



Lifting the forfeiture moratorium
What next for unprotected rent debt

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When it comes to commercial rent arrears incurred during the pandemic the focus recently has been on arrears which may be protected by the Commercial Rent (Coronavirus) Act (the "Act"). The Act will introduce a new arbitration scheme to deal with protected rent. But what about arrears that will fall outside of the ringfence?

There will be a significant amount of rent debt that is not protected by the Act. Landlords and Tenants will be giving some thought to the next steps in light of the lifting of enforcement restrictions relating to these arrears at the end of the month.

Lifting of restrictions

On 26 March 2022 exercising rights to forfeit will be an option again for landlords and there will be no COVID related restrictions on exercising the Commercial Rent Arrears Recovery ("CRAR") procedure as the blanket moratorium on those enforcement options brought in originally by the Coronavirus Act 2020 (the "CA 2020") will have lifted on 25 March 2022.

Similarly, on 1 April 2022 the restrictions on presenting winding-up petitions will no longer be in place following the expiry of those restrictions on 31 March 2022.

However the expectation is that the Act will be in force by 25 March 2022 such that the above restrictions, and others (which include restrictions on bringing debt proceedings through the courts and drawing down against rent deposits), will apply where the debt is considered to satisfy the Protected Rent Debt ("PRD") definition under the Act. The restrictions introduced by the Act will apply during a moratorium period which ends either 6 months from the Act coming into force or, where the matter is referred to arbitration, on the conclusion of the arbitration (the "Moratorium Period").

What can landlords do now?

Where a rent debt is **not PRD** a landlord will need to decide whether it wishes to take action to recover the arrears and/or terminate the tenancy under any forfeiture provision.

Forfeiture considerations:

If forfeiture action is intended then the landlord will need to ensure that it does not waive the right to forfeit when the remedy becomes available to it again.

The CA 2020 provides at section 82(2) that no action by a landlord during the blanket moratorium, other than an express waiver in writing, amounts to waiver of the right to forfeit in relation to the rent arrears. However, anything done after 25 March could act as a waiver.

Where a tenant is in arrears and part of those arrears are PRD the landlord will need to ensure it is very clear upon what debt it is exercising its right to forfeit.

CRAR considerations:

CRAR has been available to landlords as a means of recovering rent arrears throughout the pandemic but only where the minimum amounts outstanding exceeded a certain amount – since 24 June 2021 these amounts has been a sum equal to 554 days' rent (effectively equivalent to the rent accrued since the start of the pandemic up to the September 2021 quarter). From 25 March 2022 the minimum amounts outstanding before a landlord can exercise CRAR reverts to the pre-pandemic amounts, being equivalent to 7 days' rent.

There will also be another option available to landlords where subtenants are in place. Section 81 of the Tribunal, Courts and Enforcement Act 2007 allows a superior landlord to serve a notice on the subtenant requiring the subtenant to pay its rent directly to the superior landlord rather than to its own landlord until the immediate tenant's arrears have been satisfied. A superior landlord can only serve a valid s.81 notice on the subtenant where it is entitled to exercise CRAR against its immediate tenant. As such, once the restrictions on enforcement against the immediate tenant using CRAR are lifted, the restriction on enforcement against the subtenant using s.81 are also lifted.

Care should be taken however as exercising CRAR will waive a landlord's right to forfeiture in relation to pre-existing breaches.

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What next for unprotected rent debt

Court proceedings:

There have, to date, been no restrictions on commencing court proceedings in order to recover rent debt incurred during the pandemic. Attempts by tenants to defend such actions have been unsuccessful although a number of key cases are due to come before the Court of Appeal in June (*Bank of New York Mellon (International) Ltd and v Cine-UK Ltd and others and London Trocadero v Picturehouse Cinemas*).

The Commercial Rent (Coronavirus) Bill contains provisions which apply a stay to debt proceedings issued on or after 10 November 2021 where the whole or part of the sums sought are PRD. Once the Act is in place the landlords will not be able to pursue the tenant for the PRD through the court during the Moratorium Period.

Where any unprotected rent debt is outstanding the landlord may well consider commencing court proceedings for their recovery. If any element of the rent arrears is PRD the landlord will need to decide whether to:

- commence proceedings only for the unprotected rent debt (amending the proceedings once the Moratorium Period has expired or to reflect the PRD as varied by any arbitration award - this would be preferable to commencing two sets of proceedings and incurring the associated court fees)
- commence proceedings for the whole of the arrears and risk the court striking out proceedings (at least in part)
- simply wait until the Moratorium Period has passed and commence proceedings for the whole of the debt (as varied by any arbitration award) at that point

Winding-up considerations:

There are no restrictions on serving a statutory demand on a tenant in relation to any rent debts before 1st April but no winding up petitions can be presented following service of such demand until, at the earliest, 1st April (and that is on the assumption that the rent is unprotected rent debt).

A landlord may decide, therefore, to serve a statutory demand only in relation to unprotected rent debt and, if the sums remain unpaid after the 21 day period has elapsed, use this as the basis for presenting a winding-up petition.

Tenant deposit:

There have been no restrictions on drawing down against rent deposits where one is in place. The Act changes this but only where it comes to PRD. As such a landlord could draw down against a rent deposit and if the tenant fails to top up in accordance with the terms of the deposit deed it could look to enforce once the restrictions set out have been lifted.

Landlords may want to draw down against rent deposits before the Act comes into force where the debt is PRD. The amounts drawn down may still form the part of an arbitrator's determination if the matter is referred to arbitration and the landlord will not be able to insist on the tenant topping-up, but drawing down now may assist with regards to cash flow.

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What next for unprotected rent debt

Key points:

- where a landlord is owed both PRD and unprotected rent debt the landlord will need to be aware that different considerations apply
- It may well find that these different considerations and the variation in enforcement options may motivate landlords to reach a settlement on the whole of the rent debt rather than deal with it in piecemeal fashion, and especially where the landlord is uncertain as to whether specific debt is PRD or unprotected rent debt
- resolution by mediation may also be an option in these circumstances as a mediator could consider both PRD and unprotected rent debt in one exercise. This might also be especially appropriate where the parties are concerned about commercially sensitive or confidential information being shared publicly and are not convinced that the provisions in the Act designed to protect these are sufficiently robust
- alternatively, a landlord may prefer to wait and see whether a tenant will refer the matter to arbitration under the Act. If it does not, or if its referral is dismissed, the enforcement options re-open and the landlord can treat the rent arrears as one whole debt
- in essence, if the debt is PRD it will feel like an extension of the forfeiture moratorium, the restrictions on exercising CRAR and on presenting winding-up petitions as well as the introduction of new restrictions
- The Act also contains an apportionment provision which provides that if a landlord is owed both PRD and unprotected rent debt, then any payments made by the tenant in satisfaction of those debts must be used to pay any unprotected rent debt first and only when they have been paid in full can the landlord use the payments tendered to pay the PRD. The exception is where the tenant has specifically tendered the money to pay a certain part of the arrears in which case the payment must be allocated towards the arrears specified.



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