

Commercial Rent (Coronavirus) Act 2022: An Introduction

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Today's Topics

- What does the Act seek to do
- Applicable Tenancies and Rents
- Arbitration
- Costs
- Code of Practice

The Act's Objectives

- In force from 25 March 2022
- Replaces CIGA 2020 and CVA 2020 Restrictions
- Policy Aim to preserve viable businesses and jobs
- Ring Fenced Debts & Binding Arbitration
- Commercial Rent Code of Practice (7 April 2022)
- Statutory Guidance to Arbitrators (8 April 2022)

Applicable Tenancies and Rents

- Business Tenancies (section 2(5))
 - Part 2 Landlord and Tenant Act 1954 ("LTA")
 - (a) Tenant Occupied and (b) Occupied for Carrying on Business (s23(1) LTA).
 - Note exceptions to Part 2 LTA in ss 43 and 43ZA
 - "Contracting Out"?
 - Uncertainties
- Amounts paid for use and possession, service charge and interest Section 2(1)
- Includes VAT and amounts paid for services, repairs, insurance costs and management costs.
- Insurance Costs include loss of rent insurance and premises and common part insurance. (section 2(3))

Protected Rent Debt

- The Act applies to unpaid protected rent debts (see s3)
- Rents are protected if:
 - Business adversely affected by coronavirus
 - Rent attributable to a protected period
- Adversely affected by coronavirus (s4)
 - Business or premises subject to closure requirement
 - During relevant period (From 2pm on 21 Mar 2020 to 11:55 pm on 18 July 2021 (ENG) or 6:00am on 7 Aug 2021 (WAL))
- Protected Period (s5)
 - Long stop as in s4
 - Shorter period for businesses or premises subject to specific restrictions (excluding information display requirements or general restrictions).
 - Payments towards unprotected rent first (para 7, sch. 2)

Arbitration Scheme

- Approved Arbitration Bodies (Sections 7 and 8)
 - Includes: RICS, CIarb, LCAM, CCODR
- Landlords or tenants may make a reference to arbitration by an approved body up to 25 September 2022
- Notice of intention to arbitrate with 14 days for response. (Section 10(1) and (2))
- Formal resolution proposals must accompany arbitration reference. 14 days for (optional) response with a 28-day period from each proposal for revision (Section 11)
- No arbitration to be commenced or arbitrator to be appointed where tenant subject to CVA, IVA, scheme of arrangement or restructuring plan. (S.10(3) & (4))

Temporary Moratoriums

- Schedule 2 prevents Landlords relying on certain remedies in respect of protected debts.
- These are (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; and (iv) using a tenant's deposit.
- Moratorium period is 25 March 2022 to 25 September 2022 or when arbitration concludes (Section 23(2))
- Debt claims commenced on or after 10 November 2021 but before Act passed may be stayed (para 3(2), Sch 2)
- Judgments on or after 10 November 2021 can be referred to arbitration and if award/agreement is different, this will alter judgment. (Para 3(5), Sch 2)
- Similarly, landlords may not petition a winding up or bankruptcy of the tenant unless owed an unprotected debt. (Para 1, Sch 3)
- Voiding of bankruptcy orders made on or after 10 November 2021 (para 3, Sch 3)

Arbitration Scheme: Defined Awards

- Section 13 restricts awards by narrowing question to be determined.
- Must dismiss reference if: parties agree resolution before reference made, tenancy is not a business tenancy or there is no protected debt rent.
- Must dismiss reference if at time of reference: the tenant's business is not viable and would not be viable even if relief granted.
- May grant relief from payment if tenant's business is viable or if business would become viable if relief granted.
- Evidence as to viability of tenant business and effect of any type of permitted relief is therefore critical.

Arbitration: On Rails Decision Making

- The act provides powers to arbitrators to grant relief from payment of protected rent debt only. (s14(6))
- Arbitrator must consider the final proposals of the parties under section 11.
- However, these must be consistent with the section 15 principles.
- Where only one proposal consistent with the principles, arbitrator must make the award set out in that proposal. If both are consistent, must choose the most consistent (s14(3) and (4))
- If neither proposal is section 15 consistent, arbitrator may make an award consistent with the principles.
- Section 11 proposals are therefore key.
- An award of relief alters the terms of the tenancy (s14(9)).

Section 15: The Arbitrator's Principles

- Awards must be aimed at either (a) preserving or (b) restoring and preserving the viability of the business of the tenant so far as it is consistent with preserving the landlord's solvency.
- The tenant should be required to meet obligations to pay protected rent in full and without delay so far as it is consistent with the preservation/restoration principle.
- Arbitrator required to disregard anything done by parties to manipulate their financial affairs.
- Solvency is determined on the cash flow basis.

Section 16: Viability and Solvency

- Viability:
 - Assets and liabilities (including other tenancies)
 - Previous rental payments
 - Impact of coronavirus
 - Any other information the arbitrator considers appropriate
- Solvency
 - Assets and liabilities
 - Any other information the arbitrator considers appropriate
- Arbitrator must disregard possibility of borrowing or restructuring.

Oral Hearings

- Hearing by request and must be within 14 days of that request (extendable by agreement) (Section 20 (1) and (2))
- Hearing in public unless otherwise agreed by the parties (s20(8))
- Hearing fees to be split 50/50 unless ordered otherwise (s20(6) and (7))

Publication & Costs

- Awards and reasons must be published (s 18(2))
- Expectation is that arbitration bodies will facilitate.
- Confidential information must be excluded unless consented to.
- Confidential information is commercial information or information relating to private affairs of an individual.
- In both cases disclosure must or might significantly harm the legitimate business interests or individual interests of the person to whom it related.
- Default rule is that arbitration fees are split 50/50 but arbitrator may award a different proportion. (s19 (5) and (6)
- Each party must meet their own legal or other costs. No recovery via a term of the tenancy. (s19(7) and (8)

Additional Guidance

- Two major pieces of guidance
- Commercial Rent Code of Practice (7 April 2022) – How to approach negotiations and evidence if arbitrating
- Statutory Guidance to Arbitrators (8 April 2022) – Guidance on exercise of functions
- Evidence should be proportionate to scale and complexity of business.
- Table of indicators to assess viability
 - Accounts
 - Cashflow and profits (Forecasting, Long Term Contracts)
 - Balance Sheet Strength (Working Capital, Liquidity and Gearing Ratios)
 - Debt commitments (Grants, loans, overdue invoices and tax liabilities etc.)

Objectives Revisited

- True Purpose: Negotiating Pressure
- Divergent interests of tenants and landlords
- Expense
- Who will be appropriate arbitrators?
- Impact assessment (7,500 cases and 1,200 arbitrators)
- Consolidation is possible but not automatic

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