COLLAS CRILL EXPLAINS... THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

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This is part of a series of guides in which we examine areas of law that frequently arise in practice. Further guides will be released weekly; click here to subscribe to receive Collas Crill news and insights by email.

In England and Wales the Commercial Rent Bill has made its way through the legislature and on 24 March 2022 was formalised onto the statute books as the Commercial Rent (Coronavirus) Act 2022 (the **Act**).

This new law replaces previous measures that the UK government introduced, which placed a moratorium on commercial evictions and prevented landlords from enforcing recovery of rent from non-paying tenants during the pandemic.

Whilst the UK government encourages landlords and tenants to resolve disputes about arrears of rents which occurred during lockdown by mutual agreement, the legislation has been introduced so that a new binding arbitration system can be used by landlords and tenants who are unable to reach an agreement.

As a result of the Act, landlords will not be able to use the usual methods of enforcing pandemic rent arrears for at least 6 months, and potentially longer if the arbitration process starts within the 6 month period but is still ongoing.

What rents are covered by the Act?

Under the Act, rent includes:

- all amounts payable by the tenant to the landlord for the use of the premises, whether or not described as rent;
- service charges;
- insurance costs (including loss of rent insurance); and
- any interest payable on those amounts.

Does the Act apply to residential leases?

No, the Act only applies to a business tenancy, being any tenancy that Part 2 of the Landlord and Tenant Act 1954 applies to, regardless of whether the tenancy has been excluded from the security of tenure provisions of the Act.

What arrears are covered by the Act?

- The tenant needs to have been adversely affected by *coronavirus*, which for the purposes of this law, means being subject to a closure requirement imposed by the government and forcing a business to either partially close or cease operating or close or partially close their premises between 21 March 2020 and 18 July 2021 (in England); and
- The arrears must have been incurred from 21 March 2020 and end on the last day that the tenant or its premises was subjected to a closure requirement.

What can the arbitrator do?

If after assessing the viability of the tenant's business the arbitrator determines that the business is viable or would be viable if given relief from payment of the pandemic rents then the arbitrator must resolve the matter by making an award:

- determining that the debt is payable in full;
- writing off the debt in whole or in part;
- giving the tenant time (up to 2 years from the date of the award to pay).

The primary purpose of the award is to preserve or restore the viability of the tenant's business in a way that is consistent with the landlord's solvency.

How will the arbitrator determine viability?

Determining viability of the tenant's business will be in the arbitrator's discretion, but the arbitrator will take into account:

- the assets and liabilities of the tenant (including other tenancies);
- the previous rental payments made under the business tenancy; and
- the impact of *coronavirus* on the tenant's business.

Who pays?

The applicant must pay the arbitration fees in advance of the arbitration taking place.

The parties must meet their own legal and other costs.

The arbitrator will usually oblige the respondent to reimburse the applicant for 50% of the arbitration fees, but does have the discretion to make a different award on costs depending on the behaviour of the parties.

Sounds great. What's the process?

Before making an application under the Act, the tenant or landlord must notify the other of their intention to apply for arbitration and give the respondent 14 days to reply.

The applicant then must wait 14 days after the response has been received or, if no response is received, wait until 28 days after the service of their notice has expired.

Thereafter the applicant makes an application for arbitration which must include a formal proposal for resolving the matter.

The respondent will then have 14 days in which to submit a counter proposal.

Either party may put forward a revised proposal within 28 days.

Where both parties put forward final proposals, the arbitrator must make the award set out in the proposal that is most consistent. If only one party puts forward a final proposal then the arbitrator must make the award set out in that proposal provided that they consider it to be consistent with preserving the viability of the tenant whilst preserving the landlord's solvency.

That clears everything up. Let's make a proposal!

Not so fast! The Department for Business, Energy & Industrial Strategy (BEIS) needs to approve arbitration bodies who will need to go through an approval process to "demonstrate their suitability to administer the scheme". BEIS will publish a list of approved arbitrators "in due course".

In the meantime the UK government has published a Code of Practice providing guidance to landlords and tenants with a clear process for settling outstanding debts. The Code sets out that tenants who can pay their rent debt in full should do so, and that in the first instance, tenants unable to pay in full should negotiate with their landlord in the expectation that the landlord shares the burden where they are able to do so, and only as far as necessary, by waiving some or all rent arrears or giving time to pay.

Of course some landlords will find this fresh legislation extremely frustrating, particularly if they have been engaging and negotiating with a tenant for a prolonged period. However, given the costs and uncertainty of the outcome of arbitration, the new law will hopefully encourage landlords and tenants back to the negotiating table with a view to reaching their own settlement.

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

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