Commercial Rent (Coronavirus) Bill:

A short analysis and some practical pointers

By Arnold Ayoo

Lawyers and businesses in the commercial property sphere will be well aware of the Government's introduction of the Commercial Rent (Coronavirus) Bill ("the Bill") and revised Code of Practice on 9 November 2021. The intention is for it to become law on 25 March 2022. This alerter considers the arbitration procedure envisaged in the Bill (p.1-4) and provides some practical pointers for landlords, tenants and lawyers representing them (p.4-6).

THE BILL

1. The existing arrangements under s.82 of the Coronavirus Act 2020 (extended until 25 March 2022) have simply prevented landlords from enforcing claims for rent by forfeiture but have not altered the contractual arrangements or affected the rental debts themselves. The Bill, however, provides for an arbitration procedure whereby commercial rent debts attributable to coronavirus can be reduced, extinguished or time for payment can be extended. The Government intends the Bill to prevent the closure of businesses which, but for the coronavirus-related rent debts, would otherwise be viable.

What is a protected rent debt?

2. Section 3 of the Bill defines a 'protected rent debt' as a debt under a business tenancy adversely affected by coronavirus, and consisting of rent attributable to a period of occupation between 21 March 2020 and 18 July 2021 (during which period a tenant was obliged under Covid regulations to close the whole or part of its business).

The moratorium

3. The headline making feature of the Bill is the arbitration procedure (discussed further below). However the Bill also introduces a moratorium in respect of protected rent debts (for 6 months, or until such arbitration concludes) which prevents a landlord: (i) making a debt claim in civil proceedings; (ii) using the commercial rent arrears recovery power; (iii) enforcing a right of re-entry or forfeiture or (iv) using a tenant's deposit.

4. Landlords may be tempted to make their debt claims before the Bill becomes law by, for example, issuing sometime between 10 November 2021 and 24 March 2022. To address this, the Bill allows either party to apply to stay debt proceedings commenced after 10 November 2021 but before the Bill is passed into law. A court faced with such an application must stay the matter.

The arbitration procedure

5. The Bill provides for parties who have been unable to reach an agreement regarding a protected rent debt to refer the matter to a binding arbitration. The tenant or landlord has a period of 6 months (from the passage of the Act) to notify the other party ('the respondent') of their intention to make a reference, with any response to be provided within 14 days. A further 14 days after the response (or 28 days if there is no response), a reference to an approved arbitral body can be made. The reference must include a

formal proposal for 'resolving the matter of relief from payment' and the respondent may put forward their own 'formal proposal' in response within 14 days.

Assessing the viability of the tenant s business and the solvency of the landlord

6. The arbitrator has to determine the 'viability' of the tenant's business before deciding on relief:

   i. The reference will be dismissed if the business is (a) not viable and (b) would not be viable even if the tenant were to be given relief from payment of any kind.

   ii. Relief can be granted if the business is (a) viable or (b) would become viable if the tenant were to be given relief from payment.

7. The arbitrator also has to assess the solvency of the landlord.

Viability of the tenant

8. Viability is to be assessed with reference to:

   - the assets and liabilities of the tenant (including other tenancies)
   - the previous rental payments made under the business tenancy
   - the impact of coronavirus on the business of the tenant, and
   - any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

Solvency of the landlord

9. The landlord's solvency is be assessed with reference to:

   - the assets and liabilities of the landlord (including other tenancies) and
   - any other information relating to the financial position of the landlord that the arbitrator considers appropriate

10. The assessment of the landlord and tenant cannot take into account either party borrowing money or restructuring their business.

The Award

11. The aim of the arbitrator's award is to 'preserve' or 'restore and preserve' the viability of the business tenant, so far as that is 'consistent with preserving the landlords solvency'. An award may reduce or write off the debt, or give the tenant extra time to pay (of a maximum of 2 years). It is clearly a summary procedure in which an arbitrator makes a 'just' commercial assessment about the maximum a tenant can pay and a maximum a landlord can write off, with both parties remaining viable/solvent.

PRACTICAL POINTERS

For tenants: consider and aim for the minimum relief, not the maximum relief.

12. A tenant has to be careful in the type of case it puts forward at arbitration. A tenant will want to submit enough information to show either (a) that it is viable but needs significant relief or (b) it is not viable - but would be viable if significant relief is given. It will have to demonstrate enough financial peril to show that it needs relief but not so much as to impugn its viability going forward. One way of doing this may be for the tenant to ask itself '*what is the minimum amount of rental relief needed in order to make a profit, going forward?'.* By considering what the minimum relief required is (rather than aiming for the maximum) the tenant can work backwards

and present its financial position (insofar as it is possible) in a way that bears the least risk of being branded 'unviable'.

For landlords: re-evaluate your balance sheet and carefully explain the impact of different levels of rent reduction on your solvency

13. For landlords, a worse financial position equates to a better prospect of a favourable award. Insofar as it is appropriate and within accounting principles, a fresh evaluation of assets and liabilities should consider whether post-pandemic assets have arguably decreased in value or post-pandemic book debts can be written off as bad debts. Even if the balance sheet is healthy, landlords should consider cash-flow projections as an alternative basis for establishing solvency.

14. After establishing this, a case can be made as to how the current solvency position will be affected by the proposed rent relief. Clearly, the arbitrator has a wide discretion to look at 'any other information relating to the financial position of the landlord'. The aim is to 'preserve the solvency of the landlord'. Therefore, a professionally prepared document which sets out the effect of various levels of rental reductions on the solvency of the landlord could be a powerful tool. Establishing a threshold past which any further reduction will push the landlord towards insolvency could be useful. Regard should be had to cash-flow as well as balance sheet insolvency.

15. Landlords with multiple commercial tenants will have to be careful to ensure that the likely effect of the making of arbitral awards in respect of protected rent debts relating to other properties are taken into account in their submissions on solvency.

For lawyers representing a party: repeat demands for full and specific disclosure and ask for adverse inferences to be drawn from any failures to comply

16. The bill does anticipate parties producing evidence in advance of an arbitration but contains no express disclosure provisions. As the arbitrator has discretion to look at any other information relating to the financial position of the parties, it is arguable that such 'information' includes written correspondence pertaining to the finances - and in particular how the parties have responded to requests for financial documentation or their explanations as to why they have not disclosed said documents. Lawyers should consider requesting, in correspondence, that specific documents are produced (whether as part of the evidence or beforehand) and inviting the arbitrator to draw an adverse inference from incomplete disclosure.

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