

November 2021

A brave new world? Government sets out proposals for new Covid Rent Arrears Arbitration Scheme

1. The Government presented the Commercial Rent (Coronavirus) Bill to Parliament on 9 November 2021. This sets out the proposed law for an arbitration scheme to determine rent relief for business tenant's rent arrears accrued during the Coronavirus pandemic. It is a far-reaching proposal that will dramatically impact the position of landlords and tenants.
2. Whilst the full impact is still being digested, the scheme looks quite tenant friendly in terms of the time period of arrears that can benefit from the relief and the criteria arbitrators will apply. The law's impact will however be limited to those businesses that legally had to close for at least part of the pandemic (i.e. leisure, hospitality and non-essential retail tenants).
3. We provide some further analysis on the proposed law below. This analysis reflects the proposed law as it would apply to England (there are slightly different provisions for Wales, though the substance is largely the same).
7. The proposed law will not affect any settlement agreements relating to the protected arrears (both ones reached previously and those entered into after passage of this law).
8. Other enforcement options (debt claims, forfeiture, CRAR etc) are to be prohibited or stayed until arbitration is concluded or the time to apply for arbitration expires.
9. Currently this remains just a proposed bill – it may be subject to amendments.

Arrears affected by the proposed arbitration scheme

Summary of the new law

4. The proposed arbitration scheme will affect the Rent arrears for most hospitality, retail and leisure tenants that accrued from 21 March 2020 until Coronavirus restrictions for the tenants' specific sectors came to an end earlier this year.
 5. The arbitrator will be able to apply Rent relief to those protected Rent arrears, so long as the tenant's business would be viable after that relief.
 6. In deciding what relief to be granted, the arbitrator will have to determine what relief needs to be given to restore and/or preserve the viability of the tenant's business while also preserving the landlord's solvency. This appears to be a very tenant friendly criteria, focusing on saving tenant businesses where possible so long as landlords remain solvent.
 10. The proposed law will apply to "Rent" attributable to a "protected period" that was payable under a business tenancy that was "adversely affected by Coronavirus".
 11. To unpack what that means in practice:
 - a. "Rent" means the following sums due under business tenancies:
 - i. rent (i.e. sums paid under the lease for use and occupation of the property);
 - ii. service charges (the definition of which will include insurance rent);
 - iii. late payment interest on those sums; and
 - iv. rent deposit top-ups required to meet a deficit caused from using the deposit to pay rent and service charges.
- "Rent" is defined to mean amounts payable by the tenant under the tenancy – so the proposed law would not seem to apply to a guarantor's liabilities.
- b. "Adversely affected by Coronavirus" means that the whole or part of the tenant's business was required to close under Coronavirus regulations for any period of time from (and including) 21 March 2020 to (and including) 18 July 2021 or earlier. That

will not therefore include office tenants, industrial premises or essential retail (which were never legally obliged to close) but the scheme will apply to the vast majority of retail, leisure and hospitality tenants.

- c. "Protected Period" means the period beginning on 21 March 2020 and ending on the last day on which the whole or part of the tenant's business was required to close under Coronavirus regulations or was subject to a "Specific Coronavirus Restriction". For most affected businesses therefore, that will mean a time period from 21 March 2020 until restrictions were lifted for their specific sector earlier this year.
- d. A "Specific Coronavirus Restriction" is defined as restrictions imposed by Coronavirus regulations to specific businesses or premises (but not including requirements to display or provide information). It does not appear intended to apply to more general restrictions such as social distancing requirements or guidance to work from home.

Arbitration criteria and timings

- 12. The arbitrator will only be able to make an award if the Rent arrears in question meet the relevant criteria (see above) and he/she considers the tenant's business will be viable after such Rent relief.
- 13. In terms of what award is to be made, the proposed bill states that:
 - a. the aim of the reward is to preserve and/or restore the viability of the tenant's business, so long as that is consistent with the landlord's solvency. That appears very friendly to tenants, especially those with larger institutional landlords who will find it harder to argue that their solvency is likely to be impacted; and
 - b. so far as it is consistent with that principle at a. above, the tenant should be required to meet its legal obligations to pay the protected Rent.
- 14. The relief may take the form of:
 - a. writing off the protected arrears (in whole or part),
 - b. allowing more time to pay the arrears (including by instalments); and/or
 - c. reducing any interest payable.
- 15. There is to be a power for the Government to be able to issue further guidance to the arbitrators on the exercise of their function. Further details on the criteria to be applied may therefore follow in the future.
- 16. There will be a 6-month period following passage of the Act in which referrals to arbitration can be made. There are various procedural steps to be gone through before a referral to arbitration can be made (taking at least 28 days), so parties will need to be mindful of allowing sufficient time for that.

Other enforcement options

- 17. All other enforcement options for Rent arrears protected under the new law will be prohibited or will be stayed during a moratorium period (commencing when the Act is passed and ending with the arbitration being concluded or the time for commencing the arbitration expiring).
- 18. In terms of more details on the different enforcement options:
 - a. Court proceedings:
 - i. Any new debt claims for protected Rent arrears are prohibited during the moratorium.
 - ii. Any debt claims issued on or after 10 November 2021 but before the law is passed can be stayed on application of either party.
 - iii. The proposed law does not appear to affect any debt claims issued before 10 November 2021.
 - b. CRAR: CRAR cannot be used in respect of protected Rent arrears during the moratorium.
 - c. Forfeiture: Business tenancies cannot be forfeited on the basis of protected Rent arrears during the moratorium.
 - d. Rent deposits: During the moratorium landlords cannot withdraw from rent deposits to discharge any liability for protected Rent arrears.
 - e. Winding up: tenants cannot be wound up during the moratorium on the basis of protected Rent debts (though they can be wound up for other non-protected debts).

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