companies face the same uncertainties as directors of companies incorporated in the United Kingdom, along with the added risk of a wrongful trading claim. Whether the Bermudian courts grant directors a degree of leniency, given that most companies in Bermuda have been forced to stop trading as a consequence of the Regulations enacted under the Constitutional emergency powers, remains to be seen. However, Bermudian directors must be particularly aware of the solvency (or insolvency) of their companies at the stage when the restrictions on trading for their business are lifted. If, at that stage, a company is hopelessly insolvent, a director who nonetheless decides to cause the company to re-enter the market and commence trading once again is likely to render himself or herself personally liable for debts incurred during that period of trading, if the company ultimately is wound up.

9. How can company meetings take place during the pandemic?

Bermudian company law already caters for telephonic and similar electronic meetings of directors or general meetings of members by operation of s. 75A, Companies Act 1981, provided that the Bye-Laws of the company do not expressly require meetings in person.

Further, any business other than the removal of directors or the appointment or removal of an auditor that otherwise is required to be done at a general meeting can be done by way of resolution in writing, subject to the Bye-Laws: see s. 77A, Companies Act 1981. Thus, the shareholders of a Bermudian company may dispense with an annual general meeting that was due to take place during the pandemic (see s. 71A, Companies Act 1981) by way of the written resolution procedure.

10. Have companies been given longer to file necessary accounts and records at the Registry?

No general extension of time for filings has been given, however the Registrar of Companies has implemented an electronic filing system to reduce physical contact within the Registry. From 18 March 2020, all filings are to be done electronically for which a detailed guidance note entitled "Industry Notice Coronavirus (COVID-19) dated 18 March 2020" was published. In it, the Registrar provides the email addresses to which filings must be sent, and the format that the emails and attachments must take to facilitate the quick processing of documents.

CIVIL PROCEDURE

11. What changes to Civil Procedure have there been in light of the pandemic?

The administrative adjournment and relevant court circulars have already been discussed above. Circular No. 08 of 2020 makes it clear that the use of electronic means to conduct hearings is intended to be temporary. In Circular No. 10 of 2020, the court has already indicated that in some cases the parties "may" be required to attend the court in person, but subject to appropriate safeguards (such as the wearing of face masks) being undertaken.

12. What might be the legacy of these temporary changes?

The success of the electronic hearings conducted by the Supreme Court during the pandemic may have a lasting impact on court business in Bermuda, as it may have in other jurisdictions such as England & Wales.

Other jurisdictions such as the Cayman Islands have turned to electronically based hearings more generally, especially for matters concerning internationally based counsel and clients. A question that the Bermudian Government, Judiciary, Bar Council and advocates will likely face coming out of this pandemic is whether it is in the best interests of Bermuda to adopt an electronic based court system more widely, even after the pandemic has subsided, or whether it is in the country's best interest to revert to the traditional hearings in person. The language of Circulars No. 8 and 10-15 of 2020 suggest that there is a present view from the Judiciary that electronic hearings should be a temporary feature in the Bermudian legal landscape.

No doubt Bermudian advocates and anyone interested in Bermuda's legal system will await with some anticipation any feedback from the Judges as to the efficacy of the electronic hearings conducted during this time, and whether the temporary measures endure beyond the end of the pandemic.

The British Virgin Islands

Alexander Cook ©

Last Updated: 2 September 2020

INTRODUCTION

Like many countries, the British Virgin Islands ("**BVI**") took swift action to control the spread of Covid-19 following its first detected cases, with a 24-hour lockdown being imposed from late March 2020 and lasting until late April 2020. This was replaced by a 17-hour curfew, under which residents were permitted to leave their homes only between 6.00 a.m. and 1.00 p.m. From late April 2020, the BVI underwent a phased internal re-opening, with certain businesses and public spaces re-opening, subject to restrictions. On 1 August 2020, the BVI announced a further positive case, having had a significant period without any infections. The detection of further cases during August has led to the imposition of a new curfew order between 1.00 p.m. and 5.00 a.m. from 2 September 2020 for a period of two weeks.

As at the time of writing, the borders in the BVI remain closed to visitors, with exceptions for returning Virgin Islanders, Belongers, Permanent Residents, naturalised citizens, as well as for freight and cargo vessels. Eligible travellers arriving in the BVI are required to quarantine for 14 days at pre-approved accommodation.

The impact of the pandemic on the way in which litigation is conducted in the BVI has been dramatic. The courts have largely continued to operate, with a number of measures having been implemented to facilitate the continued administration of justice including, most significantly, the swift introduction, by the Eastern Caribbean Supreme Court ("**ECSC**"), of the ECSC Covid-19 Emergency Measures Practice Direction on 25 March 2020 ("**Emergency Measures PD**"), currently in its 3rd Re-Issue.

Under the Emergency Measures PD, which will remain in force until the Chief Justice otherwise directs, hearings are generally to be conducted by remote means, while the rules for the filing and service of documents have been relaxed. The Chief Justice has also issued a press release expressly recommending that legal practitioners and members of the public to utilise mediation as a first port of call for the resolution of disputes in an effort to relieve the pressure which the pandemic has put on the court system.

As at the date of writing, the BVI has not put in place statutory measures such as legislation suspending wrongful trading, nor has it placed any limits on the circumstances in which companies may be placed into liquidation equivalent to those measures in England & Wales. That is not, of course, to say that it will necessarily be "business as usual". This section will

focus on some selected legal implications of the Covid-19 pandemic from a BVI law perspective.

CORPORATE INSOLVENCY

13. Can liquidators still be appointed over BVI companies during the pandemic?

The BVI has not, at present, enacted legislation which limits the operation of the Insolvency Act 2003 ("**IA 2003**"). It therefore remains possible for an application to be made for the appointment of liquidators in respect of a BVI or a foreign company. A liquidator may be appointed in respect of a foreign company where that company has a "*connection with the Virgin Islands*". An application to appoint liquidators can be made by persons which include the company itself, a creditor or a shareholder. A company may be wound up where *inter alia* (i) it is insolvent; (ii) the court is satisfied that it is just and equitable that liquidators be appointed; or (iii) it is in the public interest for a liquidator to be appointed.

Unlike under English law, when the BVI court orders the appointment of a liquidator, the liquidation will commence on the date of appointment and will not "relate back" to the date of the application for the appointment of liquidators.

14. What are the possible implications of the pandemic for BVI liquidations?

It remains to be seen whether the financial pressure which the pandemic will inevitably place on businesses around the world will result in a surge in the number of applications for the appointment of liquidators over BVI companies. That said, the global nature of the pandemic may have implications for BVI liquidations in a number of possible ways:

(1) A common corporate structure in the BVI is for a BVI company to act as the holding company for one or more overseas operating subsidiaries. Financial difficulties experienced by the operating subsidiary as a result of the pandemic may affect the solvency of the BVI company e.g. where the holding company has guaranteed the borrowing of, or offered assets as security for, the subsidiary. In such a scenario, the board of a BVI company may have to consider whether to apply for the appointment of liquidators over the BVI company. This is likely to be a difficult decision in any case (as discussed in question 16 below), but that difficulty may be exacerbated by the fact that the board is likely to require a full understanding of the subsidiary's position which, in turn, may depend not only upon the insolvency regime to which the subsidiary is subject, but also the local laws (if any) enacted in response to the pandemic. As discussed below, given that

a degree of protection is afforded to directors of BVI companies in circumstances where they take professional advice, it is important that such advice is taken at as early a stage as possible.

(2) Conversely, the shares in a BVI company or a bank account in the BVI might be an asset identified by a creditor of a foreign company in financial distress. In this scenario, liquidators may be appointed over a foreign company under s. 163, IA 2003 on the basis that the foreign company has assets in the BVI (s. 163(2), IA 2003). This could be particularly useful if, for example, the assets in the BVI are the foreign company's shares in a BVI company, especially where (as is common) that company itself has subsidiaries. In this scenario, the BVI liquidator can seek to exercise the foreign company's powers as shareholder in the BVI subsidiary to remove the board and otherwise secure the BVI company, and any subsidiaries and/or assets which it may have.

The advantage of appointing BVI liquidators over a foreign company, at least where, for example, the foreign country in question does not have a well-developed insolvency regime, is that the liquidation can be handled by experienced BVI professionals who are well-versed in tracking down and safeguarding assets. On the other hand, the impact of the pandemic may make it more difficult to satisfy the BVI court that "*there is a reasonable prospect that the appointment of a liquidator of the company under this Part will benefit the creditors of the company*", as required by s. 163(2), IA 2003. This may be because, for example, the BVI liquidator will not be recognised by the foreign court or due to the fact that, because of restrictions imposed by local legislation to tackle the pandemic, the liquidator is unable to deal adequately with the foreign company's assets.

(3) Finally, it has been predicted by some that the advent of the pandemic is likely to bring with it an increase in the incidence of fraud and fraudulent conduct, including in the corporate governance of companies (see, for example, this article). If this proves to be correct, it may well have implications for the winding-up process in the BVI. A potentially powerful weapon in the BVI litigant's armoury is the appointment of a provisional liquidator, which will enable the control of the company to be taken immediately out of the hands of its current management and into the hands of a professional office holder (s. 170, IA 2003). The main advantage of this route is that the applicant obtains an immediate remedy, often without notice to the board of the company in question, which will be particularly useful in cases of suspected fraud.

15. Is the statutory demand route the best way to establish insolvency during the pandemic?

One practical area where the closure of businesses in the BVI may have an impact on applications to appoint liquidators is where an applicant for an order under s. 162, IA 2003 seeks to rely on the statutory demand procedure in order to demonstrate insolvency. How might that statutory demand be served if the company's registered office is closed due to governmental restrictions?

The Emergency Measures PD provides, at para. 4.4, that "*notwithstanding the provisions of CPR 5.7 and CPR 6.2, a claim form or other document may be served on a limited company by sending it by e-mail to the registered office or Registered Agent of that limited company*".

However, s. 155(2)(g), IA 2003 requires a statutory demand to be served in accordance with the Insolvency Rules 2005 which, in turn, requires a statutory demand to be served physically at the company's registered office, or at the company's last known principal place of business in the Virgin Islands, or by leaving the document "*in such a way that it is likely to come to the attention of a person coming to the office*" (r. 26(2), Insolvency Rules 2005).

Would, say, affixing the demand to the door of an office closed due to the pandemic, whilst at the same time notifying the directors that the document has been left there, suffice? It seems doubtful that the test would be satisfied if it was known that, due to a lockdown imposed in response to the pandemic, no one would be coming to the office for a substantial period of time. In the light of the fact that s. 156(2), IA 2003 requires an application to set aside a statutory demand to be made 14 days after the date of service of the demand, there would be a real risk to a creditor proceeding with an application to appoint liquidators due to non-compliance with that statutory demand in these circumstances. Given the gradual re-opening of businesses in the BVI, this will hopefully not pose any difficulty in the future. However, applicants would be well advised to consider seeking to establish insolvency using further or alternative routes under s. 8, IA 2003, such as by adducing independent evidence of cash flow or balance sheet insolvency (s. 8(1)(c), IA 2003).

16. How might the duties of directors of BVI companies be affected by financial pressure caused by the pandemic?

Directors will need to continue to consider carefully their statutory duties given the financial pressure likely to be experienced by companies under their stewardship. Duties which are likely to be of particular relevance include the duty to act in what the director believes to be in the best interest of the company, as well as a duty of care and skill (ss. 120-122, Business Companies Act 2004 ("**BCA 2004**")).

There is no statutory provision of BVI law which provides expressly the point at which directors of BVI companies must consider the solvency of the company and the interests of creditors. However, it seems likely that the BVI court would follow the approach in England, which requires directors who know, or ought to know, that their company is, or is more likely than not to become, insolvent, to take into account the interests of creditors as opposed to managing the company principally for the benefit of its shareholders (*BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112; [2019] 2 All ER 784: see further the Company section above). The *Sequana* decision appears to have been treated as authoritative by the High Court in Anguilla (another member of the Organization of Eastern Caribbean States) in *Satay Limited et al v Martin Dinning et al* AXAHCV2016/0051.

There are obviously significant difficulties for directors in making the assessment as to when this duty will be engaged in the circumstances of the pandemic. For example, an evaluation as to whether the company is cash flow or balance sheet insolvent may involve difficult calculations based on assumptions about the future operations of the business, which may turn out to be inaccurate (e.g. forecasts of income may prove to be overly-optimistic, or asset valuations may, in hindsight, prove unrealistic). While this difficulty is not unique to directors of BVI companies, given the multi-jurisdictional nature of many BVI corporate structures (see subsection (2) under question 14 above), this may pose a significant challenge.

A possible silver lining for a director of a BVI company is that – unlike the position under the English CA 2006 – directors of BVI companies are protected by statute if they rely on advice received from professional advisers (including lawyers and accountants), provided that the director believes, on reasonable grounds, that those matters are within the person's professional or expert competence (s. 123(1), BCA 2004). Although this statutory provision does provide some protection for directors, ultimately it will be the director (and not the professional advisers) who will be responsible for deciding what action a company takes.

Finally, as under English law, BVI law does not necessarily limit "director" liability to persons who are formally appointed as *de jure* directors. The definition of a director for the purposes of the BCA 2004 "*includes a person occupying or acting in the position of director by whatever name called*", while the IA 2003 defines a director as "*a person who exercises, or is entitled to exercise or who controls or is entitled to control, the exercise of powers which, apart from the memorandum or articles, would fall to be exercised by the board*". Whether a person is likely to be found to be a *de facto* or shadow director will be a question of fact and degree: *Mark Byers & Ors v Chen Ningning* BVIHCVAP20150011 at [38].

It is not uncommon for the *de jure* directors of BVI companies to be professional nominee directors, who act on the instructions given to them by the beneficial owner of the company or other individuals. Depending on the circumstances, those individuals who give instructions may unwittingly fall within the definition of a shadow director (or, in some circumstances, a *de facto* director), and may therefore be exposed to liability as if they had been a director.

17. What liabilities could directors of BVI companies incur if they cause a company to trade whilst insolvent?

As mentioned in the introduction section above, the BVI has not implemented equivalent measures to the English provision in s. 12, CIGA 2020 (suspension of liability for wrongful trading) (see the Corporate Insolvency section above). The matter will therefore continue to be governed by the current statutory regimes; principally, IA 2003 and BCA 2004.

It remains to be seen whether the BVI court will grant directors a greater degree of latitude given the advent of the pandemic. The statutory tests appear to provide sufficient flexibility to enable the court to evaluate a director's conduct in the light of the current unusual circumstances. For example:

(1) Insolvent Trading (s. 256, IA 2003): The court will have the opportunity to weigh in the balance the difficult choices facing directors during the pandemic when deciding whether a director "*knew or ought to have concluded that there was no reasonable prospect that the company could avoid going into insolvent liquidation*" and/or whether, once the director knew that the company was going into insolvent liquidation, "*he took every step reasonably open to him to minimise the loss to the company's creditor*s". As regards the court's power to require a director to make "*such contribution, if any, to the company's assets as the Court considers proper*", the BVI court is likely to follow the English approach set out in the Corporate Insolvency section above.

(2) Fraudulent trading (s. 255, IA 2003): By contrast, where fraud is involved, it seems unlikely that the court will take a materially different approach to evaluating fraudulent conduct to that taken before. As mentioned above, it has been suggested by various commentators that the current environment will lead to an increase in the number of frauds. It is noteworthy that, under s. 255, liability extends to any person (not just a director) who, prior to an insolvent liquidation "*was knowingly a party to the carrying on of the business*": (i) with the intention to defraud the company's creditors or any other person; or (ii) for any fraudulent purpose.

(3) Disqualification (ss. 261-263, IA 2003): The court has the power to make a disqualification order against a director on the application of the Official Receiver following the insolvency of a company of which they were a director. The statutory criteria, which *inter alia* requires the court to be of the view that the person's conduct as director "*makes him unfit to be concerned in the promotion, formation or management of companies*". The standard is sufficiently flexible that the court will be able to take into account the pandemic in assessing the conduct of the directors, in line with the approach in the English cases such as *Re Grayan Building Services Ltd* [1994] 11 WLUK 151; [1995] Ch 241 at p.253 (which held that, in determining unfitness, the court is required to: "*decide whether* [the relevant]

conduct, viewed cumulatively…has fallen below the standards of probity and competence appropriate for persons to be fit to be directors of companies") and Re Barings plc (No 5) [1998] 12 WLUK 25; [1999] 1 BCLC 433 at p.483 (which emphasised that "*the defendant's conduct must be evaluated in context*").

18. Will any transactions be liable to be set aside if the company enters liquidation?

BVI law provides for the avoidance of certain transactions entered into during the "twilight" period prior to insolvency. The voidable transaction provisions under ss. 245-248, IA 2003 (unfair preferences, transactions at an undervalue, voidable floating charges and extortionate credit transactions) apply to transactions which are made:

(1) at a time when the company was insolvent in the sense of being unable to pay its debts as they fell due (but not necessarily balance sheet insolvent) at the time, or the transaction caused company to become insolvent (a so-called "**insolvency transaction**");

(2) within 6 months prior to the "*onset of insolvency*", which is usually the date of an application to appoint a liquidator (or 2 years if the transaction was with a "*connected person*"), or within 5 years of the onset of insolvency in the case of an "extortionate credit transaction ("**vulnerability period**").

Directors will face the risk that, where a company is insolvent or of doubtful solvency, every transaction entered into by the company will be the subject of heightened scrutiny by a liquidator subsequently appointed, especially if that transaction was with a person who is a "*connected person*" to the company within the meaning of s. 5, IA 2003. If the counterparty is "connected": (i) the vulnerability period will stretch back for a longer period; and (ii) it will be presumed that the transaction is an "insolvency transaction", and that it did not take place in the ordinary course of business.

Again, it remains to be seen how these provisions will be applied in the circumstances of the pandemic. Although these transactions are described in the IA 2003 as "voidable", the court in fact has a very broad discretion as to the relief which may be granted (s. 249, IA 2003).

It is noteworthy that s. 245, IA 2003 (unfair preferences) imposes an objective standard (looking at whether the transaction "*has the effect of*" putting the creditor into a better position), as opposed to the position in England where the test is whether there is an "*intention to prefer*". Thus, under the IA 2003, it is not necessary for the company to be influenced by a desire to prefer the creditor. This distinction may prove crucial where the court is examining a payment made to a creditor in circumstances where the company did not intend to prefer the creditor in question, although this was the effect of the transaction.

COMPANY LAW

19. How might a shareholder's position be affected by the pandemic?

As in any economic crisis, there are threats and opportunities. This is likely to be truer than ever as the economic pressure on companies deepens. In the BVI, as elsewhere, there is the risk that controlling shareholders will take steps to favour their own interests at the expense of those with a minority stake.

As a major incorporation centre, the BVI seems likely to see an increase in shareholder disputes being litigated before its courts as the fallout from the pandemic unfolds. The BCA 2004 has a wide range of remedies available for shareholders in such circumstances, including unfair prejudice relief (s. 184I), derivative claims (s. 184C) and applications to appoint liquidators on the just and equitable ground (s. 184I(2)(f) or s. 162(1)(b) IA 2003), all of which are likely to be well-utilised over the coming months and years.

Given the likely squeeze on asset and company values, majority shareholders may have less to fear from traditional minority protections such as unfair prejudice relief under s. 184I – if, for example, the value of the company in which they are a shareholder has fallen, majorities may be less concerned about an order of the court requiring them to buy out the minority shareholder because it may enable the majority to do so at a relatively low price.

The pandemic may also increase the need for shareholders or other litigants to obtain interim relief in the BVI to protect the assets of BVI companies which are the subject matter of litigation, either in the BVI or elsewhere, or where the BVI companies are themselves the property of a party to litigation against which the claimant proposes to enforce.

In this regard, shockwaves from the recent decision of the Eastern Caribbean Court of Appeal in *Broad Idea International v Convoy Collateral* BVIHCMAP2019/0026 are likely to reverberate for some time to come, at least pending urgent statutory intervention. In *Broad Idea*, the Court of Appeal held that the decision in *Black Swan Investment ISA v Harvest View Limited* BVIHC (Com) 2009/399 (which held that the court had jurisdiction to impose a free-standing freezing injunction in BVI in support of foreign proceedings, without the need to bring a substantive claim in the BVI) was wrongly decided.

Now, therefore, where a shareholder litigating foreign proceedings wishes to obtain interim relief in the BVI in respect of a company which it believes is a repository for assets of the defendant to the foreign proceedings, the shareholder may need to consider whether: (i) any direct cause of action may be asserted against the BVI company; and/or (ii) the substantive defendant to the foreign proceedings may be joined as a defendant to a claim in the BVI so that the court may exercise its *Chabra* jurisdiction to grant an injunction over the BVI company

(*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231). Possibilities in this regard are discussed in the interesting recent decision of *Commercial Bank Of Dubai v 18 Elvaston Place* BVIHC (COM) 2020/0070.

By contrast, where the foreign proceeding in question is an arbitration, s. 43, Arbitration Act 2013 gives the BVI court the power to grant an "interim measure" in support of a foreign arbitral proceeding, provided that the award may be enforced in the BVI.

20. Can company meetings be held remotely by electronic means?

Although the BVI is easing out of its lockdown and many businesses are now able to re-open, directors or members of BVI companies may either wish to conduct corporate meetings remotely, or they may be physically located outside the BVI in a country in which the local laws do not permit a physical meeting.

Even before the pandemic, BVI company law provided significant flexibility. Subject to any contrary provision in the company's memorandum and articles of association:

(1) the directors can determine when, where, and how meetings should take place (s. 126(1), BCA 2004); and

(2) a meeting of the members of a company may be held at such time and in such place, within or outside the Virgin Islands, as the convener of the meeting considers appropriate (s. 82(3), BCA 2004).

A director or a member of the company shall be deemed to be present at a meeting if he participates by telephone or other electronic means, and all directors or members participating in the meeting are able to hear each other (ss. 126(2) and 82(4)(b), BCA 2004, respectively).

Directors may also execute written consents to pass resolutions *in lieu* of holding meetings (s. 129(1), BCA 2004). Likewise, a members' resolution may be adopted instead of a vote being taken at a meeting (s. 81, BCA 2004).

For both of the above types of meetings, the quorum and notice requirements must be followed in the same way as if the meeting were to be a physical meeting.

CONTRACT

21. Might the pandemic entitle a party to rely on a *force majeure* clause?

The pandemic is likely to see parties seek to resile from, or renegotiate, their contractual arrangements in response to economic hardship. The nature and scope of a *force majeure* clause is the subject of a wealth of common law authority, and is explored in detail in the Contracts section above (see that section for the discussion of other relevant issues of contract law, such as frustration and also material adverse change clauses).

It is likely that the BVI Court will follow the approach in the English decisions as far as *force majeure* clauses are concerned. In *Applied Enterprises Ltd v Interisle Holdings Ltd et al* BVIHCV (COM) 2012/0135, the Commercial Court had to consider the issue of a *force majeure* defence in the context of an application for summary judgment.

The defendant argued *inter alia* that its failure to pay under the contract been hindered by circumstances beyond its control – namely, the general economic downturn and difficulty of obtaining credit following the 2008 financial crisis. The claimant cited the English authority of *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm); [2010] 2 Lloyd's Rep. 668 (see above) as being authority for the proposition that changes in economic circumstances or market conditions are not a *force majeure* event. The Judge refused to grant summary judgment against the defendant, holding that:

> "*each force majeure clause must be construed upon its particular wording in the context of the contract within which it appears and against the relevant surrounding circumstances, in order to come to a decision what a reasonable person would have understood the parties to have meant*".

The Judge went on to conclude that the clause in question was extremely wide in terms, and that it was "*far from obvious*" that the clause would not operate to exclude an inability to obtain credit, particularly where (at least initially), it was envisaged that the payment would be funded by means of a loan.[14]

Overall, it will, in all cases, be for the court to construe the precise terms of the *force majeure* clause, so there is inevitably a limit on what may be drawn from the court's interpretation of one clause when considering another.

[14] In in the context of an argument to similar effect, Mathurin J, in the High Court of Anguilla, remarked that "*in the absence of anything in contradiction or other compelling authority… in order for economic circumstances to be considered as a force majeure defence it has to be specifically contracted as a term*" (*Temenos Development Inc. v Luxury Properties et al* AXAHCV2013/0078 at para. 15).

CIVIL PROCEDURE

22. What impact has the pandemic had on litigating in the BVI?

As mentioned in the introduction, the ECSC acted decisively to implement the Emergency Measures PD, which puts into place a number of measures to minimise the risks associated with the pandemic on the conduct of litigation and hearings, while still enabling the court and hearings to continue to operate.

Particular areas covered by the Emergency Measures PD include:

(1) Service and filing of documents: Service of court documents is permitted by e-mail (para. 4.1) and filed at court using the court's existing e-litigation portal (in default of which email may be used (para. 3)).

(2) Operation of the Commercial Court: The Court will continue to operate, but "*all in-person appearances are discouraged*" (para. 5). Where the judicial officer deems it fit for a hearing to be conducted in person, attendance will be limited to attorneys, parties, and necessary witnesses only. The Emergency PD provides detailed guidance for remote hearings, including provisions concerning attendance and recording of hearings (para. 5.8).

(3) Electronic bundles: Detailed guidance on the preparation of electronic hearing bundles and trial bundles appears in Schedule 2 of the Emergency Measures PD.

In our experience, the BVI court has been very flexible, recently accommodating a month-long witness trial with counsel, witnesses and experts participating from five continents. The Court will, however, remain in control of its own processes. In *PT Ventures SGPS SA v Vidatel Limited* BVIHC (COM) 2015/0117, the Court refused the parties' application for the use of a third party video conferencing system, operated by the International Dispute Resolution Centre in London, for the trial. The Court held that its own conferencing system was to be preferred *inter alia* so that the Court could ensure the security and control of its own proceedings. The Court also rejected the parties' request that an unofficial recording of the trial be made for the purposes of the Live Note transcription service, holding that there was no good reason for departing from the prohibition on unofficial recordings of court proceedings in paragraph 10.2 of the Emergency Measures PD.

The BVI court has also had to grapple with the impact of the pandemic in other jurisdictions insofar as that has an impact on litigation in the BVI.

A recent example is provided by *Starr Investments Cayman II Inc v Ou Wen Lin* BVIHC (COM) 2018/0225. In that case, the applicant sought an adjournment of the return date of a hearing due to the fact that service of the application on the respondent in China under the Hague Convention was impossible because of the closure of the Service of Process Unit in

London as a result of the pandemic. Jack J observed that, under the overriding objective of the CPR, the court must ensure that cases are "*dealt with expeditiously*". The learned Judge indicated that he was not minded to grant a further adjournment of the return date, and invited the applicant to consider ways in which the matter could be progressed in the meantime using the court's power to order alternative service by a specified method under CPR r. 5.14 (including possibly service on the BVI registered agent of the respondent) or the court's power to dispense with service under CPR r. 42.12. Although no order was made in *Starr Investments*, this case demonstrates that the BVI Court will be prepared to deal robustly with the progression of litigation, notwithstanding the exigencies caused by the current pandemic.

What, then, does the future hold for the way in which litigation is conducted in the BVI? While physical hearings will undoubtedly resume once again (particularly, one would imagine, for heavy trials), certain aspects of litigation are unlikely to return to the way they were prior to the pandemic. The court and legal practitioners have become very well-used to conducting hearings (including hearings where witnesses are cross-examined) by remote means. Video link hearings may be utilised more often than they were previously, especially for shorter or more straightforward hearings and/or hearings where the parties wish for foreign counsel to appear at short notice. Similarly, while the ECSC had implemented the Electronic Litigation Portal for the filing of court documents prior to the outbreak of the pandemic, the pandemic may accelerate moves towards further ways of working electronically, such as provision of electronic bundles as standard for all hearings.

Dubai International Financial Centre

Joseph Wigley ©

Last Updated: 2 September 2020

INTRODUCTION

From March 2020 until the end of May 2020, the DIFC courts were physically closed and court employees conducted operations remotely from home. On 31 May 2020, all DIFC court premises re-opened and all staff returned to the workplace by 14 June 2020. However, as explained further below, even during the period of physical closure, the DIFC courts continued to operate and to offer a full range of services.

In response to the pandemic, the DIFC has taken a number of measures. Of particular relevance, the DIFC issued Presidential Directive No. 4 of 2020 in Respect of COVID-19 Emergency Measures (the "**DIFC COVID-19 Directive**"), which was effective from 21 April 2020 to 31 July 2020 (the "**Emergency Period**").

In addition to seeking to provide more flexibility for employees and employers to allow them to deviate from their obligations under DIFC Employment Law during the Emergency Period, as explained further below, the DIFC COVID-19 Directive suspended during the Emergency Period rules relating to wrongful trading. As the official press release announcing the DIFC COVID-19 Directive explained, the measure to suspend wrongful trading provisions "*...eases concerns of DIFC company directors that they may be held personally liable for continuing to trade amid the heightened uncertainty created by the COVID-19 pandemic*".

In this section, in addition to considering the impact of the DIFC COVID-19 Directive on the DIFC's wrongful trading provisions, the impact of the pandemic more generally on the operations of the DIFC Courts and the measures which have been taken to provide assistance and/or regulatory relief to the DIFC's financial services community, a number of relevant issues which may arise in the context of the pandemic in the areas of insolvency and contract law are explored below.

COMPANY / INSOLVENCY LAW: DIRECTORS DUTIES AND LIABILITY

23. Are directors of DIFC companies protected from the consequences of a company becoming insolvent during the pandemic?

As in the United Kingdom, the DIFC suspended liability for wrongful trading for a limited period during the pandemic, as explained further below.

However, it is important to emphasise that, notwithstanding the suspension of wrongful trading, directors of DIFC companies remain susceptible to claims brought on other bases, for example, for breaches of their fiduciary duties.

24. Suspension of liability for wrongful trading – to whom does it apply and for how long?

The suspension of liability for wrongful trading applied for an emergency period from 21 April 2020 to 31 July 2020 to directors (including alternate directors or persons not validly appointed as a director, but acting in the position of a director) of companies established in the DIFC.

Under Article 113, DIFC Insolvency Law (Law No. 1 of 2019) (the "**DIFC Insolvency Law**"), where a director of a company knew, or ought to have known, that there was no reasonable prospect of the company avoiding insolvent liquidation, the director must take every step with a view to minimising the potential loss to the company's creditors as the director ought to have taken. The facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known, ascertained, reached or taken, by a reasonably diligent person having both: (a) the general knowledge, skill and experience that may reasonable be expected of a person carrying out the same functions as are carried out by that director; and (b) the general knowledge, skill and experience that that director has.

If the director does not take those steps, and if the company does subsequently go into insolvent liquidation, then the court, on the application of the company's liquidator, may order the director to make such contribution to the company's assets as it thinks proper pursuant to Art. 115, DIFC Insolvency Law.

Given the potentially serious personal consequences, the possibility of being found to have breached such provisions unsurprisingly makes directors nervous and may cause them to cease trading before strictly necessary. In an effort to avoid businesses ceasing trading unnecessarily in the context of the pandemic, para. 15(1), DIFC COVID-19 Directive, which took effect from 21 April 2020, provided that the wrongful trading provisions and related liability provided for

in Arts. 113 and 115, DIFC Insolvency Law, were suspended for the duration of an emergency period from 21 April 2020 to 31 July 2020.

Paragraph 15(2), DIFC COVID-19 Directive, states by way of explanation that such suspension is "*...intended to ensure that directors of DIFC companies in the current uncertain environment are able to take decisions to continue to trade, incur new credit and make decisions which may otherwise cause directors concern about the potential for personal liability under the wrongful trading regime set out in Articles 113 and 115 of the Insolvency Law*".

The DIFC COVID-19 Directive therefore appears temporarily to have removed the threat of personal liability arising from Arts. 113 and 115, DIFC Insolvency Law, for directors who continue to trade during the pandemic. However, just as in relation to the equivalent measure in the United Kingdom, as explained in some detail in the Corporate Insolvency section above, there remain a number of uncertainties as to how the suspension is to operate in practice, including, for example, if a company does eventually go into liquidation sometime after the relevant period, how it will be possible to determine which element of the loss is to be excised from any claim as having arisen during the relevant period.

CORPORATE INSOLVENCY

25. What tools are potentially available under the DIFC's existing insolvency regime to assist companies in financial difficulty?

The recently introduced DIFC Insolvency Law, which came into force on 13 June 2019, has proved to be a timely update to the DIFC's insolvency regime in light of the advent of the pandemic. In particular, the DIFC Insolvency Law, in addition to retaining previously available tools (namely company voluntary arrangements (CVAs), receiverships, and liquidations) now makes provision for:

(1) a new rehabilitation (debtor-in-possession) process (see Part 3, Arts. 13-31, DIFC Insolvency Law); and

(2) a new administration process (see Part 4, Arts. 32-41, DIFC Insolvency Law).

The rehabilitation process allows a DIFC company to apply for a Rehabilitation Plan (an arrangement proposed by the creditors or shareholders of the company under Part 3, DIFC Insolvency Law) where the debtor is, or is likely to become, unable to pay its debts and there is a reasonable likelihood of a successful Rehabilitation Plan being agreed between the company and its creditors and shareholders (see Art. 13).

If at least three-quarters in value of any class of creditors or shareholders agree to the Rehabilitation Plan and it is sanctioned by the court, it is then binding on all persons within the relevant class (see Art. 25).

The rehabilitation process allows the debtor to retain control and the debtor's directors to continue to manage the debtor's affairs, although the debtor must appoint at least one registered insolvency practitioner as a rehabilitation nominee whose role is to assist the debtor with the implementation of the rehabilitation plan (see Art. 22).

Key relevant features of the rehabilitation regime include:

(1) upon the application for a Rehabilitation Plan being made to the DIFC court, a 120-day moratorium applying to all creditors (secured or unsecured and irrespective of whether they have consented) in respect of the company thus preventing any enforcement proceedings from being brought or continued (see Arts. 15(2), 16 and 18); and

(2) an additional limitation on the application of so-called "*ipso facto*" clauses (which make provision for termination rights upon insolvency) during the moratorium period (see Art. 18(2)).

As to the new administration process, pursuant to Art. 32(1) a creditor may only apply for the appointment of an administrator in circumstances where an application for rehabilitation has been made and there is evidence of misconduct. If appointed, the administrator, who must be a registered insolvency practitioner, takes control of the company's affairs (see Art. 32(6)).

In determining whether to appoint an administrator, the court must be satisfied that the company is, or is likely to become, unable to pay its debts; and the appointment of an administrator is likely to make it more likely to achieve a Rehabilitation Plan, a company voluntary arrangement, a scheme of arrangement under the DIFC Companies Law (Law No.5 of 2018) or to investigate mismanagement or illegality related to the company's affairs. During the period of appointment of an administrator, a moratorium shall also apply, any application for winding-up dismissed and any administrative receiver vacate office (see Arts. 33-34).

CONTRACT LAW

26. Might a party be able to terminate a contract on account of failure of performance caused by the impact of the pandemic?

Articles 86 to 88, DIFC Contract Law (DIFC Law No.6 of 2004) (the "**DIFC Contract Law**") provide that a party, upon giving notice, may terminate a contract where a party fails to perform an obligation under the contract, or it is clear that he will fail to do so, and the failure amounts

to a fundamental non-performance. Pursuant to Article 86(2), in determining whether a failure to perform constitutes 'fundamental non-performance' the court should have regard to, among other things, whether:

(1) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract;

(2) strict compliance with the obligation which has not been performed is of the essence under the contract;

(3) the non-performance is intentional or reckless; and

(4) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

Article 90 provides that upon termination under Articles 86 to 88 either party may claim restitution of whatever it supplied provided that such party concurrently makes restitution of whatever it has received.

It appears that the DIFC Courts may look sympathetically upon contractual parties seeking to terminate contracts owing to a party's non-performance, notwithstanding that the failure to perform was caused by the impact of the pandemic. In *Liberty V (1) Lance Real Estate Broker (2) Lucian (3) Lilyana (4) Lucille (5) Lucca (6) Lacey (7) Lexi (8) Lawsan* 2020 [DIFC] SCT 128 (June 18, 2020) SCT Judge Maha Al Mehairi held that the claimant purchaser of residential property was entitled to, and did, terminate an agreement to purchase due to the defendant seller's non-performance of the said agreement owing to the inability of the defendant seller's representative to travel to the UAE due to the travel disruption caused by the pandemic. The claimant purchaser was also held to be entitled to repayment of the purchase deposit by way of restitution.

27. Might the pandemic entitle a party to rely on a *force majeure* clause?

A party to a contract may seek to rely upon *force majeure* to excuse non-performance.

As explained in further detail in the Contracts section of this e-book, generally, as a matter of English law there are two requirements which must be satisfied for an event to constitute *force majeure*:

(1) first, that it could not reasonably have been foreseen by the parties; and

(2) secondly, that both it and its consequences were not within the parties' control.

As again explained in further detail in the Contracts section above, however, in English law, in circumstances where there is no statutory or common law basis for the operation of *force majeure*, if an express *force majeure* clause is not contained in a contract, it is unlikely that a court would imply a term to that effect.

In contrast, in the DIFC, Art. 82, DIFC Contract Law, in effect implies a *force majeure* provision into contracts which are governed by DIFC law (as was confirmed in *DIFC Investments LLC v Mohammed Akbar Mohammed Zia* [2017] DIFC CFI 001). Art. 82(1), DIFC Contract Law, provides:

> "*Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*"

It should be noted, however, that parties are able to vary or exclude Article 82 (see Art. 11, DIFC Contract Law).

As will be apparent, Article 82(1) mirrors the general requirements for *force majeure* to apply referred to above, namely that the event could not reasonably have been foreseen and was beyond the parties' control.

There is, however, an important exception, namely in respect of obligations to pay. As a result of this exception, Article 82(1) alone will not excuse a party from payment of sums due under a contract governed by DIFC law if payment cannot be made due to the pandemic.

As to the effect of *force majeure*, Article 82(2) provides that:

> "*When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on performance of the contract.*"

What is 'reasonable' for these purposes will be dependent on various factors, including the nature of the contract and the connection between the effects of the impediment consequential upon the pandemic and the affected party's performance.

In circumstances where the effects of the pandemic are likely only to be temporary, it is unlikely that a party claiming to have been impeded could successfully rely on Article 82 in order to seek the cancellation of the contract (although not impossible dependent upon the circumstances).

Pursuant to Article 82(3), within a reasonable time after the impeded party knew or ought to have known of the impediment, that party must give notice to its counterparty of the

impediment and its effect on its ability to perform. A failure to do so will render the affected party liable for damages.

The author is not aware of a case in which Article 82 has been relied upon to excuse non-performance since the onset of the pandemic (it is perhaps surprising that it does not appear to have been relied upon in *Liberty V (1) Lance Real Estate Broker (2) Lucian (3) Lilyana (4) Lucille (5) Lucca (6) Lacey (7) Lexi (8) Lawsan* 2020 [DIFC] SCT 128 (June 18, 2020) referred to above). In *Landin v (1) Lakhan (2) Lakshmi* [2020] DIFC SCT 177 (July 29, 2020), the claimant sought to recover unpaid legal fees from the defendants. The defendants had refused to pay the claimant's invoices in April 2020, explaining in an email to the claimant that the economic situation caused by the pandemic had caused their customers to default on payments and that "[u]*nder such economic force major situation [Covid-19]*" they could no longer afford the claimant's fees. However, it does not appear from the judgment that the defendants sought to rely on *force majeure* in their defence. It is nevertheless worth noting that SCT Judge Nassir Al Nasser, in finding in favour of the claimant, observed at paragraph 39 of his judgment (albeit *obiter* in circumstances where) that "[t]*he COVID-19 pandemic does not release a party from its obligations to honour the Agreement*".

For an example of a case in which the DIFC courts have considered the operation of *force majeure*, see *Gert v Germaine* [2016] DIFC SCT 097, in which the court held that the defendant landlord was unable to rely on *force majeure* to excuse his failure to carry out maintenance in a property.

Furthermore, in circumstances where common law authorities, and in particular English case law, are generally persuasive in the DIFC, the reader is referred to the detailed guidance set out in the Contracts section of this e-book, which deals with *force majeure* clauses as a matter of English law.

28. Will the pandemic frustrate DIFC contracts?

There is no specific provision governing the frustration of contracts in the DIFC Contract Law or elsewhere in DIFC legislation. However, in such circumstances, the DIFC courts are able to look beyond DIFC law and supplement it with the application of the common law.

As explained in detail in the Contracts section above, the frustration of a contract is the automatic discharge of the contract by reason of a supervening event for which neither party to the contract is responsible. The essential element is that the supervening event renders fulfilment of the contract impossible, or radically transforms the performance obligation from that undertaken at the outset. Upon a contract being frustrated in this way, the contracting parties will no longer be bound to perform their obligations and will thus be excused from liability for damages for any such non-performance.

Whether the pandemic has the effect of frustrating a contract will be dependent upon the nature of the contract itself and the effect that the pandemic has had on the parties' ability to perform their obligations under the contract in question. In order to assess whether frustration might be arguable in respect of any particular case, the reader is referred to the detailed guidance set out in the Contracts section above, which deals with frustration.

Interestingly, in *DIFC Investments LLC v Mohammed Akbar Mohammed Zia* [2017] DIFC CFI 001, referred to above, the defendant does appear to have relied on the doctrine of frustration, contending that various acts of the claimant bank had "frustrated" the contracts in question. However, the Judge, considering that the defendant's "*...brief mention that the acts of the bank "frustrated" the [c]ontracts ha[d] not been fully pleaded...*" went on to assess simply whether the acts of the bank constituted a *force majeure* pursuant to Art. 82, DIFC Contract Law, holding that they did not in circumstances where the obligation in question was an obligation to pay, and therefore Article 82 did not apply.

29. What impact, if any did the DIFC COVID-19 Directive have on contracts?

Other than suspending wrongful trading provisions addressed in further detail above, the measures introduced by the DIFC COVID-19 Directive were overwhelmingly focussed on employment contracts and employment law more generally which are beyond the scope of this e-book.

FINANCIAL SERVICES

30. What initiatives have been introduced in order to provide assistance and/or regulatory relief to the DIFC's financial services community?

The Dubai Financial Services Authority ("**DFSA**") has introduced a number of initiatives aimed to provide assistance and regulatory relief to the DIFC's financial services.

On 24 March 2020 the DFSA issued a letter outlining its various responses to the pandemic, including how it intends to continue its operations in the context of the pandemic, how it has engaged with international financial services regulators, and how it intends to continue to engage with regulated firms.

On 7 April 2020 the DFSA announced a number of measures it was taking to support the DIFC's financial services community, including:

(1) ensuring that new businesses coming into the DIFC:

(a) are given more time to complete the application and authorisation processes and meet the set-up requirements to commence business;

(b) receive a reduction in application fees for the remainder of 2020 and flexibility in requirements for permanent premises;

(2) ensuring that existing authorised firms will be able to obtain:

(a) an extension of time for filing a number of returns and reports;

(b) flexibility in meeting authorised individual obligations, including extending the amount of time that temporary cover can be in place;

(c) a waiver of fees for applications relating to authorised individuals;

(d) temporary relief from capital requirements for those firms which do not hold or control client assets or hold insurance monies;

(e) a waiver of various fees for applications for waivers and modifications for the remainder of 2020.

PROCEDURE

31. What impact has the pandemic had on litigating in the DIFC?

The DIFC courts have operated an online Court Registry system for several years, and more recently have introduced e-bundling requirements. Furthermore, the DIFC courts are experienced in facilitating hearings with some or all participants attending remotely via telephone or video conference, and the DIFC Court Rules are sufficiently flexible to cater for such remote or hybrid hearings.

In the circumstances, the advent of the pandemic and the physical closure of the DIFC courts had more limited impact than it might otherwise have done as the DIFC courts were well-equipped to move to entirely online procedures and remote hearings. In particular, matters have continued to be listed for hearing, and case management timetables are not generally being stayed or subject to material delay, at least, solely on grounds that the restrictions imposed as a consequence of the pandemic have impacted upon the courts' operational capability.

The DIFC Courts issued an update on 17 March 2020. The guidance contained in the update, provides, among other things, that:

(1) generally speaking, all hearings in the Court of First Instance will be via teleconference, ideally using the e-bundling platform;

(2) all hearings conducted for Small Claims Tribunal (SCT) cases will be either through videoconference (for overseas litigants) or teleconference (for those situated in the UAE) and in line with the SCT's usual process, all documents must be filed electronically;

(3) practitioners and court users are encouraged to email the Registry for all enquiries using the email addresses provided;

(4) for urgent queries and applications, practitioners and court users are to contact the Registry by telephone using the telephone numbers provided; and

(5) court filing fees may be paid either through wire transfer or online through the payment link received upon filing a document on the Case Management System as explained in further detail in the guidance.

32. What approach have the DIFC Courts taken to extending time for compliance with court deadlines on account of the impact of the pandemic?

The DIFC Courts are likely to take a sympathetic approach to applications to extend time in the context of the pandemic. By way of example:

(1) in CFI 029/2019 *Bassam Khalifa v S.W.I.F.T (Dubai) Limited* (June 9, 2020), H.E. Justice Omar Al Muhairi retrospectively extended the time for filing an Appellant's Notice in circumstances where, while the Appellant's Notice itself had been submitted to the e-registry on time, payment of the filing fee was late and such late payment was attributed to the context of the pandemic; and

(2) in CFI 015/2020 *Mohammad Juma Khamis Buamaim v Falcon Golf Management Ltd* (August 10, 2020; CFI), on an application to set aside judgment in default of a defence to counterclaim which was due to be served and filed by 31 March 2020, H.E Justice Ali Al Madhani, having cited with approval the judgment of Knowles J in the recent English authority of *MS v A local authority* [2020] EWHC 1622 (QB) held on the facts of that case that the pandemic and the situation which it gave rise to were by themselves good reasons to set aside default judgment.