

Back in Business? Presenting and restraining winding-up petitions

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30 June 2022



Agenda

1. COVID
2. Back to Basics:

Presenting Petitions
Restraining Petitions



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COVID: Where are we now?

Corporate Insolvency and Governance Act 2020 (“CIGA 2020”)

- Expired without renewal on 31 March 2022

Commercial Rent (Coronavirus) Act 2022

- Came into force on 24 March 2022 to
“...make provision enabling relief from payment of certain rent debts under business tenancies adversely affected by coronavirus to be available through arbitration; and for connected purposes.”



COVID: Where are we now?

Commercial Rent (Coronavirus) Act 2022

- Business tenancies – a tenancy to which Part II of the Landlord and Tenant Act 1954 applies (s. 2(5))
- Protected rent debts: rent or service charge where (ss. 2 and 3):

The tenancy was “*adversely affected*” by COVID; and

The rent/service charge is attributable to a period of occupation by the tenant during the “*protected period*”

- *Adversely affected* – closed from any period from 2pm 21 March 2020 to 18 July 2021 (England) and 7 August 2021 (Wales) (s. 4)
- *Protected period* – the period beginning on 21 March 2020 and ending on 18 July (England), 7 August (Wales) or the last day on which the business was obliged to remain closed (s. 5)

COVID: Where are we now?

Commercial Rent (Coronavirus) Act 2022



- s. 27 and Sch. 3 prevent landlords from presenting winding-up petitions against tenants or guarantors on the grounds that the company is unable to pay its debts (i.e. protected rent debts) during the moratorium period
- Moratorium – ends on the day on which the six-month period for making a referral to arbitration has ended (i.e. six months from 24 March 2022) or the conclusion of any such arbitration (s. 23(2))

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Presenting Petitions

Back to Basics

- Section 122(1)(f) IA 1986

"A company may be wound up by the court if the company is unable to pay its debts"

- Section 123 IA 1986
 - Written demand, sum not paid, secured or compounded for 3 weeks (a stat. demand)
 - Execution or other process issued on a judgment, decree or order of any court is returned unsatisfied in whole or in part
 - Proved to the satisfaction of the court that the company is unable to pay its debts as they fall due
 - Proved to the satisfaction of the court that the value of the company's assets is less than its liabilities
- Section 124 IA 1986
 - Company, directors, creditors, contributories (subject to conditions)

Presenting Petitions

Warning! The disputed debt

- A creditor must found their petition on an undisputed debt (i.e. one which is not bona fide disputed on substantial grounds)
- A threshold test to establish standing (*Mann v Goldstein* [1968] 1 WLR 1091)
- Abuse of process
- Indemnity costs (*Media & Sport Management v Schettini* [2020] EWHC 1505 (Ch)) which may be extended to the petitioner's lawyers (*Re Company* (No. 006798 of 1995) [1996] 1 WLR 491)

Presenting Petitions

Drafting

- A statutory demand is not mandatory, but is useful – deemed inability to pay debts (s. 123(1)(a))
- Form of petition – no prescribed form but standard form commonly used.
- r. 7.5 IR 2016 – prescriptive and mandatory
- r. 7.6 IR 2016 – verification either on the petition itself or in a separate WS (note COMI and EU Reg. requirements)

Which court?

- County Court or High Court?

Presenting Petitions

Service

- r. 7.9 IR 2016 – petitioner to serve the company in accordance with Sch. 4 to IR 2016
- Para. 6 of Sch. 4 to IR 2016 – certificate of service

Notice (advertisement)

- r. 7.10 IR 2016 – give notice of the petition in the Gazette not less than 7 business days after service and not less than 7 business days before the hearing
- Filed at court not later than 5 business days before the hearing (with certificate of compliance (r. 7.12 IR 2016))

Certificate of compliance and list of appearances

- r. 7.12 IR 2016 – solicitor to certify that rules complied with
- r. 7.15 IR 2016 – list of persons who have given notice of appearing under r. 7.14

Presenting Petitions

The Hearing – top tips



1. No bundles
2. Monday lunchtime
3. One strike and you're out

Presenting Petitions

The Hearing

- The usual compulsory order – the company is wound up and the costs of the petitioner are paid as an expense of the liquidation
- Missing documents?
- Errors in the petition
 - Waive (r. 12.54 IR 2016)
 - Permission to amend
 - Dismiss
- Directions



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Restraining Petitions

How to defend a winding-up petition



1. Statutory demand received or other threats made – injunction to *restrain presentation*.
2. Petition presented but not yet advertised – injunction to *restrain advertisement*.
3. Petition presented and advertised – contest the petition.

Restraining Petitions

Why does it matter?

1. Section 127 IA 1986

- *"...any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void."*
- Winding-up commences on presentation of the petition (s. 129(2) IA 1986)
- Freezing of bank accounts
- Validation orders

2. Reputation

- Petitions are matters of public record
- Credit ratings
- Other creditors

Restraining Petitions

Disputed debt on substantial grounds

Angel Group Ltd v British Gas Trading Ltd [2013] BCC 265 at [22] (Norris J)

b) The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750).

c) A dispute will not be 'substantial' if it has really no rational prospect of success: in *Re A Company* (No.012209 of 1991) [1992] 1 WLR 351 at 354B.

e) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: in *Re A Company* (No.006685 of 1996) [1997] BCC 830 at 832F.

f) But the courts will not allow this rule of practice itself to work in justice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavits in order to claim that a dispute exists which cannot be determined without cross examination (ibid. at 841C)

g) The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment: (ibid. at 837B)

Restraining Petitions

A toolkit

1. Petition threatened or presented?
2. Debt disputed or admitted?
3. Undertakings:
 - An undertaking should avoid injunction proceedings
 - It is common practice for the company to request an undertaking from the petitioner after explaining why the debt is disputed
 - If the petitioner refuses, application for an injunction issued and costs sought on the indemnity basis.
4. Directions for a disputed debt hearing

Restraining Petitions

Other grounds for restraining / contesting

- A cross-claim based on substantial grounds (*Re Bayoil SA* [1999] 1 WLR 147)
- Procedural errors
- Jurisdiction



Questions?

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