

The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 – continuing a false sense of security for directors and companies alike?

Further suspension of liability for ‘wrongful trading’ – to 30 June 2021

New legislation a year on

On 26 March 2021, the *Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021* (“CIGA Extension Regulations 2021”) came into force - almost a year since the Government announced, on 28 March 2020, a range of measures aimed at protecting companies affected by COVID-19 and their directors, as they tried to steer businesses through the choppy waters which were then anticipated to last only a few months.

One of those measures related to liability for wrongful trading under the Insolvency Act 1986, which is triggered where, at some time before the commencement of a liquidation or administration, a director knew or ought to have known that there was *no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration*, and has failed to take every step with a view to minimising the potential loss to creditors (sections 214 and 246ZB Insolvency Act 1986).

When they were originally announced in March 2020, the measures included the temporary suspension of wrongful trading provisions for an intended 3-month period from 1 March 2020.

As subsequently enacted, on 25 June 2020, section 12 of the Corporate Insolvency and Governance Act 2020 (“CIGA 2020”), which was headed ‘*Suspension of liability for wrongful trading: Great Britain*’, provided that in determining, for the purposes of sections 214 and 246ZB of the Insolvency Act 1986, “*the contribution (if any) to a company’s assets that it is proper for a person to make, the court is to assume that the person is not responsible for any worsening of*



the financial position of the company or its creditors that occurs during the relevant period'. However, reflecting the increasingly understood scale of the pandemic, section 12(2) of CIGA 2020 provided that the relevant period was the 7 calendar months which began with 1 March 2020 and ended with 30 September 2020.

As had been publicly stated by the Business Secretary, the relaxation of the wrongful trading liability provision was intended to reassure directors that the difficult decisions they would have to make about the future viability of their business would not have to be unduly influenced by the exceptional circumstances entirely beyond their control.

Notably (amongst other things), the recently laid CIGA Extension Regulations 2021 extend the period in respect of which, for the purposes of section 214 or 246ZB of the Insolvency Act 1986, when determining the contribution (if any) to a company's assets that it is proper for a person to make, the court is to assume that the person is not responsible for any worsening of the financial position of the company or its creditors, to 30 June 2021.

Mind the gap

However, it is important to appreciate (and it is not always recognised) that the CIGA Extension Regulations 2021 do not extend the original period of suspension provided for by section 12 of CIGA 2020. Although various other temporary measures introduced by CIGA 2020 have been continued by a number of different statutory instruments, the period of suspension of the wrongful trading provisions provided for by section 12 expired on 30 September 2020 without any legislative extension.

Nevertheless, in November 2020, reflecting the fact that the UK had gone back into lockdown following a temporary reprieve from such restrictions, the *Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020* were laid before Parliament. Those Regulations, which came into force on 26 November 2020, reintroduced the same measure which had appeared in section 12 of CIGA 2020 (using the same heading - '*Suspension of liability for wrongful trading: Great*



Britain). However, they provided that the relevant period (during which the court is to assume that the person is not responsible for any worsening of the financial position of the company or its creditors that occurs) was the period which begins with 26 November 2020 and ends with 30 April 2021. It is that relevant period (and not the relevant period under the primary legislation) which has now been extended by the CIGA Extension Regulations 2021, to 30 June 2021.

Accordingly, as matters now stand, a director who might otherwise have found themselves exposed to liability for a wrongful trading claim will be assumed not to have been responsible for any worsening of the financial position of the company or its creditors either in the period of 1 March 2020 to 30 September 2020 or in the subsequent period of 26 November 2020 to 30 June 2021.

It remains to be seen whether directors are likely to face any wrongful trading claims in respect of the intervening 8-week period and/or whether the extended (albeit broken) duration of the suspension will have created a culture of poor decision-making or blasé continued trading of loss-making businesses. Only time will tell, when the inevitable insolvencies flow after the eventual cessation of the various government relief packages.

A continuing false sense of security?

In the meantime, directors should not be blinded by the stark language of the headings to the relevant legislative provisions, which are misleadingly suggestive of absolution. As noted in our article published prior to the enactment of CIGA 2020 (see [here](#)), wrongful trading is but one weapon in the arsenal of officeholders and creditors. Whilst directors may be absolved from liability under section 214 or 246ZB of the Insolvency Act 1986 (ordinarily triggered where, at some time before the commencement of the liquidation or administration, the director knew or ought to have known that there was *no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration*, and failed to take every step with a view to minimising the potential loss to creditors), they may still face valuable claims for damages for breaching their common law duty to consider the interests of creditors.



The latter (preserved by section 172(3) Companies Act 2006) remains entirely unaffected by the legislative measures introduced by CIGA 2020 and the *Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020* (as amended by the CIGA Extension Regulations 2021) and will have been triggered (even in the circumstances of the pandemic) if and when a director knew or should have known that the company *is or is likely to become insolvent* (*BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112).

Moreover, liability for fraudulent trading (under section 213 or 246ZA of the Insolvency Act 1986) has continued to remain on the books throughout and the pandemic fuelled suspension of liability for wrongful trading may lead to a resurgence of its use by officeholders and creditors (where previously a less difficult claim for wrongful trading would have sufficed to replenish the assets of a company that had been fraudulently depleted).

Summary of further amendments effected by the CIGA Extension Regulations 2021

In addition to extending the suspension of liability for wrongful trading as explained above, the CIGA Extension Regulations 2021 have also:

- (a) Extended the temporary exclusions for small suppliers from the application of section 233B Insolvency Act 1986 set down in section 15 of CIGA 2020. Following the CIGA Extension Regulations 2021 amendments, small suppliers who meet the criteria set down in section 15 of CIGA 2020 can continue to exercise their “ipso facto” rights until 30 June 2021.
- (b) Extended, for the third time, the restrictions placed on use of statutory demands and the presentation of winding up petitions by creditors provided for in Schedule 10 of CIGA 2020. Under those restrictions, creditors may not present a winding up petition based on a statutory demand served after 1 March 2020. More generally, creditors are also precluded from presenting a winding up petition based on ss123(1)-(2) of the Insolvency Act 1986 unless they have reasonable grounds to believe that either coronavirus has not had a financial effect on the debtor, that is to say, that the company’s financial position has not worsened as a consequence of, or for reasons relating to, coronavirus or the relevant circumstances relied on would have arisen even if coronavirus had not had a



financial effect on the company (the so-called “Coronavirus Test”, which sets a low threshold: *Re a Company* [2020] EWHC 1551). The CIGA Extension Regulations 2021 have similarly extended the restrictions on use of statutory demands and the presentation of winding up petitions to 30 June 2021.

- (c) Extended the temporary moratorium provisions introduced by CIGA 2020. Under the CIGA Extension Regulations 2021, the temporary moratorium procedure which was previously due to lapse on 30 March 2021 will now remain available to 30 September 2021.

The extension to the CIGA 2020 restrictions on the winding up procedure, referred to in (b) above, will inevitably add to the slew of insolvencies expected to emerge later this year once the restrictions are lifted and other government support measures cease. From 30 June 2021 companies that have survived thus far may find themselves on the receiving end of winding up petitions and forfeiture proceedings alike (a yet further extension to the prohibition on commercial landlords forfeiting leases for non-payment of rent having been announced on 10 March 2021, also extending the prohibition to 30 June 2021).

That said, the seemingly deliberate difference between the extension of the winding up restrictions to 30 June 2021 and the extension of the temporary moratorium procedure to 30 September 2021 may offer some hope to companies seeking to trade out of their financial difficulties after the lifting of lockdown and the easing of restrictions. For the three months after 30 June 2021 the more relaxed moratorium procedure set down by CIGA will remain available to companies seeking to manage their accumulated debt, which may offer some much-needed breathing space to those seeking to get back on their feet after a difficult year and more.

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