The Commercial Rent (Coronavirus) Bill: Part 2 What is happening in Parliament?

COMMENTARY BY SIR PAUL MORGAN, 6TH DECEMBER 2021

This is my second article on the Commercial Rents (Coronavirus) Bill. As is well known, the Bill provides for a statutory arbitration where the arbitrator has power to grant relief of various kinds from certain rent debts under business tenancies adversely affected by restrictions imposed due to coronavirus. In my earlier article, I focussed on the Bill's provisions dealing with a statutory arbitration. I will now provide an update on the Bill and its passage through Parliament.

The Bill was introduced to the House of Commons on 9 November 2021 and received its second reading on 24 November 2021, when it was referred for scrutiny to the Public Bill Committee. The stated intention of this Committee is to scrutinise the Bill line by line. The first sitting of this Committee is expected to be on 7 December and it is scheduled to report on 16 December 2021. The Government still expects that the Bill will be passed so as to take effect on or before 25 March 2022.

On 25 November 2021, the Committee called for written evidence for it to consider. I provided written evidence to the Committee in which I made a number of points which can be summarised as follows:

- The definition of "business tenancy" needs to be reconsidered.
- It is inappropriate for the Bill to refer to a **period of occupation** when, in many cases, the premises will not be **occupied** during a period which should qualify as a relevant period.

- The Bill should provide for the possibility of an arbitrator being appointed by agreement between the parties.
- The Bill should make more detailed provisions as to the bodies which are to be given the power to appoint arbitrators.
- The Bill should make it clear whether the arbitrator is to have power to determine whether the rent claimed by the landlord is actually due in a case where the tenant alleges he has a defence to the claim (apart from the provisions of the Bill).
- The arbitrator should be given power to hold part of the hearing in private when hearing evidence and submissions as to confidential and sensitive matters. It is not safe to rely on the Arbitration Act 1996 ("AA 1996"), s. 34(1) as conferring such a power because it can be argued that the specific provisions of clause 20(7) of the Bill would prevail over the entirely general terms of s. 34(1).
- The arbitrator should be given power to make an adverse order for costs against a party who has acted unreasonably and increased the costs incurred by the other party.

It remains to be seen what, if any, amendments are made to the Bill as it passes through its various legislative stages.

It is also useful to refer to some further documents which throw light on the Government's thinking on some of the points referred to above.

The Department for Business, Energy and Industrial Strategy prepared a Memorandum on the question whether the Bill was compatible with Human Rights (they concluded that it did). In that Memorandum (at paras. 6-7), the Department expressed the view that an arbitrator would have power to protect the disclosure of confidential information during the hearing pursuant to AA 1996, s.34, which gives an arbitrator power to decide all procedural and evidential matters. I do not think that it would be safe to rely on section 34. The point ought to be put beyond argument by an amendment of clause 20(7) of the Bill.

The Department also prepared an Impact Assessment ("IA") which contains some clues as to how the Department believes the arbitration process is likely to work. The IA reveals that the Department consulted the Chartered Institute of Arbitrators and the Centre for Effective Dispute Resolution. I suspect that the Government does not want to specify the approved arbitration bodies in the Bill as it does not know how many arbitrations there will be and how many arbitrators will be needed. The IA (at paras. 193 – 197) makes the following assumptions about how many arbitrations there will be (5,000 – 13,000), how many eligible arbitrators there will be (1236), how long the arbitrations will take (2-3 months per case and the process lasting from 3 to 15 months) and how much they will cost (£24.4 m: para. 163).

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