

LEGISLATIVE CONSENT MEMORANDUM

Commercial Rent (Coronavirus) Bill

1. This Legislative Consent Memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The [Commercial Rent \(Coronavirus\) Bill](#) (the “Bill”) was introduced in the House of Commons on 9 November 2021.

Policy Objectives

3. The objectives of the Bill are to make provision enabling relief from payment of certain rent debts under business tenancies adversely affected by coronavirus to be available through arbitration; and for connected purposes.

Summary of the Bill

4. The Bill is sponsored by the Department for Business, Energy, and Industrial Strategy.
5. Section 82 of the Coronavirus Act 2020 prevents a landlord from exercising their right of re-entry or forfeiture for non-payment of rent under certain business tenancies during the “relevant period”, which can be extended in relation to Wales by regulations made by the Welsh Ministers. The “relevant period” has subsequently been extended in Wales on a number of occasions and most recently The Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No. 3) Regulations 2021 extended the relevant period to 25 March 2022, the same day the period is currently due to end in England. In addition to the protection afforded by section 82 above, UK Government implemented other protections for tenants during the pandemic including (1) restrictions on the ability of landlords to exercise commercial rent arrears recovery; and (2) restrictions on serving a winding up petition on the basis of a statutory demand.
6. A question developed around what is to follow once the relevant period eventually ends and thereby when any arrears accrued during that period becomes payable. It was agreed that my officials would work with UK Government on the development and passing of an England and Wales Bill.
7. The Explanatory Notes for the Bill explains that the “*purpose of the Commercial Rent (Coronavirus) Bill is to support landlords and tenants in resolving disputes relating to rent owed by businesses which were*

required to close during the COVID-19 pandemic. The Bill enables arbitration to be used to resolve these disputes if landlords and tenants cannot agree a way forward.”

8. The Commercial Rent (Coronavirus) Bill makes provision in the following areas:

a) It refers to rent payable under business tenancies (i.e. a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies) and ring-fences rent arrears considered by the Bill to be a “protected rent debt”. Unpaid rent is to be regarded as a “protected rent debt” if two tests are satisfied, which are not separate tests and both must be satisfied which has the purpose of ensuring that only businesses who were subject to closure requirements fall within the scope of the Bill. These tests are (1) that the tenancy was considered to have been “**adversely affected by coronavirus**”; and (2) that the rent is attributable to a period of occupation by the tenant for, or for a period within, the “**protected period**” applying to the tenancy. These tests are briefly summarised below:

1. Adversely affected by coronavirus (Clause 4)

- A business tenancy was adversely affected by coronavirus in relation to Wales if, for any of the period between 2pm on 21 March 2020 to 6am on 7 August 2021 (note that the period in England is instead stated as ending 11:55pm on 18 July 2021, owing to the different coronavirus restrictions regimes that were in place in England and Wales respectively), the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or the whole or part of those premises, was of a description subject to a “closure requirement”. The Explanatory Notes confirm that this means that if a business was subject to a closure requirement for any period within this timeframe, then they meet the test - many types of business were required to close for some periods within this timeframe and so will be within the scope of the Bill, as they are treated as having been “adversely affected by coronavirus”.
- Generally speaking, a “closure requirement” means a requirement imposed by coronavirus regulations which is expressed as an obligation to close premises or businesses, or parts of the same, of a specified description.

The Bill also makes certain other provision in relation to the interpretation of a closure requirement, including:

(1) a requirement expressed as an obligation to close premises, or parts of premises, of a specified description every day at particular times is to be regarded as a closure requirement – the Explanatory Notes gives the example in this context of businesses being

required to close their premises at a certain time in the evening until a certain time in the morning.

(2) it is immaterial that specific limited activities were (as an exception) allowed by the regulations to be carried on despite the obligation to close (and accordingly the fact they were permitted or carried on is to be disregarded in determining whether the tenancy was affected by coronavirus).

(3) where the premises comprised in the tenancy were occupied by the tenant for the purposes of a business not carried on solely at or from those premises, the reference to whether a business tenancy was “adversely affected by coronavirus” is to so much of the business as was carried on at or from the premises. The Explanatory Notes gives an example that if a tenant runs a restaurant business partly at the tenancy premises but also from the tenant’s own owned premises, then the relevant business for the Bill purposes is just that part that was conducted at the tenancy premises.

2. Protected period (Clause 5)

- If a business tenant can demonstrate the first test (i.e. that they were adversely affected by coronavirus) the protected period is to be established. For Wales, this is stated as being the period beginning with 21 March 2020 and ending the earlier of (1) 7 August 2021; and (2) the last day on which (or for part of which) the whole or part of the businesses carried on by the tenant at or from the premises, or the whole or part of those premises, was of a description subject to either a closure requirement (as defined above) or a “specific coronavirus restriction”.
 - A “specific coronavirus restriction” means a restriction or requirement (other than a closure requirement) imposed by coronavirus regulations which regulated any aspects of the way a business or premises, or parts of the same, of any specified description, were or was to be carried on/used. The Bill provides some assistance in terms of interpreting what a “specific coronavirus restriction” would entail, including (1) that they do not include restrictions applying more generally than to specific descriptions of businesses or premises (or parts of the same); and (2) they also do not include requirements to display or provide information on premises (or parts of premises).
9. Where a landlord and tenant under a business tenancy covered by the Bill are not in agreement as to the resolution of the matter of relief from payment of a protected rent debt, then either party may refer the matter to arbitration within the period of six months beginning with the day on which the Bill is passed as an Act (and this period can be extended by regulations made by the Secretary of State). The Bill includes a bespoke

arbitration regime for this purpose and also modifies aspects of the Arbitration Act 1996 in relation to arbitrations under the Bill.

10. The Bill provides a package of measures which provides elements of protection for a tenant which owes a protected rent debt. These include the following:
 - Landlords to whom a protected rent debt is owed are prevented from using certain property law remedies in relation to the protected rent debt during the “moratorium period”:
 - The remedies which a landlord are prevented from using during the moratorium period in relation to a protected rent debt, include (1) making a debt claim in civil proceedings; (2) using the commercial rent arrears recovery power; (3) enforcing a right of re-entry or forfeiture; and (4) using a rent deposit. There are also restrictions in relation to appropriation of rent. Schedule 2 of the Bill provides further detail in relation to each of these.
 - The “**moratorium period**” is a period beginning on the day on which the Bill is passed as an Act of Parliament and ending either (1) where the matter of relief from payment of the protected rent debt is referred to arbitration, when that arbitration has concluded; or (2) where the matter of relief from payment of the protected rent debt is not referred to arbitration, the last day of the period within which the matter can be referred to arbitration (i.e. currently envisages as six months from the date the Bill is passed as an Act, but which can be extended by regulations made by the Secretary of State).
 - There is a temporary restriction on initiating certain insolvency arrangements where the matter of relief from payment of a protected rent debt has been referred to arbitration and such restrictions apply during the “relevant period”:
 - The restrictions include that (1) no proposal for a company voluntary arrangement under section 1 of the Insolvency Act 1986 which relates to the whole or part of the debt may be made; (2) no proposal for an individual voluntary arrangement under section 256A of that Act, or an application for an interim order under section 253 of that Act, which relates to the whole or part of the debt may be made; and (3) no application for a compromise or arrangement under section 896 or 901C of the Companies Act 2006 (court orders for holding of meetings) which relates to the whole or part of the debt may be made.
 - The “relevant period” for the purposes of the above begins with the day on which an arbitrator is appointed and ends with (1) where the arbitrator makes an award in accordance with relevant provisions of the Bill, the day which is 12 months after the day

on which that award is made; (2) where the arbitrator makes an award dismissing a reference, the day on which that award is made; (3) where an award is made but is set aside on appeal, the day on which that decision is made; (4) where the arbitration proceedings are abandoned or withdrawn by the parties, the day of that abandonment or withdrawal.

- There is also temporary restriction on winding-up petitions and petitions for bankruptcy orders. Further detail of these provisions are contained at Schedule 3 of the Bill and include the following in relation to a protected rent debt:
 - Where the tenant is a company a landlord is prevented during the “moratorium period” (having the same meaning as stated above) from presenting a petition for the winding up of the company under section 124 of the Insolvency Act 1986 on a ground specified (1) in the case of a registered company, in section 122(1)(f) of that Act, or (2) in the case of an unregistered company, in section 221(5)(b) of that Act.
 - Where the tenant is an individual and owes a landlord a protected rent debt, the landlord may not present a petition for a bankruptcy order against the tenant:
 - a. on a ground specified in section 268(1)(a) or (2) of the Insolvency Act 1986 where the demand referred to in those provisions related to any protected rent debt and was served during the period beginning on 10 November 2021 and ending on the date which the “moratorium period” mentioned above ends;
 - b. on a ground specified in section 268(1)(b) of the Insolvency Act 1986 Act where the judgment or order referred to in that provision related to any protected rent debt and the claim for that debt was issued during the period beginning on 10 November 2021 and ending on the date which the “moratorium period” mentioned above ends.
 - Further, where the tenant is an individual and owes a landlord a protected rent debt and where (1) a court makes a bankruptcy order against the tenant on a petition from the landlord under section 267 of the Insolvency Act 1986; (2) the order was made on or after 10 November 2021 but before the day on which Schedule 3 comes into force; and (3) the order was not one which the court would have made had Schedule 3 been in force at the time, then the court is to be regarded as having had no power to make the order (and, accordingly, the order is to be regarded as void).

Provisions in the Bill for which consent is required

11. The legislative consent of the Senedd would be required for the following provisions:

Clause 9 (to the extent that Clause 9 relates to the extension of the “moratorium period”)

Summary

12. Clause 9 provides that where a landlord and tenant under a business tenancy are not in agreement as to the resolution of the matter of relief from payment of a protected rent debt, then a reference to arbitration may be made by either the landlord or the tenant within the period of six months beginning with the day on which the Bill is passed as an Act.
13. The Secretary of State may extend the six month period by regulations.

Why a Legislative Consent Memorandum (LCM) is required

14. Clause 9 makes provision which directly effects the length of the moratorium period during which a landlord’s ability to use property law remedies in relation to a protected rent debt are restricted by virtue of Clause 23 and Schedule 2 of the Bill (see summaries below). Clause 9, therefore, has mixed competency given that it has a dual effect in terms of (1) providing for the period for making a reference to arbitration on the one hand; and (2) also providing for the length of the moratorium period. In so far as it relates to the latter, Clause 9 does not relate to the matter of arbitration for the purposes of Schedule 7A of GoWA 2006, but instead to property law and economic development which are devolved matters. To that extent Clause 9 requires an LCM pursuant to Standing Order 29 of the Standing Orders of the Senedd.

Clause 23

Summary

15. Clause 23 states that Schedule 2 to the Bill provides:
- (a) for the “moratorium period” (i.e. a period beginning on the day on which the Bill is passed as an Act and ending (1) when arbitration has concluded (where the matter of relief from payment has been referred to arbitration under Part 2 of the Bill); or (2) the period for references to arbitration has ended (where the matter has not been referred to arbitration under the Bill)), a landlord (to whom protected rent debt is owed) is prevented from taking any of the following steps:
- making a debt claim in civil proceedings;

- using the commercial rent arrears recovery power;
 - enforcing a right of re-entry or forfeiture; or
 - using a tenant's deposit;
- (b) retrospective provision in relation to certain debt claims made by a landlord before the start of the moratorium period for the protected rent debt;
- (c) provision relating to the right of the landlord during the moratorium period to appropriate any rent paid by the tenant; and
- (d) retrospective provision in relation to the right of a landlord to appropriate any rent paid by the tenant before the start of the moratorium period.

Why an LCM is required

16. It is considered that this Clause and Schedule 2 relate to property law and fall within the legislative competence of the Senedd. There are further comments made in relation to Schedule 2 below, which apply equally to Clause 23.

Clause 27 (to the extent that Clause relates to matters within the legislative competence of the Senedd)

Summary

17. Clause 27 enables the Secretary of State to make regulations (by statutory instrument) in order to provide for the Bill once passed as an Act of Parliament (apart from Clause 27 itself and Clause 28) to apply again in relation to rent debts under business tenancies affected by closure requirements. The potential remit of such regulations is summarised below.
18. For the above purposes, a business tenancy was affected by a closure requirement if (1) the whole or part of the business carried on at or from the premises comprised in the tenancy, or the whole or part of those premises, was required by regulations to close, and (b) the requirement was imposed as a public health response to the incidence or spread of coronavirus.
19. Clause 27(3) provides that the regulations which may be made by the Secretary of State under Clause 27(1) may do the following:
- specify provisions of the Bill which are not to apply;
 - provide for provisions of the Bill to apply with such modifications as are specified in the regulations;
 - make different provision for different purposes (including different provision for England and for Wales);
 - make incidental, supplemental, consequential, saving or transitional provision (including provision amending or otherwise modifying an Act of Parliament).

20. Clause 27(4) provides that the regulations may not be made unless a draft of the statutory instrument containing them has been laid before and approved by a resolution of each House of Parliament.

Why an LCM is required

21. Clause 27 is considered to be a mixed competency provision because it is reserved in so far as it applies to provisions considered to be reserved, but engages the LCM process to the extent it allows regulations to be made in respect of those provisions that are within the legislative competence of the Senedd (i.e. in relation to the provisions contained at Clause 23, Schedule 2 and (in so far as it relates to the extension of the moratorium period) Clause 9).
22. In so far as Clause 27 applies to Clauses 9, 23 and Schedule 2, an LCM is required for the purposes of Standing Order 29 of the Standing Orders of the Senedd.

Schedule 2

Summary

23. Schedule 2 details the property law restrictions on landlord's during the "moratorium period". Such restrictions include preventing a landlord - (1) making a debt claim in civil proceedings; (2) using the commercial rent arrears recovery power; (3) enforcing a right of re-entry or forfeiture; (4) using a tenant deposit.

Why an LCM is required

24. It is considered that this Clause 23 and Schedule 2 relate to property law and fall within the legislative competence of the Senedd and as such should be included in the LCM pursuant to Standing Order 29 of the Standing Orders of the Senedd.
25. Property law is not listed as a reserved matter in Schedule 7A of GoWA 2006. Further, it is considered that the relevant provisions do not fall within the restriction at Paragraph 3(1) of Schedule 7B GoWA 2006 on the modification of the private law, save for where that modification is for a purpose that does not relate to a reserved matter.
26. The purpose of the provisions as set out in Clause 23 and Schedule 2 are to provide support to, and protect the financial viability of businesses, and consequently protect the economy. Economic Development is not listed as a reserved matter in GoWA 2006, and was in fact listed as a devolved matter under the conferred powers model in GoWA 2006, prior to its amendment by the Wales Act 2017. It follows that the property law provisions above do not engage the restriction at Paragraph 3 of Schedule 7B GoWA 2006. This position is further supported due to the

temporary nature of the provisions in relation to them providing a relatively short term 'solution' to deal with any protected rent debt falling within the remit of the Bill, thus arguably meaning that they are not substantive modifications in any event.

Reasons for making these provisions for Wales in the Commercial Rent (Coronavirus) Bill

27. We follow the principle that primary legislation in devolved areas should be enacted by Senedd Cymru however, there are circumstances where it is sensible and advantageous to seek provisions in UK Parliament Bills which would be within the legislative competence of the Senedd, with the consent of the Senedd.
28. It is our view that the protections for tenants provided for by the Bill should apply in Wales. This is on the basis that, despite the fact there is little evidence to suggest whether or not unpaid rent debt from business tenancies is a large scale issue in Wales, it is our assessment that the principles of the Bill would benefit Welsh business tenants by providing protection for those that have been unable to pay rent due to the restrictions in Wales, would not put Welsh businesses at a disadvantage to those in England and would encourage landlords and tenants to agree a position in respect of any such debt.

Welsh Government position on the Bill as introduced

29. We are broadly content with the principles of the Bill however there are some concerns with the way in which some provisions are currently drafted - these include:
 - Clause 9: Clause 9 provides for the tenant or landlord to make a reference to arbitration within six months from the Bill being passed and the Secretary of State has the power to extend that period. Welsh Ministers ought to be consulted and their consent obtained, before the Secretary of State exercises such powers in relation to Wales.
 - Clause 27: This Clause gives the Secretary of State the power to apply the Bill's provisions in the event of a further wave of coronavirus giving rise to further business closures. It would enable different provision for different purposes so that some of the Bill's provisions can be applied in certain cases or to England and/or Wales only. This could arise for example if it is appropriate to pause a particular remedy or if a particular remedy is not considered appropriate in the circumstances of a particular area. The power would enable incidental, consequential, saving or transitional provision to be made (by the Secretary of State) which includes amending or otherwise modifying an Act of Parliament.

As drafted, Clause 27 means that whilst the Secretary of State is able to adapt the application of the Bill in response to future closure requirements imposed by UK Government on businesses in England

(for example, to feasibly extend the “relevant period”, the “protected period” or the “moratorium period”), the Welsh Ministers have no such flexibility under the Bill to do the same in response to any future closure requirements imposed on businesses in Wales by the Welsh Government. This creates an anomaly and is also inconsistent with the approach taken in terms of the Welsh Ministers being able to extend the relevant period in Wales for the purposes of s.82 of the Coronavirus Act 2020. Welsh Ministers, therefore, ought to have equivalent powers in relation to Wales.

30. For the reasons outlined in paragraph [29] above in relation to Clause 27, I cannot recommend the Senedd gives it consent to the Bill as it is currently drafted and have raised concerns with the UK Government.

Financial implications

31. There are currently no additional financial implications for the Welsh Government or the Senedd as a result of the powers in this bill.

Conclusion

32. In my view it is appropriate to use the UK Commercial Rent (Coronavirus) Bill as a vehicle to take forward protection from forfeiture for Welsh businesses, subject to the Bill as introduced being amended to address my concerns.

Vaughan Gething MS
Minister for Economy
3 December 2021