



COVID-19: RING-FENCING OF COMMERCIAL RENT DEBTS

November 2021

Commercial premises from pubs to retailers form a fundamental part of the economy. Businesses operating from them have a crucial role to play in the post-pandemic recovery. The government is introducing a new regime which aims to help and protect those businesses forced to close by COVID-19 regulations and to resolve the significant rent arrears built up during the pandemic.

We set out below the key measures currently proposed, which may be subject to change during the legislative process. The necessary legislation is expected to be enacted by March 2022.

Ring-fencing of rent arrears

The Commercial Rent (Coronavirus) Bill provides for the ring-fencing of rent arrears owed by business tenants affected by periods of legally mandated closure or restricted use during the COVID-19 lockdowns, such as restaurants and certain retailers. Arrears must be attributable to the period from 21 March 2020 to the end of the relevant lockdown period and can include principal rent, service charges, insurance rent, interest on late payment and VAT.

The message remains that the measures do not present an excuse not to pay and, if it is able to do so without borrowing or restructuring, the tenant should meet its payment obligations in full. Parties continue to be encouraged to reach a negotiated settlement of arrears, but there will be continued protection from enforcement in relation to ring-fenced arrears and a binding arbitration process to fall back on if agreement cannot be reached.

Continuing moratorium

The existing restrictions on forfeiture for non-payment of rent, the exercise of CRAR and the current limited restrictions on serving winding-up petitions will continue to apply beyond March 2022 in respect of the ring-fenced arrears (but will end for other arrears at that point).

In addition, landlords will not be able to issue debt claims (and, once the Bill is enacted, claims made on or after 10 November can be stayed) or look to rent deposits in respect of such arrears. Where an amount has already been taken from a rent deposit, the tenant's top-up obligation will be suspended.

This revised and extended moratorium will continue until arbitration proceedings have concluded or the time limit for reference to arbitration has passed.

Arbitration

Reference to arbitration can be made by either party within six months of the Bill becoming law and must include a formal proposal for resolution. The other party may make a counter-proposal and further revisions to each are possible.

The arbitrator must consider whether the tenant's business is viable, or would become viable if relief from payment were granted, and then consider whether any relief should be granted. The aim of the award should be to restore or preserve the viability of the tenant's business, but only to the extent that is consistent with maintaining the landlord's solvency (perhaps not a high bar in the context of amounts which will have been unpaid for some time). The award can provide relief from payment, including writing off all or part of the rent and giving up to two years to pay any amount of it. Although the party making the reference must pay the arbitration fees, the arbitrator can apportion these fees in the award.

The government will approve arbitration bodies and those bodies will maintain a list of suitable arbitrators. The appetite to take responsibility for deciding on tenant viability and landlord solvency remains to be seen.

Code of Practice

Like its predecessor, [the new Code](#) issued on 9 November 2021 seeks to encourage open and fair negotiations between the parties. The Code is intended to support the new arbitration process, but although the Bill only applies to ring-fenced arrears, the Code remains relevant to all rent arrears accrued since March 2020.

Where negotiated settlements have already been reached, these remain binding and are not affected by the new regime. The focus is on those remaining commercial landlord and tenant relationships where a settlement has not been concluded. Mediation is encouraged and the tenant should be forthcoming with evidence of affordability including its other debts and liabilities.

The Code also contains a summary of the mandated closures and those businesses affected together with a helpful summary of the arbitration process.

Conclusion

The BPF suggests that the majority of commercial landlords and tenants have already reached agreement as to how to share the pain of COVID-19 arrears. The significance of the new arbitration regime might just prove to be its role in encouraging one last push for those landlords and tenants still in dispute to return to the negotiating table, with arbitration itself being pitched as a last resort.

Either way, the Commercial Rent (Coronavirus) Act will amount to a significant piece of statutory intervention in an industry where, CVAs and restructuring plans notwithstanding, the parties have traditionally been bound by the terms of their lease. Coming on top of the government's promised review of the Landlord and Tenant Act 1954 and proposed reform of the business rates regime, these make for unprecedented times for real estate practitioners, the property industry and corporate occupiers.

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