

The Commercial Rent (Coronavirus) Bill

November 2021



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The Commercial Rent (Coronavirus) Bill ('the Bill') was introduced in Parliament on Tuesday 9 November.

The Government's press release stated that the Bill "will establish a legally-binding arbitration process for commercial landlords and tenants who have not already reached an agreement, following the principles in the Code of Practice".

A new Code of Practice was also introduced. The Bill introduces a new arbitration scheme to assess rent due in respect of premises which had to close (in whole or in part) due to the Coronavirus regulations.

Either the tenant or landlord will be able to refer to an arbitrator within 6 months of the Bill passing. The referral must include a formal proposal as to what rent is to be paid for the period, with supporting evidence, and prior to any referral, the parties are required to engage in formal pre-arbitration correspondence for a 28-day period. The arbitrator can only make a decision if the tenant's business would be viable going forward if given relief. Tenants in a voluntary arrangement, scheme of arrangement or restructuring plan do not qualify.

The arbitrator will determine what rent to award in connection with principles as set out in the Bill. These are:

(a) that any award should be aimed at preserving, or restoring and preserving, the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency, AND

(b) that the tenant should, so far as it is consistent with the principle (a) to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay.

The arbitrator will disregard any manipulation of financial affairs or the possibility of parties borrowing money or restructuring.

The arbitrator must publish any award together with reasons for making it. Tenants will not be able to compromise this rent by using voluntary arrangements, schemes of arrangement or restructuring plans in the 12 months after the arbitration award.

Use by landlords of certain enforcement action (such as forfeiture and CRAR) has been

effectively suspended until 25 March 2022 under the Coronavirus Act 2020 and this will continue. Landlords have to date been able to obtain judgments and pursue bankruptcy against individual tenants or guarantors. The Bill makes provision to stop this. If it passes in this form, the application of this will be backdated to 10 November 2021 and will prevent landlord's from obtaining or enforcing judgments against tenants in relation to the applicable rent.

The Government introduced a Code of Practice last year to regulate commercial property relationships given the moratorium. The new Code of Practice is to align with the Bill. It is not clear that compliance with the new Code will be relevant to arbitration, although there is discretion on costs.

The Code of Practice sets out "evidence to consider when negotiating" which will assist in the evidence supplied to the arbitration process.

Comment

On the face of it, the arbitration scheme appears a commercially sensible approach to solving a significant problem.

If both tenant and landlord comply with the new Code of Practice, it is to be hoped that most rental positions can be resolved by agreement. The arbitration process has proposal stages as well which may be designed to facilitate agreement.

Many tenants who were not subject to closure requirements may not have paid rent but cannot avail themselves of the arbitration scheme. Landlords will be able to take steps against them.

With the focus of arbitration awards being viability of the tenant, this may lead to some low awards. The landlord's solvency is supposed to be taken into account, however you might say that if the tenant cannot pay any sum, the landlord will not recover anything and so will be in a worse position.

From a tenant's perspective, other than potential liability for the landlord's costs, they may take the view that they have nothing to lose in referring the rent to arbitration, given that their worst case is that they have to pay the full rent which is payable under the lease in any event. In reality this is likely to be an uncommon outcome.

The "evidence to consider when negotiating" (which is noted to be a non-exhaustive list) contains a list of 20 matters that are likely to be relevant. This means that it may be considered that an arbitration scheme may not be proportionate for smaller rent claims with non-institutional landlords and tenants.

There are wide-ranging consequences for insolvency processes. It is surely to be welcomed that individual tenants and guarantors can no longer be subject to bankruptcy proceedings in respect of rental debts where other remedies are restricted. The provision to prevent tenants seeking to compromise arbitrated rent via a voluntary arrangement for 12 months is an unprecedented fetter on directors' ability to consider the full range of insolvency options if business struggles continue.

The Bill has not been given a date for the second reading yet, but we will update you as it progresses. In the meantime, if you would like any further information or advice relating to restructuring and insolvency, or property dispute resolution, please contact one of the co-authors, Richard Palmer or Graeme Dixon.



Key contacts

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