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In this edition of **Restructuring Watch**, we reflect on the first court decision on the moratorium procedure, some recent schemes and restructuring plans, the lifting of the remaining pandemic-related restrictions for commercial landlords alongside the introduction of the Commercial Rent (Coronavirus) Act 2022 and an extension of the UK directors' disqualification regime.

RECENT DEVELOPMENTS

Corbin & King: First Judicial Consideration of the CIGA moratorium

In June 2020, the Corporate Insolvency and Governance Act 2020 (**CIGA**) introduced a new standalone moratorium process alongside the restructuring plan and certain temporary measures in response to the pandemic. Over 18 months later, in early February 2022, the English court considered (and clarified) certain of the legislative provisions relating to the moratorium.

The moratorium was introduced to allow eligible distressed companies breathing space for a short period of time, during which rescue or restructuring options can be explored free from creditor action. A monitor is appointed at the beginning of the process who, during the moratorium, must "monitor the company's affairs for the purpose of forming a view as to whether it remains likely that the moratorium will result in the rescue of the company as a going concern". A monitor **must** bring a moratorium to an end if (among other things) the monitor "thinks" that the company is unable to pay any pre-moratorium debts for which the company does not have a payment holiday during the moratorium.

The February case arose in connection with the moratoria of certain operating companies (**OpCos**) within the Corbin & King group, which operates well-known restaurants such as The Wolseley and The Delaunay.

In its judgment, the court focused on the provision relating to termination for inability to pay certain pre-moratorium debts. A "pre-moratorium debt" includes a debt which the company has become (or may become) subject to during the moratorium by reason of an obligation incurred before the moratorium. A debtor will generally have a payment holiday for pre-moratorium debts, subject to certain exceptions, including in respect of "debts or other liabilities arising under a contract or other instrument involving financial services".

In this case, shortly after the moratoria commenced, demands were made under guarantees given by the OpCos. As those guarantees were considered to be "contracts involving financial services", no payment holiday was afforded to the OpCos in respect of the amounts demanded. As a result, the joint monitors had to consider whether to bring the moratoria to an end. They opted not to, concluding it likely that the OpCos would be rescued as going concerns and the loan to which the guarantees related would likely be repaid in the near term. The case came before the court when a creditor of the group applied to terminate the OpCo moratoria, alleging that the monitors' failure to terminate had unfairly harmed its interests. In dismissing that application, and allowing the moratoria to continue, the court held that it was reasonable for the monitors to "think" that the loan was capable of repayment, given that a third party had made an offer of immediately available interim funding that was sufficient to discharge the loan. That offer of funding was reportedly secured and the group's facilities were refinanced, allowing the OpCos to exit the moratoria and continue to trade.

When the moratorium process was introduced in June 2020, the government anticipated that around 1,250 moratoriums would be proposed each year. By contrast, in the period since its introduction to the end of 2021, only 15 moratoriums had been proposed. While the restructuring community may not have been as quick to make use of the moratorium procedure as the government had hoped, the court's judgment in connection with the Corbin & King moratoria provides some clarity on the approach monitors should take, and the factors to bear in mind, when the question of terminating a moratorium for (possible) inability to pay pre-moratorium debts arises.

A Busy March for the English Court: A Series of Scheme(s) and Restructuring Plan Hearings

February brought the inaugural moratorium case, while the courts were busy with scheme and restructuring plan hearings in March.

On 15 March 2022, the court handed down a judgment convening meetings of redress creditors to vote on dual schemes of arrangement proposed by a company in the Amigo Loans group. The group is a provider of "guarantor" loans in the UK, which are offered to customers who, due to their credit histories, cannot borrow from mainstream lenders. It was subject to claims for mis-selling its products to consumers. Last year, the group proposed its first scheme, which similarly sought to compromise redress claims of customers who had been mis-sold the loans provided by the company. Following opposition from the Financial Conduct Authority (**FCA**), the court declined to sanction the scheme.

Now, the company is proposing a new and novel approach: two alternative schemes, with redress creditors invited to vote on both. The court convened two simultaneous meetings of a single class: one to vote on a scheme which would (subject to FCA approval) see the group return to lending (the **New Business Scheme**) and the other to vote on a scheme which does not anticipate a return to lending but a quick and cheaper outcome for creditors than a formal insolvency process. In each case, the redress creditors' claims will be compromised and a scheme fund will be available for distribution. The scheme company believes that the New Business Scheme offers the potential for the best return to creditors and, if both schemes are approved at the meetings, intends to first ask the court to consider the New Business Scheme for sanction. The meetings have reportedly been scheduled for mid-May 2022. It remains to be seen how creditors will vote and whether, as with the first scheme, the FCA will intervene at the sanction hearing although, as of now, the FCA has not indicated an intention to do so.

Later in the month, the court sanctioned the restructuring plans proposed by companies in the ED&F Man and Smile Telecoms groups. In sanctioning the ED&F Man restructuring plan, the court reflected on and invoked the cross-class cram down power, making it the fifth plan to involve cram down (alongside the (first) Smile Telecoms, DeepOcean, Virgin Active and Amicus Finance restructuring plans). At the sanction hearing for the current (second) Smile Telecoms restructuring plan, the court considered that it had jurisdiction to sanction the plan which (among other things) sought to alter the constitution and share capital of the plan company, which was incorporated in Mauritius but with its centre of main interests (COMI) in England.

Commercial Landlords: Restrictions Lifted

At the beginning of the pandemic, measures were introduced which restricted the actions landlords could take against tenants for non-payment of rent. Certain of those measures continued through the first quarter of 2022, including:

- Until 25 March 2022, landlords could not forfeit their commercial leases if rent was unpaid for any reason, meaning that no landlord was able to re-enter leased premises for non-payment of rent.
- Until 31 March 2022, a landlord could not present a petition to wind-up a tenant company if rent under a commercial lease was unpaid and that rent was unpaid because of the impact of the pandemic.

These restrictions have now been lifted. In their place comes a new regime under the Commercial Rent (Coronavirus) Act 2022, which received Royal Assent on 24 March 2022. Under that act, landlords and tenants will be able to make a reference to arbitration to determine how certain unresolved pandemic rent arrears (**protected rent debts**) should be addressed. The regime is limited in scope: it will only be available for leases relating to premises which were mandatorily closed during the pandemic (such as restaurants and gyms) and, importantly, the regime will not apply to pre-pandemic rent arrears or arrears that have accrued after a sector re-opened. Landlords and tenants will only be able to refer their disputes to arbitration until late September and there are restrictions on landlords taking actions in relation to protected rent debts and on tenants using restructuring plans and company voluntary arrangements to compromise in-scope arrears where a reference to arbitration has already been made. In that way, the legislation seeks to give further breathing room to certain commercial tenants.

Directors' Disqualification: Tidying Up The Regime

The Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021 came into force on 15 February 2022.

With this act, a gap in the director disqualification regime has been closed. Previously, a former director of a company that had been dissolved without first going into insolvency proceedings could avoid disqualification on the basis of actions taken while a director of that company, absent an (unlikely) application to restore that company to the register. Now, under this act, the Insolvency Service can ask the court to disqualify a former director of a dissolved company without that company having to be restored. While we would anticipate director disqualifications to remain relatively rare, a practical hurdle to disqualification has been removed with this act.

If you would like further information, please contact:

James Roome
Barry Russell
James Terry
Liz Osborne
Tom Bannister
Emma Simmonds
Lois Deasey
Lauren Pflueger