



LANDLORD OR CORPORATE TENANT? HERE'S WHAT YOU NEED TO KNOW ABOUT THE CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020

On 26 June 2020, the eagerly anticipated Corporate Insolvency and Governance Act 2020 (“CIGA”) came into force. The result is that the changes made to insolvency law will now hinder the ability of landlords to recover unpaid rent from its tenants. We look at how the provisions of CIGA do this and the remaining options available to landlords to recover overdue rent.

WHAT HAS CIGA CHANGED?

(A) STATUTORY DEMANDS

Before CIGA, if a tenant failed to pay its rent, a landlord (as a creditor) was within its rights to serve a statutory demand, with a view to presenting a winding-up petition in order to put pressure on the tenant to pay any overdue rent. However, as a result of CIGA, with effect from 27 April 2020 a landlord will not be able to rely upon a statutory demand - served between 1 March 2020 and 30 September 2020 – as the basis of presenting a winding-up petition.

(B) WINDING-UP PETITIONS

CIGA has also introduced a provision whereby a creditor may not present a winding-up petition on the ground of inability to pay debts (including where that inability is derived from the company being balance sheet insolvent (i.e. broadly its liabilities exceed its assets)) between 27 April 2020 to 30 September 2020 (with the possibility of this being extended further), unless the creditor has reasonable grounds for believing that:

- a) Coronavirus has not had a financial effect on the company or
- b) The facts behind the relevant ground of the petition would have arisen even if coronavirus had not had a financial effect on the company

It is currently difficult to imagine a scenario in which a landlord could demonstrate that coronavirus has not had a financial effect on a non-paying tenant, so the option of presenting a winding-up petition is limited. A landlord might be able to argue the second limb of the test if the overdue rent pre-dates coronavirus (although the courts have, thus far, appeared relatively cautious in allowing a petition to proceed to a winding-up order). However, as it's likely that most of any unpaid rent will have actually fallen due in the [first two quarters of this year](#), such an argument is likely to struggle as these comprise key periods during which the coronavirus was likely to have had an impact.

The effect of CIGA is therefore that it broadly restricts landlords from using the winding-up process to recover unpaid rent, at least (currently) until 30 September 2020.

(C) MORATORIUM

CIGA has introduced a new free-standing moratorium and which is overseen by a professional insolvency monitor. In the moratorium, a company's directors retain control of the company and have an initial period of 20 business days (which can be extended) to facilitate the rescue of the company, free from creditor action (which includes exercising the right of forfeiture, winding-up petitions or administration applications).

During the moratorium, the company has a "payment holiday" from most pre-moratorium debts (including rent), but must still pay for certain expenses during the moratorium. These include, among other things, rent, wages and goods and services supplied during the moratorium.

Although on the face of it, this appears welcome news for tenants but bad news for landlords in relation to pre-moratorium unpaid rent, 20 business days is too short a period to deliver any meaningful restructuring and therefore an extension will almost always be required. And this is the rub, as to secure an extension from creditors, the company needs to show that it has paid all pre-moratorium debts not subject to a holiday and all moratorium debts (including rent that fell due), which if the tenant is facing real financial pressure is going to be a struggle to say the least. The fact that the moratorium does not bite against, and a tenant has to service, all financial debts (owed to any lender, not just banks or financial institutions and includes any intragroup or shareholder loan), we believe in practice means that there will be little take-up of this free-standing moratorium.

OTHER TENANT-FRIENDLY MEASURES ALREADY IN EXISTENCE

The changes brought in by CIGA are in addition to various tenant-friendly measures introduced by the government to cushion the financial effect of COVID-19 on tenants:

- On 25 March 2020, the Coronavirus Act 2020 brought in a blanket ban on a landlord's ability to forfeit a lease on the ground of non-payment of rent, recently extended to 30 September 2020
- The Commercial Rent Arrears Recovery ("CRAR") scheme, whereby a landlord instructs an enforcement agent to collect rent or take control of goods in substitution for unpaid rent, has been restricted. From 24 June 2020, this procedure cannot be used unless the tenant has an amount equal to 189 days or more of rent in arrears and
- A blanket stay on all possession proceedings has been introduced whereby new and existing proceedings have been halted until 23 August 2020

WHAT CAN LANDLORDS DO TO TRY TO RECOVER UNPAID RENT?

With many of the usual avenues of rent recovery closed off until at least 30 September 2020 (although this period may be extended), what can landlords do to try to recover any unpaid rent?

- Instigate debt proceedings: this is a relatively unpopular method of enforcement (owing to its associated costs and lengthy process); however, we might see an increase in claims against tenants owing substantial rent in the near future due to the restrictions on the usual methods
- Apply to the court to appoint administrators: note, however, the restriction on making an administration application if a company moratorium is in force
- Recover rent from subtenants: this is subject to the terms of the lease and the solvency of the subtenants as long as there is at least 6 months of arrears outstanding
- Recover rent from guarantors: subject to the terms of your lease, this may be possible. Under a pre-1996 lease, you may be able to seek to enforce against a previous tenant which assigned the lease or their guarantors. Under a 'new lease' (i.e. after 1996), you might be able to enforce against a former tenant (or its guarantor) who assigned the lease under an Authorised Guarantee Agreement (however, this might only be possible under specific circumstances)
- Attempt to forfeit the lease on grounds other than non-payment of rent: this would have to be done in accordance with the relevant notice and remedy provisions under the lease, but other grounds to forfeit may exist, such as the tenant's breach of a repair covenant. These are usually harder to demonstrate than non-payment, however
- Draw down on the rent deposit: subject to the terms of the lease and any rent deposit agreement, it may be possible to draw down on the deposited funds. However, landlords should consider the commercial advantages of drawing down now – sometimes it is better to negotiate a longer term solution and any draw down may reduce the amount of a landlord's claim in an insolvency process, or the weight of its vote in a process such as a CVA

WHAT SHOULD I DO IF I AM A TENANT?

The measures introduced under CIGA should provide you with some welcome breathing space if coronavirus is having a financial effect on your business.

However, tenants should bear in mind that the measures introduced by CIGA do not absolve them from the obligation to pay rent. Therefore, rent will continue to accrue (with interest) in the normal fashion; CIGA simply restricts the means available to landlords to enforce overdue rental payments. Tenants should remember that some of these measures are time restricted and enforcement may become available after 30 September 2020, which falls shortly after the September quarter date for rental payments. It's also key to remember that other avenues of recovery, such as those outlined above, still remain available to landlords.

The prudent course of action for both parties would be to discuss at the earliest stage possible how to move forward and refer to the new code of practice for the commercial property sector when doing so. Although this code is not binding, it provides for a helpful framework which could be used as a basis for discussion and negotiation.

COMMENTS AND CONCLUSIONS

Tim Carter, co-head of the restructuring and insolvency practice at Stevens & Bolton, comments:

“Tenants are certainly afforded some breathing space by CIGA and the other statutory provisions recently introduced by the government. However, whilst the enforcement of rent payments are currently restricted, the rent is still, and will be, payable in the future – similarly tax payments that have been deferred by HMRC will become due later this year/early next. And this is within an environment where businesses are bound to have cash flow pressures moving forwards, where trading has been impossible or severely hindered by the lockdown restrictions - especially true of the casual dining and wider non-essential retail sectors. So it looks like remaining a pretty dismissal forecast for landlords and tenants alike. Further, although as commented above, the free-standing moratorium is unlikely to help struggling tenants, another CIGA introduction – the restructuring plan which introduces a new, cross-class cram-down procedure (similar to the existing scheme of arrangement) - could result in a further headache for landlords; if for example, this new flexible procedure is used by tenants to deal with a dissenting landlord class of creditors, where they have obtained say 75% in value of the secured creditors’ class vote in favour of the restructuring plan.”

Markus Klempa, Managing Associate in the property litigation practice at Stevens & Bolton, comments:

“At a time when tenants’ businesses are receiving vital life support from the government, landlords may be justified in feeling that their own struggles are being ignored. The quick, cheap and effective remedies available to landlords prior to CIGA and the other legislative reforms introduced since March have all been taken off the table, leaving landlords unable to force payment of rent quickly and giving tenants some much needed relief. This can be a real issue for landlords who are themselves under financial pressure with cash flow issues. Whilst the Code of Conduct has sought to redress the imbalance, it is currently unenforceable. So despite its good intentions, landlords remain concerned that their hands are tied.

On the plus side for landlords, the government has not (as yet) answered some industry calls for a blanket rent holiday and rent will continue to fall due and remain payable in accordance with the terms of the lease. This means that landlords, with deep enough pockets and solvent tenants, can still force payment through the courts if necessary. Well advised landlords will also be looking at the other options available to them, including, where possible, pursuing former tenants and guarantors to plug the widening hole in their balance sheets. But, these remedies may not be available to all landlords. Meanwhile, in the main landlords and tenants have managed to work together effectively, finding compromises and reaching agreements that cater for both parties’ needs in the form of rent concessions and/or lease re-gears.

Ultimately however - whilst the legislative tweaks introduced will bring short term relief or pain for one party until the current climate improves - trust, forbearance and solidarity are likely to be the keystones in maintaining important landlords-tenant relationships in the longer-term.”

KEY CONTACTS

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