

November 2021



UPDATED COVID-19 WINDING- UP PROVISIONS

Prior to the Covid-19 pandemic, a creditor could issue a Statutory Demand on an undisputed, liquidated debt against a limited company for a sum not less than £750. If the Statutory Demand was not settled or disputed within 21 days from service, a Winding-up Petition could then be issued.

When the Covid-19 pandemic hit, the Government introduced emergency legislation to support vulnerable but viable businesses. Under this legislation, and up until 30th September 2021, a Winding-up Petition could not be issued based on a Statutory Demand. In fact, a Winding-up Petition could only be issued in very narrow circumstances if other grounds were shown to the Court's satisfaction that the company was insolvent, and that the debt and the failure to pay the debt had nothing to do with Covid-19.

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These provisions were replaced by the Corporate Insolvency and Governance Act 2020 with new provisions which apply between 1st October 2021 and 31st March 2022. Statutory Demands can now be issued but additional protections are in place. Statutory Demands can only be issued for a debt of not less than £10,000 and new temporary restrictions still restrict commercial landlords presenting Winding-up Petitions in relation to commercial rent arrears built up during the pandemic, unless it can be shown that the reason for non-payment is wholly unrelated to the pandemic (detailed further below).

Accordingly, for non-commercial rent matters, Statutory Demands can now be used again under the new Covid-19 restrictions.

HMRC GUIDANCE PUBLISHED DEALING WITH DIRECTORS' LIABILITY FOR THEIR INVOLVEMENT IN LIMITED COMPANIES AND POTENTIAL TAX AVOIDANCE

HMRC has recently published guidance in relation to joint and several liability notices which can be issued to company directors, shadow directors and certain other individuals involved in tax avoidance, tax evasion, phoenix companies (explained below), and repeated insolvency.

The guidance gives examples and in the case of phoenix companies (where businesses carry on trading through a series of companies that become insolvent), HMRC may issue notices to individuals if it is clear that the new phoenix company set up carries out similar trade to the old company.

It should be noted, however, that HMRC will not issue notices if they believe that the directors have acted in good faith and have no material influence over the company's affairs, or if the individual's connection is part of a genuine attempt to save the company. Directors should tread carefully and consider the potential risks before looking to "fold" an old company and set up a new company carrying out business that resembles the old company's business.

HMRC'S APPROACH TO DEBT ENFORCEMENT

In June 2021, Kwasi Kwarteng MP, as Secretary of State for Business, Energy and Industry Strategy, wrote to R3 (the UK's Insolvency and Restructuring Professionals Association) stating:-

"HMRC will take a cautious approach to enforcement of debt owed to the Government that will have occurred during this period ... HMRC enforcement during this critical period, however, will be largely driven by lack of engagement by companies with it, rather than just their inability to pay and that using insolvency to enforce payment will remain a last resort."

Many businesses will have built up debts as a result of the pandemic and the various loans and financial support schemes that have been made available.

It is critical, if these comments are to be followed, that early and regular engagement with HMRC is undertaken by directors or business owners, to avoid enforcement action being taken. Mr Kwarteng has made it clear that enforcement action is much more likely where businesses fail to engage with HMRC whatsoever in relation to debts owed.

RESTRICTIONS ON COMMERCIAL LANDLORDS CONTINUE DESPITE OTHER INSOLVENCY RESTRICTIONS BEING EASED

Following the outbreak of the Covid-19 pandemic, the Government introduced emergency legislation which restricted the usual enforcement options open to commercial landlords where their business tenants fell into rent arrears. This included a ban on forfeiture on the grounds of non-payment of rent, a blanket ban on a landlord's right to oppose the renewal of a commercial tenancy based on the tenant's persistent arrears where it is a protected tenancy, restrictions on using Commercial Rent Arrears Recovery (CRAR), and a ban on winding up petitions where the debt has been caused by Covid-19.

As noted above, in mid-September 2021 it was announced that the restrictions that were introduced by the Corporate Insolvency and Governance Act 2020 as a response to the Covid-19 pandemic would not be extended. Whilst this undoubtedly comes as a relief to businesses that are looking to recover outstanding debts, the restrictions that prevent landlords forfeiting a lease due to non-payment of rent have been extended yet again until 25th March 2022. It also remains the position that a winding-up petition may not be presented in respect of commercial rent that is unpaid because of the impact of Covid-19.

Whilst this has provided relief to many commercial tenants struggling to pay their rents whilst businesses have been closed, it also presents a further struggle for landlords reliant on the rental income.

The most viable option left for many landlords is to issue a money claim in order to recover rent arrears.



COMPANY DIRECTOR DISQUALIFICATION

Draft legislation is currently proceeding through Parliament that will amend the Company Director Disqualification Act 1986.

The current procedure states that if a company is dissolved without entering into a formal process of insolvency, the Company Director Disqualification Act will not apply. If the proposed legislation is passed in its current form, directors of dissolved companies can be pursued whether or not the company went through a formal insolvency process. It appears that the Government are looking to close a potential loophole that currently exists.

Disqualifications can range from two to 15 years. It is possible for directors to apply to obtain leave from the Court to act as a company director even when disqualified, but only if they can persuade the Court that it's necessary and appropriate, and leave will only be given to named companies.

Any individual potentially facing director disqualification proceedings should take professional advice in relation to defending those proceedings and consider undertakings as an alternative to disqualification.

If you would like to discuss or need help or support on any of the issues above then please contact the Dispute Resolution Team on 01582 514000



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