

**Insights**

## **COVID 19 - COMMERCIAL RENT ARREARS ANNOUNCEMENT**

Aug 13, 2021

### **SUMMARY**

The Government has finally published its response to the call for evidence in relation to Covid-19 commercial rent arrears, along with a policy statement about the proposed new legislation it plans to introduce before the forfeiture moratorium is lifted in March 2022.

Whilst the policy statement provides some further information regarding the Government's plans for the legislation, several key questions remain unanswered.

On 4 August 2021, the Government published its response to the call for evidence in relation to Covid-19 commercial rent arrears and a policy statement about the proposed new legislation it plans to introduce to address the mountain arrears that is estimated to have reached £7.5 billion as at June 2021.

The forfeiture moratorium and CRAR restrictions will continue to apply in an unqualified way until new legislation is passed. The legislation is expected in the next few months, but in any event before March 2022 when the current forfeiture moratorium is due to be lifted.

The key headlines from the announcement:

- The new legislation (and moratorium on evictions) will only apply to ring-fenced rent arrears.
- Ring-fenced rent arrears will be limited to arrears incurred since March 2020 "by commercial tenants affected by COVID-19 business closures until restrictions for their sector are removed"
- This means that when the legislation comes into force, the moratorium on forfeiture will not apply to landlords claiming:
  - rent arrears that accrued prior to March 2020; and/or

- rent that their tenants failed to pay “after the end of restrictions for their sector and who have not been affected by business closures during this period”
- Those tenants who have not been affected by closures and who have the means to pay, should pay rent. Additionally, the Government expects commercial tenants to begin paying rent as per their lease from the point of restrictions being lifted for their sector.
- The existing insolvency measures (restricting winding-up petitions) will continue until 30 September 2021 but there is mention of new insolvency measures to come, presumably to work in tandem with the legislation.
- The government announced that it will revise the voluntary Code of Practice (first introduced June 2020), and publish this ahead of the implementation of a system of binding arbitration. The revised Code of Practice will set out the principles the government expects parties and arbitrators to adhere to, which the government will seek to enshrine in the legislation.
- The government will expect landlords to “share the pain”. It is the government’s expectation that landlords “should share the financial burden with tenants where they are able to do so and give tenants breathing space to agree new terms, but also that tenants who can pay, should pay.” It will expect terms to be agreed between landlords and tenants impacted by closures to “defer or waive entirely an appropriate proportion of rent arrears”. Where agreement cannot be reached, both the landlord and tenant will need to undertake a binding arbitration.
- Arbitrators will have jurisdiction to make costs orders, and there will be cost consequences for those who are “found not to have negotiated in the spirit of the legislative principles”. Parties who have negotiated in good faith will likely be expected to share the costs of arbitration.

Several questions remain unanswered regarding how the legislation will work in practice:

- Will the legislation include a financial test for tenants, to ensure that it applies to only those tenants who were forced to close as a result of the government restrictions and, as a result, could not afford to pay their rent? This will be necessary to prevent businesses who could still afford to pay simply saying that they were forced to close, therefore the legislation applies to them.
- The legislation will apply to those businesses “affected by closures”, but what does this actually mean? Will the legislation apply to business affected by a drop in footfall and passing trade, even if they were not legally obliged to close premises?
- What level or type of restrictions will trigger the ring-fencing provisions? For example, will ongoing social distancing restrictions and limits on venue capacity enable leisure and

hospitality tenants to claim the benefit of ring-fencing for periods where they were allowed to reopen?

- Could the legislation also apply to businesses who could legally have remained open during the pandemic but were impacted government measures such as social distancing and recommendations to work from home? Many businesses closed premises for extended periods (when not legally required) because it made financial sense to take advantage of government support, including the furlough scheme.
- What about businesses who trading successfully online despite being forced to close premises? Will they be eligible for the same protection?

Whilst the legislation may provide clearer answers for sectors such as retail and hospitality, there is likely to be uncertainty for commercial office tenants and businesses who were indirectly impacted by the government restrictions whilst not legally forced to close.

The legislation will need to take into account many nuanced sectors and factors to ensure that it provides landlords and tenants with clarity as to which tenants will be able to rely on the legislation to avoid forfeiture.

You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

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