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CHAMBERS

Property in the pandemic
A toolkit for commercial real estate litigators

Update – 15th May 2020

It is a mere 25 days since I wrote "Property in the pandemic", but in that time there have already been several significant developments. The formal lockdown continues, at least for now (although with some easing in England), and it has become apparent that it will only be lifted piecemeal. Social distancing measures are likely to affect litigators, in common with everyone else, for some time to come. In addition, in recent days the government, the judiciary, and the courts service have given practitioners a more detailed idea of how the litigation landscape will look for the next several weeks and months.

All these factors suggest that an update would be helpful. The contents of my original article are not repeated here. This update aims solely to identify the key developments of the last three weeks or so and indicate what further changes may be just over the horizon.

1. Government restrictions on "aggressive rent collection and closure": winding up petitions and CRAR

As predicted in my original article and elsewhere, it has rapidly become clear to the government that the protections for commercial tenants under Coronavirus Act 2020 ("CoVA") s. 82 (forfeiture moratorium) and CPR Practice Direction 51Z (stay of possession proceedings) are inadequate and problematic; at the same time, it is obvious that further restrictions on the remedies available to landlords risk pushing many property companies into financial difficulties or insolvency.

On 23 April, the government announced that it would use primary and secondary legislation to introduce temporary measures in order to restrain *"aggressive debt recovery actions"* against commercial tenants. In particular, it was stated that:

(1) The use of statutory demands and winding up petitions would be temporarily banned where the tenant was unable to pay its debts by reason of Covid-19 (the relevant provisions are to be included in the "Corporate Insolvency and Governance Bill");

(2) The government would also put forward secondary legislation to prevent landlords using Commercial Rent Arrears Recovery ("CRAR") against tenants unless rent arrears of 90 days were owed.

The detail of the proposals is considered further below. The government does seem aware that these changes will increase the pressure on landlords. It called on tenants *"to pay rent where they can afford it or what they can"*; the Communities Secretary, Robert Jenrick MP, stated that:

"We understand that landlords are facing their own very serious pressures and are concerned about their position with lenders. We are working with banks and investors to seek ways to address these issues and guide the whole sector through the pandemic."

It thus appears that assistance specifically directed at commercial landlords dealing with defaulting tenants will for the moment take the form of guidance and exhortation only, not legislation.

The government's press release of 23 April (as updated on 25 April) can be found here:

https://www.gov.uk/government/news/new-measures-to-protect-uk-high-street-from-aggressive-rent-collection-and-closure

In addition, the Financial Conduct Authority, the Financial Reporting Council and the Prudential Regulatory Authority issued a joint statement on 26 March which, among other things, encouraged investors and lenders to take account of problems arising directly from the Covid-19 pandemic in responding to potential breaches of covenants by borrowers. See:

https://www.fca.org.uk/news/statements/joint-statement-fca-frc-pra

Again, this offers some comfort but little concrete protection to struggling landlords.

"Responsible and fair" contractual behaviour

More recently, the government has given a strong steer to all parties to contracts, which must be taken to include landlords and tenants, and parties to property contracts generally, on what it now expects of them. The Cabinet Office published "Guidance on responsible contractual behaviour" on 7 May[1]. This sets out at paragraph 1 the key principle that:

"The guidance in this note is that parties to contracts should ***act responsibly and fairly***, ***support the response to Covid-19*** *and* ***protect jobs and the economy****."*
(Words in bold as in the original.)

The guidance is expressly stated to apply to *"all individuals, businesses (including funders) and public authorities"* (para. 3).

While the note readily acknowledges that it is no more than non-statutory guidance (para. 6)[2], and does not override (e.g.) the terms of specific contracts or rights and obligations under general law (see para. 7), it observes (at para. 10) that:

[1] Full title: "Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid 19 emergency", Cabinet Office, 7 May 2020. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final__7_May_.pdf.
[2] Note also that it does not apply in the devolved administrations: see para. 6.

"The Government strongly encourages responsible and fair performance and enforcement of contracts during this public health emergency."

In para. 14, the principle of "responsible and fair behaviour" is stated to include:

"being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties), the availability of financial resources, the protection of public health and the national interest."

This principle applies in particular (but in light of the wording of para. 10, seemingly not only) where *"there has been a material impact from Covid-19"* (see para. 14).

Para. 15 sets out fifteen circumstances where *"responsible and fair behaviour is strongly encouraged"*. Among those especially relevant for property litigators are likely to be:

"(d) requesting, and making, payment under the contract;

(e) making, and responding to, claims for damages, including under liquidated damages provisions;

…

(g) exercising remedies in respect of impaired performance, including enforcement of security, forfeiture or repossession of property, calling of bonds or guarantees or the initiation or continuation of insolvency or winding up (or equivalent) proceedings;

(h) claiming breach of contract and enforcing events of default and termination provisions (including termination rights arising by reason of the insolvency or potential insolvency of a party)".

The whole of para. 15, and indeed the guidance in general, repay detailed study. It remains to be seen how far litigants will now seek to found procedural or substantive arguments on alleged breaches of the guidance, and how the courts will respond.

Prohibition on winding up corporate tenants

By contrast with the guidance on responsible and fair contractual behaviour, the government's proposals to restrict "aggressive" rent collection are intended to be given statutory force. The government press release of 23 April fleshes out its proposals. With respect to winding up petitions, the position will be as follows:

(i) Statutory demands made between 1 March and 30 June 2020 will be "banned", as will winding up petitions presented between 27 April and 30 June 2020, where the reason the debtor company cannot pay its bills is Covid-19. The cut-off date of 30 June is of course the same as that for the moratorium on commercial lease forfeitures, and like the latter may be extended;

(ii) Where it is asserted in a winding up petition that a company cannot pay its debts, the court will first review the petition to determine why that is;

(iii) No winding up order can be made, and no petition can be presented, where the company's inability to pay its debts is the result of Covid-19.

These proposals, which at the time of writing had apparently still not been expressly formulated in a Bill, should be read alongside an earlier press release of the Department for Business, Energy and Industrial Strategy ("BEIS"), dated 28 March, which received widespread coverage at the time. There it was stated that the government proposed to:

"make changes to enable UK companies undergoing a rescue or restructure process to continue trading, giving them breathing space that could help them avoid insolvency",

and in particular to help them to continue to buy supplies (the examples given were energy, raw materials or broadband) while attempting a rescue. It was also proposed that company directors would be protected from the effect of the wrongful trading provisions retrospectively from 1 March for three months[3].

The proposals of 23 April are significantly more detailed and specific, and are expressed to be directed at corporate tenants that are in difficulties by reason of Covid-19, while the earlier announcement appears to relate to all companies in difficulty.

These provisions must also be understood against the background of major reforms to corporate governance and the corporate insolvency regime that have been under detailed consideration by BEIS since 2016[4]. Key elements of the proposed corporate insolvency reforms, which were thus in the pipeline long before the pandemic, were:

(i) Creation of a new procedure to allow companies to enter a moratorium (modelled on the administration moratorium) to allow the company's directors to formulate with a "monitor" a restructuring plan for rescuing the business. The moratorium would last for 28 days initially (the government's original proposal was three months);

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[3] On the suspension of the wrongful trading provisions, and the limits of the protection for directors it appears to offer, see the helpful discussion by Catherine Addy QC et al., "Wrongful Trading Suspension: does it create a false sense of security?" (8 April 2020), https://www.maitlandchambers.com/information/articles-publications/articles/wrongful-trading-suspension-does-it-create-a-false-sense-of-security/downloadableArticle. The BEIS press release of 28 March was updated on 14 May; for the current version, see: https://www.gov.uk/government/news/regulations-temporarily-suspended-to-fast-track-supplies-of-ppe-to-nhs-staff-and-protect-companies-hit-by-covid-19#history. Among other changes, the suspension of wrongful trading liability has been extended to 30 June.

[4] For the corporate insolvency aspects of the proposed reforms, see the important House of Commons Briefing Paper by Lorraine Conway, "Corporate insolvency framework: proposed major reforms" (9 December 2019), with links to BEIS consultations from 2016 to 2018, https://commonslibrary.parliament.uk/research-briefings/cbp-8291/. Note in particular *Insolvency and Corporate Governance: Government response* (26 August 2018), which can be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf.

(ii) Helping companies to trade through restructuring, in particular by restricting the ability of their suppliers to terminate contracts by reason of the company's entry into an insolvency procedure; and

(iii) Creating flexible restructuring plans which would involve binding both secured and unsecured creditors by means of a cross-class "cram down".

The new rescue mechanisms were apparently to be made available alongside the administration and CVA regimes, as well as schemes of arrangement.

It appears from the 23 April announcement that the new protections to be offered to corporate tenants against winding up proceedings are intended to form part of the bill introducing these wider reforms.

How the temporary protections for tenants will work in practice is still unclear. It appears that the legislation will in effect create a new category of debt, i.e. one which the company is unable to pay by reason of Covid-19; a "Covid-19 debt"[5]. If the intention is to protect debtor companies from the consequences of presentation of a winding up petition, then presumably all petitions which, on examination, appear to be founded on Covid-19 debts will have to be dismissed; merely adjourning them until after 30 June will not necessarily protect the debtor company (for example, under the law as it stands it would ordinarily need to seek a validation order to continue in business, which might not be straightforward). In addition, one infers that it should be a sufficient ground for a company to obtain an injunction to restrain presentation of a petition if it can merely show that the petition would be based on a Covid-19 debt.

It would also be odd if similar protections were not extended to individual debtors; if a corporate commercial tenant is to be protected from winding up petitions founded on Covid-19 debts, it is hard to see why individual commercial tenants should not be similarly shielded from bankruptcy petitions founded on them.

Further discussion must await publication of the Bill, which it is assumed is imminent. It should be noted, meanwhile, that an attempt to invoke the pandemic and the government's prospective Bill as grounds for granting injunctions restraining presentation of two winding up petitions was rejected by Snowden J in *Re Saint Benedict's Land Trust Ltd and Shorts Gardens LLP* [2020] EWHC 1001 (Ch) (27 April). The case involved highly unusual facts; but in any event the Court was satisfied that the pandemic was no basis for an injunction where the prospective petitions were founded on unpaid liability orders in relation to national non-domestic rates which pre-dated the crisis.

Restrictions on the use of CRAR

The proposals to restrict the use of CRAR are more straightforward and do not require detailed comment. The amendments were rapidly brought into force (in fact on 24 April 2020) by The Taking of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus)

[5] Note that the Insolvency Law Committee of the City of London Law Society has developed proposals that would allow a company director to file at court a declaration (a "Covid-19 Declaration") that the company is facing liquidity or operational difficulties as a result of the pandemic, which would trigger a 90-day moratorium. See its "Proposals for Mitigating the Short-Term Effect on Viable Businesses of Covid-19" (26 March): http://www.citysolicitors.org.uk/storage/2020/03/CLSL-Insolvency-Law-Committee-Paper-mitigating-the-effects-of-Covid-19-002-1.pdf.

Regulations 2020 (SI 2020/451)[6]. They are to have effect in parallel with the restrictions on forfeiture under CoVA s. 82, i.e. until 30 June 2020 in the first instance, with the possibility of extension thereafter: see para. 2(6)(b) of the Regulations[7].

2. Amendment to CPR Practice Direction 51Z (Stay of Possession Proceedings etc.)

With effect from 18 April, CPR Practice Direction 51Z, which had imposed a stay of 90 days from 27 March on possession proceedings and proceedings to enforce a warrant or writ of possession, was amended. The amended version provides (at para. 2A) that the stay does not apply to:

(i) a claim against trespassers to which CPR 55.6 applies;
(ii) an application for an interim possession order under CPR 55 Section III (including the making of the order, the hearing required by CPR r. 55.25(4), and any application under CPR r. 55.28(1)); or
(iii) an application for case management directions which are agreed by all the parties.

In addition, it is also now specifically provided (at para. 3) that the stay does not preclude the issue of a claim.

The amended PD 51Z can be found at:

https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-possession-proceedings,-coronavirus

Para. 2A primarily addresses the problem that the original PD 51Z apparently stayed actions to recover property from trespassers. It is now clear that the courts are able to deal with possession claims alleging trespass against "persons unknown" (CPR r. 55.6). In addition, claims for Interim Possession Orders ("IPOs") under CPR 55 Section III can also proceed; to take advantage of this procedure, a claimant must be seeking only possession against trespassers, must have an immediate right to possession, and must have had such a right throughout the whole period of alleged unlawful occupation. These amendments are of real assistance to landowners whose land is occupied by trespassers during the crisis.

Para. 2A also provides that case management of possession claims may continue during the stay by consent (although it requires an application to be made to court).

The purpose of para. 3 is to address the concern that limitation on a possession claim (or the time limit on an application for relief from forfeiture) might expire during the crisis. It expressly confirms something that was implicit in the original version, that it remains entirely permissible to issue a claim, e.g. to protect the limitation position; the point is that, after issue, the claim will be subject to the automatic stay, save to the extent that the parties are able to agree case management directions.

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[6] For which see: http://www.legislation.gov.uk/uksi/2020/451/regulation/2/made#f00003.
[7] The Queen's Bench Division on 28 April issued Information Bulletin 7 in relation to the restrictions on CRAR: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882799/QB_Bulletin_7.pdf.

The amendments to PD 51Z followed a letter written jointly by the PLA and the PBA to the Master of the Rolls on 8 April[8]. The reply from the Master of the Rolls, dated 20 April, both explained the changes and gave a helpful commentary; see:

https://www.pla.org.uk/2020/04/covid-19-and-stay-of-possession-proceedings-response-from-master-of-the-rolls/.

Further points to note from the reply are that:

- PD 51Z was not intended to apply only to housing possession proceedings, but rather to *all* possession proceedings under CPR 55.
- The suggestion raised by members of the PLA and PBA that PD 51Z might not be lawful, inasmuch as it had arguably gone beyond Parliament's intention as embodied in CoVA, was not accepted.
- A distinction was to be drawn between the work of the Business and Property Courts and the work of the County Courts; since the latter operate under greater constraints of resources, decisions had to be made as to their listing priorities[9].
- The Master of the Rolls noted the availability of injunctive relief as an alternative to a possession claim against trespassers[10].

In the light of the amended PD 51Z, the Queen's Bench Division on 21 April issued a Bulletin (Bulletin 6) setting out the procedure to be adopted in a possession claim against trespassers during the crisis; see:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881189/QB_Bulletin_6.pdf.

Arkin v Marshall

Nevertheless, the effect of PD 51Z remained an area of contention. *Arkin v Marshall* (unreported; HHJ Parfitt, Central London County Court, 15 April) addressed the question of whether judges can lift the PD 51Z stay in individual cases, for example to require compliance with case management directions. Judge Parfitt concluded that the stay was mandatory, not discretionary.

Arkin was subject to an expedited appeal to the Court of Appeal (heard on 30 April), in which the Lord Chancellor and the Housing Law Practitioners' Association were given permission to intervene. The Court of Appeal considered: (i) whether PD 51Z was *ultra vires*; (ii) whether the stay applied to cases that had been allocated to the multi-track and where directions had been given; and (iii) whether the court had power to lift the stay. Its judgment was handed down on 11 May (*Arkin v Marshall* [2020] EWCA Civ 620) and its conclusions were in summary that:

[8] The PLA / PBA joint letter can be found here: http://www.pla.org.uk/wp-content/uploads/2020/04/PBA-PLA-Letter-to-the-Master-of-the-Rolls.pdf .

[9] That is, in practice County Courts are less able to attempt to operate on a "business as usual" basis than the High Court; though it should be apparent that the situation is very far from "business as usual" in the High Court too at present. On the position of the Central London County Court, see below.

[10] Compare *University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB) (9 April), discussed in my original article.

- Although a challenge to the *vires* of PD 51Z ought strictly to have been made by an application for judicial review, the Court of Appeal was prepared to rule on the issue in this case;
- PD 51Z was not *ultra vires*; it was properly to be regarded as a pilot scheme made under CPR r. 51.2, and was not inconsistent with CoVA;
- In addition, PD 51Z was not incompatible with the parties' rights under ECHR Article 6 or the principle of access to justice;
- The amended PD 51Z now allowed applications for case management directions by consent, but this did not lift the stay so far as compliance with agreed directions was concerned (para. [38]);
- While as a matter of strict jurisdiction a judge has the power to lift any stay, *"it would almost always be wrong in principle to use it"*, at least save in the most exceptional circumstances (para. [46]). One such circumstance might be where the stay operated to defeat the purposes of PD 51Z and endanger public health (para. [42]);
- It was open to the parties to comply with agreed directions during the stay, but neither party could apply to court to enforce compliance while the stay was in force.
- The appeal was thus dismissed (save that the postponed directions given by the judge were to be deleted from his order unless they could be agreed by the parties, since prior to the amendment of PD 51Z on 20 April he should not have made them in contradiction of the stay): see paras. [52] – [54].

The Court of Appeal has thus given short shrift to any attempt to circumvent the mandatory stay. The Court did observe expressly, however, that it was open to interested persons to make representations to the Master of the Rolls seeking further amendment to PD 51Z, if it could be shown to be operating unfairly in a particular class of case: see para. [45].

After the hearing of *Arkin* in the Court of Appeal, but before judgment was handed down, the PLA and PBA did indeed write again to the Master of the Rolls, noting the following points. (1) The amended PD 51Z was problematic inasmuch as it appeared that a defendant could evade the effect of para. 2A merely by giving his / her name to the claimant; at that point, the defendant would no longer be a "person unknown" in accordance with CPR r. 55.6, and would thus seemingly be entitled to benefit from the 90-day stay of possession proceedings. (2) The position where possession proceedings were brought against both named and unnamed defendants was unclear[11]. It remains to be seen whether these concerns will prompt a further amendment to PD 51Z of the sort countenanced by the Court of Appeal in *Arkin*.

3. Business at Central London County Court

A number of important points emerged from a remote meeting of the Chancery Users' Group at Central London County Court ("CLCC") on 23 April. Although the official minutes have not yet been published, the following should be noted by litigators:

- CLCC has something close to the full complement of judges, some working at the RCJ, others remotely.

[11] The second joint PBA / PLA letter (undated) is here: http://41todw2i37w9c74zg3ndz7xp-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/PBA-PLA-Reply-to-Master-of-the-Rolls.pdf.

- The major difficulty the court faces is that (as at 23 April) it was only able to keep roughly one third of its staff working at the RCJ, with about 10% more working remotely. This self-evidently places significant limits on the amount of work that CLCC can process at present.
- Even so, the attitude of CLCC is that it is open for business and will attempt to keep as much work on foot as possible.
- CLCC continues to conduct a range of hearings, from straightforward applications to multi-track trials. Hearings are at present being conducted through Skype or by telephone. The intention is to move to the new Cloud Video Platform ("CVP") shortly. The Interim Applications List is continuing.
- At the start of the lockdown, very large numbers of hearings were adjourned; it may not be possible to re-list these for some time (possibly until October).
- The bankruptcy and insolvency judges at CLCC are currently dealing with urgent matters only. Petition lists are being adjourned and re-listed to the first open date after 12 weeks.
- In accordance with the Remote Hearings Protocol, the court office at CLCC currently aims to contact parties two to three weeks in advance of a hearing to establish whether the hearing should take place remotely or whether it should be adjourned.
- Particularly where judges are operating remotely, parties should assume that they will not have access to paper files; e-bundles are likely to be necessary.

CLCC plans to update users at a further remote meeting on 21 May.

4. The First-Tier Tribunal (Property Chamber)

The FFT (Property Chamber) issued "Guidance for Users During Covid-19 Pandemic" on 29 April; it can be found here:

https://www.judiciary.uk/wp-content/uploads/2020/04/Property-Chamber-First-Tier-Tribunal-Guidance-for-Users.pdf

In summary, all face-to-face hearings in the FTT (Property Chamber) listed to be heard before the end of May 2020 have been or will be postponed. This may also apply to later hearings; a decision will be taken on those by the end of May. No face-to-face hearings will be conducted until further notice. It appears that the FTT will not be able to offer remote hearings for some time, and so parties should not expect to hear from the FTT for at least six weeks, i.e. until June. The FTT will seek to deal with urgent cases in the meantime, either by remote hearing or by consideration of the documents alone.

One specific problem has arisen in relation to unopposed business lease renewals under the Landlord and Tenant Act 1954 in relation to London property. Before the crisis, these were being transferred from CLCC to the FTT under a pilot scheme. An unfortunate consequence of the lockdown is that claims that went to the FTT before the lockdown will now take some time to progress. As a temporary measure, claims issued after the lockdown are being retained by CLCC and case-managed there.

5. Some recent cases: "roll up your sleeves"; but only within reason

In *Municipio de Mariana v BHP Group Plc* [2020] EWHC 928 (TCC) (Liverpool, 20 April), HH Judge Eyre QC gave guidance on applications for adjournments and for extensions of time by reason of Covid-19. A seven-day hearing (with four days of pre-reading) was listed for early June of an application challenging jurisdiction in a very large class action arising out of the collapse of the Fundão Dam in Brazil; the defendants sought a seven-week extension (later reduced to five to six weeks) for service of their (expert) evidence in reply and an adjournment of the hearing until July or the autumn, while the claimants were agreeable to a modest extension of time but opposed the adjournment.

Judge Eyre considered the overriding objective, the Covid-19 protocols and guidance, and the authorities, and concluded (at para. [32]) that the applicable principles were that:

(i) The objective if achievable was to keep to existing deadlines; otherwise, it was to grant the minimum extension of time that was reasonably practicable;
(ii) The court would expect legal professionals to make appropriate use of modern technology;
(iii) The court would expect legal professionals to rise to the challenge presented by the pandemic. This involved a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the skills needed for effective use of remote technology. Lawyers would be expected to "roll up their sleeves" or "go the extra mile";
(iv) The same could be expected of expert witnesses who were professionals, but different considerations were likely to apply to private individuals;
(v) For its part, the court should accept evidence and material that is less polished or focused than would otherwise be required where this is necessary to achieve timely production;
(vi) The court must be realistic and not impose deadlines which are not achievable even with proper effort;
(vii) The court must be conscious that it is likely to take longer to produce material by remote working than by traditional methods;
(viii) The court should also have regard to the consequences of remote working; those working from home might have internet connections of variable quality, or be looking after sick relatives or children;
(ix) In general, an extension of time which causes the loss of the trial date will be granted much less readily than one which does not.

Considering all these factors and the facts of the case, Judge Eyre was nevertheless prepared to grant the defendants an extension of five to six weeks and vacate the June hearing. He re-listed the hearing for 20 July, with a slightly extended time estimate to take account of the possibility that it might still have to be held remotely (see para. [48]).

In *Re P (A Child: Remote Hearing)* [2020] EWFC 32, on 16 April Sir Andrew MacFarlane, the President of the Family Court, held that it was not appropriate for a 15-day trial, due to commence on 20 April, to take place. The trial concerned care proceedings, where a local authority believed that a mother had caused significant harm to her child as a result of fabricated and induced illness. At a PTR on 3 April, both the judge and the parties had accepted that the trial should be heard remotely. The President, by contrast, concluded (at para. [29]) that: *"a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis"*.

Of course, hearings in the Family Court raise issues of particular sensitivity, especially where children are concerned. Nevertheless, it may be possible to extract principles applicable to civil

litigation as well. We can conclude that lawyers and other professionals will be expected to "roll up their sleeves" to keep the wheels of the court system turning through the pandemic[12]. Even so, it is also now apparent that many cases will take significantly longer to prepare and hear, and some (particularly involving sensitive subjects and highly contested factual evidence) may be wholly unsuitable for remote hearing.

6. FCA declaration proceedings on business interruption insurance

An important question that commercial tenants and landlords have been asking themselves since the start of the crisis is whether their business interruption ("BI") insurance will respond to losses they suffer by reason of the lockdown. In the majority of cases, unfortunately, the answer is likely to be "no", because most BI policies respond only where there has been physical damage to the insured premises themselves (although detailed consideration is beyond the scope of this article).

However, the FCA is now taking steps to bring urgent declaratory proceedings in relation to BI insurance; the scope of these is at present unclear, but the FCA is likely to seek declarations as to the meaning of the main policy wordings offered in the market. Details can be found in the FCA's press release of 1 May:

https://www.fca.org.uk/news/press-releases/fca-seeks-legal-clarity-business-interruption-insurance.

Property companies will wish to keep a careful eye on developments.

7. Conclusions

53 days into formal lockdown, the government, the judiciary, and HMCTS continue to work creatively and nimbly to keep the civil justice system moving. Nevertheless, the limits of what can be done are becoming increasingly clear. It is by no means "business as usual" in the civil courts and it is unlikely to become so for weeks or months to come. Further procedural developments are likely, in particular as CVP becomes available. Most importantly, the government has promised radical reform, especially to insolvency law, in ways which will have a dramatic effect on commercial property owners and tenants. A big question is what these reforms will actually look like. The bigger question is how many of these substantive and procedural developments will continue in force after the crisis, and thus change the litigation landscape permanently.

[12] Compare *Heineken Supply Chain BV v Anheuser-Busch Inbev SA* [2020] EWHC 892 (Pat) (9 April), the trial of a patent claim, where time for reply evidence and for written closings was slightly extended but the original trial start date of 29 April was preserved.

Richard Fowler
Maitland Chambers

15th May 2020

Appendix: other useful links

The HMCTS Operational Summary on Courts and Tribunals during the Covid-19 Outbreak is to be found here:

https://www.gov.uk/guidance/hmcts-weekly-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak

This was updated daily until 24 April; since 1 May it has been updated weekly and the intention is to update it each Friday evening.

The Royal Courts of Justice Operational Update (for week commencing 11 May) is here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883922/HMCTS_RCJ_Update_Template_7_May_2020.pdf

The Civil Court Listing Priorities (again for week commencing 11 May; applicable to County Courts only) are here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883914/Civil_court_listing_priorities_7_May_2020.pdf

Updates can be accessed through the HMCTS Operational Summary.

The guidance and orders issued for civil courts on the circuits in England and Wales is here:

https://www.judiciary.uk/civil-circuit-guidance/

The High Court Business Contingency Plan for maintaining Urgent Court Hearings (26 March) is to be found here:

https://www.judiciary.uk/wp-content/uploads/2020/03/High-Court.Contingency.final_.26thMarch2020-002.pdf

The Business Contingency Plan applies to the RCJ and the Rolls Building. Two points are especially notable: first, "urgent business" means business that would warrant an out of hours application in normal times; secondly, the intention is that non-urgent business will continue to be dealt with so far as possible, although urgent business will have priority.