Landmark Chambers

Can a corporate tenant get an injunction to restrain presentation of a winding up petition while the Coronavirus Act 2020 restricts its landlord's ability to forfeit its lease?

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1. On 26th March 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI No 350 came into force. Those regulations repealed and revoked earlier regulations, which came into force on 21st March. The broad effect of those regulations was to enforce measures announced by the Prime Minister on 23rd March: businesses selling food and beverage on premises had to cease to do so, as did most shops and a number of business were prevented from operating altogether. Additionally, people were not permitted to leave where they live without reasonable excuse. Similar restrictions came in force on the same day in Wales by the Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020 SI No 353. The restrictions under both sets of regulations are in force until 26th September 2020 unless the Secretary of State declares the restrictions or requirements no longer necessary.

2. Additionally, on 25th March 2020, Parliament enacted the Coronavirus Act 2020. Section 82(1) of the Act provides that a landlord is prevented from exercising a right of re-entry or forfeiture, under a "relevant business tenancy", for non-payment of rent, by action or otherwise, between 25th March 2020 and 30th June 2020. A relevant business tenancy is one to which Part 2 of the Landlord and Tenant Act 1954 applies or to which it would apply if the occupier were the tenant.

3. Against that backdrop, many companies with 1954 Act protected tenancies, having shut their premises and feeling the pain of COVID-19, have chosen not to pay rent that fell due on the March quarter day. Without the ability to forfeit, some landlords are now serving statutory demands on their tenants or threatening to present winding up petitions.

4. The consequences of a winding up petition are serious: advertisement of a petition in the Gazette will often mean the company's bank account is frozen and that creditors are unwilling to trade with the company. In the present climate, it may well impede the company's access to essential credit.

5. In those circumstances, what are the chances that a company could obtain an injunction to prevent its landlord from presenting a petition based on rent arrears?

6. The court has a discretion to restrain the presentation of a winding up petition if it is satisfied that the company would succeed in establishing the proceedings were bound to fail and were an abuse of the court's process. A creditor with an undisputed debt is entitled to petition because the failure to pay the debt is evidence that the company is unable to pay its debts as they fall due. So if the debt that the petition would be based on is genuinely disputed on substantial grounds, the court will restrain the presentation of a petition, because the petition would be an abuse.

7. It will also be an abuse of process to present a petition where the petitioner either does not want a winding up order at all but issues or threatens to in order to achieve an ulterior purpose, or where, in addition to wanting a winding up order, the petitioner has an additional purpose which will operate to the detriment of the body of creditors. It has been suggested that a tenant in the situation under review might successfully invoke one or both of those limbs, on the basis that the landlord does not really want to end up with the probable disclaimer of the lease and the empty property that will result; and also that the tenant's liquidation might be to the

detriment of the body of creditors as a whole, at least in a case where the tenant is in the process of applying for emergency credit.

8. We would not wish to discourage anyone from running the argument, but it might not be a straightforward one. Taking first the case of a tenant which can demonstrate that it is in the process of obtaining further credit: such a tenant might well have strong grounds for a time-limited injunction or (and strictly, we think this is the more likely scenario) for a petition, once presented, to stand adjourned until the credit situation is stabilised. But implicit in such a stance is an acceptance of a current unsatisfied debt, as well as an inability to pay it within the 3 weeks of a statutory demand if served, which is what produces a "deemed" inability to pay debts under section 123(1)(a) of the Insolvency Act 1986. Even without a statutory demand, non-payment of even one undisputed debt evidences, for the purposes of section 123(1)(e) of the 1986 Act, that the company is unable to pay its debts as they fall due to also produce the "deemed" inability. It is hard to see how a creditor can be said to abuse the court's process by presenting a petition asking for it to act on the very "deeming" which statute requires. Further, the argument as a whole appears to rest on a broad view of what the court means by it being an abuse for a creditor to petition without "wanting" to wind up a company. Many creditors present petitions without it being their primary hope that proceedings will reach their logical end point, because they would prefer to be paid in full. But this by itself does not disentitle a creditor from presenting a petition. It will seldom be an abuse of the court's process, to ask it to do what the statute explicitly authorises, in the circumstances specifically adumbrated by the statute itself. This, we suggest, is the essential point underlying recent case law on abuse of process in this field, in *Ebbvale Ltd v. Hosking* [2013] PC 1; [2013] 2 BCLC 204 and also, and most recently, *Sell Your Car with Us Ltd v. Sareen* [2019] EWHC 2332 (Ch); [2019] BCC 1211 and in *Re Maud (No 2)* [2018] EWHC 1414 (Ch); [2019] Ch 15.

9. What then of the argument that it is an abuse of process for a landlord to present a winding up petition for rent when the 2020 Act prevents the landlord from forfeiting the tenant's lease?

10. It is hard to resist the outward attraction of this argument. Section 82 of the Coronavirus Act 2020 was enacted to protect businesses from the effects of their cash-flow reduction because of the necessary closure of their trading premises and/or restrictions in ability to trade. The outward purpose of removing the landlord's ability to forfeit until 30 June 2020, is to allow the tenant to be able to return to trade from those premises, once restrictions are eased or end. That objective is rendered ineffective if the tenant faces a petition for rent arrears which will lead to being in compulsory liquidation as a result of failing to pay its debts as a result of its reduced cash-flow.

11. As before, we would not wish to discourage anyone from running the argument, but it may not be plain sailing. Using a petition to obtain payment of an undisputed debt has been repeatedly confirmed by the courts as not being abusive, as recently as in *Sell Your Car with Us Ltd v. Sareen* and in *Re Maud (No 2)* (both, *supra*). The Coronavirus Act 2020 does not suspend tenants' liability to pay rent. Parliament has specifically withheld that relief to tenants and kept open the use of other enforcement action for landlords. It can thus be seen that, correctly analysed, section 82 puts a tenant in the same position vis-à-vis its landlord as it is vis-à-vis any other unsecured creditor. The Act neutralises the tenant's peculiar vulnerability to the "direct" proprietary remedy of forfeiture. But all this achieves, is to align landlords with other unsecured creditors. The tenant's contractual obligations continue to be enforceable. And the associated remedies for a breach of those obligations remain available, including (although this simplifies the nature of a winding up) an "indirect" proprietary remedy of recovering the premises after disclaimer by the liquidator.

12. What then about the argument that the landlord is using the petition for an ulterior or collateral purpose which is that it wants to forfeit the lease in question? While a question of fact in each case, there are some general problems this argument would face. One is that the landlord would still be precluded by section 82 of the Coronavirus Act 2020 from forfeiting the lease on the basis of non-payment of rent even once the tenant is in compulsory liquidation. Even if the landlord has reserved a right to forfeit for an 'insolvency event' under the terms of the lease,

nevertheless the Insolvency Act 1986 places restrictions on the landlord's ability to do so: it will certainly need consent from the court to bring proceedings and, arguably, would also need it to peaceably re-enter. The reason for this is clear: the lease is an asset for the liquidator to realise and it is for the liquidator to decide whether to do so or to disclaim it.

13. What about the argument that COVID-19 in and of itself is a reason for the court to restrain the presentation of a petition? A tenant might argue that, because viable businesses have been shut for the foreseeable future, it is unrealistic that a tenant can meet its rent obligations. The Insolvency Act 1986 was not designed with a pandemic in mind. Might the court improvise a response to these conditions, by giving the tenant some "breathing space", where it is clear that non-payment of rent is due to COVID-19?

14. This argument is in some ways the most attractive of those to which we have referred, because it could be rationalised as a response to the exceptional and unprecedented situation created by the contagion, without threatening to undermine the general principles which apply in normal times. But it, too, faces substantial difficulties. In truth, a company which happens to lease premises is not the only kind of debtor facing cash-flow difficulties in time of contagion. The problem of liquidity affects the whole economy and, potentially, all actors within it — including landlords. It is necessary to recall that every debtor's creditor is likely also to be someone else's debtor. The policy of the state is that all businesses should contribute to a simulation of normality by paying their debts, taking on credit to do so where this is necessary; and, to this end, making credit more widely available. Whether or not that policy has been perfectly implemented is a separate question. But what Parliament has declined to do, is elevate the interests of any one debtor or class of debtors over those of others, including those (like many landlords) who happen also to be creditors in relation to certain debts. It may well be an exaggeration to call this "state policy": it may well be more of the usual muddle from the top. But that is hardly the point. Where Parliament has not ventured, the Court should be slow to tread.

15. Further, it should be recalled that the Insolvency Act 1986 and also the Companies Act 2006 make specific provision for companies facing cash-flow difficulties: notably, schemes of arrangement under the Companies Act, as well as company voluntary arrangements and administrations under the Insolvency Act, are all designed to deal with the problem of a lack of cash-flow (whether temporary or permanent) facing the tenant company. These measures are all accompanied by specific controls (for example, the support of a particular portion of the affected creditors in the case of a scheme of arrangement). It is perhaps foreseeable that the court might be persuaded to injunct the presentation of a petition (or, as we think more likely, adjourn a winding up petition) in favour of a company that can demonstrate that such measures are being pursued, to give the company an opportunity to complete the measures which it has put in hand, though even this is problematic. But what is harder to imagine, is the Court improvising a response which would achieve the same effect (essentially, buying time) while discarding the controls.

16. So an argument based on abuse of process may well face substantial hurdles. But that is not to say that a tenant might not succeed in obtaining an injunction to restrain presentation on the basis that the debt is genuinely disputed on substantial grounds.

17. One argument might be rent has been suspended because of supervening illegality. Not all of the analysis of the law on this subject has recognised the particulars facts in which the courts have used the language of "suspension": for example, in one case, a contractor's ability to perform his obligations was "suspended" by a wartime proclamation; but it is clear that what the court regarded as suspended, was his ability to perform it, not his liability to do so, the point being that the contract conferred on him a reasonable period to meet the obligation. Moreover, *Cricklewood Property & Investment Trust Ltd v. Leighton's Investment Trust Ltd* [1945] A.C. 221 and *John Lewis v. Viscount of Chelsea* (1994) 67 P. & C.R. 120 will leave the tenant in some difficulty: both the House of Lords, in the former case, and Mummery J, as he then was, in the latter, stated that restrictions which came into force after the lease was entered into and which made the performance of covenants impossible may provide the tenant with a defence to

a claim for breach of covenant, but would not relieve the tenant of its liability to pay rent under the lease. That is not the end of the road when it comes to a possible argument about frustration, but it is hard to reconcile this reasoning with the idea that English law recognises a half-way house in which obligations are suspended, without the contract being frustrated. Perhaps it should develop in this direction, but it is hard to see how any such development could deal coherently with what one might call the "policy"-type points mentioned earlier in this note. Put more shortly: it is hard to see how a doctrine of suspension could avoid ending up by starving Peter, to feed Paul.

18. Much has been written and said about the potential frustration of leases as a result of COVID-19. We will not add to it save to make the no doubt obvious point that it is hardly a "remedy" to the cash-flow crisis now facing so many businesses for tenants or for that matter landlords to show that their leases are frustrated. Rather the opposite: it is an admission of defeat.

19. The moratorium on insolvency proceedings which the Government proposed on 28th March 2020 seems to have been quietly shelved. Nor, despite what we have called state policy in this field, has there been the emergence of the 'easy' credit that the Government envisaged would see debtors through this period of economic turmoil. Unless Government policy changes, faster and cheaper loans need to made available: swift action is needed to ensure that a large number of companies with short-term cash-flow issues do not collapse into compulsory liquidation as landlords (and other creditors) start petitioning to recover their debts. It is not safe for anyone to assume that the Court will, or can, or should, step in to improvise a response which it is the responsibility of the Government and Parliament to provide.

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