

The Commercial Rent (Coronavirus) Act 2022: A Solution to the Commercial Rent Arrears Problem?

by Melissa Moyle and Joseph Lewin

On 24 March 2022, the Commercial Rent (Coronavirus) Act 2022 (the “**Act**”), took effect in England & Wales. This legislation further continues the range of coronavirus measures passed by the government, which aim to provide an as fair as possible outcome for affected parties in the face of the ongoing financial effects of Covid-19.

The Act is intended to support landlords and business tenants in resolving disputes relating to commercial rent arrears that accrued during the Covid-19 pandemic when businesses were forced to close.

In summary, the new law provides for:

- The ring-fencing of certain rent arrears referred to as, “Protected Rent Debts”, incurred by businesses during the Covid-19 pandemic.
- A legally binding arbitration process to resolve outstanding Protected Rent Debts related to the pandemic, in cases where the relevant tenant business remains viable (or would be viable if given relief from payment of any kind) and solvent.
- Temporary restrictions on the availability of certain remedies and insolvency arrangements which would otherwise be available to landlords.

Protected Rent Debts

The Act provides for the ring-fencing of Protected Rent Debts, money that would have been paid under normal circumstances during an applicable tenancy, but which fell due during a period where a tenant’s business was subject to a closure requirement or specific restriction between 21 March 2020 and 18 July 2021 (for English business tenancies) or 7 August 2021 (for Welsh business tenancies) (“**Protected Rent Debts**”).

The Act views businesses subject to such closures as having been, “adversely affected by coronavirus”. The arrears must have been accrued within the “protected period”, running from 21 March 2020 to the last day the business was subject to a closure requirement or a specific coronavirus-related restriction.

Related People

- Melissa Moyle
- Joseph Lewin

Related Capabilities

- Commercial Litigation
- Europe
- Real Estate & Land Use

What tenancies does the Act apply to?

The Act applies to business tenancies (those tenancies to which Part 2 of the Landlord and Tenant Act 1954 (“**LTA 1954**”) applies). These business tenancies include, among other things, a lease, underlease and an agreement for a lease. Licences, tenancies at will and those tenancies specially excluded by Part II of the LTA 1954 do not appear to be considered business tenancies for the purposes of the Act.

Settling unpaid rents and the new Arbitration Scheme

Should a landlord and tenant not reach an agreement in relation to a Protected Rent Debt, they will have a six-month window that starts from 24 March 2022 (the “**Moratorium Period**”), in which to refer the matter to the new arbitration scheme created by the Act.

Involvement in any insolvency arrangement will exclude a tenant from the scheme.

As part of making a reference to the new scheme, each party must submit a formal proposal, including supporting evidence, for resolving the matter of relief from a Protected Rent Debt (a “**Proposal**”) to an arbitration body approved by the Secretary of State pursuant to the Act.

What relief can be granted?

Provided that the arbitrator determines a reference is suitable for the scheme, the arbitrator will have wide discretion to determine a dispute based on the evidence provided by both parties. However, this discretion is tempered by a requirement that the arbitrator first consider any final Proposal put forward to it by a party.

The arbitrator must make the award set out in whichever final Proposal is most consistent with the aim of preserving, or preserving and restoring, the tenant’s business so far as that is consistent with preserving a landlord’s solvency. Where neither Proposal is consistent with this aim, the arbitrator may make whatever award it considers appropriate which is consistent with the aim.

The Act states that relief from payment of a Protected Rent Debt can include:

- Writing off the whole or any part of the debt.
- Giving time to pay the whole or any part of the debt, including payment by instalments (though any payments ordered towards the debt must be made no later than 24 months from the date of the award).
- Reducing (including to zero) any interest otherwise payable in relation to whole or part of the debt.

The arbitrator may also order that the tenant receive no relief at all.

Awards of relief alter the effect of tenancy terms

Notably, where a tenant is granted relief, the award is taken to alter the effect of the terms of the tenancy relating to the Protected Rent Debt. In particular,

1. the tenant will not be regarded as being in breach of a covenant for non-payment on an amount written-off by an award or for failure to pay an amount under the terms of the award before it falls due,
2. a guarantor shall not be liable for amounts written off by an award or failure to pay an amount under the award before it becomes due, and
3. any amount payable under an award shall be treated as rent payable under the tenancy.

Will the arbitration award be confidential?

No. Unlike the award in an arbitration under the Arbitration Act 1996, the default is for hearings and awards to be made public.

However, the parties can agree for the hearing to be private, and certain confidential commercial and private affairs information must be excluded from the published award.

How does the Act affect landlords' claims and remedies?

Landlords who are owed a Protected Rent Debt will be prevented from using certain remedies in relation to the debt until either: (a) the six-month period for making a referral to the arbitration has ended, or (b) where a referral is made, until the arbitration has concluded.

The restrictions on claims will vary depending on the time at which a claim was started, as outlined below.

A. Claims started before 10 November 2021

The Act is not currently understood to affect claims and other proceedings started before 10 November 2021. The Court of Appeal is due to hear two cases in June 2022 which are expected to confirm this position.

B. Claims started on or after 10 November 2021 up to and including 23 March 2022

Existing restrictions under the Coronavirus Act 2020, the Taking of Goods Regulations (SI 2020/451, 2020/614, 2020/1290), and the Corporate Insolvency and Governance Act 2020 continue to apply.

The Act contains retrospective provisions that apply to certain landlord claims in respect of Protected Rent Debts during this period, namely that either party to a business tenancy may apply to the court for proceedings involving a Protected Rent Debt to be stayed to enable the matter to be resolved, through arbitration or otherwise. The court must grant such an application.

Where a judgment has already been given in respect of such a claim, but where a

relevant Protected Rent Debt or any interest is presently unpaid:

- the matter can be referred to the new arbitration scheme;
- the landlord may not enforce the judgment so far as it relates to a Protected Rent Debt or any interest during the Moratorium Period;
- where an arbitrator makes an award giving the tenant relief, or the parties reach agreement, the judgment debt shall be taken as being altered accordingly; and
- where a court officer becomes aware that (i) a judgment relates only to Protected Rent Debt, (ii) that relief payment has been awarded or agreed, and (iii) the Moratorium Period for the debt has ended, it must send a request to the registrar to cancel the entry from the registrar of judgments, and the registrar must do so.

C. Claims started on or after 24 March 2022 (the passing of the Act)

The new Act prevents / restricts landlords from pursuing a number of claims / remedies during the Moratorium Period with respect to Protected Rent Debts. Among these are the following:

- Starting a debt claim to enforce a Protected Rent Debt.
- Using Commercial Rent Arrears Recovery (CRAR) process in relation to a Protected Rent Debt.
- Enforcing a right of re-entry or forfeiture for non-payment of a Protected Rent Debt.
- Initiating arbitration proceedings other than in accordance with the Act.
- Presenting winding-up or bankruptcy petitions against tenants or guarantors.
- Deposit withdrawals.
- Appropriating rent payments.
- Enforcing money judgments.

Rents which are not Protected Rent Debts

Restrictions introduced by the Coronavirus Act 2020 ended on 25 March 2022 and those introduced by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No. 2) Regulations 2021 lapsed on 31 March 2022.

Thereafter, landlords will once again be able to exercise their usual remedies, from the relevant dates, for any rents which are not Protected Rent Debts.