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Property in the pandemic
A toolkit for commercial real estate litigators

Introduction

It is now four weeks since the UK entered formal lockdown and no immediate end is in sight. Social commentators believe they see a new spirit of co-operation, both in private and in commercial relations; meanwhile government and public institutions, including the judiciary and the courts service, have been trying to adapt at speed to the new reality.

This article is an attempt to identify some of the key questions currently facing commercial property litigators in England and Wales, in particular in the field of landlord and tenant, and to pull together the more important themes that are emerging from the Covid-19 crisis, in statute, procedural rules, case law and guidance.

Anecdotal evidence suggests that a good many landlords are engaging with their tenants and agreeing to waive obligations, or at least to pause or vary them temporarily; and again, a good many tenants appear to be complying with their obligations as best they can, on the basis that they do not want to breach the terms of their leases and damage relations with their landlord (or indeed risk their landlord's solvency, with all its knock-on implications for the tenant) unless and until they are compelled by circumstances to do so. Even so, it would be naïve to assume that this is universally the case; or that the spirit of comity can continue indefinitely. Sooner or later, landlords and tenants, property owners, property developers, contractors, victims of nuisance and trespass will turn once again to the courts, often because they have no alternative if they wish to stay in business themselves.

Both socially and commercially, the most attractive (or least unattractive) outcome for the property world would be that the unforeseen costs of the crisis should not fall, more or less at random, on particular companies or individuals, but rather should be borne by the state (which in practice means present and future taxpayers). The alternative, is the real risk of a sequence of collapses into insolvency, as parties knock down their counterparties in turn: failing tenants ruin their landlords, the creditors or liquidators of bust landlords

are compelled to push their tenants over the edge, developers and contractors ruin each other, buying and selling, maintenance and improvement all grind to a halt.

Even so, while it is easy to argue that government should shoulder the burden of the crisis in all society's interest, that prompts further hard questions. Most obviously, what is the "burden of the crisis"? It is likely to prove difficult or impossible to tell which bust businesses would have survived and thrived "but for" Covid-19. Ultimately, the answers to the underlying questions (who should be helped? How? And for how long?) will be moral, social and political, not legal.

All that said, the intention of this article is to focus on the legal questions, although keeping well in mind the point (as all litigators should) that those questions are likely to seem arid and bloodless (if not heartless) unless seen against the background of these larger societal problems.

The questions for now are thus: what emergency reforms have the government, judiciary and courts service introduced, and what do they amount to? What is the current "state of play" for commercial property litigation? How is that likely to change in the next few weeks and months?

It ought to be emphasised at the outset that, in my view, the government's reaction to Covid-19 so far as the property world is concerned has been timid, in striking contrast to its bold approach (e.g.) to tax, employment and self-employment issues. It thus seems likely, in particular if the lockdown is to last several more weeks and is only then to be relaxed gradually and incompletely, that further and more far-reaching legislation / regulation will have to be forthcoming.

What then is the current state of play in commercial landlord and tenant?

The Coronavirus Act 2020, s. 82

All commercial property litigators will be aware of s. 82 of the Coronavirus Act 2020 ("CoVA")[1], which was passed on 25 March and came into force the following day[2].

[1] The protections from eviction granted to residential tenants by CoVA s. 81 are beyond the scope of this article. Note also CPR Practice Direction 51Z, which imposed a 90-day stay from 27 March on all possession claims under CPR 55, and on all proceedings to enforce a warrant or writ of possession; this includes possession claims against trespassers. Significantly, however, it expressly does not apply the stay to claims for injunctive relief: see further below.

[2] See the helpful discussion by Rob Nicholson and Andrew Walker QC, "Forfeiture beyond the Covid-19 moratorium" (https://www.maitlandchambers.com/information/articles-publications/articles/forfeiture-beyond-the-covid-19-moratorium/downloadableArticle).

S. 82 applies to "relevant business tenancies" and provides (in essence) as follows:
(i) A landlord may not exercise a right of forfeiture or re-entry for non-payment of in respect of a "relevant business tenancy" for the "relevant period" (s. 82(1));
(ii) Landlords are given some protection by s. 82(2), which provides that they will not be treated as having waived a right to forfeit during the "relevant period" unless they have given an "express waiver in writing"; and
(iii) Provision is made in relation to proceedings for forfeiture for rent arrears already on foot as at 25 March 2020 in the High Court (by s.82(4)-(6)), and in the county court (by s. 82(8)-(10)). In brief summary, no tenant is to be required to give up possession of premises until the end of the "relevant period", and no tenant is required, before the end of the "relevant period", to pay rent arrears and costs in order to defeat a possession order under s. 138(3) or (4) of the County Courts Act 1984;
(iv) Lastly, in determining whether there has been "persistent delay in paying rent which has fallen due", as a ground for possession under s. 30(1)(b) of the Landlord and Tenant Act 1954 ("LTA 1954"), the court is required to disregard any failure to pay rent during the "relevant period".

"Relevant period" is defined as the period from 26 March to 30 June 2020, although it is open to the government to extend the period once or repeatedly by statutory instrument (CoVA s. 82(12)). The 30 June deadline was introduced when the formal lockdown had just been introduced and was planned to last 21 days. Since it is now expected to last for six to seven weeks at a minimum, it can safely be assumed that tenants' groups will lobby government hard for an extension over the next two months.

CoVA defines "rent" as "any sum a tenant is liable to pay" under the tenancy (s. 82(12) again). It appears that this will cover insurance, service charge, VAT and other sums due from tenants to landlords under a "relevant business tenancy", whether or not the lease itself reserves them as rent[3].

More problems have been caused by the term "relevant business tenancy". S. 82(12) defines it as a tenancy to which Part 2 of LTA 1954 applies, or one to which it would apply if any relevant occupier were the tenant. Para. 628 of the government's "Explanatory Notes" to the Coronavirus Bill helpfully gives as an example of the latter a tenancy where the original tenant has sublet the premises and is no longer in occupation. Even so, this does not solve all the problems. On its strict terms, s. 82 would appear not to cover (e.g.) contracted out tenancies, tenancies excluded from LTA 1954 Part 2 (such as farm business tenancies), and tenancies of six months or less (save where brought within Part 2 by s.

[3] See Response 2 of the Responses of the Ministry of Housing, Communities and Local Government ("MHCLG") to the "Questions Regarding the Forfeiture Moratorium" very helpfully put to it by the PLA on 27 March 2020 ("the MHCLG Responses"): http://www.pla.org.uk/wp-content/uploads/2020/04/200330-Response-to-PLA-questions.pdf.

43(3)). In response to urgent enquiries by the PLA on 27 March, MHCLG stated that "the policy objective is to cover all commercial leases" (see Responses 3 to 6 of the MHCLG Responses). The government's view is thus now commendably clear, although it is unfortunate that that is not what CoVA actually says.

More generally, it is important to bear in mind how narrow the protection afforded to tenants by s. 82 actually is. It does not relieve the tenant from the obligation to pay rent. It does not on its face prevent a landlord forfeiting a lease for breaches of covenant other than non-payment of rent by serving notice under s. 146(1) of the Law of Property Act 1925 ("LPA 1925"). Nor does it prevent a landlord using any of the range of other weapons in its armoury against a defaulting tenant: issuing and pursuing a CPR Part 7 claim in debt (and/or for damages), presenting a winding up petition, or pursuing commercial rent arrears recovery ("CRAR"). The MHCLG Responses are quite explicit on this:

"CRAR, winding up proceedings and debt action are not covered by section 82 of the act. MHCLG is monitoring the enforcement of non-payment closely and is keeping this issue under review." (Response 10.)

The protection afforded to tenants by the s. 82 moratorium is thus clearly much narrower than that offered by (e.g.) an administration moratorium (on which see below). One element of the government's reasoning may have been that s. 82 was only ever envisaged as a "backstop" provision, and it was hoped that landlords and tenant would negotiate their own arrangements, more generous to tenants; that is certainly proving to be true of many tenancies, but not of all. Another element may have been the idea that all that was needed was a brief pause in the most immediate and arguably the most destructive of landlords' remedies, forfeiture; claims for other remedies, by contrast, required time to bring to court, and so a moratorium for those was perhaps thought unnecessary. If that was the theory, the extended lockdown and the courts' vigorous attempts to keep hearings moving (considered below) may be about to test it to destruction.

Even so, the point that the government is keeping the extent of s. 82 protection under review is very much to be noted; in my view it will need to be reviewed sooner rather than later.

(1) Procedures and remedies still available to commercial landlords

The obvious remedies that remain open to landlords against their commercial tenants are thus: pursuing a Part 7 debt / damages claim, forfeiture following service of a s.146 notice,

winding up the tenant on the ground that it cannot pay its debts as they fall due[4], and CRAR. Let us put to one side the potential reputational damage that a landlord could suffer in present circumstances by pursuing any of these. We should also not forget that the government could at any moment bring forward emergency legislation in any of these areas. What are the practical implications of using each of these methods?

Little need be said here about ordinary Part 7 claims in debt or damages. In normal circumstances, both the procedures and time-frames involved are well understood. The interesting question is how these have changed by reason of the new Covid-19 Practice Directions introduced by the courts; this is considered below.

Likewise, little need be said about s. 146 notices, although two points should be noted. First, where the ground of forfeiture is one other than non-payment of rent, it is more likely (though by no means certain) that that ground will have arisen for reasons other than Covid-19; there may thus be less political (or moral) justification for legislative intervention to prevent this. Secondly, if the ground in question results from an act of insolvency, the tenant may be able to take advantage of the protections offered by the relevant insolvency regimes, which are more extensive than the s. 82 moratorium anyway.

Winding up petitions up raise more profound issues. Although petitioning to wind up a company under Part IV Chapter VI of the Insolvency Act 1986 ("IA 1986") in principle involves seeking a class remedy for the benefit of all creditors, it is common knowledge that in practice it is frequently used as a technique for debt-collection.

Its obvious advantage over a Part 7 claim is speed; ordinarily, where a landlord serves a statutory demand on the tenant's registered office and the tenant has failed to pay (or secure or compound for the debt) for three weeks, the landlord can immediately petition to wind up the tenant and (in the Business and Property Courts) can expect a first hearing in a matter of weeks rather than months. A confident landlord need not even serve a statutory demand before petitioning, although in those circumstances it will need to satisfy the court with evidence that the tenant is unable to pay its debts as they fall due before a winding up order will be made. By contrast, where a tenant fails to comply with a statutory demand, the court deems the tenant to be unable to pay its debts without more[5].

[4] For the purposes of this article, it is assumed for simplicity that the tenant is a company; winding up partnerships and LLPs raises almost identical issues, while pursuing bankruptcy proceedings against a commercial tenant who is an individual raises similar (though not quite identical) ones.
[5] Contrast IA 1986 s. 123(1)(a) (statutory demand) with s. 123(1)(e) (proving to the court's satisfaction).

The disadvantage of trying to winding up a tenant is that, where debt recovery is the aim, a landlord's victory may well prove Pyrrhic. First, if a winding up order is eventually made, the "commencement of the winding up" is deemed to have taken place at the time of presentation of the winding up petition (or earlier, if the petition had been preceded by a resolution of the tenant to wind itself up voluntarily): see IA 1986 s. 129(1) and (2). By IA 1986 s. 127, all dispositions of a company's property after the commencement of the winding up are void. Thus if a tenant wishes to continue trading after the presentation of the petition, it must apply to the court for a validation order. The evidential requirements for such an application are set out in para. 9.11.4 of the Practice Direction: Insolvency Proceedings (4 July 2018 version), [2018] BCC 421 [6], and are not trivial; the tenant will be required to give full details of assets, security and liabilities, to be supported as far as possible by documentary evidence. In addition, the tenant will need to give a cash flow forecast and profit and loss projection for the period for which the validation order is sought, and details of the dispositions or payments which it wishes to validate. It is obvious that, in current circumstances, many tenants may struggle to provide adequate evidence of this sort. This may be enough on its own to push a struggling tenant over the edge.

Secondly, if a winding up order is made, rent arrears accrued prior to the date of the liquidation will be an unsecured debt; the landlord can prove in the liquidation but that may well be cold comfort. By contrast, after the making of the winding up order, rent for periods in which the liquidator has retained the premises for the benefit of the winding up is usually recoverable as an expense of the liquidation: see Insolvency (England and Wales) Rules 2016 ("IR 2016"), r. 7.108; *Re Toshoku Finance UK plc* [2002] 1 WLR 671 (HL) at 680E-F; *Re Games Station Ltd (Jervis v Pillar Denton Ltd)* [2014] EWCA Civ 180, [2015] Ch 87.

Thirdly, it is open to the liquidator of the tenant to disclaim the lease as onerous property in accordance with IA 1986 ss. 178 and 179. In these circumstances a landlord may find itself with neither rent nor tenant; its concern then will be whether the premises can be readily re-let in current conditions.

Fourthly, even if a landlord reaches a negotiated agreement with a tenant after presenting a winding up petition, both parties run the risk that the court will permit another creditor to be substituted as petitioner under IR 2016 r. 7.17. If that happens, the tenant may be wound up anyway and the landlord may once again have nothing to show for its efforts.

Lastly, and in passing, it should be noted that after a winding up order is made, "no action or proceeding shall be proceeded with or commenced against the company or its property" without the leave of the court: IA 1986 s. 130(2). By contrast, between presentation of the petition and the making of a winding up order, an action or proceeding

[6] See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/insolvency_pd.

against the company is not automatically stayed, but the court may stay it on application by the company, a creditor, or a contributory: IA 1986 s. 126(1).

If a winding up petition is not the answer for a landlord, what about CRAR? This was introduced by the Tribunals Courts and Enforcement Act 2007 ("TCEA 2007") ss. 71-87 and Sched. 12, although in fact not brought into force until 2014. CRAR, which replaced the self-help remedy of distress (though it is only permitted in relation to purely commercial leases), allows a landlord to instruct an enforcement agent to recover goods of a tenant and sell them to meet arrears of rent. Among its most obvious difficulties for the landlord are that (1) the landlord is required to give advance notice of enforcement; and (2) it can only be used in relation to arrears of rent in the sense of the sum payable for possession and use of the premises, not of (e.g.) service charge or insurance premium, even if they are reserved as "rent" in the lease. Even so, it remains a possible route to a remedy for a landlord.

Note in passing that in *Thirunavukkrasu v Brar* [2019] EWCA Civ 2032, [2020] 2 WLR 841, the Court of Appeal has recently confirmed that an attempt to exercise CRAR, even if invalid, amounts to a waiver of forfeiture (just as an attempt to distrain did). An interesting question which arises is thus whether attempting CRAR during the moratorium under CoVA s. 82 could amount to a waiver of forfeiture. We assume not: s. 82(2) provides that *"no conduct by or on behalf of a landlord, other than giving an express waiver in writing, is to be regarded as waiving a right of reentry or forfeiture"* for non-payment of rent. If that is right, then apparently a landlord could lawfully (if perhaps unattractively) attempt CRAR now and then still forfeit the lease for rent arrears on 1 July. CoVA may in this regard (inadvertently) have strengthened the landlord's position.

(2) Protections still available to commercial tenants

In general, tenants should bear in mind that, while both the civil courts in general and the insolvency and companies courts specifically are having to deal with work more slowly than usual, cases continue to move through the system. Thus tenants will still have to determine whether to fight or settle ordinary commercial claims in fairly short order, as usual.

It is worth considering briefly the two insolvency procedures most commonly used by tenants to try to protect their business, administration and company voluntary arrangements ("CVAs"). The mechanics of entering administration have been addressed in the Temporary Insolvency Practice Direction introduced in response to the Covid-19 crisis (see below).

Administration. Since 2003, administration has been governed by IA 1986 Sched. B1, which was introduced by the Enterprise Act 2002. Administrators are appointed to manage a company with a strict hierarchy of objects (Sched. B1 para. 3(1)): to rescue the company as a going concern; to achieve a better result for creditors than would be likely in winding up; or to realise property to distribute to one or more secured or preferential creditors.

Uniquely amongst EU (and post-EU) countries, a company can enter administration under Sched. B1, not only by a court order on an application (though this route remains open to applicants), but also by merely filing the appropriate notices and supporting documents at court. An appointment out of court may be made by the holder of a qualifying floating charge (under Sched. B1 para. 14), or by the company or its directors (Sched. B1 para. 22).

One of the great advantages of administration is that, by Sched. B1 para. 44, once notice of intention to appoint an administrator is filed at court, a temporary interim moratorium comes into effect; moreover Sched. B1 paras. 42 and 43 provides for a further moratorium once a notice of an actual appointment is filed at court and the administration has thereby formally commenced. Each moratorium is of broad effect: it provides that no legal process may be instituted or continued against the company (including distress; by which, one assumes, is meant CRAR) and also prevents (among other things) forfeiture by peaceable re-entry of premises let to the company, or enforcement of security over the company's property without, in each case, the consent of the administrator or the permission of the court.

Even so, it is now clear (following *Games Station*; see above) that an administrator will be required to pay rent for periods in which s/he has retained the premises for the benefit of the administration. This is a useful right for the landlord, though how useful depends on both the likely length of the administration and the availability of alternative tenants who might be willing to pay more (probably low at present).

A topical consideration of how the administration regime can interact with Covid-19 legislation constructively is provided by the very recent judgment of Snowden J in *In the matter of Carluccio's Ltd (in administration)* [2020] EWHC 886 (Ch) (14 April), where the court concluded that administrators could make use of the Coronavirus Job Retention Scheme, following the Scheme Guidance, to furlough employees of a company in administration if there was a reasonable likelihood that the employees would be rehired, e.g. following sale of the business; that the public funds provided through the Scheme were assets of the company, not of the employees; but that employees would have super-priority in accessing them, ahead of the administrators' fees and expenses.

CVA. The other preferred insolvency procedure for commercial tenants is the CVA, where a company enters into a binding agreement with its creditors for the composition of its indebtedness. The details of CVAs are beyond the scope of this article; but it should be noted that companies that satisfy two or more requirements of being a "small company" set out in Companies Act 2006 s. 382(3) can also benefit from a moratorium while creditors consider the CVA proposals: see IA 1986 Sched. A1 paras. 1-11.

No doubt administration or a CVA is a last resort. As a general point, tenants just as much as landlords need to think pragmatically about where their true interest lies. If they withhold rent or service charge, that self-evidently increases the risk that landlords may not be able to meet their own obligations, whether to their building contractors, to their banks, or to a superior landlord. While a friendly landlord may be prepared to renegotiate lease obligations, grant extra time to pay or even waive rent for a period, a superior landlord may not be ready to release an intermediate landlord from its obligations, or defer them, and the landlord's mortgagees, and ultimately receivers, administrators or liquidators owe duties of their own and may well be substantially less willing or able to help a defaulting tenant.

The conduct of litigation

Note in passing CPR Practice Direction 51V, the Video Hearings Pilot Scheme, which came into force on 2 March this year; this tentative sidle into the age of remote video hearings has since become a gallop. The main developments of the last month or so in the civil and insolvency courts are first set out (with references), and then the current position is considered.

(1) General developments in the civil courts

1. The starting point is the Message of the Lord Chief Justice to Judges in the Civil and Family Courts of 19 March (https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/).

   This established the general touchstones for civil and family litigation; that hearings should continue where possible, but that this must be done safely. Note in particular the following extracts:

   "The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely";

   (NB this predated the Health Protection Regulations: see below)

"we all need to recognise that we will be using technology to conduct business which even a month ago would have been unthinkable. Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage"; and

"The message is to do what can be done safely".

2. In National Bank of Kazakhstan v Bank of New York Mellon (unreported; 19 March 2020), Teare J, refused to adjourn a trial, referring to the Lord Chief Justice's guidance and saying:

"it seems to me that having regard to the need to keep the service of public resolution of disputes going, it is incumbent on the parties to seek to arrange a remote hearing if at all possible."

3. On 20 March, the Civil Justice in England and Wales Protocol Regarding Remote Hearings was published
(an amended version was issued on 26 March:
(https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1-1.pdf).

The present version provides (at para. 1):

"The current pandemic necessitates the use of remote hearings wherever possible. This Protocol applies to hearings of all kinds, including trials, applications and those in which litigants in person are involved in the County Court, High Court and Court of Appeal (Civil Division), including the Business and Property Courts. It should be applied flexibly"

Under para. 16, the court will, wherever possible, propose to the parties one of three approaches to a hearing: a *"stated appropriate remote communication method"* (those listed include both audio and video options); that the case will proceed in court with appropriate precautions; or that the case will need to be adjourned. However, adjournment is treated as the last resort; the wording of para. 16(iii) is:

"that the case will need to be adjourned, because a remote hearing is not possible ***and*** *the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time".*

By paras. 17 and 18, where parties disagree with the court's proposed approach, they are permitted to make representations in writing. The judge will then give a *"binding determination"* as to the way in which the case will proceed, and/or direct a short remote CMC.

4. Further guidance was provided by the Lord Chief Justice on 23 March, in a Review of court arrangements due to Covid-19 (https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/).

With regard to the Civil and Family Courts, this stated:

"Hearings requiring the physical presence of parties and their representatives and others should only take place if a remote hearing is not possible and if suitable arrangements can be made to ensure safety."

5. Some statutory guidance as to the conduct of civil hearings was also provided by CoVA ss. 53 to 57, which have the general heading "Courts and tribunals: use of video and audio technology"; by implication, CoVA thus apparently envisaged that hearings in both the civil courts and the tribunals would continue. (S. 57 refers to Northern Ireland, while ss. 53, 54 and 56 specifically relate to hearings in criminal matters.) S. 55 cross-refers to Sched. 25, which amends the Courts Act 2003 to enable the public to see and hear hearings in courts and tribunals being conducted remotely by video or audio link, and regulates the recording and transmission of such hearings.

6. Practice Direction 51Y – Video or Audio Hearings during Coronavirus Pandemic (in force: 25 March) (https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/116th-civil-pd-making-doc.pdf).

This directs (by para. 2) that:

"where the court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice";

but also (by para. 3) that where a media representative was able to access the hearing remotely it would be a public hearing.

7. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 350/2020) (in force: 26 March).

Reg. 6 provides that, during the emergency period (as defined), no person may leave the place where they are living without "reasonable excuse". However, by reg. 6(2)(h),

"reasonable excuse" includes the need *"to fulfil a legal obligation, including attending court or satisfying bail conditions or to participate in legal proceedings"*.

Reg. 7 prohibits participation in gatherings in a public place of more than two people, subject to exceptions. By reg. 7(d)(iv), one exception is where the participation is *"reasonably necessary ... to participate in legal proceedings or fulfil a legal obligation"*.

8. Practice Direction 51Z – Stay of Possession Proceedings and Extension of Time Limits – Coronavirus (in force: 27 March; ceases to have effect: 30 October 2020) (https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-117th-pd-making-doc.pdf).

This directs (at para. 2) that all possession proceedings under CPR 55 and proceedings to enforce a warrant or writ of possession were stayed for 90 days from 27 March, but, importantly, confirmed (at para. 3) that claims for injunctive relief were not subject to the stay.

9. Practice Direction 51ZA – Extension of Time Limits and Clarification of Practice Direction 51Y – Coronavirus (in force: 2 April; ceases to have effect: 30 October 2020) (https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/civil-proc-rules-118-update.pdf).

This (by para. 2) temporarily amends CPR r. 3.8 to allow the parties to agree extensions of time of up to 56 days, but (by para. 3) requires to court to consider and approve on paper any extension for longer.

Para. 4 provides that:

"Insofar 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."

10. *Re One Blackfriars Ltd (in liquidation); Hyde v Nygate* [2020] EWHC 845 (Ch). On 1 April, Mr John Kimbell QC (sitting as a Deputy Judge of the High Court) refused to adjourn a trial in the London Business and Property Courts (Insolvency and Companies List) which was listed to be heard over five weeks from June 2020. On 6 April he handed down a reasoned judgment. He concluded:

(i) (At para. [39]) there was no jurisdictional difficulty in conducting a trial with the judge at home and counsel and witnesses in diverse locations in England and Wales; see Senior Courts Act 1981 s. 71(1);

and noted:

(ii) (At para. [44]) at least two fully remote trials had already been conducted since 16 March; one in the Court of Protection by Mostyn J, and the other in the Commercial Court by Teare J (see para. 2 above).

11. A somewhat different tone emerged from the Message for Circuit and District Judges sitting in Civil and Family from the Lord Chief Justice, Master of the Rolls and President of the Family Division (published by the Bar Council on 16 April) (https://www.judiciary.uk/wp-content/uploads/2020/04/Message-to-CJJ-and-DJJ-9-April-2020.pdf?dm_i=4CGD,TJMG,1839MT,3KTBH,1).

Important points to emerge from this were that:

(i) It appears that use of the bespoke HMCTS video hearing facility is likely to increase at the expense of Skype;

(ii) So far, around 40% of hearings have continued across all jurisdictions;

(iii) Judges are not required or expected to undertake their full list, in view of the extra pressures which remote hearings place on them (and indeed on all participants); accordingly, *"lists of about half their usual length may well be appropriate"*;

(iv) The intention is apparently that substantive hearings should continue if they involve only submissions, but this may be less appropriate where there is hotly-contested witness evidence;

(v) *"If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way."* (This is apparently intended to apply both to Family and to Civil proceedings);

(vi) Listings should continue in accordance with the Civil Listing Priorities, although urgent matters outside those categories will continue to be dealt with.

This seems to evidence a little rowing back from the robust approach taken in the *Kazakhstan* and *One Blackfriars* cases. Experience is suggesting that court lists are unlikely to be able to carry on at anything like their normal speed for the foreseeable future, and that there are likely to be particular problems with listing cases that require oral evidence.

(2) Developments in the Insolvency Courts

Meanwhile, the Insolvency and Companies Courts have also been responding to the crisis. On 6 April, a new Temporary Insolvency Practice Direction ("TIPD") came into force. (https://www.judiciary.uk/publications/temporary-insolvency-practice-direction-approved-and-signed-by-the-lord-chancellor/)[7]

The following points should be noted:

(i) By para. 2, the TIPD is to have force until 1 October 2020 and is to apply throughout the Business and Property Courts (subject to variations outside London);

(ii) Para. 3 relates to administration and is of particular importance to property litigators. It provides that:

(a) a Notice of Intention to Appoint an Administrator, to be filed by a company or its directors under IA 1986 Sched. B1 para. 27;
(b) a Notice of Intention to Appoint an Administrator, to be filed by a qualified floating charge holder under IA 1986 Sched. B1 para. 18; and
(c) a Notice of Appointment of an Administrator, to be filed by a company or its directors under IA 1986 Sched. B1 para. 29;

may all be CE-filed at court, and will be treated as delivered to court at the date and time recorded in the Filing Submission Email, when filed between 10.00 and 16.00 hours on any day that the courts are open for business. Documents CE-filed under paras. 27 and 29 outside those times are treated as filed at 10.00 hours on the day the courts are next open for business (note that this does not apply to an "out of hours" filing under para. 14 by a qualifying floating charge holder; in those circumstances, IR 2016 rr. 3.20-22 still apply). (In general, this confirms the effect of *Re SJ Henderson Ltd* [2019] EWHC 2742(Ch), [2020] BCC 52.)

[7] See e.g. the helpful survey by Duncan McCombe: https://www.maitlandchambers.com/information/articles-publications/articles/the-temporary-insolvency-practice-direction-2013-preparing-for-the-side-effects-of-covid-19/downloadableArticle.

These provisions are important, because it is the date and time of filing and court which determines (1) when the interim moratorium starts under IA 1986 Sched. B1 para. 44 (for Notices of Intention to Appoint); and (2) when the substantive moratorium starts under IA 1986 Sched. B1 para. 43 (for Notices of Appointment);

(iii) Para. 4 provides that all applications, petitions and claim forms (except winding up and bankruptcy petitions listed in the Rolls Building in London) listed for hearing before 21 April are adjourned (subject to any application to have it relisted as urgent). The intention is that these should all be re-listed within six weeks of 21 April: see the Guidance Note of Chief ICC Judge Briggs of 7 April: (https://www.ilauk.com/docs/ILA.Listing_guide_for_hearings_before_an_ICCJ_London_copy_.pdf);

(iv) Para. 5 provides for the listing of urgent hearings before High Court Judges and ICC Judges;

(v) Para. 6 directs that all insolvency hearings will take place remotely unless otherwise directed;

(vi) Para. 7 sets out a temporary procedure for the hearing of winding up and bankruptcy petitions; according to para. 4.1.2, this applies immediately in the Rolls Building in London, but elsewhere only once brought into force;

(vii) Para. 8 makes provision for remote hearings of other matters. In effect, this is very similar to paras. 16-18 of the Civil Justice Protocol for Remote Hearings (20 and 26 March);

(viii) Para. 9 provides (in effect) for the validity of statutory declarations which are sworn remotely. This is of vital importance for appointments of administrators out of court, which depend for their validity on statutory declarations.

The TIPD also indicates (at para. 4.2) that further guidance notes will be published on the Insolvency List web page for the relevant hearing centre.

For general information on the Insolvency and Companies Courts around the country, see:

https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/insolvency-and-companies-courts/

There are also now Protocols for Insolvency and Company work in the County Court at Central London (24 March), as well as in the North East and in Manchester[8].

Conclusions – and what next?

Let us try to draw the threads together. So far as practice and procedure is concerned, the judiciary and HM Courts and Tribunals Service have been admirably nimble and creative in trying to get the courts (and tribunals) up and running after the first shock of the lockdown, and in seeking to ensure that it is not merely the most urgent cases that are heard. It is obvious that it would be wholly misguided for a commercial landlord or tenant to assume that it can safely avoid the risk of proceedings for months to come. Both ordinary CPR Part 7 claims and insolvency proceedings are advancing, and individual judges are taking bold steps to ensure that even heavy trials go ahead where possible.

That said, in the last week or so we have started to see the limits of the new procedural order. Judges and litigators are becoming accustomed to a new way of working; it appears that past experience of telephone hearings, or of taking evidence of particular witnesses by video link, is of only limited use as preparation for working in a court system that is operating entirely remotely. Attempting to deal with court work at its previous pace may be unrealistic and put excessive demands on all involved. The natural conclusion is that almost all kinds of work will continue, but delays are bound to increase.

So far as the substantive law is concerned, it seems clear that in the commercial world both landlords and tenants are likely to be dissatisfied with the emergency reforms so far introduced and will be asking for further legislative intervention. It is possible to work creatively within the new rules: an interesting example is *University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB) (9 April), where, faced with the stay of possession claims under CPR PD 51Z, the court granted a mandatory injunction requiring a patient to leave a hospital where her licence to remain had been terminated. In general, claims will keep coming to court; not every dispute or problem can be solved by negotiation or forbearance, and this will become more true the longer the present lockdown continues.

Commercial tenants will be acutely aware of how limited the protection offered by CoVA s. 82 really is. Commercial landlords, meanwhile, will be acutely conscious that the protections offered by government so far have generally benefited tenants. Intense lobbying from both sides is to be expected over the coming week

[8] Respectively at: https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/insolvency-and-companies-courts/; https://www.ilauk.com/docs/TIPD-North-Guidance_copy.pdf; https://www.ilauk.com/docs/GUIDANCE_FOR_HEARING_THE_WINDERS_LIST.pdf.

A great deal has been accomplished in a very few weeks; but it is clear that very much more will need to be done if any sort of healthy commercial property sector is to emerge blinking into the sunlight once the crisis is past.

Richard Fowler

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