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Kirkland Alert

## Travelodge Obtains Interim Injunction to Restrain Winding Up Petition, Pending Restructuring Proposal and Forthcoming Legislation

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### At A Glance

In a ground-breaking development, on 6 May, Travelodge, the UK's largest independent hotel brand, successfully obtained the first interim injunction in the current market to restrain a winding up petition threatened by certain of its landlords for non-payment of rent.

The court took account of:

1. legislation to suspend winding up petitions, which had been announced but not yet published or enacted; and
2. plans for a restructuring that would likely produce a substantially better result for creditors as a whole.

The judgment of the High Court was published today, 8 June. Travelodge launched its company voluntary arrangement on 3 June.

### Forthcoming Legislation

The case turned on UK Government measures to suspend winding up petitions from being presented where the company cannot pay its bills owing to the COVID-19

pandemic. Forthcoming legislation was first announced on 23 April but – at the date of Travelodge’s injunction hearing – the Government had yet to publish a draft. The draft Corporate Insolvency and Governance Bill was later published on 20 May (see our [Alert](#)) and is currently making its way through Parliament on an accelerated timetable. The new measures are expressly intended to give companies breathing space from “aggressive rent collection” through these difficult times (according to the UK Secretary of State for Business, the Rt. Hon. Alok Sharma MP).

## The Threatened Winding Up Petition

As a result of a “catastrophic” collapse in revenues owing to the COVID-19-induced lockdown, Travelodge had stopped making rental payments. The landlords of two Travelodge sites threatened to present a winding up petition against Travelodge Hotels Limited (“the Company”). The debts were undisputed.

## The Injunction Application

The Company applied for an interim injunction to restrain the threatened winding up petition, providing evidence that:

- it was forecast to face a liquidity shortfall, as revenues had dropped by c.95% as a result of the lockdown;
- there was the possibility of a strong rebound performance if COVID-19 restrictions were to lift in the reasonably foreseeable future;
- it had proposed a turnaround plan, which it hoped to agree on a consensual basis or, if that was not possible, potentially via a company voluntary arrangement;
- presentation of a winding up petition would have a damaging and destabilizing effect on its potential restructuring;
- in a winding up or administration, landlords and other unsecured creditors would receive very little by way of recovery; and
- the threatened petition was therefore contrary to the interests of the Company’s creditors as a whole.

## Judgment

Case highly likely to be covered by forthcoming legislation

The court noted that it was clear the government intended to bring in legislation imminently. The court was satisfied that the Company was the sort of business the forthcoming legislation would cover and it was “highly likely” the legislation would cover this situation, as:

- any winding up petition would be presented after 27 April (the announced commencement date for the suspension to be effected by the new law);
- the applicant was a commercial tenant (in the leisure sector) facing a prospective winding up petition by a commercial landlord, in respect of rent arrears; and
- it was clear that the Company’s financial difficulties were the result of COVID-19.

Courts have the power to take into account evidence of a likely change in the law in exercising its power and discretion.<sup>1</sup> The court in *Travelodge* found this ground was of itself sufficient to grant the requested injunction.

Court’s power to restrain winding up petition to allow company to pursue restructuring

In deciding whether or not to make a winding up order, the court will have regard to the interests of creditors generally rather than those of the petitioner alone. Courts are generally reluctant to exercise their discretion to grant a winding up order where there is a real prospect of the company’s affairs being dealt with in a manner that would be more beneficial (to creditors as a whole) than a winding up.

Here, the court granted the requested injunction on the basis that the threatened winding up petition was likely to be detrimental to the wider interests of creditors as a whole, because:

- landlords and other unsecured creditors would receive very little by way of recovery in a winding up;
- a restructuring was being proposed which would produce a substantially better return for the Company’s creditors as a whole than in a winding up; and
- the threatened petition would jeopardize the Company’s restructuring proposal (and risk termination of key leases, given landlords’ rights of re-entry and forfeiture).<sup>2</sup>

The court also took account of the petition’s “collateral purpose” to put pressure on the Company to pay the relevant landlords ahead of other creditors.

Travelodge's case builds on precedents in which the court exercised its power to restrain individual creditor action likely to be detrimental to the broader interests of creditors generally.<sup>3</sup> It now appears that the court may exercise its power to restrain winding up petitions where necessary to allow the company an opportunity to put a proposed restructuring to its creditors that has both a reasonable prospect of success and a reasonable prospect of providing a better return to creditors as a whole, whether or not a restructuring process has commenced.

No other reason to wind up

The court found there was no other reason to wind up the Company, e.g., no antecedent transactions at risk of falling outside of the challenge period.

Distinguishing factors (from an unsuccessful injunction application)

Travelodge's case contrasts sharply with another recent case in which the court dismissed applications to restrain winding up petitions against two property companies.<sup>4</sup> Key distinguishing factors were that, in the earlier case:

- the court held the reason the debtors had not paid the debts had "nothing to do with the coronavirus";
- the court found the applicants were apparently not within the protected class of the imminent legislation;
- the applicants had no proposal for dealing with creditors on foot; and
- the court did not have the benefit of the citation of relevant authorities cited in Travelodge's case, to the effect that the court may take account of forthcoming changes to the law.

In contrast, Travelodge put forward evidence that it conducted a profitable and solvent business prior to the current pandemic, but its revenues had diminished severely in light of COVID-19 and the effect of the lockdown. On the evidence, the balance of prejudice and convenience were firmly in favor of granting an interim injunction, to "hold the ring".

We are aware of a later case<sup>5</sup> involving a high street retailer in which the court again agreed to restrain presentation of a winding up petition brought by a landlord, following the authority set by Travelodge's case.

*The Kirkland team advising Travelodge included [Elaine Nolan](#), [Kon Asimacopoulos](#) and [Richard Boynton](#).*

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1. *Hill v Parsons* [1972] Ch 305 (Court of Appeal); *Sparks v Harland* [1997] 1 WLR 143.↔

2. Notably, the Coronavirus Act 2020 suspends landlords' ability to enforce rights of re-entry or forfeiture for non-payment of rent (under certain leases). However, this does not restrict the exercise of such rights on other grounds, e.g., following presentation of a winding up petition.↔

3. E.g., *Bluecrest Mercantile BV v Vietnam Shipbuilding Industry Group & Ors* [2013] EWHC 1146 (Comm) (stay on summary judgment application) and *Sea Assets Ltd. v. PT Garuda Indonesia*, 27 June 2001, unreported (stay of execution of a judgment), in each case pending the implementation of a scheme of arrangement. ↔

4. *Re Shorts Gardens LLP* [2020] EWHC 1001 (Ch).↔

5. *Re A Company (injunction to restrain presentation of petition)* [2020] EWHC 1406 (Ch) – decided after the publication of the draft Corporate Insolvency and Governance Bill.↔

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