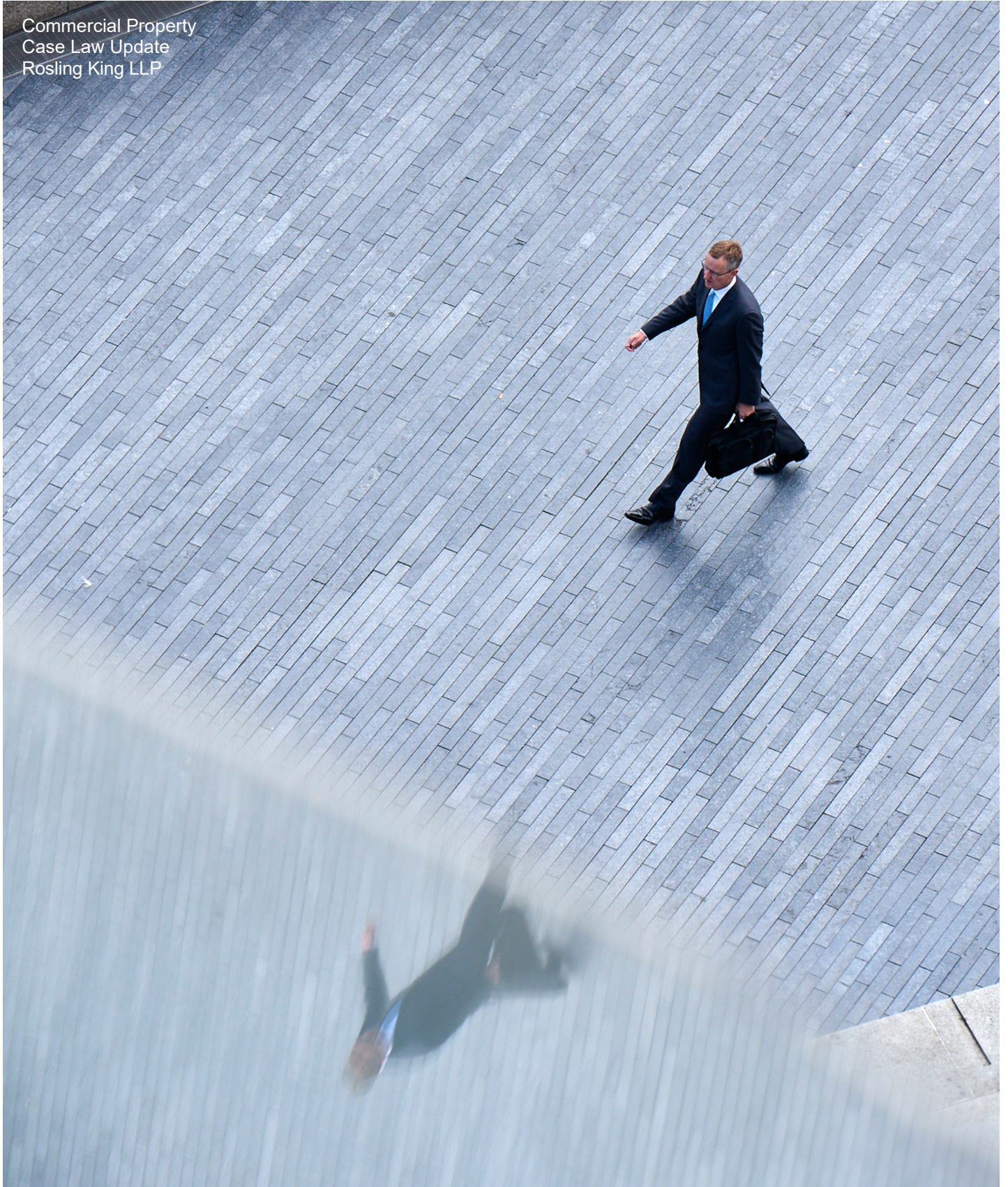


Commercial Property
Case Law Update
Rosling King LLP



April 2022
Page 2

Introduction

The introduction of the Commercial Rent (Coronavirus) Act (the “**Act**”) on the 25 March 2022 has created a temporary new landscape for landlord and tenant relations.

The new Act ringfences rent arrears that accrued during periods of enforced closures and creates a new binding arbitration scheme to deal with these sums. The blanket protection against forfeiture, imposed by the Coronavirus Act 2020 (the “**2020 Act**”), ended on 25 March 2022.

The Act has introduced temporary restrictions on protected rent debts for six months, or until the day on which an arbitration under the Act concludes (there is the potential for these temporary restrictions to be extended by the Government under a provision of the Act). The Act is expected to be read alongside the revised voluntary code of practice which provides guidance on how parties should approach negotiation of rent arrears. The Government has made clear, with the code and the Act, that their intention is to preserve viable businesses.

This Article will first consider the categories of debts that are eligible for a protected status under the Act; followed by an overview of the binding Arbitration Scheme created by the Act. Should you require any further information in relation to the arbitration scheme, and how to use it, or should you wish to discuss any debt, whether ringfenced or not, please do not hesitate to contact us.

Protected Rent Debts

Firstly, we consider the type of debts that qualify as eligible for protection under the new Act.

To qualify as a protected rent debt, the debt has to be a commercial, rather than a residential, rent debt.

Debts that can qualify as being eligible under the Act include: service charge, interest on arrears, possession and use, rent deposits and VAT.

A landlord who is owed a protected rent debt will face greater restrictions than they faced under the 2020 Act, and will not be able to pursue the following remedies:

- Commencing debt proceedings
- Forfeiture of the lease;
- Drawing down from the tenant's deposit;
- Winding-up a debtor company (with regards to a protected rent debt);
- Commercial Rent Arrears Recovery

Due to the lifting of the 2020 Act restrictions, it is however now possible for a landlord to forfeit the lease if the rent is not a protected rent debt. That said, the updated code of practice concerns all rent debts, and not just those that are protected and, whilst not binding, this should be borne in mind by landlords.

April 2022
Page 3

To qualify as a protected rent debt, the debt must have been commercial rent, from a tenancy that was “adversely affected” by coronavirus, within the “protected period”. If the tenancy was not “adversely affected” by coronavirus, or it was “adversely affected” but not during the “protected period” then there is no protection available to be found under the Act.

The terms “adversely affected” and “protected period” shall be looked into further below.

- What does “adversely affected” mean? A tenancy will be adversely affected if some or all parts of the premises were subject to a coronavirus closure requirement.
- What is the “protected period”? This is any period of mandated closure plus any period where there were specific coronavirus restrictions in place.

Due the staggered nature of the relaxation of the coronavirus restrictions in England and Wales, different individual business sectors have different relevant end dates for restrictions, and therefore there is no definitive “protected period” date.

The Arbitration Scheme

The Act uses a binding arbitration scheme which applies strictly and specifically to protected rent debts, for six months from the Act’s introduction.

The arbitration scheme is designed to encourage landlords and tenants to reach a deal consensually.

The Arbitrator’s primary principle is twofold:

- Preserve the viability of a tenant business (which has genuine chances of survival);
- While at the same time preserving landlord solvency.

If it is possible for a tenant to pay their outstanding protected rent debts outright, then it should do so promptly.

The key features of the scheme are as follows:

- There is a six-month window from 25 March 2022 for either the landlord or the tenant to take a protected rent debt into the scheme. Either the landlord or the tenant can apply.
- From the tenant’s perspective, if they are not in a good financial position, there is no jurisdiction to bring them into the scheme. Only viable businesses qualify.
- If a consensual deal has already been entered into between the landlord and the tenant, the arbitration cannot override that deal.

April 2022
Page 4

- The parties typically share the arbitrator's fee but are responsible for their own legal costs. This should have the effect of forcing prompt settlement to avoid a situation where the costs become disproportionate to the amount being claimed.
- The arbitrators have initially been from approved arbitrator bodies, which can be located on the Government website.

Arbitrators can make the following awards:

- Writing off all or part of the debt, including the interest on protected rent.
- Payment deferral for a period of up to 24 months from date of the award.
- Granting no relief, or remedy.

Once an arbitrator has made an award, a landlord cannot attempt to make up for any difference in lost rent from guarantors or through rent deposits.

Unusually for arbitrations, all of the awards that the arbitrators make in Arbitration must be published (with confidential information removed). This has led to the rather unique situation where previous awards may be referenced to arbitrators as a precedent for future awards. This will likely act as a deterrent for large commercial landlords and tenants, who will not wish to have their financial affairs made public.

The arbitrators utilise the "pendulum system" of arbitration when deciding on awards. The pendulum system encourages both parties to bring realistic offers which are appropriate with regards to the principles:

- If both "best offers" from the landlord and the tenant are compliant with the principles, then the arbitrator decides between them both which is the most compliant, and that has to be the ruling given.
- If only one offer is consistent and compliant, that will be the award.
- If neither is, the arbitrator will have jurisdiction to decide on the facts of the case.

Conclusion

Given the exceptional circumstances created as a result of the Coronavirus pandemic, it is perhaps no surprise that the legislation created to deal with the fallout of the pandemic is equally exceptional in character. The specifics of the arbitration scheme, coupled with the code, reflect the Government's intention to ramp up the pressure on those landlords and tenants who have not previously engaged in serious negotiations to now do so. If a stalemate is reached, and cannot be overcome, the arbitration scheme can be used to deal with the arrears and to allow viable businesses to move forward.

