



# **Marriott Harrison**

## **Covid-19 update**

6 October 2020

## MH COVID-19 UPDATE

### Tuesday, 6 October 2020

The Covid-19 pandemic is continuing to create unprecedented challenges for businesses across the world and the legal and regulatory response to it continues to change.

As the outbreak unfolded, we produced a series of regular updates on the issues and challenges our clients were facing. As business faces an uncertain autumn and winter, we have set out in this update a multi-disciplinary guide to the key changes to the various government support initiatives and response measures, reflecting market insight gained from speaking with and advising you, our clients, first-hand.

**The content of this update is accurate as at the date of publication but may be superseded.**

If you are unsure as to the latest position on any particular issue, please follow up-to-date governmental advice and feel free to contact a member of the Marriott Harrison team (see details on the page 3).

Our Managing Partner has the following message for our clients:

We at Marriott Harrison have been helping our clients address the challenges that Covid-19 has presented since the outbreak started, and have adapted alongside our clients to working and delivering transactions and timely advice in 'the new normal'.

As the situation evolves, we want you to be fully aware of our commitment to continue this support to enable you achieve your objectives. In particular, we can help you plan ahead so that you can place your business in the best position possible in these uncertain times.

Further, in providing these high quality services and advice we are nonetheless keen to protect the health and wellbeing of our staff and all those with whom we work. We are following the advice from the relevant government and health authorities and our IT infrastructure enables our lawyers and support teams to work both remotely and in the office according to business needs. This is working well, so please contact us as you normally would.

If you plan to visit us in person our offices are open during normal working hours. However we ask that you first contact our Front of House team direct on +44 20 7209 2000 to confirm our current COVID-19 measures for external clients and visitors.

Thank you for your continued support. We wish you, our friends, the very best through this challenging time.



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Since our last report, there have been a number of changes to the various government initiatives introduced to help businesses address the issues faced by the Covid-19 pandemic. In this update, we report on the most important changes.

### Coronavirus business support schemes

The Government's Winter Economy Plan, announced on 24 September 2020, contains extensions to its support measures for businesses affected by Covid-19, including the UK Coronavirus Business Interruption Loan Scheme (CBILS), the UK Coronavirus Large Business Interruption Loan Scheme (CLBILS), the Covid-19 Corporate Financing Facility (CCFF) and the Bounce Back Loan Scheme.

#### CBILS and CLBILS

CBILS and CLBILS will both be extended to **30 November 2020**. Each scheme was originally open for six months, with CBILS being due to close on 30 September 2020. CBILS lenders will now be allowed to extend the term of an existing loan to a total of up to ten years.

The British Business Bank has also confirmed that businesses applying for CBILS or CLBILS will benefit from more flexibility as to the date the test of whether or not their business is an 'undertaking in difficulty' is assessed. To be eligible for these schemes, businesses previously had to demonstrate that they were not an 'undertaking in difficulty' as of 31 December 2019.

#### CCFF

The Bank of England and HM Treasury have given six months' notice of the withdrawal of the CCFF and have confirmed that it will not be extended beyond its current lifetime. The CCFF was launched on 17 March 2020 for an initial period of 12 months. Under the scheme, the Bank of England can purchase short-term corporate debt from firms that can demonstrate that they were in sound financial health prior to the impact of Covid-19 and which make a material contribution to the UK economy.

The CCFF will therefore make no further purchases of commercial paper after **22 March 2021**.

On **31 December 2020**, the CCFF will also close to new applications from counterparties and issuers looking to become eligible. The deadline for submitting a letter of commitment is also **31 December 2020**.

#### Bounce Back Loan

The Bounce Back Loan Scheme was initially open for a period of six months and is also being extended to **30 November 2020**. All businesses that borrowed under this scheme will have new options to repay their loans over a period of up to ten years (increased from the previous six-year period), to move temporarily to interest-only payments for six months (on up to three occasions) or to pause repayments entirely for six months (on one occasion and only after six payments have been made). Companies' credit ratings will not be affected by taking up any of these options.

### Spotlight on early stage investment – the Future Fund

The Government's Future Fund Scheme has been extended and will now remain open for new applications until 30 November.

The Future Fund was launched on 20 May 2020 and was originally due to close on 30 September 2020. Under the Future Fund, the Government has matched private investment with state-backed convertible loans ranging from £125,000 to £5 million.

Marriott Harrison has spoken to the Future Fund, which has confirmed that a company which already has a Convertible Loan Agreement in place with the Future Fund will now not be able to make a second Future Fund application. However, companies that have secured funding under the Future Fund will still be able to take advantage of the UK Government's other Coronavirus business interruption loan schemes, to the extent they are applicable.

For our previous commentary on the Future Fund and its terms, please see our previous updates [here](#) and [here](#).

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## **Resumption of Companies House strike off activity**

As a result of the Covid-19 pandemic, Companies House paused all strike off activity to relieve the burden on businesses and to protect creditors which may have struggled to register an objection.

### **Voluntary strike off**

From **10 September 2020**, all companies that applied to be struck off before July 2020 will be struck off the register in a phased approach over a period of four weeks. For companies that applied from July 2020 onwards, the voluntary strike off process will continue as normal after this initial four-week period.

### **Compulsory strike off**

From 10 October 2020, the temporary measure to suspend compulsory strike off action will be lifted. Companies House will resume the process to remove a company from the register if there is reasonable cause to believe it is no longer carrying on business or in operation.

## **Possession proceedings and enforcement**

The stay on all possession proceedings brought under CPR 55 and all enforcement proceedings by way of a writ or warrant of possession expired on **20 September 2020**.

Any claims brought before 3 August 2020 will not be listed, relisted or referred to a judge until a party serves a reactivation notice. The deadline for doing so is currently **4pm on 29 January 2021**.

Where case management directions were made before 21 September 2020, a party filing and serving a reactivation notice must propose new dates for directions and a proposed hearing date, or state that an existing hearing can be met. The new arrangements also include a review date before the case proceeds to a substantive hearing.

The claimant must let the court know of any knowledge they have of the effect of the Covid-19 pandemic on the defendant and their dependants. This information should be included with any reactivation notice or claim form filed with the court. The claimant should also tell the court and the defendant as soon as possible if they themselves have faced any hardship as a result of the Covid-19 pandemic. The case will be 'Covid-19 marked' and this information kept in mind throughout. The claimant should do this by sending the court and the defendant a letter by post or email.

To Covid-19 mark the case at your request, the court will require the following information from you:

- brief details of the hardship you have faced; and
- whether you have received assistance under a Covid-19 scheme, including (where you are a landlord) with any borrowing in respect of the property.

Evictions that will be given priority include where there has been anti-social behaviour or extreme rent arrears of at least 12 months' rent or nine months' rent where this constitutes more than 25 per cent of a landlord's total annual income from any source. Other priority evictions will include those where there has been evidence of squatters, domestic violence, fraud, deception, illegal sub-letting or abandonment of a property.

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### **Protections from forfeiture for non-payment of rent for business tenancies in England has been extended to 31 December**

*The Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No 2) Regulations 2020 (SI 2020/994)*, which came into force on 29 September 2020, extend the protection from forfeiture for non-payment of rent for business tenancies in England to 31 December 2020.

Section 82 of the Coronavirus Act 2020 provides that a right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent may not be enforced, by action or otherwise, during the relevant period. The relevant period began on 26 March 2020 and was initially due to end on 30 June 2020. It was later extended until 30 September 2020, and now expires on **31 December 2020**.

### **Amendments to CIGA 2020**

*The Corporate Insolvency and Governance (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 (Early Termination Regulations)* and the *Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 (Extension Regulations)* were laid before Parliament at the end of last month and were enacted to amend some of the temporary measures introduced by the *Corporate Insolvency and Governance Act 2020* (CIGA 2020).

The Early Termination Regulations act to terminate the application of certain temporary provisions relating to moratoria on **1 October 2020** (rather than on 30 March 2021, as would be the case under the Extension Regulations). Specifically, modifications allowing the supervising insolvency practitioner to disregard aspects of a company's financial position that relate to coronavirus when considering whether the company is 'rescuable' in seeking a moratorium will no longer apply.

The relaxation of the conditions for extending, monitoring and terminating the moratorium on the grounds that any worsening of the company's financial position due to Covid-19 should be disregarded will also cease to apply.

The Extension Regulations came into force on 29 September 2020 and extend the duration of some of the temporary measures introduced by CIGA 2020 beyond their current expiry date of 30 September 2020 as set out below:

The temporary insolvency measures introduced by CIGA 2020 are extended as follows:

- The prohibition on presenting winding-up petitions based on statutory demands and the prohibition on presenting winding-up petitions or making winding-up orders based on any other definition of a debtor's inability to pay its debts, unless coronavirus can be discounted as a reason for that inability, are extended to **31 December 2020**;
- The modifications to the new moratorium procedure, which relax the entry requirements applicable to it, will also be extended until **30 March 2021**. A company may enter into a moratorium if it has been subject to an insolvency procedure in the previous 12 months and does not have to prove that it can be rescued as a going concern as a result, where its potential failure is due to coronavirus. Measures will also ease access for companies subject to a winding up petition. However, as set out above, the Government intends to carve-out some of the temporary provisions relating to moratoria from the scope of the extension; and
- The small supplier exemption from the restrictions on termination of supply contracts is extended to **30 March 2021**.

It is also important to highlight for directors that the temporary suspension of potential liability for wrongful trading is not being extended - this expired on **30 September 2020**.

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## The new restructuring plan

In a landmark case, Virgin Atlantic Airways Limited (Virgin) has become the first company to use the new restructuring plan process to pursue a solvent recapitalisation of its business under the new Part 26A of the *Companies Act 2006*, brought in by the *Corporate Insolvency and Governance Act 2020*. While the introduction of Virgin's plan did not require the use of the new cross-class cramdown procedure (something borrowed from Chapter 11 in the US), as all four classes of creditors approved the plan at the convening hearing, the judgments provide helpful practical guidance and confirm that the court will be likely to approach its consideration of new restructuring plans in a similar way to that in which it assesses creditor schemes of arrangement under the *Companies Act 2006*. This will include consideration of any relevant scheme case law in evaluating the proposed plan and on questions of interpretation which arise with respect to the new restructuring plan process.

As it was not necessary to use the cross-class cramdown mechanic, this novel aspect has not yet been tested in practice. In both the convening and sanctioning judgments, the court did not comment on whether it considered it would be appropriate to exercise this mechanic in circumstances such as Virgin's case where the assenting classes of creditor had unanimously approved the scheme (meaning that arguably it was artificial to convene meetings of those classes anyway, since they could simply have signed up to a consensual agreement with Virgin outside of any scheme procedure). This remains a point to be decided in the future.

It also remains to be seen whether the restructuring plan becomes widely used as we head into further uncertain times, in particular given its complexity and the potential costs involved. As with schemes of arrangement, which are primarily used by large international companies involved in complex debt restructurings, it is expected that application of the new restructuring plan process will rarely be seen in the SME market.

*Re Virgin Atlantic Airways Ltd [2020] EWHC 2191 (Ch)*  
*Re Virgin Atlantic Airways Ltd [2020] EWHC 2376 (Ch)*

## Temporary Insolvency Practice Direction

The *Temporary Insolvency Practice Direction (TIPD)* came into force in April 2020 to assist court users during the Covid-19 pandemic. It remained in force until 1 October 2020 and, on 2 October 2020, a new *Temporary Insolvency Practice Direction (New TIPD)* took immediate effect, replacing and extending the TIPD and remaining in force until 31 March 2021 unless amended or revoked by a further insolvency practice direction within that timeframe.

The purpose of the New TIPD is still to assist court users during the continued pandemic and, while the substance of the New TIPD remains unchanged from the TIPD, the wording has been updated to take account of developing court practice. There is no substantive change to the procedures that are currently being followed for insolvency hearings and none at all for the provisions relating to administration appointments and statutory declarations.

The New TIPD continues to supplement the *Insolvency Proceedings Practice Direction 2018* and applies to all insolvency proceedings in the Business and Property Courts. A copy of the New TIPD can be found [here](#).

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### Spotlight on Property

Whilst Coronavirus's impact on the real estate sector is undoubtedly severe, it is also now clear that the long-lasting impact is going to vary both in terms of sectors and location.

This note briefly summaries the position as at 25 September for commercial property in England, it does not take into account any localised lockdowns which might have been imposed.

#### Rents

It would be fair to say that in March a number of Landlords acted aggressively believing their Tenants had the money to pay the March quarter's rent. Most Landlords then agreed to rent being paid **monthly** and then fairly quickly the mood of aggression began to move towards one of acceptance so that many Landlords agreed that the rent (or a portion of it) could be **deferred**. In some instances, especially if the Tenant was willing to commit to a longer period or to "lose" a break, Landlords gave some form of rent **reduction**. Other large Landlords granted reductions to "small" Tenants especially in the retail and hospitality sectors.

But it is also important to remember that Landlords are suffering from the effects of Coronavirus too and that often their hands are tied by their **Lenders** as to what they can or cannot do. Loan to value ratios in many instances are being severely tested.

#### What can a Landlord do at present if the Tenant has not paid its rent?

Generally, Landlords have insisted that **service charges** are paid in full (arguing that they are still incurring costs) but most have accepted monthly payments. Some Landlords have pushed back planned capital projects to reduce the amounts their Tenants have to pay.

- **Statutory demands/winding up.** A route some Landlords went down which was "banned" by new legislation if the Tenant could show that the reason for non-payment is Covid related. This Tenant protection now ends 31 December 2020.

- In the real world, not many Landlords are going to want to **forfeit** (end) a lease unless the Landlord has a third party who will take the space immediately. In any event, there is now a ban on forfeiting for non-payment of rent until 31 December 2020.
- Draw upon a **rent deposit**. Some Landlords can and are now beginning to do this in order to receive cash, even though they know it is unlikely the deposit will be immediately "topped up".
- Almost certainly by now Landlords will have pursued **parent company guarantors and guarantors** under an AGA.
- Charge **interest**, but if the Tenant is not paying the rent this currently is a "theoretical" claim.
- **Sue** for non-payment, but what will that lead to?

**Loss of rent insurance** which we mentioned previously was uncommon and the insurers have generally refused to pay out. However, a test case bought by the FCA in relation to some insurance claims has proved generally favourable for the insured. So maybe there will be some pay outs?

#### Other Government action

In June the Government published the "**Code of Practice for Commercial Property relationships during the Covid-19 pandemic**" which it hopes Landlords and Tenants will follow. The Code encourages dialogue and transparency. All of this is very sensible, and few would argue with the sentiment. We expect Landlords (and their Lenders) will want to see detailed business plans from their Tenants which will show the loans, grants, etc. the Tenant has obtained before the Landlord agrees to any form of concession. Tenants may argue they do not want to take on further debt but why should the Landlord suffer? The Government has stated it "is clear that where businesses can pay rent they should do so". The Code though is voluntary.

The Government has also relaxed **planning** legislation to make it easier for pubs/restaurants to accommodate more customers outside and to make it easier to use properties for a different planning use. Steps have been taken already to encourage development and the White Paper "Planning for the Future" hopes to lead to a streamlining and modernising of the planning system.

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## What are we seeing in the market?

Some large institutional Landlords/those with broad shoulders are holding out for near pre-Covid Lease deals whilst other smaller/leveraged Landlords are much keener to secure income. Again, sector and locations are important. Certainly, the fact that no business rates are payable on retail, hospitality and leisure properties until 31st March 2021 has affected how some Landlords react.

We are completing new Leases and Lease renewals in all sectors. Some are "standstill arrangements" for 3/6 months, others have been much more conventional. Whilst talked about a lot we have not (yet) an increase in the use of turnover rents on new lettings but are beginning to see "Covid" clauses. Of course, some new lettings remain "on hold" or fell by the wayside.

Many office Tenants are talking about downsizing (many by around 50%) and we have already acted for Tenants who have moved within a building in order to take smaller space following a negotiation with their Landlord. We think there will be a very large number of re-gears over the coming months. We have served a number of break notices, but it is worth bearing in mind that it is absolutely standard for a break to be conditional on the annual rent being paid up to date so Tenants who have not paid rent for 2, coming up to 3, quarters may have to find a considerable amount to exit from premises they no longer need.

There does seem more dialogue between Landlords and Tenants. It is clear though that (a) Landlords are prioritising which properties they want to "sort out" first and (b) Landlords who have mortgages will require their Lender's consent and Lenders too are prioritising which transactions to sanction/consider.

## Job Retention Bonus

As a reminder, the Job Retention Bonus is a one-off payment to employers of £1,000 for every employee who they previously claimed for under the furlough scheme, and who remains continuously employed through to 31 January 2021.

It is important to note that the employee must not be serving a contractual or statutory notice period that started before 1 February 2021 for the employer making a claim.

Eligible employees must earn at least £520 a month on average between the 1 November 2020 and 31 January 2021. Employers will be able to claim the Job Retention Bonus after they have filed PAYE returns for January 2021 and payments will be made to employers from February 2021.

Employers will need to present their claim for the bonus between 15 February and 31 March 2021.

The Treasury has also issued a [direction](#) and [guidance](#) on the Job Retention Bonus containing [a set of worked examples](#) of eligible employees. If you have any queries on Job Retention Bonus eligibility or claims, please do get in touch.

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## **New Jobs Support Scheme**

Last week, the Chancellor announced that the Coronavirus Job Retention Scheme (the “furlough scheme”) will finally come to an end, as planned, on 31 October and simultaneously announced its successor.

The new ‘Jobs Support Scheme’ will help employers keep people in ‘viable’ jobs in work, even if they are on reduced hours.

The headline points for the new scheme are:

- as with the furlough scheme, this does not give employers a right to require their employees to work reduced hours. **That will need to be agreed with each employee going on to the scheme;**
- employees will need to work a minimum of 33% of their usual hours;
- for every hour not worked, the employer and Government will each pay one third of the employee’s usual pay, with the Government’s contribution capped at £697.92 per month (*this means that, provided the Government cap does not come into play, employees using the new scheme will receive at least 77% of their pay*);
- the employer will be reimbursed in arrears for the Government contribution;
- employees cannot be made redundant or put on notice of redundancy during the period within which their employer is claiming the grant for that employee (*a noticeable shift from the position under the Coronavirus Job Retention Scheme*);
- it will run from 1 November 2020 for six months; and
- all small and medium sized businesses are eligible, as will some large businesses, depending on their coronavirus-related losses.

Employees must have been on the employer’s PAYE payroll on or before the 23 September in order to be eligible for the new scheme. This means that a “Real Time Information” submission notifying payment to that employee to HMRC must have been made before that date.

Employees will be able to cycle on and off the scheme and do not have to work the same pattern each month, however each short time working arrangement must cover a minimum period of seven days to qualify for the employer and Government top-up.

The Government has also indicated that the 33% threshold could be increased in 4-6 months and that the Government’s contribution will not cover Class 1 employer NIC or pension contributions (*the employer must still make these contributions*).

The key short-term issue for employers to action is documenting the consent to a reduction of hours with the employee; this is a fundamental requirement to varying the terms of an employment contract.

## **New requirements for employers - employees & self-isolation**

New legislation came into force on 28 September in relation to self-isolation requirements for those either testing positive for coronavirus or being notified by the NHS Covid 19 app that they have been in close contact with a person who has contracted the virus.

Under these regulations, employers must not knowingly allow employees to attend any place (other than the place they are isolating) for the duration of their isolation period for the purposes of their employment. In addition, employees must tell their employer if they have tested positive or been notified by the NHS Covid 19 app if they have to self-isolate, and they face fines of £50 if they fail to do so.

Contravention of this regulation without reasonable excuse will result in employers receiving fixed fines starting at £1,000 for the first offence, £2,000 for the second offence, £4,000 for the third offence and £10,000 for each subsequent offence. If an officer of any business consents to a breach of their obligations or if any breach is attributable to their negligence, then that individual officer and the business will have committed an offence.

This puts the focus very much on employers to take care when they are bringing employees back to work. The new regulations are likely to particularly impact on employers with lots of employees who cannot work from home.