

Commercial Landlords v. Tenants: Let Battle Recommence

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KEY POINTS

- An arbitration scheme for commercial landlords and tenants was introduced during March 2022 under the Commercial Rent (Coronavirus) Act 2022 with the aim of resolving disputes over outstanding rent arrears falling due in periods when lockdown restrictions were in force (known as protected rent debts).
- The UK Government expected 7,500 cases to be referred to the arbitration scheme. However, the Property Litigation Association has reported an exceptionally low uptake.
- Given the short time frame for referrals to be made to the arbitration scheme (six months), there was little incentive for landlords to initiate arbitration proceedings.
- Following the conclusion of the scheme on 24 September 2022, the accompanying moratorium on landlord enforcement has also come to an end and landlords are now able to exercise their usual remedies for non-payment of rents.

Commentary: Published Arbitration Awards

The limited number of published arbitration awards highlight the narrow scope of relief afforded to tenants who were referred to the scheme. Based on the most high profile publicised awards, the rulings, which were all in favour of the landlord, were decided on the following grounds:

- There was no protected rent debt under the scheme as, even though the applicant's retail stores had to close down for a period of time pursuant to the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, the offices, which the application concerned, were not subject to a similar closure requirement (*Signet Trading Limited v. Fprop Offices (Nominee) 4 Limited and Fprop Offices (Nominee) 5 Limited*).
- The tenant had "simply buried its head in the sand and adopted a policy of radio silence," and that furthermore, the arbitrator found no evidence that the tenant was not viable or unable to pay its debts (*TPIF (Portfolio No.1 GP) LLP and TPIF (Portfolio No.1) Nominee Limited v. Nuffield Health*).

On the conclusion of the arbitration scheme, it appears that its impact on the vast sum of outstanding rent arrears (c.£9bn) has been negligible. The limited time period for the implementation of the scheme has done little to encourage parties to undertake alternative dispute resolution to resolve the position relating to outstanding arrears. Instead, in light of the limited relief now available to tenants for non-payment of rents, the majority of landlords will have bided their time to take enforcement action to recover rent arrears without restriction.

Commercial Landlords: Enforcement Options

Following the end of statutory protections, landlords can now benefit from all enforcement options being back on the table. Landlords with tenants who have not made a referral to the arbitration scheme, or whose referral to the scheme has now concluded but no payment has been made, are able to utilise all pre-pandemic enforcement measures against tenants for non-payment of arrears, which include:

- issuing debt proceedings to recover outstanding arrears;
- forfeiture;
- commercial rent arrears recovery (CRAR);
- pursuing a guarantor or former tenant;
- drawing down on a rent deposit; and/or
- commencing insolvency proceedings against a commercial tenant.

Whilst many will welcome the removal of restrictions, landlords should be cognisant that commercial tenants may need to enter into an insolvency process as a result of accumulated outstanding rental arrears.

Given the arbitration scheme not ruling in favour of tenants and the Court of Appeal also finding in favour of landlords (see *London Trocadero (2015) LLP v. Picturehouse Cinemas Ltd.*), it would appear that tenants are presented with a limited ability to justify non-payment of rents if their businesses were able to operate during the pandemic (even in a restricted capacity) and/or are currently viable.

This seemingly underlying theme towards favouring commercial landlords could in fact sound as a warning notice to landlords not to pursue their tenants overly aggressively due to the risk of pushing them towards insolvency. The Insolvency Service has confirmed in the latest insolvency statistics report that company insolvency figures were higher than pre-pandemic levels, driven by an increase in the number of Creditors' Voluntary Liquidations. The Insolvency Service's latest published figures reported that August 2022 saw an increase of 550 percent in the number of Company Voluntary Arrangements and an increase of 111 percent in the number of administrations compared to the same period during 2021.

Conclusion

Commercial landlords must consider which remedies will be appropriate in the circumstances and should obtain legal advice in order to obtain further guidance on initiating enforcement proceedings against tenants.

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