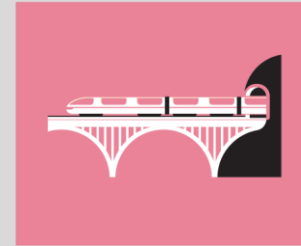


# Property Litigation: Insolvency during the Pandemic

Caroline Shea QC and Gavin Bennison

29 April 2020



Falcon Chambers

[www.falcon-chambers.com](http://www.falcon-chambers.com)

# Today's Zoominar

- 1. Landlord remedies on tenant insolvency pre-Covid 19**
- 2. Changes to the landscape as a result of the Pandemic**
- 3. Practical implications and strategic considerations**





Falcon Chambers

[www.falcon-chambers.com](http://www.falcon-chambers.com)

# In a nutshell

- The changes to the existing landscape started off relatively minor, but have become more sweeping in recent days.
- Focus on curbing landlords' most severe remedies (forfeiture, winding-up). More “broad brush” than in ordinary times.
- Creating room for landlords and tenants to take stock and reach a *commercial* solution to their circumstances (a “breathing space”).
- Creativity and flexibility will be required on both sides.



# 1. Landlord remedies on tenant insolvency pre-Covid 19





Falcon Chambers

[www.falcon-chambers.com](http://www.falcon-chambers.com)

# Insolvency Regimes

1. Liquidation (voluntary or compulsory): IA 1986, Pts IV, VI, VII
2. Administration: IA 1986, Sch. B1
3. Company Voluntary Arrangements (CVAs): IA 1986, Pt I
4. Receivership (administrative or fixed-charge): IA 1986, Pt III/ LPA 1925



# Landlord's remedies

1. **Forfeiture**
2. Statutory demand → winding up
3. Money claim
4. Commercial Rent Arrears Recovery (CRAR)
5. Third party claims (guarantors, former tenants, sub-tenants)
6. *Recourse to a rent deposit deed (outside scope of this seminar)*





# 1. Forfeiture

- **Statutory moratoria on exercising a right of re-entry *without leave of court*:**
  - Small company pre-CVA moratorium: IA 1986, Sch. A1
  - Administration: IA 1986, Sch. B1
  - Winding-up order (or appointment of provisional liquidator): IA 1986 s.130



# 1. Forfeiture (cont.)

## **Small company pre-CVA moratorium: IA 1986, Sch. A1**

- Eligibility criteria (paras. 2-5): “small company” as per CA 2006 s.382(3): no >£10.2m turnover, no >£5.1 assets, no > 50 employees (2 of).
- Leave required to forfeit lease, whether by peaceable re-entry or by proceedings: paras. 8, 12(1)(f), 12(1)(h).

## **Administration: IA 1986, Sch. B1**

- Moratorium initiated by filing application for an administration order, or prescribed documents if out-of-court route used: paras. 12, 31, 42-43.
- Leave of court *or* consent of the administrator required to forfeit lease, whether by peaceable re-entry or by proceedings: para. 43(4), (6).
- Pending claims likely to be stayed or dismissed.



# 1. Forfeiture (cont.)

**Liquidation (winding up):** IA 1986, Parts IV, VI & VIII

- **Voluntary:** forfeiture remains possible despite commencement, but court likely to stay any proceedings on application by liquidator (or creditor or contributory) under IA 1986 s.112.
- **Compulsory:**
  - Between petition and winding-up order: possible, but likely to be stayed under IA 1986 s.126.
  - Leave needed after winding-up order or appointment of provisional liquidator: s.130(2).
  - Position re peaceable re-entry remains unclear in both instances.



# 1. Forfeiture (cont.)

**CVA:** IA 1986, Part I: the CVA “*can modify any pecuniary obligation upon breach of which the right of re-entry may be exercised; and the right will then be exercisable only in relation to the pecuniary obligation as so modified. But it cannot modify the right of re-entry itself. It can alter the covenant but must leave the reservation (or condition upon which the lease is granted) untouched*”: Discovery (Northampton) v Debenhams Retail [2019] EWHC 2441 (Ch) at [99], per Norris J.

**Receivership:** no effect on L’s ability to forfeit.



# 1. Forfeiture (cont.)

**Obtaining leave to forfeit:** the familiar guidelines in Re Atlantic Computer Systems [1992] Ch 505:

- The landlord must make out the case.
- Leave should normally be given if forfeiture proceedings are unlikely to impede the purposes of the administration.
- In other cases, the interests of L and T must be balanced, but with great importance usually attached to the proprietary rights of L.
- Potential for significant loss to L usually points to leave being granted, unless substantially greater, or disproportionate, loss caused to others.
- Consider: parties' respective financial positions; effect on the administration (in light of purposes, history, prospects of success and end result sought).



## 2. A note on disclaimer: IA 1986 ss.178-182

- Liquidator may disclaim any lease as “onerous property”, subject to doing so within 28-days of L giving notice to the liquidator to decide whether to disclaim: s.178.
- L may prove in the winding up for loss and damage suffered as a result: s.178(6).
- Disclaimer has no inherent effect on third parties (guarantors, sub-tenants, mortgagees, previous tenants subject to AGAs): s.178(4); Hindcastle v Barbara Attenborough Associates [1997] AC 70.
- L may recover possession by (i) forfeiture of ‘deemed’ lease for non-payment of rent, putting M or S to election re whether to seek a vesting order under LPA 1925 s.146(4); or (ii) putting TPs to election re whether to seek vesting order under LPA 1925 s.181.

\*See also Insolvency Rules 2016, Part 19.



### 3. Other remedies in insolvency pre-Covid-19

- **Statutory demand → winding-up:**
  - Presentation of petition onwards precluded by the pre-CVA/ administration moratoria: Sch. A1, para. 12(1); Sch. B1, paras. 40(1), 42(3).
  - Otherwise available, subject to the terms of any CVA.
- **Money claim for rent:**
  - Generally the same as for forfeiture.
  - CVA: governed by the terms of the CVA, which can include future rent.
  - Consider the position re rent as an expense of the administration.
- **CRAR (Tribunals, Courts and Enforcement Act 2007 ss.72-80):**
  - Unavailable: from presentation of winding up petition (IA 1986 s.128(1), note also s.176(2)); during pre-CVA or administration moratoria (as above).
  - Subject to additional complexities: IA 1986 s.183(1).
- **Third party claims (guarantors, former tenants, sub-tenants):**
  - Generally unaffected by tenant insolvency, subject to the terms of any CVA.
  - Subject to compliance with LT(C)A 1995 s.17 or TC&EA 2007 s.81 (as relevant).



## **2. Changes to the landscape as a result of the Pandemic**







Falcon Chambers

[www.falcon-chambers.com](http://www.falcon-chambers.com)

# Points for discussion:

1. **Coronavirus Act 2020, Section 82**: moratorium on forfeiture for non-payment of rent & **PD 51Z**: stay on possession proceedings
2. **Moratorium on winding up** and **changes to CRAR**
3. Other changes in the **Corporate Insolvency and Governance Bill**
4. **Temporary Insolvency Practice Direction**



# 1. Coronavirus Act 2020, Section 82: moratorium on forfeiture for non-payment of rent

- Prevents landlords from forfeiting any “*relevant business tenancy*” for non-payment of rent, whether by action or peaceable re-entry, during the relevant period of 26 March – 30 June 2020 (subject to extension).
- Affects existing proceedings and orders so that possession need not be given until after 30 June 2020.
- Does not matter whether the lease is contracted out of the 1954 Act: a “*relevant business tenancy*” is one meeting the primary definition in section 23(1) of the 1954 Act, or which would do if any “*relevant occupier*” (lawful occupier) were the tenant.



# 1. Practice Direction 51Z – stay on possession claims

- As amended on 20 April 2020. Currently subject to challenge before the Court of Appeal.
- Stays all Part 55 possession claims and associated enforcement action until **25 June 2020**.
- Except for: trespass claims against persons unknown, IPOs (squatters only) and agreed case management directions.
- **No exception for commercial premises.**



## 2. Moratorium on winding up and changes to CRAR

- Announcement by Alok Sharma on 23 April 2020, to be implemented in the Corporate Insolvency and Governance Bill (supposedly to be published imminently) and secondary legislation.
- Any winding up petition on the basis of inability to pay debts will be reviewed by the court. Neither presentation of a petition nor a winding-up order will be permitted where the company's inability to repay has arisen as a result of Covid-19. (Query statutory demands)
- CRAR: only available if 90 days' rent in arrear (up from 7 days).



### 3. Other changes in the Corporate Insolvency... Bill

- Announcement by Alok Sharma on 28 March 2020, also to be implemented in the Corporate Insolvency and Governance Bill.
- 1) **Temporary moratorium for *solvent* businesses undergoing a “*restructuring process*” (aka “breathing space”)**
- 2) **Suspension of wrongful trading laws for 3 months from 1 March 2020** (with retrospective effect)



### 3. Other changes in the Corporate Insolvency... Bill (cont.)

#### 1) Temporary moratorium for solvent businesses undergoing a “*restructuring process*” (aka the “breathing space”)

- Distressed but not yet insolvent companies.
- Short moratorium on creditor action, modelled on the existing small company pre-CVA moratorium.
- Out-of-court process.
- Powers of management to remain in hands of directors other than for specific disposals/dispositions requiring approval of the “monitor”.



### 3. Other changes in the Corporate Insolvency... Bill (cont.)

#### 2) Suspension of wrongful trading laws for 3 months from 1 March 2020 (with retrospective effect)

- IA 1986 s.214: director *knew or ought to have concluded* that there was *no reasonable prospect* that the company would avoid going into insolvent liquidation or insolvent administration.
- Defence: s.214(3): every step possible taken to minimise potential losses to creditors.
- Risk of personal liability: financial contribution to company's assets.
- All other “checks and balances” remain: directors' duties, fraudulent trading, misfeasance, reviewable transactions.





## 4. Temporary Insolvency Practice Direction

- Came into force on **6 April 2020**, until **1 October 2020** unless amended or revoked.
- Applies across the Business & Property Courts nationwide.
- Clarifies procedure for out-of-court administration notices of appointment/ intention to appoint to be filed electronically: para. 3.
- New procedure for urgent hearings before a HCJ or ICC Judge: para. 5.
- **Temporary Listing Procedure for Winding-up Petitions**: para. 7: groups of petitions heard over Skype from the start of April.



### **3. Practical implications and strategic considerations**





Falcon Chambers

[www.falcon-chambers.com](http://www.falcon-chambers.com)

# Remedies on tenant insolvency as they now stand (1)

## 1. Forfeiture:

- In almost all instances, not possible until July 2020 at the earliest (combined effect of s.82 and the stay in PD 51Z).
- Remains available only for non-rent grounds, effected by peaceable re-entry.
- Longer periods than usual will likely need to be given in section 146 notices.
- Questions of whether leave to forfeit will be granted unlikely to arise in the meantime. As and when they do, there are arguments in both parties' favour:
- Tenant: low prospect of L re-letting premises, or re-letting close to passing rent.
- Landlord: administration doomed to fail as no prospect of rescuing company.
- Overall, unlikely to be a practicable or desirable remedy at present.



# Remedies on tenant insolvency as they now stand (2)

## 2. Winding-up:

- Details awaited in the Bill e.g. re ability to serve statutory demands.
- Even if available in principle, real difficulties of proof will arise if petitions are reviewable to ascertain the cause of the debtor's inability to pay.
- **Do landlords need to be wary of abuse of process arguments?**
- Arguments in favour: (i) petitioner does not really want to force T into liquidation in current market; (ii) to do so would disadvantage body of creditors (given government support available to T): Re Maud [2015] EWHC 1626 (Ch).
- Arguments against: (i) what L 'wants' is not so simple; (ii) L not able, or required, to prove liquidation will advantage the body of creditors generally.
- **Harper v LB Camden [2020] EWHC 1001 (Ch) at [70]-[90], per Snowden J**



## Remedies on tenant insolvency as they now stand (3)

3. **Money claim:** position remains as per pre-Covid 19. Consider the likelihood of successful enforcement of any money judgment.
4. **CRAR:** 90 days' unpaid rent, up from 7. Practical difficulties likely in exercising CRAR and auctioning goods → may be counter-productive.
5. **Third-party claims:** no restrictions *per se*, but as with money claim against T, if third party doesn't pay, L will need to consider enforcement.
6. **Rent deposit deed:** as-yet unaffected.



# Rent as an expense of the administration during Covid

- T goes into administration during the lockdown period.
- T's premises are required to remain shut by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, Reg. 2 and Sch. 2. The premises nonetheless remain fitted out.
- Does the Pillar Denton test require one to consider the counterfactual: what use (if any) *would* the administrators have made of the premises but for the lockdown? Probably not.
- But query whether negotiating a rent deferral/holiday is sufficiently analogous to negotiating a surrender or assignment.



# Receivership during the Pandemic

- Issues affecting Law of Property Act receivership during the Pandemic:
- A **must read**: **Stephanie Tozer QC and Cecily Crampin, “*Receivership in the COVID-19 Crisis*”**
- [www.falcon-chambers.com/publications/articles/receivership-in-the-covid-19-crisis](http://www.falcon-chambers.com/publications/articles/receivership-in-the-covid-19-crisis).





# Conclusions and Strategy (1)

- An **increasingly unfavourable landscape** with **few *effective remedies*** open to landlords.
- The **commercial reality**: both parties want the lease to continue; often no clear winner and loser from the present circumstances.
- The **legal reality**: stacked against the tenant whatever the speculative arguments that rent is not due during the lockdown (frustration, implied term, rent cessor, force majeure, human rights).



## Conclusions and Strategy (2)

- Government expects Ls and Ts to make use of the “**breathing space**” to reach **sensible compromises** where possible.
- **Side letters** remain the **most conciliatory and cost-effective option**, if achievable.
- One or more of: rent holidays, rent deferrals, re-grant for longer term.
- Ensure tenants are taking **full advantage of all government support** (e.g. Business Interruption Loan Scheme, Job Retention Scheme)



**Falcon Chambers**

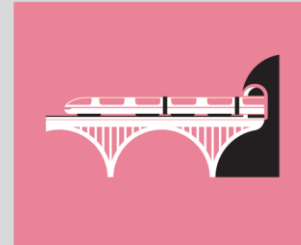
Falcon Court  
London  
EC4Y 1AA

**T:** 020 7353 2484

**F:** 020 7353 1261

**Email:** [clerks@falcon-chambers.com](mailto:clerks@falcon-chambers.com)

**DX:** 408 Lond/Chancery Lane



Falcon Chambers

[www.falcon-chambers.com](http://www.falcon-chambers.com)