Commercial Landlords: Covid-19 and enforcement for breach of covenant
Some Observations

"But the comfort is, you shall be called to no more payments, fear no more tavern-bills".

First Gaoler, *Cymbeline,* Scene 5, Act 4

Posthumus Leonatus is in jail. His gaoler is propounding the benefits of incarceration. Whilst the prisoner is hardly in an enviable spot, one silver lining is that the burden of meeting the innkeeper's bills for ale and mead has been deferred.

What follows relates to business tenants who find themselves in difficulty in meeting their liabilities by reason of the pandemic. It is not intended as all-embracing or comprehensive.

Rather it presents as a distillation of essentials. It sets out current and proposed changes in law relating to a **Commercial Landlord's powers of enforcement** where a Tenant is in breach of covenant by reason of their failure to pay rent and or meet other financial sums due under their lease as a result of difficulties occasioned by the Covid-19 pandemic.

Glossary

A Landlord's rights of enforcement:	This takes the form of peaceable re-entry upon the demised premises or legal proceedings for forfeiture of the Lease arising from breaches of a tenant's covenant.
Covenant:	This means a legally binding and enforceable written promise in a Lease by a Tenant to a Landlord (or indeed *vice versa).*
Forfeiture:	This comprises a legally binding granting back to the Landlord of the right to re-enter and take possession. [effectively eviction]
Peaceable re-entry:	The plain words convey the concept; it is not peaceable re-entry if a breach of the peace is either threatened or occasioned nor, for instance, if the Landlord's attempts to secure possession are met with physical resistance.
LTA 1954:	Landlord and Tenant Act 1954.
Contracting Out:	This is a procedure which excludes a Tenant's security of tenure (that is their right of renewal of their commercial lease) at the end of the Lease term. It is contained within section 38 of the LTA 1954.
Waiver:	This comprises the voluntary relinquishment or surrender of some known legal right or privilege. It may be oral, written or possibly imputed from a party's conduct.
CA 2020:	Coronavirus Act 2020.
The Moratorium	Section 82(1) of the CA 2020 gave protection to business tenants in that it prohibited a Landlord's rights of re-entry or forfeiture where there were arrears of rent owed by reason of the pandemic.

	This interim protection ran from 23 April 2020. It was subject to successive extensions. It now runs until 25 March 2022 (SI2021/994), when the Bill is due to become law.
The Bill:	The Commercial Rent (Coronavirus) Bill intended to come into force on 25 March 2022.
The Code:	The Code of Practice for commercial property relationships following the Covid-19 pandemic and published on 9th November 2021 by Her Majesty's Government.

1. Introduction

In recognition of those financial problems experienced by businesses (who were forced to close or suffered a substantial downturn in custom and income during the height of the pandemic), the Government introduced restrictions upon a commercial landlord's ability either to evict for arrears of rent or to seize goods in lieu thereof.

This took the form of a moratorium on the ability of commercial landlord's to evict tenants on account of rent arrears or render them insolvent by reason thereof.

To fortify this approach, the Government (in conjunction with heads of business) has recently published The Code. Its principal aim is to encourage consensus between commercial Landlords and their tenants on practical ways of resolving claims for unpaid rent and other sums as may be due. For the purposes of what follows the term "unpaid rent" may properly be read as extending to other third party liabilities due from a tenant to their landlord.

(For instance business rates or a premium, which a tenant has covenanted to pay to an Insurer under the terms of its lease).

2. The Protection of the Moratorium

The protection is afforded to relevant business tenancies. These include tenancies which have been contracted out of the lease renewal provisions of LTA 1954 and also include sublettings by a headlessee.

This Moratorium applies to England. A separate Statutory Instrument permitting the same protection for business tenants in Wales has also passed into law.

3. The Bill

In a minority of the cases, some landlords and tenants have been unable to resolve their disputes over rent arrears. The purpose of The Bill is to allow for the ringfencing of rent debt incurred by businesses forced to shut during the pandemic. It is to establish a binding arbitration system which will determine what is to happen to that ringfenced debt.

The Moratorium is to prevail (paragraph 2) until The Bill has become law.

4. The Code

The Code aligns with the proposed legislation. It provides information as to how the arbitration process is intended to work.

The Code relates to all commercial rent debts accrued and accruing since March 2020 within England, Wales, Northern Ireland and Scotland.

It states that – where affordable – a tenant should always aim to meet their obligations under their lease and in full.

It makes it clear that business' viability should not be at the expense of a landlord's solvency.

It provides that a tenant should never feel obliged to take on additional debt or borrow or restructure solely in order to meet rent arrears.

The Code provides additional guidance on how parties should seek to conduct negotiations – the intent being that wherever possible rent disputes ought to be resolved prior to The Bill becoming law, or even after.

The Code applies to all commercial leases held by businesses who have accrued rent arrears as a result of their inability to pay by reason of the impact of the Covid-19 pandemic. It broadly covers the leisure, manufacturing, industrial and logistics, ports, food and drink, and rural sectors. (Although the agricultural sector is excluded businesses within this category may wish to adopt the pragmatic provisions of The Code).

5. The Code : key features

The key features of The Code are these:

(a) Scope and Provisions of the Bill:

Explaining the scope and provisions of The Bill and its creation of a binding arbitration process;

(b) **Best Practice:**

Providing best practice for landlords and tenants who fall without the scope of the binding arbitration process laid down in the Bill;

(c) **Negotiations:**

Promoting good practice between commercial landlords and their tenants, in particular in relation to negotiations;

(d) **Principles**

Laying down principles which are intended to guide the landlord and tenant when it comes to negotiation over debts owed.

6. The binding arbitration process

The Bill is to introduce a binding arbitration process where agreement has not proved possible on rent arrears.

That process will comprise the following stages:-

(a) A compulsory pre-application stage. In summary, this is where either party must notify the other of their intention to pursue binding arbitration allied with a proposal to settle in settlement of the rent arrears owed.

The other party may respond and either accept the proposal or make a counter-proposal. Where the Respondent to arbitration is a landlord, they do not have to provide evidence of their financial position, although this may be considered at an arbitration.

(b) An application – by either landlord or tenant – together with payment of a fee. This must append the documents which will have come into existence at the pre-application stage.

The application must contain a proposal for resolution and supporting evidence (and where made by a tenant any proposals put must fortify the case for viability and affordability).

(c) Each party will have 14 days in which to respond to the application. They can submit a counterproposal with supporting evidence. Thereafter the parties may submit revised proposals as to what the Arbitrator's award should be. The hearing is to be treated as inquisitorial – not adversarial.

(d) Both landlord and tenant will be given the choice of a public hearing or – if neither party requests such – the Arbitrator will determine the application based upon the documents alone.

(e) The Arbitrator will seek to furnish their decision no more than 14 days from receipt of the initial request. The Arbitrator is to be empowered to decide how to conduct the hearing, which is not to last more than 6 hours (excluding breaks).

(f) The Arbitrator will notify the parties within 14 days of a hearing of their award. The award is to be legally binding.

The Government's aim is to pass The Bill by 25th March 2022, subject to Parliamentary approval. On the date on which the Bill becomes law, the parties have 6 months in which to utilise the binding arbitration process. The 6-month timeline includes the pre-application stage.

Where a tenant may have multiple premises owned by the same landlord, or *vice versa,* these may be considered jointly if the parties so agree or the Arbitrator should decide upon consolidation.

The fees payable on arbitration will be set by approved Arbitration bodies and payable in advance. It is thought that there is likely to be a sliding scale, relative to the size of the debt owed and that the fees themselves will ultimately be capped.

Arbitration bodies will need to demonstrate their competence to conduct such arbitrations. That competence will be assessed by BIS against an "acceptance model" that will set out the criteria which will need to be met (such as evidencing impartiality, monitoring and training - allied with a robust appeals system in the event of any complaint occasioned by an individual arbitration).

7. Timelines

The ringfenced period within The Bill is to run from 21st March 2020. This was the date on which businesses were first required either to close or cease trading (save for essential shops) under the Coronavirus legislation. That legislation comprised Regulations made under the Public Health (Control of Disease) Act 1984. These specific restrictions on trading were removed on different dates depending on the particular business sector affected.

The Government has published a Table showing when the restrictions for each category or type of business were removed.

Accordingly, the ringfenced period should be considered on a business-by-business basis.

Tenants may not fit neatly into their chosen sector, however.

Details of those restrictions (and their removal) may be found in the Table on https//www.gov.uk/government/publications/commercial-rents-code-of-practice-november-2021.

8. Evidence to consider when negotiating

When seeking to assess the viability and affordability of any proposals, the parties and the Arbitrator may wish to take into account a non-exhaustive list of factors such as:-

- Existing credit and debit balances
- Business performance since March 2020
- The tenant's available assets
- Other debts, invoices or tax demands
- Expert evidence on the tenant's current trading position
- Evidence of credit difficulties
- Loss of important contracts or business
- Unexpected retentions (lack of working capital)
- Loss of key personnel or staff redundancies
- The costs: benefit ratio of arbitration as against rough and ready commercial resolution.

9. General

In the respectful view of the author the philosophy underlying the provisions of the proposed Bill is commendable. It seeks to reinforce that conciliatory and pragmatic approach adopted by the Moratorium and enshrined within the Code. Emphasis should continue to be upon the constructive resolution of debts as between a commercial landlord and their tenant. Such

presents as laudably conducive to that goodwill which should which should be the foundation stone of such a relationship.

These measures will clearly impact upon other rights which might ordinarily be available to a commercial landlord respecting recovery of debt from its tenant. Paragraph 10 which follows refers. Mention is also made of other considerations which might have a material bearing upon a commercial landlord's judgment and actions where the tenant is in default.

10. Other : CRAR

On the 6th April 2014 the ancient common law remedy of distraint, which had stood for over 800 years, was abolished. This had been a time honoured means whereby a Landlord owed rent might properly seize and sell his Tenant's goods and chattels and thereby satisfy or offset the arrears. No court order was required.

Instead there is now the regime known as the Commercial Rent Arrears Recovery (CRAR).

CRAR does not require a Court Order in order to be effective. Rather the Landlord instructs an enforcement agent (formerly known as a certificated bailiff) to enter upon the commercial premises in question, take control of the Tenant's goods and subsequently effect their disposal by sale.

Only rent, VAT and interest can be recovered by way of CRAR. Where there are arrears of service charges or insurance a Landlord will still need to take legal proceedings and obtain a County Court Judgment.

The combination of the Moratorium and the proposed Bill effectively renders redundant for the time being any exercise of a landlord's remedies under the CRAR regime.

11. Other : election

Where a landlord learns of his commercial tenant's breach he is always placed on **election**.

This means that he must choose whether to **affirm** the lease (that is to treat it as continuing) or regard the lease as **forfeit** (effectively terminated) - and act accordingly (whether this be by way of peaceable re-entry or legal proceedings to regain possession).

However, given the current constraints as described in this Article a landlord must take stock. Instead they must seriously examine and pursue cost effective means of compromise with their tenant having regard to the provisions of the Code, the roadblock imposed by the Moratorium and the Bill.

12. Other : waiver

The principal elements of waiver are these

(1) The landlord needs first of all **to know** of the tenant's breach. The test is objective. Whether or not the landlord can be said to know is assessed from the standpoint of the reasonable man. (The facts may be such as might persuade a Court to infer that a landlord did have such knowledge or to impute such knowledge to him.)

(2) There must be **unequivocal conduct** by the landlord. This must show that he still regards the lease as continuing. This may take many forms. For instance it may well comprise negotiations to agree the new terms of the lease or the acceptance of rent where a non-monetary breach of covenant has arisen and

(3) There must be the **communication** of the landlord's unequivocal act to the tenant.

13. Other : continuing breaches

Although a landlord may have waived his rights of re-entry or forfeiture, it is possible that these may be revived.

Should a tenant commit **continuing breaches** post-waiver, then the landlord's rights of re-entry or forfeiture are automatically renewed on each day on which the continuing breaches persist., such rights being subject to the constraints aforesaid.

14. Caveat

The foregoing provisions attempt an outline of the current and proposed law. They may be said to be broadly applicable to commercial landlord and tenant relations. However, it cannot be a "*one size fits all"* means of resolving individual problems which might arise on the question of landlord and tenant debt. Much may turn upon the individual fact-specific nature of the case.

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