

# The perishing of post-pandemic protections: Insolvency and Commercial Property Update

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1. During the covid-19 pandemic, the Government introduced a number of measures to assist struggling businesses survive the pandemic whilst restrictions were in place (for example, the forced closure of non-essential retail etc).
2. This month has been busy seeing the end of one piece of legislation offering important protection to businesses and the introduction of another piece of legislation offering a roadmap for rent arrears accrued during the pandemic, both of which are important to commercial and property practitioners.

## **31<sup>ST</sup> MARCH 2022: END OF TEMPORARY INSOLVENCY MEASURES**

3. The Corporate Insolvency and Governance Act 2020 (“**CIGA**”) introduced certain temporary measures into the Insolvency Act 1986 to assist businesses affected by the lockdown restrictions. These measures included restrictions on the use of statutory demands and winding-up petitions and introduced moratoriums preventing actions from creditors. For example, during a moratorium a landlord or other person to whom rent was payable was not to exercise a right of forfeiture by peaceable re-entry in relation to premises let to a company, except with the court’s permission (see A21, Chapter 4, Part A1 of the Insolvency Act 1986).
4. The majority of the temporary restrictions expired in 2021. However, certain restrictions concerning winding up companies continued until today’s date (31<sup>st</sup> March 2022). For example, a creditor was not to present a winding-up petition “*in respect of excluded debt, which is defined as debt in respect of any sum payable by a tenant under a business tenancy that is unpaid by reason of a financial effect of coronavirus*” (paragraph 4(3), Schedule 10, CIGA 2020).

5. However, the Insolvency Service has confirmed that those remaining restrictions will not be extended further “*allowing the insolvency regime to return to its pre-pandemic operation*” forthwith.<sup>1</sup>
6. For practitioners who are advising their clients who have been affected by the protections (either creditors or debtors), there is a risk of an influx of cases. We have provided some helpful guidance below on what practitioners should be thinking about from 1 April 2022 onwards.

## **THE ROAD TO THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022**

7. Practitioners are likely to be aware of the newly enacted Commercial Rent (Coronavirus) Act 2022 (“**the Act**”) which received royal assent on 24<sup>th</sup> March 2022. The Act is an important development for property and insolvency practitioners alike to consider when advising clients on commercial rent which has accrued during the course of the pandemic. Before diving into what the Act provides, it might be helpful to revisit how the relationship between landlords and tenants was regulated prior to and during the pandemic.
8. In the event of non-payment of rent, commercial landlords would often forfeit the relevant leases by peaceable re-entry to recover possession and would then bring proceedings or present a winding up petition to recover the outstanding rent. Prior to the pandemic, it was not uncommon for the weekly winding up court cause list in the High Court to be filled with over one hundred companies. Counsel for said companies and associated creditors would gather *en masse* to argue their respective positions concerning debts owed and the appropriateness of an order placing a company into liquidation.

## **CIGA 2020, Coronavirus Act and the Code**

9. The pandemic quickly transformed the winding up court into a virtual and smaller list. Through CIGA, the Government placed restrictions on the use of statutory demands and so forth.

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<sup>1</sup> <https://www.gov.uk/government/news/april-2022-temporary-insolvency-measures-are-ending>

10. The Coronavirus Act 2020 similarly suspended the Landlord's right of re-entry or forfeiture under a "*relevant business tenancy*" for non-payment of rent (Section 82, Coronavirus Act 2020).

## Voluntary Code

11. In June 2020, the Government also introduced a code of practice for commercial property relationships during the covid-19 pandemic ("the Code") in which there was "*continued encouragement for negotiations between landlord and tenant in the context of the Commercial Rents (Coronavirus) Bill*".<sup>2</sup> The Code was superseded in November 2021 by a code concerning commercial property relationships *following* the pandemic.

12. The Code was voluntary (see paragraph 1, the Code). Landlords and tenants were encouraged to:

*"do everything reasonable to enable otherwise viable businesses to continue operating through the period of recovery. This means landlords and tenants must work collaboratively and many will find temporary, and where possible sustainable, arrangements outside of the existing letter of their leases in order to create a shared recovery plan"* (paragraph 2, the Code).

13. The Code recognised that tenants were liable to pay rent under relevant lease unless this was re-negotiated with the landlord. On the one hand, tenants who could afford to pay rent were to do so (paragraph 3, the Code). On the other hand, tenants who were in financial difficulty were encouraged to seek agreement with their landlord to pay what they were able to taking into consideration the principles of the Code which included:

- 13.1. transparency and collaboration;
- 13.2. a unified approach; and
- 13.3. acting reasonably and responsibly.

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<sup>2</sup> <https://www.gov.uk/government/publications/code-of-practice-for-the-commercial-property-sector/code-of-practice-for-commercial-property-relationships-during-the-covid-19-pandemic>

## WHAT ARE THE KEY LEGISLATIVE PROVISIONS?

14. The Act introduces a statutory arbitration scheme to resolve a tenant's liability for "protected rent debts" owed under a lease where the parties have been unable to reach an agreement (presumably having already tried to negotiate a settlement under the Code), per section 1 of the Act.

### Key Terms

#### Rent

15. Under the Act, "rent" consists of:

- 15.1. rent, in relation to a business tenancy means - "*an amount payable by the tenant to the landlord under the tenancy for possession and use of the premises comprised in the tenancy (whether described as rent or otherwise)*" (see section 2(1)(a) of the Act) plus VAT;
- 15.2. service charges – "*an amount payable by the tenant to the landlord under the tenancy as a service charge*" plus VAT. A service charges is defined as an amount:
  - 15.2.1. which is payable (directly or indirectly) for services, repairs, maintenance, improvements, insurance costs or the landlord's management costs (including management costs of a superior landlord which the landlord is required to pay); and
  - 15.2.2. which is a fixed amount or an amount that varies or may vary according to the relevant costs (or a combination of the two) (see section 2(2)(c) and section 2(3) of the Act for further details).
- 15.3. interest on the above.

### Business Tenancy

16. Under the Act, a “*Business Tenancy*” is defined as a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies (“the 1954 Act”) (see section 2(5) of the Act).
17. Conversely, it is likely that the tenancies excluded from the 1954 Act will not be governed by the Act, for example:
- 17.1. a tenancy of an agricultural holding;
  - 17.2. a farm business tenancy;
  - 17.3. a tenancy created by a mining lease; and
  - 17.4. a tenancy for less than six months (see Section 43 of the 1954 for further details).

### Deposits

18. If landlord draws down an amount from a tenancy deposit to meet the whole or part of a rent debt, this is “*to be treated as unpaid rent due from the tenant to the landlord (and such rent is ‘paid’ where the tenant makes good any shortfall in the deposit)*” (section 2(4) of the Act).

### Protected Rent Debt

19. A “*protected rent debt*” is unpaid protected rent due under a business tenancy. “*Protected rent*” is so if:
- 19.1. the tenancy was adversely affected by coronavirus; and
  - 19.2. the rent is attributable to a period of occupation by the tenant, for, or for a period within, the protected period applying to the tenancy (see Section 3(2) of the Act).
20. Section 3 provides further guidance concerning how the Act treats “*rent*”, including if the outstanding rent is only in part within the protected period.

21. Section 4 provides guidance on how the Act treats a business as being “*adversely affected by coronavirus*”, which specifies that there must have been a closure requirement for the whole or part of the business (which is dealt with in greater detail below).
22. This is echoed in section 5 of the Act which details what is the “*protected period*” for business tenancies in England. Section 5 provides that this is the period beginning with 21<sup>st</sup> March 2020 and ending with 18<sup>th</sup> July 2021 (see Section 5(1) of the Act, including for the end of the protected period in Wales).

#### Adversely affected by coronavirus

23. A business tenancy was “*adversely affected by coronavirus*” under the Act, if for any of the relevant period (at or after 2pm on 21<sup>st</sup> March 2020 and ending on or before 11:55pm on 18<sup>th</sup> July 2021 for English business tenancies):
- 23.1. the whole or part of the business carried on by the tenant at or from the premises compromised in the tenancy; or
  - 23.2. the whole or part of those premises,
- was of a description subject to a closure requirement (see Section 4(1) of the Act).
24. A closure requirement means a requirement imposed by the coronavirus regulations expressed as an obligation to close the business or premises or parts of them of a specified description (see Section 4 of the Act for further details). Therefore, if certain businesses could re-open before 18 July 2021 (for example garden centres which could re-open in May 2020) then the relevant period would only be until that earlier date.

#### **The Arbitration Process**

25. Landlords and tenants under a business tenancy are able to make a reference to arbitration where they cannot agree as to the “*resolution of the matter of relief from payment of a protected rent debt*”. The reference should be made within six months beginning with the date on which the Act was passed (25<sup>th</sup> March 2022) (see Section 9 of the Act). It is a matter for the relevant parties to weigh up whether to engage with this process during its operation (see Moratorium section below). For practitioners advising

tenants (and proactive landlords) it may be worth diarising 24<sup>th</sup> September 2022 to ensure that the relevant deadline is not missed.

26. The Arbitrator should resolve all issues relating to the question:

- 26.1. whether there is a protected rent debt of any amount; and
- 26.2. if so, whether the tenant should be given relief from payment of that debt and, if so, what relief. Relief means:
  - 26.2.1. writing off the whole or part of the debt;
  - 26.2.2. giving time to pay the whole or any part of the debt by instalments; and
  - 26.2.3. reducing any interest otherwise payable under the tenancy (see Section 6 of the Act).

27. Sections 9 – 22 deal with how the arbitration process works.

28. It should be noted that at the time of writing, the Department for Business, Energy and Industrial Strategy have yet to publish the list of approved arbitration bodies, which is hardly satisfactory if parties want to get started on the arbitration process (especially where there is only a six month window).

## **Moratorium**

29. The Act arguably incentives use of this form of statutory arbitration by imposing a temporary moratorium on the enforcement of protected rent debts, including making a debt claim in civil proceedings; using the commercial rent arrears recovery (CRAR); enforcing a right of re-entry or forfeiture; and using a tenancy's deposit (see Section 23 of the Act).

30. The moratorium period begins on 25<sup>th</sup> March 2022 and ends either:

- 30.1. within the period of six months beginning with the 25<sup>th</sup> March 2022, if no referral is made to arbitration; and
- 30.2. the day on which the arbitration closes, if the matter is referred to arbitration (see Section 23 of the Act).

31. Likewise, from 1<sup>st</sup> April 2022, landlords are restricted from presenting petitions associated with business tenancy where protected rent is owed in certain circumstances (see Schedule 3, paragraph 1 of the Act). There are similar limitations placed on landlords who seek to bankrupt tenants (see Schedule 3, paragraph 2 of the Act).

## CONCLUSION

32. Although today marks the end of certain temporary insolvency measures aimed at assisting businesses during the pandemic, some continued protection is afforded to tenants through arbitration process and/or moratorium prescribed by the Act. As with any form of new legislation there are likely to be challenges to how the Act applies in practice, for example what business tenancies the Act will apply to and how it will operate if there is a sub-tenancy. Furthermore, in circumstances where the courts will not necessarily be called upon to interpret this new legislation in the first instance (save for possibly if the award is challenged and its jurisdiction is engaged), it will be interesting to observe how far the publication of the arbitrator's decision making promotes clarity and parity of understanding for parties and their legal advisors.

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31 March 2021



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