

The Commercial Rent (Coronavirus) Bill



Read the latest [update on The Commercial Rent \(Coronavirus\) Bill](#).

We take a closer look at the Arbitrator's Guidance in anticipation of the Bill receiving Royal Assent on 25 March 2022.

So far, the Government has produced:

1. a Draft Commercial Rent (Coronavirus) Bill – this is now in the final stages and we expect it to be passed as law by 25 March 2022
2. A new Code of Practice for commercial property relationships following COVID-19
3. A draft Guidance Note about how arbitrators should exercise their functions under Part 2 of the Draft Bill

Generally speaking, the Bill will ring-fence (or protect) rent arrears built up as a result of mandated business closures during the COVID-19 pandemic and introduce a new binding arbitration process aimed at resolving disputes relating to those protected rent debts where landlords and tenants have not been able to reach agreement on how those debts should be dealt with.

The Bill will not be dealing with businesses that did not have mandated closures, for example post offices, chemists, pharmacies, food shops and offices. For these industries, after 25 March 2022, all landlords' remedies are likely to come back into force.

The Bill does however deal with businesses that did have mandated closures. For instance, retail, hospitality, and



leisure tenants.

We considered the Bill and new Code (items 1 and 2 above) in our previous blog on [rent arrears](#). This note will focus on item 3. This is the *draft* guidance to be provided to arbitrators operating under the Commercial Rent (Coronavirus) Bill when a referral is made by either a Landlord or a Tenant.

Key issues

The key issues contained in the draft are:

Stage 1 – pre-arbitration stage

This stage aims to encourage the parties to resolve the dispute by negotiation, before arbitration begins. Parties will be barred from making a reference to the arbitrator until they have complied with certain requirements. These include notifying the other party of their intention to make a reference and subsequently allowing a period of time to pass before actually making the reference.

Fees must also be paid at this stage, when one of the parties makes a reference to an approved arbitration body. The party making the reference (Applicant) is the one who initially pays the fees – see below for a more detailed discussion. An Applicant's reference must contain their formal proposal for resolving the matter.

Stage 2 – eligibility stage

This stage is where the arbitrator will determine if the dispute in question is eligible for the arbitration process.

The purpose of the Bill is to provide a method of arbitration to deal with relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy.

In order to be eligible:

- The tenancy in question must be a “business tenancy”;
- The rent debt in dispute must be a “protected rent debt”;
- The parties must not have reached agreement on the matter of relief from payment of the “protected rent debt”; and
- It must be the case that the tenant's business is viable or would be viable if given relief from payment of the protected rent debt.

Meaning of “Business Tenancy”

In short, the Bill applies to tenants (even those contracted out of the 1954 Act) in occupation for their business. It does not therefore apply to head tenants not in direct occupation.

Meaning of “Protected Rent”

“Protected Rent” includes arrears of principle service charge, insurance, VAT, interest and even deposit top up. Rent is “Protected Rent” if:

a. the tenancy was “adversely affected by coronavirus”; and

This means the whole or part of the business/premises was subject to a “closure requirement”. A closure requirement includes reduced trading hours. If limited activities were (as an exception) allowed to be carried on despite the obligation to close, this is to be disregarded. For instance non-essential shops might



have been open for collections but they were still subject to a closure requirement.

b. the rent is attributable to a “protected period”:

This is essentially a ring-fenced period from 21 March 2020 to the date when specific restrictions were last removed for the relevant sector. For the hospitality sector the period is 21 March 2020 to 18 July 2021 and for non-essential retail it is 21 March 2020 to 12 April 2021. The exact date can be found at Annex A to the Code which sets out what the date is for each business sector.

It is important to note that if a tenant’s business is undergoing a CVA, IVA or ‘compromise arrangement’ (under section 899 or 901F of the Companies Act 2006), this arbitration process will not be available to them in relation to any of the ring-fenced debt which is covered by the aforementioned arrangements.

From 25 March 2022, the Bill will bring a new moratorium for Tenants with Protected Rent which will mean that Landlords can’t:

- Issue debt proceedings
- Draw down on rent deposit
- Exercise CRAR
- Forfeit
- Issue winding up or bankruptcy petitions

Landlords will also not be able to use Protected Rent Arrears to oppose lease renewals under section 30(1)(b) of the 1954 Act.

The moratorium will last for 6 months from 25 March 2022 or until the award by the arbitrator has been made.

However, from 25 March 2022, the new moratorium will not apply to Non-Protected Rent. For Non-Protected Rent landlords will be able to use the above remedies.

Meaning of “Tenant Viability”

The draft guidance provides a useful insight into the critical concept of tenant viability. A dispute will only be eligible for arbitration if the tenant’s business is viable or would otherwise be viable if given relief from payment of protected rent debt. When assessing viability, the arbitrator will have in mind the tenant’s assets and liabilities, previous rental payments made to the Landlord, the impact of Covid, general bank account information, gross profit and net profit margins.

Viability is deliberately not specifically defined, to account for the wide range of different business models between sectors. The arbitrator will consider evidential information submitted by the parties and as the arbitrator considers appropriate.

The Code says that ‘when referring to viability, parties should consider whether, ring-fence debt aside, the business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading’. The arbitrator must disregard the possibility of the tenant borrowing money or restructuring their business when considering its viability. The arbitrator can however look at the financial position of the whole Group if the tenant is a subsidiary.

Pre-existing debt claims

Debt claims issued on or after 10 November 2021 which are for ring-fenced debt must be stayed if either party requests it, at which point either party can refer the issue to the arbitration process. If a judgment has already been given, then any unpaid judgment is to be treated as protected rent debt, and the question of payment is to



be determined by the arbitrator.

Appropriated rent

If a tenant has paid rent at a time when they owe both protected and unprotected rent, the Bill provides that the payment will be allocated towards unprotected rent debt, before protected debt. This ensures that the tenant gains the benefit of the Bill.

If the parties have already agreed

If the parties have already come to an agreement on the protected arrears, they may not use the arbitration scheme to undo these agreements. The arbitrator must dismiss any references in respect of agreements already reached.

Stage 3 – Resolving the matter of relief from payment

The parties' proposals for resolving the dispute will be considered by the arbitrator and a ruling will be made based on viability, solvency and the key principle that the tenant should meet its obligations in full and without delay.

The arbitrator will make an award based on which party's proposal is most consistent with the principles of the Code. If neither proposal is consistent with the principles, then the arbitrator has discretion to make an award based on what they consider appropriate.

Tenant viability and preserving the landlord's solvency are considered here. The arbitrator will use these concepts to determine how much and how quickly the tenant can afford to pay the protected debt, in order to ensure tenant viability whilst preserving landlord solvency.

A landlord is treated as solvent unless the landlord is, or is likely to become, unable to pay its debts as they fall due. Arbitrators must consider the assets and liabilities of the landlord, including other tenancies to which the landlord is a party, and any other information that it considers appropriate relating to the financial position of the landlord.

An arbitrator can grant a tenant (and any guarantor) relief from payment of a protected rent debt by:

- Writing off the debt in whole or in part;
- Deferring payment of the debt in whole or in part; or
- Reducing or writing off any interest payable.

Appeals

Awards made by the arbitrator are final and binding but may be challenged or appealed within 28 days of the date of the award. Awards may be challenged as to the substantive jurisdiction of the arbitrator, serious irregularity or on a question of law.

Fees

There is no guidance yet on what the fees are likely to be; these will be set by the government-approved arbitration bodies. The Secretary of State will have capacity to cap these fees should they so choose, and it is anticipated that any caps may differ based on the amount of protected rent debt in dispute.

Whilst the applicant is to pay the fees initially, in advance of the arbitration taking place, the general rule is that



on making an award, the arbitrator will rule that the other party reimburse the applicant for half of the fees.

Arbitrators may deviate from this if they consider it appropriate. They have discretion to award any level of reimbursement they see fit.

Aside from this, the Bill provides that parties must cover their own legal or other costs in connection with the arbitration, and Landlords cannot recover these costs under the terms of the lease.

Settlement

If the parties settle during the course of the arbitration, then the Tribunal must record the settlement in an agreed award and terminate the arbitration. The agreed award will have the same status and effect as any other award under the Bill, and it shall be fully binding on the parties.

For more information, or advice on how to deal with protected or non-protected rents going forward, please contact [Elena Chrysostomou](#) or a member of our [property dispute resolution team](#).



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