Woodfall
Landlord and Tenant
Bulletin

Rent arrears claims preceding the Government's Arbitration Scheme: stay the proceedings or stay the course?

1. In the battle over whether commercial tenants are liable to pay rent that accrued due whilst lockdown restrictions applied, landlords are undoubtedly winning. Defences based on implied terms, frustration, failure of basis, breach of the landlord's obligation to insure and the Code of Practice for Commercial Property Relationships During the COVID-19 Pandemic have, so far, failed to gain any traction with the Court and landlords have been granted summary judgment in rent arrears claims in *Commerzreal Investmentgesellschaft mbh v TFS Stores Ltd* [2021] EWHC 863 (Ch), *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013[1] and, most recently, in *London Trocadero (2015) LLP v Picture House Ltd* [2021] EWHC 2591 (Ch). The possibility that tenants may now be able to secure a reduction in their lockdown rent arrears and/or a more generous period of time in which to pay them off under the government's forthcoming rent arrears arbitration scheme represents a glimmer of light for tenants and storm clouds gathering for landlords. In the inevitable rush for landlords to get their rent claims determined before the new scheme intervenes, the question that arises – which this article considers – is whether a tenant might be able to prevent that from happening by applying for a stay of the proceedings or alternatively a stay of any judgment secured at trial pending implementation of the arbitration scheme.

Announcement of the Arbitration Scheme

2. On 16 June 2021, the Government announced its intention to introduce legislation to "ringfence outstanding unpaid rent that has built up when a business has been shut down

[1] NB: on 22 September 2021, Cine-UK was granted leave to appeal directly to the Court of Appeal.

during the pandemic". The press release stated that landlords were now expected to "make allowances for the ringfenced rent arrears" and to "share the financial impact with their tenants" and that, absent agreement between the parties, these 'allowances' would be determined in a "binding arbitration process".

3. That tantalising glimpse into the future was followed, on 4 August 2021, by publication of the Ministry of Housing, Communities and Local Government's policy statement, entitled "Supporting businesses with commercial rent debts", which stated that the Government would "expect terms to be agreed between landlords and tenants impacted by closures to defer or waive entirely an appropriate proportion of the rent". The Ministerial Statement made clear that 'allowances' would not fall to be made in every case: "those tenants who have not been affected by closures and who have the means to pay, should pay". Although a little bit more detail about the proposed arbitration scheme was provided in the paper, we were told that the arbitration procedure and the governing principles by reference to which these 'allowances' were to be negotiated and, in default of agreement, determined by arbitrators would be published at a later date.

4. As at the date of writing, that is as far as matters have progressed.

Authorities on impending legislation in other contexts

5. In other contexts, it has been held that, for certain purposes, the Court can take into account the possibility of a future change in the law when making its decision: see *Hill v C A Parsons* [1972] Ch 305 and *Sparks v Holland* [1997] 1 WLR 143. The facts of those cases are a little far removed from the scenario with which we are concerned. But closer to home for our purposes are the four recent cases in which companies sought to restrain presentation of a winding up petition on the grounds that the law was about to be changed by the Corporate Insolvency and Governance Act 2020.[2]

    (1) In *Short Gardens v London Borough of Camden* [2020] EWHC 1001 (Ch) Snowden J declined to restrain presentation of winding up petitions on the grounds that the companies would otherwise miss out the benefit of a change in the law that had recently been announced in a number of Ministerial Statements. In declining to do so, Snowden J pointed out that the scope of the intended legislative restrictions was, as yet, unclear; he said that it was overwhelmingly likely that the legislation would only

[2] Under the Act, a creditor may not, during the relevant period, present a petition unless it has reasonable grounds for believing that (a) the coronavirus has not had a financial effect on the company or (b) the relevant ground for presenting a petition would have arisen even if the coronavirus had not had a financial effect on the debtor company (s.10 and para 2 of Sch. 10) and similar restrictions apply in relation to the making of a winding up order (s.10 and para 5 of Sch. 10).

protect companies in the retail and hospitality sectors (which these companies were not) and he concluded that, on the facts, the companies' financial woes were nothing to do with the coronavirus. Somewhat controversially, Snowden J said that, in any event, he was required to "make [his] decision on the basis of the law as it stands".

(2) In *Travelodge Hotels Ltd v Prime Aesthetics Ltd* [2020] EWHC 1217, Birss J declined to follow Snowden J's view that the Court should simply apply the law as it stands (pointing out that Snowden J had not had the decisions in *Hill v C A Parsons* and *Sparks v Holland* cited to him). Birss J concluded, by reference to more recent Ministerial Statements, that the legislative protection would be likely to apply to companies in the hotel industry; that Travelodge's financial difficulties had clearly been brought about by the coronavirus and that, in the circumstances, the right thing to do was to restrain presentation of the petition.[3]

(3) In *Re A Company* [2020] EWHC 1406 (Ch), Morgan J sided with Birss J on the question of principle and concluded that "when the court is deciding whether to grant relief and, in particular, relief which involves the court controlling or managing its own processes, it can take into account its assessment of the likelihood of a change in the law which would be relevant to its decision". By the time of the decision, the Corporate Insolvency and Governance Bill 2020 was making its way through Parliament and Morgan J therefore felt a "high degree of confidence" that the provisions set out in the CIG Bill, or provisions to substantially the same effect, would shortly become law.

(4) In *Re A Company* [2020] EWHC 1551 (Ch) ICC Judge Barber restrained advertisement of an existing petition and restrained two other creditors from presenting a petition on the grounds that the impending change in the law would make it oppressive and unfair to allow steps to be taken towards winding up the company in the meantime. In light of Morgan J's decision, which had been handed down just a few weeks earlier, it was common ground before the Court that, in principle, it was appropriate for the Court to take into account the CIG Bill when exercising its discretion.

6. Given the above decisions, it ought not to be difficult for a tenant to satisfy the Court that the forthcoming arbitration scheme is, at least in principle, a matter that the Court can take into account when deciding whether to grant substantive relief and how to exercise its case management powers in the meantime.

[3] The injunction was granted for a relatively short period: 14 days.

Methods of deferral under the Civil Procedure Rules

7. Under CPR, there are various ways in which a tenant defending a lockdown rent arrears claim might go about ensuring that it does not miss out on the benefits of the arbitration scheme:

   (1) The tenant could apply for an order staying the proceedings, under CPR r.3.1(f), before any trial takes place.

   (2) A tenant responding to a landlord's application for summary judgment could rely on the impending arbitration scheme as grounds for an adjournment of the application or alternatively as a "compelling reason" why the case should be disposed of at trial and/or a reason why the Court's residual discretion under CPR r.24.2 to give summary judgment ought not to be exercised.

   (3) A tenant might instead allow the claim to proceed to trial (or the hearing of a summary judgment application) and then do one or other of the following:

      (i) apply to stay the execution of any money judgment obtained by the landlord under CPR r.83.7.[4]

      (ii) invite the Court to resolve any substantive disputes about the tenant's underlying liability for the rent by making appropriate declarations, but to then stay the proceedings, under CPR r.3.1(f), so as to defer the making of any money judgment until after the scope of the arbitration scheme has been made clear.

Arguments for and against

8. Would it be right for the Court make some form of order holding up an existing lockdown rent claim pending clarification or implementation of the new scheme? There are respectable arguments to be made on both sides.

9. In support of its case that the proceedings should be held up, a tenant would no doubt make the following points:

[4] In *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 55, the Court of Appeal held that, in relation to money judgments, the existence of the bespoke provisions in CPR r.40.8A and r.83.7 excludes the more general power in CPR r.3.1(f) to stay a judgment. The jurisdiction under CPR r.40.8A may only be exercised in response to "matters that have occurred since judgment or order". Given that the Government's intention to introduce the arbitration scheme will have been known prior to judgment, CPR r.40.8A may not be quite the right fit here. The jurisdiction under CPR r.87.3 – which is exercisable where there are "special circumstances which render it inexpedient to enforce the judgment or order" or "the applicant is from [sic] any reasons unable to pay" – would seem to be a better bet.

(1) Now that the Government has announced that rent arrears that accrued when the tenant's business was closed because of the pandemic fall to be "ringfenced" and treated differently by comparison with ordinary rent arrears, it would be wrong for the Court to frustrate that initiative by exercising its case management powers in a way that results in the claim being determined *before* the scheme becomes law and by reference to ordinary legal principles, rather than those applicable under the scheme.

(2) It would be arbitrary and unfair if the availability of the protection afforded to tenants by the arbitration scheme depended entirely on the happenstance of when their landlord chose to instigate proceedings against them. The Court should lean in favour of consistent treatment of commercial tenants and against capricious outcomes.

(3) Once a money judgment is made, the contractual liability for rent arrears *merges* with the judgment. There is nothing in the Ministerial Statements to suggest the new scheme will enable arbitrators to ignore the fact of the judgment and re-open previously determined rent claims. Furthermore, once a judgment has been made, the tenant will then be under significant pressure to make payment to the landlord; and many tenants will then do so. There is, again, no suggestion that the new scheme will empower arbitrators to intervene in cases where judgment has been both given and satisfied. Accordingly, it would seem quite likely that if a claim proceeds to a judgment, the tenant will lose out on the benefit of the scheme – even if execution of the judgment is later stayed.

(4) If (contrary to what one might expect) the new scheme is cast in terms that ensure that the arbitrator's hand is *not* tied by an earlier judgment or the fact that the money has since been paid, it would be hugely wasteful of both costs and court resources for the question of the tenant's liability for rent to be tried twice – once applying ordinary principles and once applying the principles that govern the arbitration scheme.

(5) The Court need not, of course, immediately kick existing proceedings off into the long grass. The Court could impose a brief stay of the proceedings (say 4-6 weeks) with a view to revisiting this issue once further details of the scheme and the timetable of its implementation have been made known. The prejudice to the landlord that would be caused by a delay of that sort would surely pale by comparison with the prejudice that would be caused to a tenant if it were adventitiously deprived of legislative protection that most other tenants will enjoy.

10. In response, a landlord might say something along the following lines:

(1) It would be wrong to stay or otherwise hold up proceedings in circumstances where the content and timing of the new legislation remains quite so signally unclear. The winding up petition cases do not provide a good analogy. In those cases, it was tolerably clear from the Ministerial Statements, and clearer still following the advent of the CIG Bill, how the law in relation to statutory demands, presentation of petitions and winding up orders was going to be changed and it was also pretty clear that the change in the law would be effected imminently. By contrast, here, we know nothing at all about how far the arbitrator's powers to reduce or defer payment of rent arrears will go; we have not even had a glimpse into the criteria by reference to which those powers would be exercised and the likely timeframe for enactment of the scheme is similarly shrouded in doubt.

(2) There is also a notable lack of clarity about which tenants will ultimately qualify for inclusion in the new scheme. The Ministerial Statements made to date emphasize that those tenants who *can pay*, *should pay*. It may therefore be that the scheme will only ultimately apply to tenants who can show that the legislative response to the pandemic has completely disabled them from paying their rent arrears and that tenants who have merely been disadvantaged by that response will fall outside the scheme. It would not be right for proceedings to be held up at the suit of tenants who will ultimately find themselves outside the scope of the scheme and it would not be practical or proportionate for the Court to be tasked with investigating the impact of the pandemic on a tenant's financial circumstances merely to enable it to resolve an application for a stay.

(3) The majority of tenants defending rent arrears claims will have denied their liability to pay some or all of the rent, on one or more of the usual grounds, and some will have advanced a set off (eg. a cross-claim for damages for disrepair or derogation from grant). On the basis of the various Ministerial Statements, it is far from clear that the job of determining those wider issues will fall within the remit of an arbitrator appointed under the new scheme. Accordingly, if the proceedings are stayed, now, so that they can be sent off to the new scheme, the result may be that they are *re-directed back to Court* by the arbitrator so that those wider issues are determined before consideration is then given to whether the resultant arrears should be reduced or deferred under the scheme. Well-intentioned, but precipitous, intervention by the Court could ultimately lead to increased costs, delay and pressure on court resources.

(4) The Government is, of course, perfectly aware that some of these rent arrears cases have already been determined and that others will have done so by the time the new scheme lands. It will be for the *legislature* to decide whether and, if so, how to

intervene in cases that have already been determined: judges should not seek to arrogate that decision to themselves when making case management decisions. Similarly, rent arrears proceedings could have been stayed, across the board, by the legislature or the Lord Chief Justice or the Master of the Rolls[5] pending implementation of the arbitration scheme, but that has notably not happened. Individual judges should respect, not reverse, that decision.

(5) If it ultimately proves to be the case that the new legislation empowers an arbitrator to reverse the contractual allocation of risk under the relevant lease and disable a landlord from recovering arrears of rent that are otherwise lawfully due, that would be a very significant intrusion into the parties' private law rights. It is not difficult to imagine that legislation of that sort might be subject to challenge (eg. on Article 1 Protocol 1 grounds) and perhaps even ultimately overturned. The prospect of challenge, if the legislation works in the way that tenants hope, is a further complicating feature that might be said to militate against holding up existing proceedings.

London Trocadero (2015) LLP v Picture House Limited

11. There has, in fact, been one case in which the Court has had to consider and determine this issue: *London Trocadero (2015) LLP v Picture House Limited* [2021] EWHC 2394 (Ch). Prior to the hearing of the landlord's summary judgment application, the tenant applied for an adjournment of that application on grounds that included the need to ensure that the tenant was not deprived of the benefit of the forthcoming arbitration scheme. In refusing that application to adjourn, Deputy Judge Robin Vos said this:

> "*…the proposed legislation is not relevant to the issues in this case. This case is about whether rent is owed. The defendants say it is not. The claimant says that it is. Indeed, it seems to me that it is necessary for the court to come to a conclusion on that point, given that the defendants have chosen to put it in issue, before there can be any question of the defendants being able to take advantage of the arbitration scheme.*
>
> *The press release of 16 June explains that the legislation will help tenants and landlords work together to come to an agreement on how to handle "the money owed". It is plain from this that the assumption is that the starting point will be that there is an amount of rent which is due from the tenant to the landlord*."

12. There is undoubted merit in the proposition that the Court should determine any dispute between the parties about the underlying liability for rent, so as to establish the amount due applying ordinary principles, before the question of the tenant's entitlement to a reduction or

[5] At the start of lockdown, possession proceedings were stayed by the Master of the Rolls, acting under powers delegated by the Lord Chief Justice, by means of Practice Direction 51Z.

deferral under the new legislation is considered. However, by refusing the application to adjourn and later granting summary judgment in respect of a substantial part of the landlord's rent claim,[6] the Deputy Judge took a step which may very well have disabled the tenant from availing itself of the benefits of the scheme: see paragraph 9(3) above. The short judgment given in respect of the adjournment application does not reveal whether that factor operated on the Deputy Judge's mind and, if it did, the reasons why it ultimately did not hold sway are likewise unclear from the judgment.

Conclusion

13. Tenants considering applying for a stay or other order holding up an existing rent arrears claim should not be unduly disconcerted by the decision in *London Trocadero (2015) LLP v Picture House Limited*; and landlords should remain wary. In another case, the result might be different. Much would of course depend on the particular jurisdiction that the tenant seeks to invoke (see paragraph 7 above), on the up-to-date information about the timing and content of the arbitration scheme and on the facts of the particular case.

14. There has to be real doubt about whether the legislation will go as far as to upset existing judgments and/or empower arbitrators to require landlords to repay rent that has already been recovered under a judgment validly obtained – it is really quite hard to imagine that happening. That being so, it is submitted that there is real force in the tenant's argument that judgment for the full amount of the arrears ought not, in fairness, to be given to a landlord now, before the scheme arrives. For that reason, an order staying execution of a money judgment is probably not the right way to 'hold the ring'.

15. There is, at least in the writer's view, something to be said for the notion that a short stay of the proceedings – measured in weeks rather than months – is the appropriate response to this issue, particularly where proceedings are at a relatively early stage. It cannot be long now before the Government shows its cards and provides better particulars of the procedure, governing principles and timetable for the new scheme. Once that happens, the Court will be in a far better position to reach an informed decision about what orders should now be made to ensure that, so far as possible, the existing Court proceedings dovetail with the arbitral proceedings that may follow.

16. There will be some instances in which the proceedings have progressed to the point where they are ready, or near enough ready, for trial. It may be harder to persuade the Court to stay proceedings that have reached that point, particularly where any order made would result in the loss of an existing trial fixture. But if the case is to be allowed to proceed to trial

[6] The judgment in respect of the landlord's summary judgment application is reported at [2021] EWHC 2591 (Ch).

(or a summary judgment application for that matter), there is surely merit in the proposition that the Court should determine the substantive issues between the parties by means of declaratory relief only and should defer the making of any judgment until after the scope and timing of the arbitration scheme has been brought into sharper focus. Although doing so may have the effect of further deferring the date on which the landlord ultimately gets paid, the landlord will, in most cases, hold and be seeking to enforce a contractual right to interest on arrears of rent which should provide a measure of solace.

17. Not for the first time in this pandemic, landlords and tenants are being called upon to navigate relatively unchartered waters. It will be interesting to see where we end up.

NATHANIEL DUCKWORTH
FALCON CHAMBERS
3 November 2021