

Insolvency and divorce in the time of coronavirus (COVID-19) and the effect of the Corporate Insolvency and Governance Act 2020

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Restructuring & Insolvency analysis: Melania Constable, senior associate, and James Riby, partner, of Charles Russell Speechlys LLP discuss how the issue of insolvency and divorce has been impacted by the coronavirus (COVID-19) pandemic and the temporary provisions introduced by the Corporate Insolvency and Governance Act 2020 (CIGA 2020).

It is sadly not uncommon to face the misfortune of concurrent insolvency and divorce proceedings, but sometimes one spouse may be engineering or using insolvency in an attempt to undermine the other's financial claims upon divorce.

In England and Wales, the business interests of the parties or any one spouse can be taken into account as one of the 'matrimonial assets' to be divided on divorce. The Family Court has a wide discretion over the outcomes it can impose: it could determine the future shares in the business of both parties, or order a sale and division of the proceeds. If affordable, the court may also be persuaded to provide for a buy-out by one party of the other in the interests of keeping the business intact and functioning smoothly in the future.

Before that outcome is agreed or determined by the court, the parties will often disagree on how much a business is worth and one of them may be tempted to seek to undervalue a business, even to the extent of pushing it into insolvency proceedings. The legal relationship between concurrent divorce and insolvency proceedings is complex and can make a significant difference to divorce settlements. In some circumstances it may even be appropriate for the family and insolvency courts to hold combined hearings, a recent procedural innovation that arose from a case the authors were involved in.

This issue may become more prevalent in the current economic turmoil we are facing as result of the coronavirus pandemic and a second national lockdown. It is inevitable that some parties will refer to the pandemic to downgrade the value of their business interests. In some cases, this may well be a genuine consideration—but in others it will require further investigation. The Family Court has extensive disclosure powers and often has recourse to accountancy and business recovery experts to get to the bottom of the commercial realities facing the parties. A spouse (and in some situations insolvency practitioners as well) should consider asking the court to make full use of these powers when faced with claims of insolvency.

CIGA 2020

[CIGA 2020](#) was enacted as law on 25 June 2020 as part of the government's coronavirus support package. This legislation introduced some significant temporary changes to the corporate restructuring and insolvency regime.

One of the key (albeit temporary) changes introduced by [CIGA 2020](#) in the context of divorce proceedings is in relation to the temporary restrictions on the presentation of winding-up petitions, use of statutory demands as a ground for winding-up petitions, and the making of winding-up orders. The

time period for these restrictions was recently extended from 30 September 2020 to 31 December 2020. It may be extended again given the recent decision to hold a second national lockdown. In summary, [CIGA 2020](#) provides that:

- a creditor cannot present a winding-up petition against a company based on a statutory demand served between 1 March 2020 and 31 December 2020
- a creditor cannot present a winding-up petition in the period between 1 March 2020 and 31 December 2020 on the basis that a company is unable to pay its debts, unless that creditor has reasonable grounds for believing that:
 - coronavirus has not had a financial effect on the company, or
 - the company's inability to pay would have arisen even if coronavirus had not had a negative financial impact on the company

Impact on divorce proceedings

These changes may impact on related divorce proceedings in the following manner:

Early bird catches the worm

There is often friction between the creditors of a spouse and the spouse's ex partner in the context of divorce proceedings—usually, with the first party to obtain judgment (and enforcement) taking priority over the matrimonial pool of assets.

This is because, since *Hill v Haines* [[2007 EWCA Civ 1284](#)], it is very difficult for a trustee or liquidator to overturn a divorce financial order. And once a party is adjudged bankrupt (or their business enters into liquidation or another formal insolvency process), the other spouse will often not be able to continue or finalise any enforcement over the assets forming part of the relevant insolvent estate. For further reading, see Practice Note: [R&I spotlight on matrimonial law](#) (subscription required).

The Family Courts have remained open throughout the pandemic, with most hearings being held by video conference, and there have been no restrictions on the issuing of divorce and associated financial proceedings. Some parts of the process may even have been speeded up given the court's rapid switch to the online receipt and processing of applications. The judiciary and Ministry of Justice have said this will remain the case throughout the second national lockdown.

Accordingly, it could be argued that a spouse (when faced with the possibility of claims that a business asset may soon be forced into insolvency) should seek to commence divorce proceedings and obtain a financial order as soon as possible, ideally prior to the lifting of the temporary suspension (currently on 1 January 2021) to avoid creditors obtaining priority and/or the other spouse using insolvency as a tool in the divorce. And despite the temporary suspension on winding-up petitions, genuine third-party creditors would be well advised to consider what other means may be available to them to ensure recovery of what is owed to them (see below).

Valuing business assets on divorce

Careful consideration will need to be given in the context of valuing business interests during the coronavirus pandemic and the likely impact this will have on the divorce financial award. Expert valuation advice will likely need to be taken and may now need to address what support a business may obtain from the government's coronavirus support package.

In particular, where it is alleged by one spouse that there is threat of a winding-up petition against their company (thus diminishing the value of the matrimonial assets to be divided up between the

spouses), consideration ought to be given as to whether this is pertinent at this stage (in light of the temporary restrictions introduced by [CIGA 2020](#)). This is likely to depend on the type of business in question as coronavirus appears to be having a disproportionate impact on specific sectors such as leisure, hospitality and retail. Other businesses may be able to adapt and cope relatively well, while others may even see opportunities in the new economic landscape.

As mentioned above, if a creditor successfully demonstrates that the basis for the winding-up petition had arisen prior to coronavirus or the situation would have happened even if coronavirus had not had a financial effect on the company, then it should be able to proceed with a winding-up petition notwithstanding the temporary restrictions.

Personal insolvency and debt proceedings

It should be noted that even though winding-up petitions against companies are largely suspended for the time being, there are no restrictions on commencing debt proceedings in England and Wales, although this is likely to be a more timely and costly process than issuing a statutory demand and winding-up petition. In addition, there are no restrictions on bankruptcy proceedings or statutory demands served on individuals.

While the changes made by [CIGA 2020](#) affect corporate insolvencies only (not personal bankruptcies), they will likely impact the division and valuation of business interests in the context of divorce in the months and perhaps years to come.

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