

The government's plans for dealing with Covid-19 rent arrears – the evidence required and binding arbitration process revealed

On 9 November 2021, the government gave its first reading of the new Commercial Rent (Coronavirus) Bill and updated its Code of Practice introduced to deal with the commercial rent arrears accrued during the pandemic.

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Please note: the information contained in this legal update is correct as of the original date of publication.

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As well as setting out the details of the formal arbitration process, which we will come on to below, the amended Code also confirms that the proposed Bill will prevent certain remedies being available to landlords for ring-fenced debt (i.e. those arrears from 21 March 2020 until the last date restrictions were removed from the tenant's sector).

It will prohibit the landlord from forfeiting, winding up, drawing down on rent deposits and issuing debt proceedings whilst an arbitration is ongoing. However, once the Bill becomes law, landlords will be able to take action for any arrears accrued after the ring-fenced period or before March 2020.

With regard to the binding arbitration process, a proposed timetable is set out showing that the parties will need to comply with a compulsory pre-application stage (including a formal letter of notification) before then formally applying for arbitration. The process will allow the parties to put forward their own proposals, within set timeframes, before the appointed arbitrator makes a decision either at a hearing or on paper.

Interestingly, throughout the Code, there is an ongoing set of guidance and principles which landlords and tenants should adhere to when dealing with these rent arrears.

The keys pieces of guidance include the following:

- Landlords and tenants are to do everything reasonable to enable otherwise viable businesses to continue operating during this period of recovery;
- A tenant should aim to meet its obligations under a lease in full, where affordable;
- Existing agreements made between landlords and tenants should continue to be honoured despite the changes to this Code and the proposed Bill;
- The preservation of the tenant business' viability should not come at the expense of the landlord's solvency;
- Tenants should never have to take on more debt – or restructure their business – in order to pay their rent.
- Where a tenant is wanting to deviate from the contractual terms of the lease, they need to demonstrate why the payment has become unaffordable and when in the future it might be affordable.
- If tenants and landlords are transparent as to their circumstances and provide documentation as necessary to affordability, that will allow each other and the arbitrator to make informed decisions.

- The parties should consider their own (and each other's) viability and affordability. When considering both tenant viability and what a tenant can afford to pay, evidence to be considered could include the existing and anticipated credit/debit balance, business performance since March 2020, assets, government assistance received (including loans and grants), and dividend payments to shareholders.
- For the purpose of the binding arbitration process, where the arbitrator is satisfied that a tenant has taken unjustifiable steps to alter its financial position so that its ability to afford to pay protected rent debt is reduced, for example through the payment of excessive dividends, the arbitrator will have the option to disregard the amounts involved in assessing any award. The arbitrator can also disregard anything that has been done by a landlord to manipulate their financial affairs so as to improve their position in relation to an award.

The government hopes that by providing a structure to the legal procedure and evidence that will be required to bring forward an application, this will allow both tenants and landlords to prepare their case where negotiations are failing / have failed. This update provides some answers to tenants as to what evidence and financial information is required for the arbitration, which will allow them to collate this in advance of March 2022.

However, whilst this code has provided us with a helpful overview of the process, it does not provide answers to specific questions, such as the status of guarantors in these cases or the impact on businesses who were partially open during the pandemic. As the Bill will be scrutinised within parliament in the coming months, it will hopefully not be too much longer before these questions are answered.

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