

## The Commercial Rent (Coronavirus) Bill & Revised Code of Practice – Key Points of Government's Proposals

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In the summer the government announced that it would introduce a scheme of "binding arbitration" to deal with commercial rent debt accrued during the pandemic (the "COVID Arrears"). The government has now published its Commercial Rent (Coronavirus) Bill ("the Bill") along with an updated Code of Practice. The Bill still has to go through parliament so some aspects may change by the time it comes into force.

The key takeaways are as follows:

- As drafted, the Bill only applies to tenants who were forced to close. It does not help those who chose to close for commercial reasons.
- It applies to all amounts payable under a business tenancy (known as "protected rent") including principal rent, service charge, insurance rent, VAT and interest during the "protected period". It will also apply to rent deposit top ups where a rent deposit has been utilised in settlement of "protected rent".
- The protected period is from 21 March 2020 to the date the business was no longer subject to a closure requirement or regulations which affected the way the business was operated, or the premises used.
- Parties should seek to settle claims or refer them to the binding arbitration system within six months of the legislation coming into force. During this time, there will be a moratorium on other remedies landlords can pursue. This moratorium will also apply to any debt proceedings issued after 10 November 2021.
- The current restrictions on forfeiture, winding up petitions and CRAR will remain in place until the legislation is passed but after that landlords will be able to take action for:
  - pre- 21 March 2020 arrears and arrears in relation to periods after the end of the ringfenced period; and
  - COVID Arrears that fall outside the scope of the binding arbitration scheme.
- Unlike previous regulations, in certain circumstances the Bill also prevents the presentation of a bankruptcy petition against individuals who are tenants.

- For any debt proceedings issued after 10 November 2021 which include "protected rent" either party can apply for the proceedings to be stayed pending arbitration. If judgment is given, the landlord will not be able to enforce it and the debt can still be referred to binding arbitration.
- The position remains unclear for tenants that are the subject of ongoing court proceedings to recover COVID Arrears. Such tenants may fall within the binding arbitration scheme but there is nothing to prevent these claims proceeding, as they are not protected by the moratorium. This means that it could be a race between the proceedings and binding arbitration to see which process determines the rent first.

### To which tenancies does the Bill apply?

The Bill applies to business tenants that were adversely affected by the COVID-19 pandemic (i.e. ordered to close). It affects rent, service charge, insurance rent arrears and VAT as well as interest that accrued during the period from 21 March 2020 to the last date the business was forced to remain closed or subject to restrictions brought about by the COVID-19 pandemic.

### What can the arbitrator do?

The arbitration process will allow both landlords and tenants to put forward their proposals for resolving the COVID Arrears. The arbitrator can award any of the following remedies:

- writing off the whole or part of the COVID Arrears;
- giving the tenant additional time to pay the arrears, including payment by instalments; and
- reducing interest payable under the terms of the tenancy.
- The arbitrator could also decide not to allow any relief from payment of the debt.
- In reaching the decision, the arbitrator must apply the following principles:
- Any award should be aimed at preserving or restoring a tenant's viable business, so far as that can be achieved while still preserving the landlord's solvency.
- Subject to those considerations, the tenant should be required to meet its obligations in full and without delay.

The arbitrator's award will be published, although any confidential information will be excluded.

The arbitration fees will be split between the parties, either 50:50 or in whichever way the arbitrator considers appropriate. Parties must otherwise meet their own legal or other costs.

### Temporary moratorium

Once the new legislation is enacted, landlords will be prevented from using the following remedies to secure payment of COVID Arrears for 6 months or whenever the arbitration concludes:

- issuing proceedings to recover payment of COVID Arrears;
- using the Commercial Rent Arrears Recovery (CRAR) in respect of COVID Arrears;
- enforcing a right of re-entry or forfeiture;
- using a tenant's deposit towards COVID Arrears; and
- presenting a winding up/bankruptcy petition, except for debts which are not COVID Arrears;

There is some uncertainty but it appears that the legislation is also retrospective, so where proceedings are issued on or after 10 November 2021, either of the parties may apply to court for a stay. Once the court receives that application, it must stay the proceedings. If judgment is entered on such proceedings and is unpaid, the parties can still refer it to arbitration. The arbitration award will alter the judgment debt. The landlord may not enforce the judgment until the end of the moratorium period.

Where a tenant makes a payment to the landlord when, at the time, the tenant owes unprotected rent, and does not specify how that payment should be applied, the landlord no longer has a choice of how to appropriate that payment. It must be applied towards an unprotected rent debt before a protected rent debt. This rule applies to payments made between the end of the protected period and the Bill being implemented. If the landlord has wrongly allocated a payment then it will be treated as if it had been allocated to a unprotected rent debt before the protected rent debt.

### **How does the new Code of Practice for Commercial Property Relationships following the COVID-19 Pandemic ("the Code") assist with arrears?**

The Code is designed to be read alongside the Bill, to assist landlords and tenants in resolving Covid Arrears without the need for the binding arbitration scheme. The guidance in the Code is also for tenants who may have COVID Arrears but fall outside the scope of the binding arbitration scheme.

The principle behind the Code is to balance the needs of both the landlords and tenants to ensure a fair outcome. It remains the case that tenants are liable for the rent and should pay in full if they are able to do so. However, the government does not want otherwise viable businesses to cease trading as a result of COVID Arrears. The principles of the Code are as follows:

- "The aim is to preserve viable businesses.
- The preservation of the viability of the tenant should not be at the expense of the solvency of the landlord.
- Where it is affordable for a tenant to meet its obligations under the lease in full, they should do so without delay and any relief should be no greater than necessary for the tenant business to afford the payment".

While the Code contains more detail on the scope of the negotiations and the principles it is designed to uphold, it is not binding and it is not compulsory to comply with it. It will be interesting to see how the court deals with the question of costs for parties that have chosen not to comply with the Code, both in court proceedings and under the new binding arbitration scheme.

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