COMMERCIAL RENT (CORONAVIRUS) BILL

Commercial Rent (Coronavirus) Bill: Property Litigation Association highlights serious defects

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Property Litigation Association

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The Property Litigation Association (PLA) is a leading membership organisation comprised of about 1500 solicitors that specialise in property litigation. In December 2021, we submitted evidence to the House of Commons, highlighting numerous areas of concern about the current drafting of the Commercial Rent (Coronavirus) Bill.

Since the PLA represents both property owners and occupiers, the evidence we provided affords rare insight into the commercial challenges businesses have faced as a consequence of the Covid-19 pandemic. It brings an impartial expert perspective and adds our voice to the growing number of industry bodies expressing concern about the Bill.

It seems clear to many of us in the industry – including the Property Bar Association (PBA), the professional body for barristers practicing property law, who also submitted evidence to the House of Commons at the same time – that the Bill is problematic in its current form, and a redrafting of key provisions is needed before it is made into law.

The PLA believes this well-meaning legislation has the potential to destabilise fragile negotiations between property owners and occupiers, the opposite of what is intended, and we have some serious misgivings about the Bill as presently drafted.

Taking a systematic point by point approach, the nature of our concerns is listed below.

Ambiguities and uncertainties

- The Bill covers 'Business Tenants' and there are legal consequences of such definition, including those relating to service of documents. The Bill does not contain provisions as to service, thus creating uncertainty and potential litigation.
- The Bill requires referrals to arbitrations to be made within six months of the commencement of the Act. There is no definition as to what constitutes a reference to arbitration and, given the tight timetable, there are likely to be late references and resultant litigation to determine whether action taken constitutes a valid reference.

- The current language indicates that if the pre-arbitration steps required by clause 10 of the Bill are not carried out, then no valid reference can be made. If this is the case, it needs to be made clear that parties actually only have five months in which to start the process.

Are there enough arbitrators?

There is a question as to whether there will physically be enough arbitrators to deal with the claims or that there will be a robust system in place to ensure that the arbitrations can be conducted in accordance with the anticipated timeframes.

There is a real risk of delay to the appointment of arbitrators and to procedural timetables once the appointments are made if the number of arbitrators is limited and they are taking on multiple referrals. Can a brand new, fully operational arbitration process be in place by March this year, and is the government's desire to set up the arbitration work so quickly realistic given the pressure on the business and public sectors at this time?

Tight timescales

The parties have relatively little time to go through all the necessary notification steps required prior to a referral and prepare the evidence or submissions needed at the point of referral, within the initial six-month period. The fact that the six-month period can only be extended by government, not the parties, puts a lot of pressure on parties to trigger the arbitration process once the Act comes into force, and leaves little time to focus on or continue negotiations for the settlement of the arrears.

The timescales of the arbitration process are very tight. Once a referral is made, the counterparty must put in proposals with supporting evidence within just 14 days, with revised proposals submitted by the parties in successive two-week periods.

Disclosure of evidence

The lack of an obligation of a party to make full disclosure of all relevant evidence prevents the other party from making an informed formal proposal. While the Bill requires parties to put forward formal proposals with 'supporting evidence', there is no requirement to provide evidence 'adverse' to a proposal, which may set out the basis for challenging a proposal or formulating a counter-proposal.

There may well be circumstances in which relevant evidence is provided by a party after the 'final proposals' have been submitted. Should there be an obligation on the arbitrator to consider any further proposals received from each party in light of that, rather than limit their consideration to proposals that were made before each party had the opportunity to consider, challenge and test all the evidence?

To encourage full disclosure at the beginning, perhaps late disclosure should be penalised by appropriate cost awards.

Unfair procedures and results

The decision-making process outlined in clause 14 requires the arbitrator to follow the designated process, and if one party has followed the procedure and the other not, the arbitrator must make the award for the amount submitted by the former. This is likely to lead to anomalous and unfair results, and is inconsistent with the obligations set out in the Arbitration Act 1996.

Although the intention of the Bill is to create a structure for relatively quick determination, the sequencing of events in the Bill could well lead to the court determining on appeal that the process was procedurally unfair and thus nullify the arbitration with potentially significant costs being wasted.

Difficult questions of interpretation

There are a number of questions over the extent to which certain arrears will constitute a protected rent debt. The arbitration process will only apply to protected rent debt.

There are some potentially difficult questions of interpretation of the Bill that might need to be decided, whether by the arbitrator or the court, as preliminary issues before consideration of the parties' proposals and of the tenant's viability. However they are determined, these issues are not really catered for within the procedures anticipated in the Bill and could lead to delays, inconsistency between court judgments and awards on issues of interpretation, as well as appeals on important questions of interpretation of the Act.

Multiple referrals

It is very likely that there will be a number of referrals where the tenant has different landlords. These referrals may be made by different landlords to different arbitration bodies with the consequence that different arbitrators will be making different findings of fact on very similar evidence, especially in relation to viability. The Bill also fails to cater for how the arbitrator should approach affordability when the tenant has other rental liabilities that have or could be referred to arbitration, but have not yet been determined.

Different arbitrators can make different procedural orders that would not be subject to any appeal. In other words, different evidence relating to the same tenant will be before different tribunals, probably resulting in inconsistency of awards.

There is potential for significant duplicated cost and/or time being incurred by a single tenant fighting multiple arbitrations.

Viability

There is no specific definition of what constitutes viability.

Is it intended that viability is confined to a particular premises let by one landlord, or is

viability an assessment of the totality of the tenant's business, which may cover several premises within a short distance of each other, or may cover premises throughout the county or internationally? There are a number of issues the Bill does not address that will have to be left to the courts, which is most unsatisfactory.

The considerable latitude and lack of guidance given to arbitrators, as well as the very confined appellant procedures, is likely to result in a number of conflicting awards that will provide little guidance for other arbitrators.

The guidance notes refer to matters the parties should take into consideration during negotiations, but the guidance notes are of little or no assistance to the arbitrator as they are neither statutorily binding, nor adequately detailed. If, as a matter of policy, the government is wanting consistency and wants an arbitrator to decide whether a business is viable, it is suggested that more detailed parameters are provided.

As the Code of practice for commercial property relationships following the Covid-19 pandemic acknowledges, business models vary hugely, and there is a question mark over the period of time during which viability will be assessed (and it should be borne in mind that different sectors will recover at different rates). The Bill does not appear to have considered the enormous adverse reputational issues of a finding that the business is not viable by an arbitrator, notwithstanding that the tenant's funder believes otherwise.

Reputational issues

The fact that awards and hearings will be public has the potential to cause serious concern to landlords and tenants. The act of calling into question the viability of a business may be enough to cause other suppliers to withdraw credit facilities causing the premature closure of the business.

The Bill makes reference to the ability to redact confidential matters from an award. How is this reconciled with the fact that the disclosure of this information will have taken place in a public forum?

The possibility of an adverse ruling on viability may deter some tenants from pursuing a claim through the scheme.

Fees and costs

It is unclear how the government proposes to control the fees of the arbitration process. The Secretary of State retains delegated powers to set a cap on the fees charged (with no indication whether the cap could be imposed during an arbitration, or only in relation to prospective arbitrations), which they may do, but it is not clear how much all of this is going to cost tenants who are already facing large arrears bills, and landlords who have been affected by non-payment of their rent.

Questions of viability could require a lot of evidence, factual and expert, which will inevitably be costly. How will this impact the fairness of the arbitration process if one of the parties cannot afford legal/accountant fees?

There will be a number of cases where significant costs have been incurred in obtaining the evidence and ensuring it is presented to the arbitrator in a manner that makes it understandable. The extent of the arbitrator's powers to make awards on costs is unclear. It is not clear how the general power under s61 of the Arbitration Act should be applied in light of clause 19 of the Bill.

The assumption is that clause 8(6) requires arbitration bodies to publish the fees payable by the parties to the arbitration body to provide an arbitrator. It does not appear practically possible for an arbitration body to provide a fixed fee that covers all possible references. We are concerned that the lack of clarity as to the requirement under this provision will result in fewer arbitration bodies being appointed as approved bodies and it may also result in fewer potential arbitrators putting themselves forward.

The cost of an arbitration is not necessarily proportional to the value of the dispute. Low-value disputes can be expensive to resolve and high-value disputes can be much cheaper to resolve.

If arbitrator's fees are to be capped, possibly retrospectively, will they accept an appointment to deal with potentially difficult and time consuming arbitrations?

Other issues

- The Bill is creating a mechanism whereby the rent due can be varied by an arbitrator. It would assist the parties if the Bill included a provision that set clearly the consequential effect on former tenants under s17 of the Landlord and Tenant (Covenants) Act 1995, so as to avoid further satellite litigation.
- The Bill's position on management companies and mixed-use developments is unclear.
- Under clause 24, it appears that an application for a CVA/IVA/s.896 or 901C can be made between the period after an application for a reference to arbitration but before the actual appointment of an arbitrator. The appointment of an arbitrator can take days or weeks; the appointment is not instantaneous as conflict and availability checks have to be completed.
- There appears no reason why there is a 12-month period in clause 24(3)(a). Once the award has been made, why should a tenant be precluded from applying for a CVA etc? If the intention is that the award is protected from being further compromised under a CVA, then the time period could be the period in which the arbitrator has given the tenant to pay the arrears and it could be more clearly expressed, thus removing any interpretational doubt. Even this could create problems if a tenant's circumstances change significantly during this period.
- There does not appear to be any good reason why the Bill precludes the parties from agreeing the revocation of the appointment of the arbitrator. There should be a simple process whereby an arbitrator can be replaced by agreement or, say the arbitrator becomes ill, the parties can agree his resignation and seek the appointment of a replacement.
- The Bill introduces a new concept for bodies who process applications for the appointment of arbitrators. While we are aware of two bodies that have expressed interest in becoming approved arbitration bodies, the Bill will impose obligations on them that they do not currently have. The question arises as to whether they are

either able to or wish to oversee the arbitration – clause 8 (1)(e). There is a lack of clarity as to what is meant by 'oversee' and this is a novel concept in the field of appointment of arbitrators.

Additionally, there are a number of parties, sectors and scenarios that appear to fall outside the ambit (and protections) of the Bill. For example:

- Only landlords and tenants will be able to refer the matter to, or participate in the arbitration and not third parties – eg guarantors and former tenants who may be pursued by the landlord for arrears and who may end up picking up the tab. It is also unclear whether the issuance of an award will prevent the landlord from pursuing guarantors under the lease, particularly in cases where guarantees have been given by way of indemnity. Where there is a guarantor, that person has no means by which to reduce his liability in circumstances where the tenant could well have met the tests to be awarded a lower rent.
- Head tenants will not be covered. This is difficult to reconcile when many head tenants will be entities whose income derives solely from the rents received from occupational tenants. In circumstances where the occupational tenant's arrears for a protected period is commuted as a result of arbitration, they will also end up picking up the shortfall.
- There is doubt as to whether an otherwise qualifying tenant who has sub-let part to another commercial tenant qualifies for protection and if so, what protection?

For all the flexibility built into the scheme, and given to the arbitrators on the question of relief, the scheme application itself is arguably too narrowly drawn.

Final thoughts

The above merely scratches the surface of the issues with the Bill. In addition to submitting written evidence, the PLA has offered to serve as an impartial expert as the Bill progresses through Parliament, and we look forward to working closely with the government – with the support of our members – to help clarify and resolve these issues should it wish to benefit from our members' expertise.

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