A GUIDE TO THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

Background

During the Covid-19 pandemic the UK government introduced closure requirements and other restrictions on the operation of non-essential businesses. The restrictions varied over time from ordering full closures to curbing how businesses could conduct their operations when they were allowed to open.

In order to protect businesses who found themselves unable to pay their rent and other sums due under their tenancies as a consequence of the pandemic and the closure requirements, the government introduced restrictions on what action landlords could take against commercial tenants to recover unpaid sums. These measures prevented landlords from forfeiting leases, restricted their ability to seize goods to recover unpaid rent (known as Commercial Rent Arrears Recovery ("CRAR")) and restricted the use of winding-up petitions and statutory demands against tenants (although these restrictions also applied beyond the commercial landlord and tenant sphere). As a consequence huge amounts of rent debt built up over the pandemic.

The restrictions on forfeiture and seizure of goods come to an end on 25 March 2022 with the restrictions on winding-up petitions and statutory demands due to end on 31 March 2022, leaving many tenants at risk of landlords taking enforcement action against them.

Overview of the Commercial Rent (Coronavirus) Act 2022

To coincide with the lifting of the above restrictions, the Commercial Rent (Coronavirus) Act ("the Act") will come into force on 25 March 2022. The purpose of the Act is to support landlords and tenants in resolving disputes relating to rent owed by businesses that were required to close and/or subject to specific restrictions during the pandemic. It introduces the concept of a "protected rent debt" and a new

compulsory arbitration process and replaces the existing protections for tenants with new, more limited measures.

Throughout the passage of the Act through the House of Commons, the House of Lords and the Committee stages, it was repeatedly said that the focus of the Act was to protect those sectors who suffered the most as a consequence of the pandemic and the closure requirements i.e. the hospitality, leisure and retail industries. This is reflected by the limitations of the new protections in terms of the definition of a 'protected rent debt' and the limited application of the new restrictions. One of the most important points for landlords and tenants to take away from this guide is that come 25th March 2022 forfeiture and CRAR will be back on the table for unprotected rent debts.

This Guide

The purpose of this guide is to provide landlords and tenants with an overview of the new Act and how it is intended work in practice. As with all new laws, it will undoubtedly be subject to different interpretations and there are likely to be a number of disputes between landlords and tenants as the new laws find their feet. It is provided for information purposes only and should not be relied upon as legal advice.

This guide is divided into four separate sections, which reflect the structure of the Act:

1. Part 1 – the scope of the Act
2. Part 2 – the compulsory arbitration process
3. Part 3 – the restrictions on certain remedies and insolvency arrangements.
4. Part 4 – the power to apply the Act in relation to future coronavirus controls

PART 1 – SCOPE OF THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

Protected Rent Debt

The concept of a 'protected rent debt' is the foundation of the Act. The restrictions on enforcement and the requirement for compulsory arbitration set out in the rest of the Act only apply where the underlying debt is classed as 'protected rent'.

A protected rent debt is a debt under a business tenancy consisting of unpaid protected rent. In Part 1 of this guide we will examine the meaning of these terms.

Business Tenancy

The Act applies only to sums due under a 'business tenancy', which is defined by reference to Part II of the Landlord and Tenant Act 1954. A 'business tenancy' is one where the property, or part of the property, demised by the tenancy is occupied by the tenant for the purpose of a business. It will apply even if the business tenancy is 'contracted-out' of the security of tenure protections provided for in the 1954 Act. However, a property not occupied by the tenant for the purpose of its business will not benefit from the protection of the Act. This will be a problem for many intermediate landlords who are not in occupation of a property but have sub-let the same and owe what would otherwise be a protected rent debt to their head landlord; even where the reason they owe that debt is because their own sub-tenant has failed to pay. This reflects the fact that the focus of the Act is to protect those sectors hit the hardest by the pandemic and consequential closures.

It's also worth noting that the Act binds the Crown.

Rent

'Rent' for the purpose of the Act includes:

- An amount payable by the tenant to the landlord for possession and use of a premises (whether described as 'rent' or not);
- Service charge (including contributions to a reserve/sinking fund);
- Insurance rent;
- VAT on the above sums; and
- Interest on the above sums.

These sums will be regarded as 'rent' for the purpose of the Act regardless of whether or not the tenancy itself reserves such sums as 'rent'.

"Protected"

Rent due under the tenancy is 'protected rent' if:

- The tenancy was '***adversely affected by coronavirus'***; **and**
- The rent is attributable to a period of occupation for the '***protected period***' that applies to the particular tenancy (or for a period within the protected period).

Adversely Affected by Coronavirus

A business tenancy is automatically deemed to have been adversely affected by coronavirus if, for any relevant period:

- The whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy; or
- The whole or part of those premises,

was of a description subject to a closure requirement.

Closure Requirement

A closure requirement means a requirement imposed by coronavirus regulations which is expressed as an **obligation**:

- To close businesses, or parts of businesses, of a specified description; or
- To close premises, or parts of a premises, of a specified description.

It is immaterial for the purpose of determining whether a business or premises was subject to a closure requirement that specific limited activities were, as an exception, allowed by the regulations to be carried on despite an obligation to close. For example, certain retail businesses were required to close during some periods, but could make deliveries or respond to online, telephone or postal orders (without admitting customers). This is a closure requirement, despite the exception.

Rent Attributable to a Protected Period

The 'protected period' in relation to a business tenancy adversely affected by coronavirus is the period beginning with 21 March 2020 and (for business premises in England) ending on the earlier of:

- 18 July 2021; and
- The last day on which the whole or part of the business carried on by the tenant at or from the premises, or the whole or part of the premises, was subject to a **closure requirement** or a **specific coronavirus restriction**.

Closure Requirement/Specific Coronavirus Restriction

"Closure requirement" is considered above.

A "specific coronavirus restriction" is a restriction, other than a closure requirement, imposed by coronavirus regulations, which regulated any aspect of the way a business, or part of a business, was to be carried on or the way a premises, or any part of a premises, was to be used.

It does not include requirements to display or provide information on a premises or restrictions applying more generally than to a specific description of business or premises.

For example, the requirements to wear face masks and "check-in" to restaurants and gyms was a general requirement and so is not regarded as a "specific coronavirus restriction". On the other hand, there were periods of time, when restaurants, pubs and gyms were allowed to open but, in the case of restaurants and pubs only table-service was permitted (not bar service) and customers had to be seated and limited to groups of 6, and, in the case of gyms, group exercise classes were not permitted. These are 'specific coronavirus restrictions' and therefore the protected period runs up to when those restrictions were lifted (or to 18 July 2021, if earlier) as opposed to when the closure requirement was lifted.

Interest

Rent that consists of interest on an unpaid amount of rent, service charge or insurance rent is attributable to the same period of occupation by the tenant as the underlying unpaid amount. This may be different to when the interest fell due, for example if interest is only payable on demand.

Apportionment

If any rent due under the tenancy is attributable to a period of occupation of which only part is within the protected period, then so much of the rent as can be reasonably attributed to that part of the period is protected rent.

By way of example, rent is often payable quarterly in advance on the usual quarter days. If the protected period for a particular tenancy ended on 18 July 2021, then the rent attributable to the period from and including the June quarter day (24 June 2021) up to 18 July 2021 will be protected, but the rent attributable to the rest of the quarter i.e. 19 July 2021 to 28 September 2021 will not be a protected rent.

Rent Deposit

Where a landlord has withdrawn a sum from a tenancy deposit to meet the whole or part of a protected rent debt, the Act provides that the amount is to be treated as unpaid rent due from the tenant to the landlord. If the tenant has since topped up the rent deposit the Act regards the rent to which the withdrawal related as paid.

PART 2 – COMPULSORY ARBITRATION PROCESS

Introduction

Certain types of disputes (for example construction disputes) are commonly determined by an arbitration process rather than through the court system, however the concept of arbitration is alien to most areas of landlord and tenant law (with the exception of rent reviews and protected lease renewals, which are often determined this way).

Even more alien, however, is the concept of compulsory arbitration, where the parties are compelled by statute to settle their disputes through this process rather than through the court system. Even in the case of rent review disputes (which are commonly settled by arbitration) the parties will have agreed at the outset (in the drafting of the lease) to settle any such dispute in arbitration rather than in the courts.

In Part 2 of this guide we will set out how the Act envisages arbitrations in relation to protected rent debts being conducted, including:

- What disputes must be referred to arbitration;
- The identity of the arbitrator;
- The timeline for referring the matter to arbitration;
- The process of making a reference;
- The awards open to the arbitrator to make;
- How the arbitrator is to decide what award to make; and
- The costs of the arbitration process.

Compulsory compromise

Throughout the pandemic, the UK government made it clear in the guidance they gave to landlords and tenants that the restrictions they imposed on landlords taking enforcement action against commercial tenants did not change the fact that rent was still owed. In instances where a landlord sued a tenant for recovery of unpaid rent and service charge, unless the court found that there was some provision in the lease that meant the impact of the pandemic and/or closures meant the rent was not due, it had no choice but to award judgment in favour of the landlord for the full amount. Through this new arbitration process, however, the government is changing

that position. The Act gives arbitrators the power to unilaterally compromise the sums that a tenant owes under a lease.

What disputes must be referred to arbitration under the Act?

The Act introduces a compulsory arbitration process for disputes relating to a protected rent debt. This will include disputes relating to:

- Whether there is a protected rent debt of any amount (which will be a question of fact); and
- Whether the tenant should be given relief from payment of that debt and, if so, what relief.

The "Matter of Relief from Payment"

Assuming there is a protected rent debt, the arbitrator's role is to determine whether the tenant should be given "relief" in respect of payment of that debt and, if so, what type of relief.

"Relief from payment" in relation to a protected rent debt means any one or more of the following:

- Writing off the whole or any part of the debt;
- Allowing the tenant time to pay the whole or any part of the debt, including by allowing the whole or any part of the debt to be paid by instalments; and/or
- Reducing (including to zero) any interest otherwise payable by the tenant in relation to the whole or any part of the debt.

When can a reference not be made

CVAs/IVAs/compromises

A protected rent dispute cannot be referred to arbitration where the tenant that owes the protected rent debt is subject to one of the following:

- A compulsory voluntary arrangement, which relates to a protect rent debt (and which has been approved under section 4 of the Insolvency Act 1986);
- An individual voluntary arrangement, which relates to a protect rent debt (and which has been approved under section 258 of the Insolvency Act 1986); or

- A compromise or arrangement which relates to a protected rent debt (and which has been sanctioned under section 899 or 901F of the Companies Act 2006).

Where the parties have already reached agreement

A referral to arbitration should not be made where the landlord and tenant have already agreed between them a form of relief from payment of a protected rent debt. That is, where the landlord has already agreed to concessions in respect of a particular protected rent debt e.g. rent reductions and deferrals. If the arbitrator finds that a reference is made where such an agreement already exists then they must dismiss the application. It is not the purpose of this new compulsory arbitration process to 'undo' agreements already struck between landlords and tenants during the pandemic.

This provision is reflective of the fact that in the early stages of the pandemic the government released guidance encouraging landlords and tenants to co-operate to reach voluntary arrangements in respect of rent and other sums due under leases. At that stage, however the guidance encouraged tenants to pay service charges on the basis landlords were still required to maintain, insure and otherwise service properties. Somewhat controversially from the perspective of landlords, the definition of 'rent' in the Act includes service charges and insurance rents giving arbitrators the power to award tenants relief from payment of these sums as well as true rent. However, for tenants who complied with the spirit of the guidance and entered into arrangements with landlords pursuant to which they continued to pay service charge and alike, they no longer have the opportunity to be granted relief in respect of those charges. Furthermore, many landlords and tenants entered into agreements where the former agreed to compromise the rent in return for some form of quid pro quo, such as tenants agreeing to give up their security of tenure under the Landlord and Tenant Act 1954 and/or not to operate break rights. Under the Act the arbitrator has no powers to require tenants to make such compromises, so tenants who have previously compromised on such terms will be at a disadvantage to those who have not.

There is also likely to be some debate as to whether agreements reached early on in the pandemic (before many understood how long the situation would last for) that

deferred the requirement to pay rent to a future date and/or were conditional upon tenants paying future rents in full, will mean that relief has already been agreed in respect of those future instalments such that the arbitrator has no jurisdiction or whether those future instalments are "protected rent debt" that can be referred to arbitration.

Who will the arbitrator be?

Under the Act the parties will have no choice over the identity of the arbitrator (although the debate at committee stage suggested it was anticipated that the approved arbitration bodies would engage with the parties in relation to appointing an arbitrator with suitable experience, particularly in terms of locality of the subject premises).

Given that the key role of an a arbitrator will be to assess the viability of the tenant's business and the solvency of the landlord (see below), the key skillset required of an arbitrator will be sound financial and business knowledge but ideally with knowledge of the particular locality and business sector, some understanding of how leases operate and an understanding of arbitration.

Approved Arbitration Bodies

The Act provides for the Secretary of State to appoint one or more professional bodies as an "approved arbitration body" for the purpose of carrying out arbitrations under the Act. The approved arbitration bodies must maintain a list of arbitrators who they consider suitable, by virtue of their qualifications or experience, to act as an arbitrator of disputes referred to them under the Act.

When a landlord or tenant refers a protected rent dispute to arbitration under the Act, then it will be down to the approved arbitration body to appoint an arbitrator, or a panel of arbitrators, from its list to deal with the reference (although as noted above it is anticipated that the body will involve the parties in this decision). The appointed arbitrator must be independent from the parties.

The approved arbitration bodies will also be required to carry out other administrative functions such as setting and collecting the fees of arbitrators and reporting to the Secretary of State on how arbitrations administered by the body are progressing and on awards made so that the government can keep the position under review.

Removal of the Arbitrator

An arbitrator can only be removed from a particular dispute by the relevant approved arbitration body. The grounds for removal are as follows:

1. Circumstances exist that give rise to justifiable doubts as to the impartiality or independence of the arbitrator;
2. The arbitrator does not possess the qualifications required for the arbitration;
3. The arbitrator is physically or mentally incapable of conducting the arbitration or there are justifiable doubts as to their capacity to do so; and/or
4. The arbitrator refuses or fails to properly conduct the arbitration, or to use all reasonable despatch in conducting the proceedings or making an award, **and** that substantial injustice has been or will be caused to the parties.

Timeline for referring a dispute to arbitration

Either the landlord or tenant may refer a dispute about a protected rent debt to arbitration within 6 months of 25 March 2022 i.e. by 24 September 2022 (although the Act allows for the Secretary of State to extend this deadline).

A party intending to refer a protected rent dispute to arbitration must take into account the requirement to notify the other party prior to making the reference (discussed below). In practice this requirement means the referring party needs to make the decision to refer the dispute to arbitration at least 28 days in advance of the deadline.

Once the deadline has expired, unless it is extended by the Secretary of State, then it will no longer be compulsory for landlords and tenants to refer protected rent disputes to arbitration (although it may well be open to the parties to agree to submit a dispute to arbitration under the Act).

Should a landlord make a reference to arbitration?

The deadline for references opens up the question as to whether it is in a landlord's best interests to refer a dispute about a protected rent to arbitration.

If the tenant makes a reference to an arbitrator under the Act then the landlord is obliged to submit to the process, but if the tenant makes no such reference then a landlord may be better off waiting out the 6 month deadline period and then commencing enforcement proceedings against the tenant for payment of the

protected rent debt in the normal way e.g. by issuing court proceedings against the tenant. This means the landlord will have to wait longer to recover the protected rent debt, but when it does it should recover the full amount plus interest and costs, as the court has no discretion to compromise the tenant's obligations under the lease to pay the full rent. If a landlord chooses this option then it needs to be aware of the risk that the Secretary of State will extend the referral deadline in due course.

The Arbitration Process

The Act sets out the following process for making a reference to an arbitration:

- Before referring a protected rent dispute to arbitration the tenant or landlord (being "the applicant") **must** notify the other party ("the respondent") of its intention to do so.
- The applicant **must** include a formal proposal for resolving the matter of relief from payment of a protected rent debt. The proposal **must** be accompanied by supporting evidence. (**Note:** there is no guidance given in the Act as to what the effect would be if the applicant failed to include said evidence).
- The respondent **may** submit a response – it has 14 days from receipt of the notification in which to do so.
- The respondent **may** put forward a formal proposal in response to the applicant's proposal within 14 days of receipt of it. The proposal **must** be accompanied by supporting evidence.
- The reference to arbitration must not be made before:
    - The end of the period of 14 days after the day on which the respondent responds to the notification; and
    - If no response is received, the end of the period 28 days beginning with the day on which the applicant notified the respondent of its intention to refer the dispute.
- Either party **may** put forward a revised formal proposal within the period of 28 days beginning with the day on which it gives a formal proposal to the other party. A revised proposal **must** be accompanied by further supporting evidence.

- The parties can agree to extend the deadline for the respondent making its proposal or for the parties to submit revised proposals (the arbitrator also has the power to extend such deadlines if they consider it reasonable to do so).
- Any written statement provided to the arbitrator in relation to a matter relevant to the arbitration must be verified by a statement of truth or it will be disregarded.
- The arbitration may be dealt with on paper or by an oral hearing. An oral hearing must be held where either or both of the parties request it and must be held within 14 days beginning with the day on which the arbitrator makes a request. This period can be extended by agreement between the parties or where the arbitrator considers it reasonable to do so.
- An oral hearing will be held in public unless the parties agree otherwise; so before a party request an oral hearing it should consider whether it wishes to maintain confidentiality over anything to be discussed or determined at the hearing (albeit the award itself will still be made public).
- The arbitrator must make an award as soon as reasonably practicable after:
    - Where both parties have put forward a final proposal, the day on which the latest final proposal is received; or
    - Otherwise, the last day on which a party may put forward a revised formal proposal.
- Where an oral hearing is held the arbitrator must make an award within 14 days beginning with the day on which the hearing concludes (unless the parties agree to extend this period or the arbitrator considers it reasonable to do so).
- The arbitrator must publish their award and the reasons for making it.

What is a "Formal Proposal"?

A formal proposal is defined by the Act to mean a proposal that:

- Is made on the assumption that the reference is not dismissed (see below);
- Expressed to be made for the purpose of s.11 of the Act (being the section that controls the making of formal proposals); and
- Is given to the other party and the arbitrator.

This definition of "formal proposal" suggests that any such proposal given by one party to the other is not an offer capable of acceptance by the other party. Nonetheless,

a party making a "formal proposal" would be well advised to specify within the proposal itself that it is not intended to be an offer to settle the protected rent dispute.

What can the Formal Proposal Suggest?

Section 11(1) of the Act refers to a "*formal proposal for resolving the matter of relief from payment of a protected rent debt*".

Looking back at the definition of "relief from payment" in s.6(2) of the Act this includes the ability for the arbitrator to write off the whole or part of any protect rent debt, to defer payment/order payment in instalments and write off any interest due under the terms of a lease in respect of the same.

It is therefore open to a tenant who is making a reference to arbitration to make a proposal to the landlord that the latter simply writes off the whole debt. Whilst this is unlikely to be acceptable to a landlord, we may find that in practice this is the starting position for most tenants; particularly since there is no requirement to act reasonably when making a proposal.

Tenants should, however, be cautious of taking this approach and, if the landlord submits its own proposal in response, should consider making a revised proposal. It is unlikely (except in exceptional circumstances) that an arbitrator would consider a proposal by a tenant to pay nothing in respect of a protected rent debt is consistent with the principles in section 15 of the Act by reference to which the arbitrator must make their decision (discussed below). Where the arbitrator has received proposals from both parties but only one of them is consistent with the principles in section 15, then they are required (by section 14 of the Act) to make an award in the terms of the consistent proposal (discussed further below).

Similarly a landlord may make a proposal that requires a tenant to make payment of everything due as soon as possible i.e. that the tenant should be given no relief. It is within the arbitrator's powers to make such an award (reflecting a concern raised at the committee stage of the Act that some well-known (and well-funded) high street tenants took advantage of the restrictions on landlords enforcing rent debts during the pandemic and simply refused to engage with them in relation to any form of compromise). Similar issues as identified above in relation to a tenant making a

proposal to pay nothing apply, however, and the landlord should keep any such proposal under review.

There may be an argument that the requirement to provide supporting evidence for a proposal restricts the proposing party to making proposals that are "supported" by the evidence and that any proposal not so supported is not a proper proposal for the purpose of the Act. In practice, however, it is likely to be very difficult for anyone, including an arbitrator, to say that a particular proposal is not supported by the evidence given in support of it as such evidence will always be open to interpretation (and manipulation). In any event, if a proposal is not supported by underlying evidence then it is open to an arbitrator to determine that it is not consistent with the arbitrator's principles in section 15 of the Act (by reference to which they must determine their award) and therefore the arbitrator may disregard the proposal.

I'm the respondent – should I make a proposal in response to the reference and/or a revised proposal from the applicant?

The Act is clear that there is no obligation on the respondent (who in most cases is likely be the landlord) to make a proposal in response to the reference nor to revise any such proposal they do make in response to a revised proposal from the applicant.

Respondents may be tempted to try and reduce their legal costs (which are not recoverable) by not formally responding and leaving it up to the arbitrator to make a decision on what relief, if any, should be granted in relation to the protected rent debt. However, the respondent needs to exercise caution if taking this approach.

Section 14 of the Act specifies what award the arbitrator should make and provides that where only the applicant puts forward a 'final proposal' (being either the proposal they made when they referred the matter or a revised proposal they subsequently submit), then the award will be on the basis set out in the proposal provided that said proposal is consistent with the principles set out in section 15 (discussed in more detail below). This would give the advantage to the applicant in terms of the award that is made.

What Award Can an Arbitrator Make?

The Act provides the arbitrator with three options when it comes to making their award:

1. to provide the tenant with some form of relief in respect of the protected rent debt;
2. not to provide the tenant with any form of relief (i.e. rule the tenant should pay everything due immediately); or
3. dismiss the reference.

Where the award gives the tenant time to pay an amount, the payment date must be within the period of 24 months beginning with the day after the day on which the award is made.

Dismissal

It is convenient to start with considering the circumstances in which the arbitrator **must** dismiss the reference. They are as follows:

- The parties have by agreement resolved the matter of relief from payment of a protected rent debt **before** the reference was made. This is potentially a very significant "carve-out" from the compulsory arbitration process. As explained above, "relief from payment" in relation to a protected rent deposit means writing off the whole or part of the debt, giving the tenant time to pay (including by instalments) and/or reducing interest payable on the debt. Accordingly, if the landlord and tenant have already agreed to some form of relief from payment of a specific protected rent debt, then the arbitrator has no option but to dismiss the reference. During the pandemic, many landlords and tenants entered into agreements to compromise rent due in some way on a voluntary basis e.g. landlords agreed to reduce rents and/or to defer payment and/or allowed the tenants to pay in instalments, and waived their right to recover interest. Where that's the case then the arbitrator will not be able to make an award to further compromise that debt.

- The tenancy is not a business tenancy.

- There is no protected rent debt.

- If, after assessing the viability of the tenant's business, the arbitrator determines that at the time of their assessment the business is not viable **and** would not be

viable even if the tenant were to be given relief from payment of any kind. (The purpose of this provision is presumably to not compromise further any recovery the landlord may make for sums due to it under the lease on the insolvency of the tenant.) The "viability" of the tenant's business is considered further below.

Providing Relief

If, after making their assessment of the viability of the tenant's business, the arbitrator determines that at the time of the assessment the business **is** viable, or would become viable if the tenant were to be given relief of any kind, then the arbitrator **must** resolve the matter of relief from payment of a protected rent debt by:

- Considering whether the tenant should receive any relief from payment and, if so, what relief; and
- Making an award to this effect.

What relief (if any) should the arbitrator include in their award?

Before determining what award to make the arbitrator must consider the final proposals put forward to them by the parties (or if the respondent did not make a proposal, then just the applicant's final proposal).

A party's "final proposal" is either the revised proposal it put forward in response to the other's proposal or, if no revised proposal was made, the proposal made by the applicant in making the reference and, in the case of the respondent, any proposal it put forward in response.

Where both parties put forward final proposals

- If the arbitrator considers both proposals are consistent with the principles in section 15 of the Act, the arbitrator **must** make the award on the terms set out in whichever of them the arbitrator considers to be the most consistent; or
- If the arbitrator considers that one proposal is consistent with the principles in section 15 but the other is not, the arbitrator **must** make the award on the terms set out in the proposal that is consistent.

As such, parties should be very careful about what they put in their proposals as they do not want to be in the position of having their proposal disregarded, if the arbitrator considers it not to be consistent with the principles in section 15 of the Act. This

emphasises the importance of parties considering properly whether or not to revise their initial proposals.

Where only the applicant put forward a formal proposal

Where only the party making the reference put forward a final proposal, the arbitrator **must** make the award set out in that proposal if they consider that it is consistent with the principles in section 15 of the Act. Accordingly, the respondent should consider their position very carefully before deciding not to put forward their own proposal in response to a reference.

No "consistent" proposal

If neither party has put forward a proposal that is consistent with the principles set out in section 15 of the Act then the arbitrator must make whatever award they consider appropriate (applying the principles in section 15 of the Act).

The Effect of the Award: Variation of the Lease

An award giving the tenant relief from payment of a protected rent debt has the effect of altering the terms of the tenancy in relation to the protected rent debt.

This means the tenant is not in breach of the lease by virtue of not paying a sum written off by the award or failing to pay an amount payable under the terms of the award before it falls due thereunder.

Similarly, a guarantor of the tenant's obligation to pay rent, or a former tenant who is liable for a failure by the tenant to pay rent (under an Authorised Guarantee Agreement), will not be liable for any sum written off by the award or for any sum payable under the terms of the award but before it falls due thereunder.

Confidential Information

The arbitrator must exclude from their award any confidential information unless the party to which it relates consents to its publication.

"Confidential information" is information that the arbitrator is satisfied relates to a party or another person, the disclosure of which would or might significantly harm their legitimate business interests or information relating to the private affairs of an individual, disclosure of which would or might significantly harm that individual's interests.

The purpose of this provision is to encourage full and frank disclosure by the parties to allow the arbitrator to make their assessment of the viability of the tenant's business and the landlord's insolvency (as discussed below). The provision addresses concerns raised by bodies representing the retail and hospitality industries, that tenants would not avail themselves of the arbitration process if it meant disclosing confidential/market-sensitive information about their businesses.

Given that any oral hearing is required to be held in public unless the parties agree otherwise, a party disclosing confidential and/or sensitive information (e.g. about its finances) as part of the arbitration process may want to opt for a decision made by the arbitrator on the basis of written representations from the parties rather than in a hearing.

The Arbitrator's Principles

In terms of the matters to which the arbitrator must have regard when settling the terms of the award, the Act provides that they are to comply with the principles set out in section 15 thereof. These are as follows:

1. Any award should be aimed at preserving, or restoring and preserving, the **viability of the tenant**, so far as that is consistent with preserving the **landlord's solvency**.

2. The tenant should, in so 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 other words, tenants who can pay should pay.)

3. In considering the viability of the tenant's business and the solvency of the landlord, the arbitrator must disregard anything done by either party to manipulate their financial affairs so as to improve their position in relation to an award. (This principle addresses concerns raised during debate that one or other of the parties may try to 'game' the system and to ensure that awards are made based on financial information that accurately represents the status of the tenant or the landlord.)

Viability vs. Solvency

What the principles tell us is that the arbitrator's focus should be on preserving the viability of the tenant's business, albeit not at the cost of the landlord's solvency (which presumably overrides the requirement to preserve the viability of the tenant's business).

In making both assessments the arbitrator is to disregard the possibility of either the landlord or the tenant borrowing money or restructuring its business.

Viability

"Viability" is not defined by the Act but it does not mean the same as solvency nor that the business needs to be profitable. A business may be viable whilst still not technically being solvent or making a profit (for example seasonal businesses and start-ups). The Act deliberately refrains from defining or restricting the definition of "viability" to ensure that arbitrators are able to take a flexible approach on a case-by-case basis.

In assessing the "viability" of the tenant's business the Act provides that the arbitrator **must** have regard to:

- The assets and liabilities of the tenant, including any other tenancies to which the tenant is party;
- The previous rental payments it has made under the tenancy to the landlord;
- The impact of coronavirus on the tenant's business; and
- Any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

The protected rent debt should be disregarded when considering the viability of the tenant's business as the whole purpose of the assessment is to determine whether the business is viable if relief is granted.

Solvency

In assessing the "solvency" of the landlord, the arbitrator **must** have regard to:

- the assets and liabilities of the landlord; and
- any other information relating to the financial position of the landlord as the arbitrator considers appropriate.

The distinction between the two assessments the arbitrator has to carry out is stark. Most notably, there is no express obligation on the arbitrator to consider the impact of coronavirus on the landlord's business. The arbitrator is essentially confined to determining whether it is solvent on a going concern basis i.e. can it pay debts as they fall due?

Their review of the tenant's business, however, is required to be more holistic; they are not concerned with whether the tenant is solvent but whether its business is, or can with relief from the protected rent debt be, viable.

The saving grace for landlords is that, if the tenant's business is "viable" without any relief in respect of the protected rent debt being granted, then the arbitrator should make an award that provides for the tenant to pay in full and without delay.

There are not, however, any options for the arbitrator to penalise a tenant whose business is, and has at all times been, viable, but who has failed to comply with its obligations in the lease to pay rent and other sums until such time as compelled by the arbitrator's award to do so (a concern raised when the Act was debated at committee stage in relation to a number of well-known tenants with many high-street branches who have held their landlords (including small, independent landlords) to ransom as a consequence of restrictions on enforcement (and some who have simply refused to engage at all)).

Code of Practice for Commercial Property Relationships

When the Commercial Rent (Coronavirus) Bill was first published in November 2021, the government also released a new 'Code of Practice for Commercial Property Relationships Following the Covid-19 Pandemic' ("the Code) to replace the one it issued in June 2020.

The purpose of the Code is to assist landlords and tenants in resolving disputes relating to rent owed as a result of premises having been closed or business restricted during the pandemic. It was issued in anticipation of the Act being passed into law in March 2022 and expressly recognises that viable business models will differ from party to party and within different sectors.

The Code also considers the concept of "affordability" (separate from "viability"). "Affordability" is not a concept included within the Act, but the Code provides that

where a viable tenant is seeking to deviate from the terms of the lease in respect of rent owed it needs to demonstrate why the payment is "unaffordable" and what payment or payment period might otherwise be payable. A landlord can also evidence what is affordable to them, for example that a proposed reduction in rent demonstrates a threat to their solvency.

The Code includes (at Annex B) a non-exhaustive list of the documents landlords and tenants might provide to the arbitrator to prove their financial situation. The list includes:

- Existing and anticipated credit/debit balance;
- Business performance since March 2020;
- Tenant's assets (noting a distinction between liquid and non-liquid assets);
- Position of the tenant with other tenancies;
- Government assistance received by the tenants including loans and grants;
- Dividend and bonus payments to shareholders;
- Excessive or unreasonable dividend payments to directors (although regard should be had to the fact that director dividends may be their only income);
- Overdue invoices or tax demands;
- Unpaid or returned payments;
- Exceeding overdraft limits;
- Creditor demands;
- Money judgments;
- Expert evidence as to the tenant's trading position;
- Shortfalls in share issues;
- Evidence of prior refusal of credit, funding or lending (but not the possibility the tenant could obtain finance it has not already applied for);
- Whether or not it has met budget projections;
- Loss of important contracts;
- Insolvency of a major customer;
- Unexpected retentions – knowledge of a lack of working capital; and
- Loss of key personnel or staff redundancy.

Statutory Guidance to Arbitrators[1]

The Government has also issued guidance to arbitrators in relation to the exercise of their functions under the Act, which list the following as matters the arbitrator may want to take into consideration when determining the viability of the tenant's business and the solvency of the landlord:

1. Bank account information – including savings accounts, current accounts and loan accounts from each financial year after March 2019;
2. Financial accounts for each financial year after March 2019;
3. Management accounts for each financial year after March 2019;
4. Gross profit margin and net profit margin;
5. Details of dividends paid to shareholders for each financial year after March 2019;
6. Evidence of prior refusal of further credit, funding or lending;
7. Evidence of overdue invoices of tax demands, unpaid or returned cheques or electronic payments, exceeding overdraft limits, creditor demands, money judgments;
8. Liquidity ratio;
9. Gearing ratio;
10. Current ratio; and
11. Profit forecasting.

Arbitrators do not need to request all of the information in this list and may consider that some items above are not relevant in a particular case. However, if such information is provided by the parties the arbitrator should consider it. Arbitrators may ask for additional information, including for items not featured in this list, if that would be helpful in determining viability. It is the tenant's responsibility to provide evidence to support their proposal and to enable the arbitrator to determine the viability of the tenant's business.

[1] At the time of drafting the Statutory Guidance issued by the Government is in draft form. This note will be updated as and when a final version of the guidance is issued.

Costs

The usual position will be that the arbitrator's fees are split equally between the parties (although it is open to the arbitrator to order one party to pay more).

The parties have to bear their own legal and other expenses of the arbitration; there is no jurisdiction for the arbitrator to penalise either party for unreasonable conduct by making a different award.

In addition, the landlord is prohibited from recovering any costs it incurs through the arbitration process from the tenant even if the tenancy allows for it to recover costs relating to a tenant's breach of the lease (which it usually does).

The approved arbitration body must publish on its website the fees payable in relation to arbitrations referred to it under the Act. It is open to the Secretary of State to make regulations that specify limits on the fees arbitrators can charge. One concern that was made throughout the debate and committee stages of the Act was that arbitration must be made affordable (particularly for smaller tenants). It may be that a sliding scale of fees is introduced to reflect the value/complexity of different disputes.

The applicant must pay the fees and expenses of the arbitrator and the approved arbitration body (other than an oral hearing fee) in advance of the arbitration taking place. When the arbitrator makes their award they must also make an award requiring the respondent to reimburse the applicant for half the arbitration fees paid by the applicant, unless the arbitrator considers it more appropriate in the circumstances to award a different proportion (which may be zero).

Where both parties request an oral hearing they are jointly and severally liable to pay the hearing fees in advance but where one party makes the request, they must pay the hearing fees in advance. When the arbitrator makes their award they must require the other party to reimburse the party who requested the hearing for half the hearing fees unless it is not appropriate to do so

PART 3 – RESTRICTIONS ON REMEDIES AND INSOLVENCY ARRANGEMENTS

Introduction

In order to allow time for the parties to pursue the arbitration process, the Act introduces a temporary moratorium on steps landlords can take to enforce protected rent debts and temporary restrictions on initiating certain insolvency arrangements against tenants. Part 3 of this guide provides an overview of the new restrictions.

Moratorium on Enforcement of Protected Rent Debts

The Act introduces a new moratorium that prevents a landlord who is owed a protected rent debt from using the following enforcement actions against tenants in relation to that debt during the moratorium period:

- making a debt claim in civil proceedings;
- using CRAR in respect of the protected rent debt (i.e. seizing the tenant's goods);
- enforcing a right of re-entry or forfeiting in respect of a protected rent debt; and
- making a withdrawal from a tenant's deposit in respect of the protected rent debt.

There are also separate restrictions on insolvency actions, which are discussed further below.

The Moratorium Period

The "moratorium period" commences on 25 March 2022 and ends on:

- (where the matter is referred to arbitration) the day on which the arbitration concludes; or
- (where the matter is not referred to arbitration within the 6 month deadline (or later if that deadline is extended by the Secretary of State)), the last day of that period.

When does arbitration conclude?

The arbitration process is deemed to conclude when:

- the arbitration proceedings are abandoned or withdrawn by the parties;
- the time period for appealing expires without an appeal being brought or

- any appeal brought within that period is finally determined, abandoned or withdrawn.

Debt Claims Issued before the Act is Passed

Claims issued on or after 10 November 2022

If a landlord has issued a debt claim against a tenant that includes a claim for a protected rent debt on or after 10 November 2021, the court **must** stay the proceedings on the application of either party in order to enable the payment of the protected rent debt to be resolved (by arbitration or otherwise).

Where, prior to the Act coming into force on 25 March 2022, judgment has been passed on a debt claim issued on or after 10 November 2021 and the judgment remains unpaid, the tenant can still refer to arbitration a request for relief from payment of the part of the judgment debt that relates to a protected rent debt (or interest on it). In other words, the tenant can ask the arbitrator to reverse the court's judgment in respect of the protected debt and replace it with an alternative award.

In practice, this is unlikely to be an issue in many cases as there will have been insufficient time between 10 November 2021 and 25 March 2022 for the case to have reached court and judgment to have been made (save where default judgment has been granted against the tenant for failing to respond to the claim).

Claims issued before 10 November 2022

On the face of the Act, it appears these claims are not intended to be caught by the moratorium in the Act and can continue as normal (as can enforcement of any judgments made in respect of such claims).

However, the Court has an inherent power under the Civil Procedure Rules to stay any proceedings or judgment and, based on the drafting of the Act, there is an argument to be made that any judgment given after 10 November 2021 and before 25 March 2022 in favour of the landlord, may not be enforced insofar as it relates to a protected rent debt and that it may, instead, be referred to arbitration.

Unprotected Rent Debts

The new moratorium only relates to protected rent debts. After 25 March 2022 landlords will be able to forfeit or exercise CRAR in relation to a rent debt that does

not relate to the protected period. Landlords will also continue to be permitted to issue debt claims against tenants and/or make withdrawals from rent deposits for unprotected rent debts. Tenants should therefore make sure they pay all unprotected rent debts to avoid forfeiture or CRAR.

Landlord's Right to Appropriate Rent

If a tenant pays rent due under a business tenancy during the moratorium period at a time when it owes the landlord both a protected rent debt and an unprotected rent debt, the landlord **must** use the payment to meet the unprotected rent debt before applying it to the protected rent debt.

Where a tenant owes both an unprotected rent debt and a protected rent debt and, between the last day of the protected period for the protected rent debt and 24 March 2022, the tenant has made a payment of rent, the landlord must use that payment to meet the unprotected rent debt before it is applied to the protected rent debt.

Using Tenant's Deposit

During the moratorium period a landlord cannot draw down a protected rent debt from the tenancy deposit.

If the landlord has lawfully drawn down a protected rent debt from the tenancy deposit before the beginning of the moratorium period, the tenant is not required to top up the deposit before the end of the moratorium period.

Intermediate Tenants/Head Landlords

An intermediate tenant/head landlord who is not in occupation of a premises for business purposes does not have a "business tenancy" for the purposes of Part II of the Landlord and Tenant Act 1954 and therefore does not benefit from the protection provided by the Act.

If an intermediate tenant fails to pay a rent that would otherwise be considered a protected rent debt (including because its sub-tenant has failed to pay a protected rent debt they owe under their business tenancy), the superior landlord retains the

right to take enforcement against the intermediate tenant. If that action involves forfeiting the superior lease then, as a matter of law, the sub-lease also falls away.

It is open to both the intermediate tenant and the sub-tenant to apply to court for relief from forfeiture. Relief from forfeiture is an equitable and discretionary remedy but the court will usually grant it if a tenant pays all of the arrears and the landlord's costs. The Act provides that, if the sub-tenant makes the application, for the purpose of determining whether to grant relief, the court must disregard any failure to pay the protected rent debt. The intermediate tenant/head landlord would, however, need to pay the full arrears in order to obtain relief from forfeiture and reinstate their lease.

Restrictions on Insolvency

Company Tenants: Winding-up Petitions

From 1 April 2022, during the ***moratorium*** period the landlord is prohibited from presenting a petition for the winding-up of a tenant company or an LLP unless the landlord is owed a debt that is not a protected rent debt.

Individual Tenants: Bankruptcy Petitions

During the ***relevant*** period the landlord is prohibited from presenting a petition for a bankruptcy order against a tenant who is an individual where the underlying demand, judgment or order on which the landlord relies includes any protected rent debt and (in the case of a demand) was served or (in the case of a judgment or order) the claim was issued during the relevant period.

Note: the 'relevant' period for this purpose is not the moratorium period. It is the period beginning on 10 November 2021 and ending on the last day of the moratorium period (as defined above).

Bankruptcy orders made before 25 March 2022

Where:

- a court has made a bankruptcy order against a tenant on a petition from the landlord under s.267 of the Insolvency Act 1986; and
- the order was made on or after 10 November 2021 but before 25 March 2022; and

- the order is not one which the court would have made if the Act had been in force at the time,

then the order will be regarded as void on the basis that the court is to be regarded as having had no power to make the order.

The court may make an order/give directions as it thinks appropriate to restore the position to what it was immediately before the petition was presented.

Guarantors

The restrictions on issuing winding up petitions/bankruptcy petitions against tenants apply equally to:

- any person who has guaranteed the obligations of the tenant under the business tenancy;
- any person/company who or is liable on an indemnity basis for the payment of rent under a business tenancy; and
- a former tenant who is liable for the payment of rent under a business tenancy.

Voluntary Arrangements/Compromises

Where a matter of relief from payment of a protected rent debt has been referred to arbitration, then during the relevant period:

- No proposal for a company voluntary arrangement under section 1 of the Insolvency Act 1986, which relates to the whole or part of the debt, may be made;
- No proposal for an individual voluntary arrangement under section 256A of the Insolvency Act 1986, or an application for interim order under section 254 of that Act, which relates to the whole or part of the debt may be made; and
- No application for a compromise or arrangement under section 896 or 901C of the Companies Act 2005, which relates to the whole or part of the debt, may be made.

PART 4 – THE POWER TO APPLY THE ACT IN RELATION TO FUTURE CORONAVIRUS CONTROLS

Part 4 of the Act has been introduced to allow the government to apply the protections set out therein in response to any closure requirements that may be imposed in response to a future coronavirus outbreak.

It permits the Secretary of State to introduce regulations that provide for the Act to apply in relation to rent debts under business tenancies in the event that further closure requirements are introduced in relation to the whole or part of a business carried on at or from the premises or the whole or part of those premises.

This power is restricted to closure requirements imposed in response to coronavirus, (meaning severe acute respiratory syndrome coronavirus 2) and not other viruses.

The regulations may re-introduce some or all of the protections provided for in the Act and may modify the Act if required.

CONTACTS

If you require any further information or assistance in relation to the Commercial Rent (Coronavirus) Act 2022 or any other property dispute please contact one of our experts:

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