

Commercial Rent (Coronavirus) Bill Initial Questions & Answers

10 November 2021

Commercial Rent (Coronavirus) Bill

The Government has brought forward its proposed legislation dealing with Covid Rent arrears and the arbitration scheme to resolve Covid Rent arrears disputes. The Bill will now be subject to the usual parliamentary scrutiny and may change as it makes its way through Parliament. We answer some of the initial questions that the real estate industry will have.

What arrears are covered?

The proposed legislation ring-fences the following arrears:

- sums paid for possession and use of premises whether or not described as rent
- service charge, which includes insurance costs incurred by the landlord (or superior landlord)
- interest on unpaid rent and service charge; and
- VAT

What period does the ring-fencing apply to?

Arrears will be ring-fenced for the period from 21 March 2020 to the last day the property was required to be closed or the last day the property was subject to coronavirus restrictions. This is the protected period. The protected period will therefore include not just mandatory closures but also periods where there were restrictions on use, e.g. restrictions on numbers or seated customers only.

Can landlords still pursue debt proceedings for ring-fenced arrears after 10 November 2021?

Technically yes, but in reality, pursuing arrears may have limited value. The Court will stay any proceedings for ring-fenced arrears issued from 10 November 2021 until the date the Act is passed. No proceedings for ring-fenced arrears can be issued from the date the Act is passed until after the earlier of the 6 month period for applying for arbitration has passed or the date on which an arbitration concludes (the “Moratorium Period”).

Where a judgment for ring-fenced arrears in proceedings issued after 10 November 2021 is delivered between 10 November 2021 and the date the Act is passed:

- the judgment cannot be enforced or relied upon before the end of the Moratorium Period;
- the ring-fenced arrears to which the judgment relate are to be resolved through the arbitration process or agreed between the parties; and
- if relief is awarded at arbitration or agreed, the effect of the judgment debt is altered in accordance with the agreement or award.

Can landlords still enforce a judgment entered before 10 November 2021, or after 10 November 2021 but in proceedings issued before then?

The draft Bill does not prevent judgments obtained before 10 November 2021 being enforced save that current restrictions mean that forfeiture, CRAR and winding-up petitions for ring-fenced arrears are unlikely to be permitted until expiry of the Moratorium Period.

It appears that for judgments obtained after 10 November 2021, but in proceedings issued before then the position is the same.

The position is the same for guarantors as it is for tenants.

Can a rent deposit be used for ring-fenced arrears?

Where a landlord has made a drawdown from a rent deposit for ring-fenced arrears and the tenant has not topped-up the deposit balance, these arrears will still be considered “unpaid” and a tenant can take these arrears into the arbitration scheme for determination (in exactly the same way as unpaid ring-fenced arrears). It is irrelevant when the drawdown happened.

If, for example, a landlord had drawn down £100,000 from the deposit account for ring-fenced arrears (which has not been topped-up by the tenant); and the tenant achieved an award in the arbitration scheme for a 75% reduction in all of its ring-fenced arrears, then the tenant would consequently only be obliged to top-up the deposit balance by £25,000.

However, if the deposit drawdown was part of any prior agreement reached between landlord and tenant as to the drawdown and/or ring-fenced arrears (i.e. as part of a wider rent concession arrangement) the new legislation will not interfere with the terms of any such agreement; and so that agreement would override any ability on the tenant to take such sums into the scheme.

Further, during the Moratorium Period, a landlord will be precluded from deducting any rent debts from a deposit.

What does the proposed arbitration scheme entail?

- If the parties cannot reach an agreement for payment of the ring-fenced arrears either party can refer the matter to arbitration within 6 months of the Act being passed subject to compliance with certain notice requirements and submission of formal proposals for settlement (with supporting evidence) within specified timescales.
- Either party can also submit written statements to the arbitrator and can request an oral hearing. Given the scheme is intended as a last resort, it seems likely written statements and oral hearings will be pursued as the parties will have exhausted negotiations.
- If the conditions for reference are satisfied the arbitrator must determine what, if any, relief the tenant should receive having considered the proposals made by the parties. Where a proposal is made only by the party who made the reference to arbitration, the arbitrator must make an award on that basis providing it is consistent with the “arbitrator’s principles” (see below). Otherwise, the arbitrator must make whatever award it considers appropriate.
- The arbitrator can make the following awards:
 - relieve the tenant from payment of the debt as set out in the award,
 - allow the tenant time to pay for a period of up to 24 months after the award is made, or
 - give no relief.
- The arbitrator must publish the award with reasons excluding confidential information, unless consent has been provided by the affected party to publication of the confidential material.

- There will be a right of appeal for serious irregularities only, making the ability to challenge any award very difficult.
- The scheme does not apply to tenants subject to a CVA, IVA, company scheme of arrangement or restructuring plan. Tenants who have entered the arbitration process cannot include ring-fenced arrears in any of these insolvency processes after an arbitrator is appointed for a period of 12 months after the award is made.
- The arbitration scheme does not apply to tenants who would not be viable even if an award giving relief was made.
- Parties must bear their own legal and other costs.
- The arbitrator can make an award for the arbitration fees (which may be limited and depend on the amount of protected rent in question) to be equally shared or awarded as the arbitrator considers appropriate.

What are the arbitrator's principles?

Any award is aimed at:

- preserving, or restoring and preserving, the viability of the business of the tenant, so far as consistent with preserving the landlord's solvency; and
- that the tenant should, if consistent with the above, be required to meet its obligations to pay protected rent in full and without delay.

In assessing tenant viability and landlord solvency, the arbitrator must disregard anything done by the tenant or landlord to manipulate their financial affairs to improve the terms on which any award is made. This may help to address some concerns about dubious transactions, but for complex corporate structures it may be difficult to prove, particularly in tight timescales.

A landlord will be treated as solvent unless it is (or is likely to become) unable to pay its debts as they fall due, which will be a matter of evidence.

What factors will the arbitrator have regard to when assessing viability and solvency?

The arbitrator must have regard to:

- assets and liabilities of the tenant/landlord, including other tenancies to which they are party.
- previous rent paid by the tenant to the landlord.
- impact of coronavirus on the business of the tenant.
- any other information relating to the financial position of either party which the arbitrator considers appropriate.
- but disregarding either party borrowing money or restructuring its business.

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