

THIRD SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4709 GIBRALTAR Thursday 7th May 2020

B. 07/20

BILL

FOR

AN ACT to amend the Insolvency Act 2011.

ENACTED by the Legislature of Gibraltar.

Title.

1. This Act may be cited as the Insolvency (Amendment) Act 2020.

Commencement.

2. This Act and comes into operation on the day of publication.

Amendment of Insolvency Act 2011.

3. After section 499 of the Insolvency Act 2011, insert-

“PART 21

TEMPORARY PROVISIONS

Interpretation.

500. In this Part, unless the context otherwise requires-

“Covid 19 pandemic” means the outbreak of the Coronavirus which was declared by the Minister with responsibility for Civil Contingencies acting with the consent of the Chief Minister to be a pandemic pursuant to the powers conferred on her by section 11 of the Civil Contingency Act 2007 following the declaration on the 11 March 2020 by the World Health Organisation that the outbreak of the Coronavirus was a pandemic;

“company” means a company to which this Act applies and which is licensed or authorised in Gibraltar under the Fair Trading Act or any other enactment of Gibraltar, and in the plural “companies” shall be construed accordingly;

“prescribed” means prescribed by the Minister;

“published” means contained in any notice, press release or other statement issued or made public by the Government;

“Legal Notice” means a legal notice by the Minister in the Gazette;

“moratorium period” has the meaning specified in section 501;

“Other Relevant Entity” means any form of legal entity, partnership or sole trader other than a company or unregistered company established under any enactment of Gibraltar (“the enactment of establishment”) or law to which this Act applies by virtue of the enactment of establishment or other law, and which is licensed or authorised in Gibraltar under the Fair Trading Act or any other enactment of Gibraltar, and in the plural “Other Relevant Entities” shall be construed accordingly;

“Relevant Circumstances” means, the suspension, restriction, continuation or conduct of trade during the moratorium period-

(a) in such manner as-

(i) conforms to advice or recommendations issued publicly by the Government or any minister; or

(ii) is required or permitted by law,

in connection with Covid-19 pandemic; or

(b) in the context of and notwithstanding market conditions or circumstances prevailing; or

(c) despite conduct and/or degree of compliance with commitments and obligations by clients and other contractual counterparties;

“Regulations” means regulations made by the Minister under section 514;

“unregistered company” means any unregistered company to which this Act applies and which is licensed or authorised in Gibraltar under the Fair Trading Act or any other enactment of Gibraltar.

Moratorium period.

501.(1) The moratorium period shall be such period of time commencing and ending on such dates as may be prescribed by Legal Notice.

(2) Any period prescribed under subsection (1) may be-

- (a) extended; or
- (b) abridged,

by Legal Notice.

- (3) A date comprising the commencement date of a period of time prescribed under this section may be a date before the date of the Legal Notice by which the period is prescribed.

Holder of floating charge may appoint administrator.

502. Section 48 (holder of floating charge may appoint administrator) shall not apply during the moratorium period.

Application for administration order.

503. Subsection (1)(c) of section 56 (application for administration order by a creditor) shall not apply during the moratorium period.

Statutory demand.

504. Section 141 (service of statutory demand by a creditor) shall not apply during the moratorium period.

Application for order appointing liquidator of company.

505. The following parts of subsection (1) of section 150 (Application for order appointing liquidator of company) shall not apply during the moratorium period-

- (a) subsection (1)(b) (application by a creditor); and
- (b) subsection (1)(e) (application by a director).

Unregistered companies.

506. Section 505 shall apply *mutatis mutandis* to unregistered companies for the purposes of sections 229 and 230.

Additional measures applicable during the moratorium period.

507. During the moratorium period, except with the consent of the company-

- (a) no steps may be taken to enforce any security interest over the company's assets;

- (b) no right of forfeiture by peaceable re-entry may be exercised in relation to premises let to the company; and
- (c) no steps may be taken to repossess assets in the possession of the company supplied to the company-
 - (i) under a hire purchase, conditional sale or chattel leasing agreement, or
 - (ii) subject to a retention of title agreement.

Unfair Preferences.

508. Unless the contrary is proved, it is presumed for the purposes of section 249(2) (unfair preferences) that-

- (a) Relevant Circumstances constitutes the ordinary course of trade; and
- (b) any bona fide commercial transaction entered into for the benefit, or intended benefit of a company, took place in the ordinary course of business.

Voidable Floating Charges.

509. The presumption in subsection (3) of section 251 (presumption that floating charge in favour of a connected person is an insolvency transaction) shall not apply to a floating charge created during the moratorium period provided that-

- (a) the requirements of subsection (2) of section 251 are met; and
- (b) any money secured by the floating charge was advanced or paid to the company during the moratorium period.

Summary remedy against delinquent officers.

510.(1) The court shall not on the grounds specified in sub-section (2) of this section alone make an order under subsection (3) of section 258 (summary remedy against delinquent officers) against a person who is or has been an officer of a company for any act committed or omission incurred during the moratorium period.

(2) The grounds are that-

- (a) a company continued to trade or entered into a transaction in the ordinary course of business; or
- (b) did not appoint a liquidator or administrator,

even though the company was or may have been insolvent by reason of-

- (i) the Relevant Circumstances; or
- (ii) reduced demand for its goods or services.

Fraudulent trading.

511.(1) The court shall not on the grounds specified in sub-section (2) of this section alone make an order under subsection (2) of section 259 against a person for any act committed or omission incurred during the moratorium period.

(2) The grounds are that-

- (a) a company continued to trade or entered into a transaction in the ordinary course of business; or
- (b) did not appoint a liquidator or administrator,

even though the company was or may have been insolvent by reason of-

- (i) the Relevant Circumstances; or
- (ii) reduced demand for its goods or services.

Insolvent trading.

512.(1) The court shall not on the grounds specified in sub-section (2) of this section alone make an order under subsection (2) of section 260 against a person who is or has been a director of a company for any act committed or omission incurred during the moratorium period.

(2) The grounds are that-

- (a) a company continued to trade or entered into a transaction in the ordinary course of business; or
- (b) did not appoint a liquidator or administrator,

even though the company was or may have been insolvent by reason of-

- (i) the Relevant Circumstances; or
- (ii) reduced demand for its goods or services.

Persons who may apply for a bankruptcy order.

513. The following paragraphs of section 321 (persons who may apply for a bankruptcy order) shall not apply during the moratorium period to a natural person who is

carrying on a business or was carrying on a business immediately before the commencement of the moratorium period-

- (a) paragraph (b) (application by a creditor or creditors under section 325); and
- (b) paragraph (c) (application by a creditor under section 330).

Dealing with assets obtained on credit.

514. Unless the contrary is proved, it is presumed for the purposes of section 428 (3) (offence not committed) that-

- (a) Relevant Conduct constitutes the ordinary course of trade; and
- (b) any bona fide commercial transaction entered into for the benefit, or intended benefit of the business of the bankrupt, took place in the ordinary course of business.

Rash and hazardous speculations.

515. Unless the contrary is proved, it is presumed for the purposes of section 431 (1)(b) (rash and hazardous speculations) that-

- (a) Relevant Conduct; and
- (b) any bona fide commercial transaction entered into for the benefit, or intended benefit of the business of the bankrupt,

does not constitute rash or hazardous speculations.

Unfair Preferences by an individual.

516. Unless the contrary is proved, it is presumed for the purposes of section 434(2) (unfair preferences by an individual) that-

- (a) Relevant Conduct constitutes the ordinary course of trade; and
- (b) any bona fide commercial transaction entered into for the benefit, or intended benefit of a business carried on by the individual, took place in the ordinary course of business.

Application of this Part to unregistered companies and Other Relevant Entities.

517.(1) This Part shall apply *mutatis mutandis* to unregistered companies and Other Relevant Entities in so far as the provisions of this Act referred to in this Part apply to them.

(2) Section 507 shall apply to unregistered companies and to Other Relevant Entities.

Minister’s Regulation making power.

518.(1) Subject to subsection (3), the Minister may make regulations generally for giving effect to this Part and specifically in respect of anything required or permitted to be prescribed by this Part.

(2) Without prejudice to the generality of sub-section (1), the Regulations may-

- (a) amend any provisions of this Part;
- (b) add any provision to this Part;
- (c) repeal the whole or any part or parts of this Part.

(3) Unless it is not practicable to do so, the Chief Minister will consult with the Leader of the Opposition prior to the Minister making regulations under subsection (1).

Common law.

519. During the moratorium period any common law of Gibraltar which is to the same or similar effect to any of the provisions of this Act referred to in this Part or which shall otherwise impose personal civil or criminal liability on persons for which by virtue of this Part, such liability would not exist under this Act, shall be modified and applied in like manner and to like effect as provided for in this Part, *mutatis mutandis*.”.

Explanatory Memorandum

This Bill inserts a new Part 21 into the Insolvency Act 2011 and provides for measures arising from the Covid 19 pandemic.

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