

Insights

THE NEW COMMERCIAL RENT (CORONAVIRUS) BILL AND CODE OF PRACTICE

Nov 17, 2021

SUMMARY

The government has introduced the Commercial Rent (Coronavirus) Bill in Parliament to attempt to streamline and accelerate the resolution of the billions of pounds of rent arrears that have accrued during the Covid 19 pandemic. The Bill is expected to receive Royal Assent next spring. The government also published a new (voluntary) Commercial Rents Code of Practice providing further guidance on how parties should negotiate rent arrears. Businesses are encouraged to apply the principles underpinning the Code and Bill to help them resolve rent disputes, even if they fall outside of scope of the new legislation.

This note considers how the Bill and new Code might impact parties' negotiations for rent arrears now and going forward until Bill receives Royal Assent.

Scope of the Bill – protected rent debt

The Bill contains the key concept of “protected” rent arrears, which are rent arrears (also including service charges, insurance rent, interest and any VAT) incurred by business tenants whose businesses or premises were subject to coronavirus closure requirements. These occurred between 21 March 2020 and 18 July 2021. Where landlords and tenants have already reached agreement or resolved the issue of protected rent arrears (including under a CVA, IVA or Companies Act 2006 compromise), those arrears fall outside the scope of the Bill.

What are landlords' options in respect of protected rent debt, (1) now and (2) when the Bill receives Royal Assent (March 2022)?

From 10 November 2021 until Royal Assent

The existing government measures that restrict forfeiture, CRAR and winding up will continue to be in place and apply to protected (and unprotected) rent debts until the Bill receives Royal Assent.

However, the Bill also introduces a number of new “interim” measures that will apply specifically to protected rent debts with immediate effect:

- **Court proceedings:** If a landlord issues court proceedings to recover a protected rent debt, a tenant (including a guarantor being sued) can apply to stay those court proceedings, to enable the matter of payment of the protected rent debt to be resolved by arbitration under the Bill or otherwise.
- **Court judgments:** If a tenant does not apply for a stay of the court proceedings, and the landlord obtains or has already obtained a judgment debt for protected rent arrears, then, despite judgment having been given, the landlord will not be able to enforce that judgment because it can still be referred to arbitration under the Bill (and potentially be altered).
- **Rent deposits:** Tenants will not be required to top up rent deposits that have been drawn down by landlords to settle a protected rent debt (and note that any sums drawn down from a rent deposit that are used to deplete a protected rent debt will be treated as “unpaid” and referable to arbitration under the Bill).
- **Rent appropriation:** Where a tenant owes its landlord both a protected and unprotected rent debt, a landlord cannot appropriate its tenant’s rent payments to the protected rent debt (unless the tenant expressly does so), but should instead apply any rent payments received to the unprotected rent debt.

From Royal Assent

▪ Moratorium

When the Bill receives Royal Assent, a temporary “moratorium” period will commence in respect of protected rent arrears, during which landlords will have only two options in respect of protected rent arrears: (1) negotiate and reach an arrangement with their tenants, or (2) refer the matter to arbitration under the Bill. No other remedy to recover or enforce protected arrears will be available to landlords during the moratorium period.

The temporary moratorium will be in place for either six months from the date of Royal Assent of the Bill (where the matter is not referred to arbitration), or, where there is an arbitration, until it concludes.

▪ Arbitration

Where parties cannot reach agreement on a protected rent debt, either party will have six months from the date of the Bill’s Royal Assent to refer the dispute to arbitration, effectively ousting the jurisdiction of the Court. The Bill also imposes restrictions on tenants initiating certain insolvency arrangements during the arbitration. If neither party applies within those 6

months (and note that the initial 28-day notification period prior to making a formal reference to arbitration means that the parties effectively have 5 months from Royal Assent to start the referral process), the landlord will have recourse to all the usual remedies to pursue the arrears.

If either or both parties refer the dispute to arbitration, an arbitrator will be appointed by an arbitration body (the parties have no choice). Following a “pre-action” exchange of formal proposals supported by evidence, the arbitrator will (1) dismiss the arbitration (where the rent debt is out of scope, or where the tenant’s business is unviable (and wouldn’t be viable even if relief were awarded) or (2) award “relief from payment” of a protected rent debt, which may include writing off the whole or part of the debt, giving the tenant time to pay (no more than 24 months), and/or reducing any interest otherwise payable on the protected rent debt.

In deciding what award to make, the arbitrator must apply the “principles” set out in the Bill, which are:

- Any award should be aimed at preserving, or restoring and preserving, the viability of the tenant’s business, so far as that is consistent with preserving the landlord’s solvency; and
- The tenant should, as far as it is consistent with the above principle, be required to meet its obligations as regards the payment of protected rent in full and without delay.

In assessing the viability of the tenant’s business and the solvency of the landlord, the arbitrator must have regard to the parties’ assets and liabilities, including any other tenancies to which the tenant/landlord is a party, and any other information relating to the parties’ financial position that the arbitrator considers appropriate. Additionally, in relation to the tenant’s viability, the arbitrator must take into account the previous rental payments made under the tenant’s tenancy and the impact of coronavirus on the tenant’s business.

When making an assessment, the arbitrator must disregard the possibility of the tenant or the landlord (as the case may be) borrowing money, or restructuring its business.

The arbitrator will decide the matter on the papers or, at the request of one or both of the parties, at a public oral hearing. Although the arbitrator’s award will be “published”, it must exclude confidential information. The parties will share the arbitrator’s fee, and pay their own legal fees.

Comment

The Bill has introduced an unprecedented dispute resolution mechanism for determining whether rent, which would otherwise be unquestionably due, should be discounted or deferred, by balancing the tenant’s viability (even if they were given 24 months to pay rent arrears) with the landlord’s solvency, on the basis of evidence voluntarily put forward by both parties. There are aspects of the

Bill that will certainly cause major concern – the vague parameters of the evidence and principles to prove viability and solvency, the “publishing” of the award and the possibility of a public hearing, the potentially significant irrecoverable costs, the retrospective application of the Bill to rent deposit draw downs and judgment debts, the potential impact on tenant insolvency, to name a few.

There are also the cases before the Court of Appeal concerning the defences to the Covid rent arrears claims brought by Bank of New York Mellon and London Trocadero that will impact landlord and tenant tactics and the question of whether arbitration under the Bill might be preferable or maybe even unnecessary if those appeals are unsuccessful.

When you consider that only the hardest cases are likely to end up in arbitration, there is much to lose if either or both parties are being unnecessarily difficult, so perhaps for that reason alone, the publication of this Bill is likely to lead to more negotiated settlements.

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