PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

COMMERCIAL RENT (CORONAVIRUS) BILL

First Sitting

Tuesday 7 December 2021

(Morning)

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not later than

Saturday 11 December 2021

The Committee consisted of the following Members:

Chairs: † Stewart Hosie, Mrs Sheryll Murray

† Benton, Scott *(Blackpool South)* (Con)
† Britcliffe, Sara *(Hyndburn)* (Con)
† Buchan, Felicity *(Kensington)* (Con)
† Cadbury, Ruth *(Brentford and Isleworth)* (Lab)
† Clarkson, Chris *(Heywood and Middleton)* (Con)
† Daly, James *(Bury North)* (Con)
† Dowd, Peter *(Bootle)* (Lab)
† Eastwood, Mark *(Dewsbury)* (Con)
† Fletcher, Colleen *(Coventry North East)* (Lab)
Fuller, Richard *(North East Bedfordshire)* (Con)
† Green, Chris *(Bolton West)* (Con)
Hopkins, Rachel *(Luton South)* (Lab)
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Scully, Paul *(Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy)*
Vaz, Valerie *(Walsall South)* (Lab)
† Whitley, Mick *(Birkenhead)* (Lab)
Whittaker, Craig *(Lord Commissioner of Her Majesty's Treasury)*

Seb Newman, Sarah Ioannou, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 7 December 2021

(Morning)

[Stewart Hosie *in the Chair*]

Commercial Rent (Coronavirus) Bill

9.25 am

The Chair: We are now sitting in public and the proceedings are being broadcast. Before we begin, I have a few announcements. Please switch electronic devices to silent. No food or drink is permitted during sittings of the Committee except for the water provided. Members are expected to wear masks when they are not speaking, in line with current Government guidance and that of the House of Commons Commission. I remind Members that they are asked by the House to have a covid lateral flow test twice a week if coming on to the parliamentary estate. That can be done either at the testing centre in the House or at home. Please also give one another and members of staff space when seated and when entering and leaving the room. *Hansard* colleagues will be grateful if Members could email their speaking notes to hansardnotes@parliament.uk.

We will first consider the programme motion on the amendment paper. We will then consider a motion to enable the reporting of written evidence for publication, and a motion to allow us to deliberate in private about our questions before the oral evidence session. In view of the time available, I hope that we can take those matters formally, without debate.

Ordered,

That—

(1) the Committee shall (in addition to its first meeting at 9.25 am on Tuesday 7 December) meet—

(a) at 2.00 pm on Tuesday 7 December;

(b) at 11.30 am and 2.00 pm on Thursday 9 December;

(c) at 9.25 am and 2.00 pm on Tuesday 14 December;

(d) at 11.30 am and 2.00 pm on Thursday 16 December;

(2) the Committee shall hear oral evidence in accordance with the following Table;

Date	*Time*	*Witness*
Tuesday 7 December	Until no later than 10.10 am	UKHospitality; British Retail Consortium
Tuesday 7 December	Until no later than 10.55 am	British Property Federation; Lightstone Properties
Tuesday 7 December	Until no later than 11.25 am	Chartered Institute of Arbitrators
Tuesday 7 December	Until no later than 3.00 pm	ukactive; Federation of Small Businesses; British Independent Retailers Association

(3) proceedings on consideration of the Bill in Committee shall be taken in the following order: Clauses 1 to 22; Schedule 1; Clause 23; Schedule 2; Clauses 24 to 26; Schedule 3; Clauses 27 to 30; new Clauses; new Schedules; remaining proceedings on the Bill;

(4) the proceedings shall (so far as not previously concluded) be brought to a conclusion at 5.00 pm on Thursday 16 December.—*(Paul Scully.)*

The Chair: The Committee will therefore proceed to line-by-line consideration of the Bill on Thursday at 11.30 am.

Resolved,

That, subject to the discretion of the Chair, any written evidence received by the Committee shall be reported to the House for publication.—*(Paul Scully.)*

The Chair: Copies of written evidence that the Committee receives will be made available in the Committee Room and circulated to Members by email.

Resolved,

That, at this and any subsequent meeting at which oral evidence is to be heard, the Committee shall sit in private until the witnesses are admitted.—*(Paul Scully.)*

The Chair: We will now go into a short private session to discuss lines of questioning.

9.27 am

The Committee deliberated in private.

Examination of Witnesses

Kate Nicholls and Dominic Curran gave evidence.

9.28 am

Q1 The Chair: We are now sitting in public again and the proceedings are being broadcast. Do any Members wish to make a declaration of interests in connection with the Bill? No, so in that case, we will hear evidence from Kate Nicholls OBE, chief executive of UK Hospitality, who will appear in person, and Dominic Curran, property policy adviser at the British Retail Consortium, who will appear by Zoom. I remind Members that questions should be limited to matters within the scope of the Bill, and that we must stick to the timings in the programme motion that the Committee has agreed. For this session we only have until 10.10 am. Would the witnesses introduce themselves for the record? If they have any brief introductory remarks, I would be delighted to hear them. Kate, I will begin with you because you are in the room.

Kate Nicholls: Thank you. I am Kate Nicholls, chief executive of UK Hospitality, which is the national trade body representing hospitality businesses, from single site to multi-chain. We have 700 member companies and 95,000 outlets—about 95% of the market.

The Chair: Do you have any introductory remarks to make about the Bill?

Kate Nicholls: In the interest of brevity and given the time, I will not make any introductory remarks.

The Chair: Thank you. Dominic, will you introduce yourself and make any introductory remarks that you may have?

Dominic Curran: Thank you, Chair. I am Dominic Curran, property policy adviser at the British Retail Consortium. I will follow Kate's lead and incorporate any remarks that I might have made into the evidence that I give.

The Chair: Thank you very much. In that case, I will open up the floor to questions. Seema Malhotra.

Q2 Seema Malhotra (Feltham and Heston) (Lab/Co-op): Thank you very much. We really appreciate you both coming to give evidence today. I will ask Ms Nicholls a question first, if I may. Do you feel that the Government have engaged sufficiently with stakeholders on introducing the Bill, and are there specific changes that you feel may be important in order for it to better achieve its intended outcomes?

Kate Nicholls: I will begin by saying that we have had unprecedented engagement in terms of the preparation for the Bill and all the way through the coronavirus crisis. In terms of when we first started talking to Ministers in the various Departments about the impact on rent and rent debt and the ability of businesses that were forced to close to pay rent debt, the engagement began in March of last year and has continued throughout the process. Certainly over the course of the summer since the intention to legislate was announced, we have had extensive dialogue and consultation meetings with Ministry of Housing, Communities and Local Government and Department for Business, Energy and Industrial Strategy officials.

Q3 Seema Malhotra: Have you had any concerns at all about any definitions in the Bill—for example, the definition of "tenant", which is slightly narrower than definitions in other parts of coronavirus-related legislation? Given your experience in the hospitality sector, what can you share about areas where there may have been difficulties with landlords and tenants achieving an agreement between them?

Kate Nicholls: I do not have any concerns about the definition of tenant in this legislation. I think it is important that this piece of legislation sits within the existing canon of property law. There are some very clearly defined terms and references there, so the definitions do not cause us any degree of concern. An area that we may have wanted greater clarity on—we would hope that that would come forward in the guidance to arbitrators—is around the importance of sharing the burden of outstanding rent debt for those businesses that are covered by the ongoing moratorium and the mandatory arbitration process. It is also important to make sure that we have clarity around affordability and the affordability tests, but that could come through in guidance to arbitrators.

In terms of the challenges that businesses have faced over the course of the pandemic, I have to say that in large part landlords and tenants have worked very closely together to try to get through the crisis and, over the period of time that has been affected, about half to two thirds of landlords and tenants have been able to reach agreement on the treatment of rent debt and ongoing rent liabilities during that period, before the Government introduced legislation. The decision and the announcement of the intention to legislate gave a further nudge to those parties that had outstanding rent debt or which refused to negotiate or come to the table over that period. At that point, about a third of our businesses in hospitality had not got a negotiated settlement. The announcement of legislation pushed that towards resolution, and we have more businesses undergoing negotiations now. It is not all resolved. About 60% of our members say that all their outstanding rent debt is resolved and they have agreement as to how it will be treated, but that still leaves around one in five who have not got any form of negotiated settlement yet, the balance of the two being those that are in the process of negotiating while this legislation is introduced.

We see a small number of businesses that have been directly affected and continue to be directly affected. That is why this legislation is important—because without it, we would see an unsustainable rent debt that would be borne by a small number of tenants and would undoubtedly result in damage to their business and their businesses becoming unviable, or an impact on jobs, growth and investment going forward. The legislation remains vital to be able to provide the extended protection and to provide a negotiated solution for the remaining businesses that are unable to negotiate that themselves.

Q4 Seema Malhotra: I have one final, small question. Do you have any views about the fee structure that may be brought in? Clearly, we want the scheme to be affordable and accessible. Have you been involved in any discussions about whether there should be a cap on the fees or what kind of fee structure there should be for the arbitration process?

Kate Nicholls: That remains an ongoing discussion with officials and Ministers. Clearly, there is an indicative fee level that is set out for an application to the arbitration process, which is consistent with other arbitration schemes. It is reasonable and relatively small scale. Obviously, even if it is a paper process—let alone if it goes to a hearing—there will be considerable additional arbitration costs. We would welcome a cap on that and direction to arbitrators about the treatment of costs that are incurred as part of an arbitration process. Particularly where there is one party who is being deliberately obstructive or who has not co-operated, it would be helpful to have an ability to award costs.

As we go forward and understand in more detail what the arbitration process will look like, and as the guidance to arbitrators comes out, we as the trade association will work to make sure that we have got template systems in place to allow small independent lessees in particular to have access to the resources—the burdens of proof and the benchmarking data—that would help them to make their case at arbitration, so that we can try to keep the costs as low as possible and avoid the need for small businesses in the sector to require professional advice and support. That is where the costs will ratchet up, rather than the entry point costs to arbitration—where people feel they need to have expert witnesses and expert support to be able to build a case. We will work to make sure that we can do whatever we can to help businesses access that in a cost-effective way.

Q5 Seema Malhotra: Mr Curran, do you have any additional comments to make on those areas, and do you feel confident that the scheme as outlined will work in practice?

Dominic Curran: The British Retail Consortium, in the call for evidence that the Government published last spring, did call for a scheme that extended the moratorium to a future date and ringfenced the protection of the arrears that arose during the process, and it called for a process of compulsory arbitration. At least at headline

level and in terms of the core principles of the Bill, this is what we have called for and what our members want. We do welcome it.

We have a slight concern about the definition of a business tenancy. The Bill appears to suggest that it is only a tenancy that is not contracted out of the Landlord and Tenant Act 1954. We have been assured by officials in separate meetings that that is not the intention of the Bill and that actually the Bill covers any tenancy that would be within the scope of the 1954 Act, whether it is contracted out or not, which does give us some comfort. That might be an area you would want to clarify in the course of scrutiny of the Bill.

Engagement with officials and Ministers has been fantastic, actually, throughout the pandemic and through the drafting of the Bill. We have a similar concern to UK Hospitality about the approach that will be taken on viability. Some of the definitions that the Government have said they do not want to enshrine in legislation—which is, I suppose, understandable—will be left to guidance for arbitrators. More than ever, the devil will be in the detail on that. We would want to see what that guidance is as soon as possible to give as much clarity as possible to businesses that might be thinking about using this route.

We would want to make sure that that guidance also directed arbitrators to take as broad a concept of viability and affordability as possible, so that there is enough understanding of a business's circumstances that they could build in an allowance for the uncertainty of future cash flow and turnover, not least because there will be tax rises coming from April onwards when this process will effectively kick in—both higher businesses rates liabilities for many businesses and further tax increases on Business Network International contributions. We would want to see as much certainty in advance as possible and as much understanding of the need for businesses to have a buffer to enable them to trade while all these adverse headwinds are hitting them. We certainly share some of the concerns of UK Hospitality. I think the approach taken on fees is exactly right, as Kate outlined. While there may be a nominal, reasonable amount to enter the arbitration process, we would want the process to be as straightforward as possible, particularly for smaller businesses, which will not have access to in-house or agency consultants to support them through the process, so that it really is open to all and seen as fair and equitable.

Q6 The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy (Paul Scully): Can you give us an idea from the retail perspective of how significant the problem of rent arrears still is?

Dominic Curran: I think it is less of a problem than it is for UK Hospitality. That is not to say that it is not a problem, but I think retail rent collection levels are higher than hospitality, as you would expect, given that the retail sector includes businesses that were allowed to open throughout the pandemic, particularly grocery and pharmacy businesses, so turnover has probably been higher proportionately in retail than it has been for hospitality.

I think it affects a smaller proportion of our sector in terms of the quantum of rent arrears, but it is still significant. It is estimated that there are still several billions of outstanding rent arrears in the retail sector during the pandemic period that the Bill covers, as far as we know. Some of that surveying does not take account of agreements that will have been reached off the books, as it were, or outside the formal rent collection dates, so it is an uncertain figure. When we have spoken to members, and this is an informed guesstimate rather than a thorough survey, it feels like we are at about 80% to 90% of rent having been collected and deals having been done, so it is a very small proportion of the outstanding rent liabilities that is left to be resolved. With each extension of the moratorium every three months, as we have seen over the past year and a half, and particularly with the announcement of this Bill and the process that it proposes, we have seen that percentage chipped away. Ever more landlords and tenants are reaching agreements. While it is a significant problem, it is probably less of a problem than it is for UK Hospitality, but it is still really important that even if businesses do not take advantage of the arbitration process, that process is there—if for no other reason than to help chivvy both landlords and tenants into making new arrangements.

Q7 Paul Scully: The code of practice will remain an important part of the solution. How has it helped over the past few months

Dominic Curran: In all honesty, members report that the code of practice did not aid them particularly. Its voluntary nature was the real sticking point. It was not necessarily the content, which was developed in very deep and meaningful consultation with us, UK Hospitality and other interested parties, but it was the fact that it was voluntary that was the sticking point. Because it was good practice, those who were going to use that approach did so anyway, almost regardless of the code's existence, and those who were not going to use the approach did not feel like the code applied to them, because there were no sanctions on the requirement to negotiate in line with it.

What has helped—in so far as people are aware of it—is the suggestion, and Kate alluded to it, that if you do not negotiate in line with the principles of the previous code and the revised code, there may be some penalty in terms of costs being awarded against you in any subsequent arbitration process. That may help focus minds somewhat.

Q8 Paul Scully: Do you think signifying that we are legislating has helped move things on significantly? Have people priced this in to their discussions now?

Dominic Curran: I would not be able to say significantly, but certainly anecdotally speaking to members, yes, it has helped.

Kate Nicholls: I agree with what Dominic said. The code of practice content was really helpful, and it gave a steer towards negotiations and how you should negotiate in good faith. A mandatory backstop and a legislative backstop are absent. It was limited in its impact in bringing recalcitrant players to the table. When Ministers announced that they were intending to legislate, a third of our businesses still had no negotiations and a large amount of outstanding debt, with no agreement as to how that was to be treated. That has dropped from a third to 20% and it keeps getting chipped away every time we move further forward in the legislative process.

The introduction of the legislative backstop is really important. The code of practice principles will be important to guide discussions for those businesses that fall outside

the legislative solution, because obviously there will be parts of the business that will not be covered by the arbitration process. It is about giving the legislative backstop and the clearer direction towards sharing the pain, coming to a negotiated solution and being able to support what would otherwise be viable businesses.

The ministerial forewords in the legislation and the call for evidence are immeasurably helpful in giving a clear direction that landlords should do whatever they can to support businesses that would otherwise be viable. That was the piece that was missing from the code of practice that gives a clearer steer of the intent of the legislation.

Paul Scully: Fantastic. Thank you very much.

Q9 Ruth Cadbury (Brentford and Isleworth) (Lab): We have had evidence of concerns about the arbitration scheme—for example, whether there should be a single approved arbitration body and about the difference compared with other arbitration schemes in how the agreement is reached as to which arbitrator should be used. There is a concern that they should be legally qualified rather than just businesspeople, because of the nature of complex arbitration processes. There is also a question about confidentiality, which is the norm in such processes but is not specified in the Bill. Mr Curran, do you have any comments on those issues?

Dominic Curran: On the arbitrators who will be used, the Bill says, if I remember it correctly, that the Secretary of State will nominate or choose which arbitrating bodies will be eligible to provide arbitrators to the process, so it remains a bit of an open question. All I would say—having spoken to officials, this point is well understood and well heard—is that given the nature of the discussions that inevitably will be had during the arbitration process, we would prefer to see arbitrators who have a strong accountancy background, perhaps more so, or at least as much as, those who have a property conflict resolution background.

The nature of the process is to look at tenants' accounts and to make sure that their income, liabilities and forecasts for turnover are such that they can pay a relevant and viable proportion of their rent arrears. So rather than it being a dispute over the interpretation of a lease or the duties of a tenant or a landlord, it should really be about understanding the finances of that business and enabling it to pay a proportion of rent between 0% and 100%, while being able to continue to trade viably at the same time. We certainly want to see the accountancy profession well represented in that.

Whether any other trade bodies, beyond those that represent accountants, are given the right to carry out the process by the Secretary of State remains to be seen. If you wanted to get the confidence of businesses that are tenants, however, you would want to make sure that you had accountants rather than property dispute arbitrators fulfilling the duty.

Q10 Ruth Cadbury: Is there anything else to add about the arbitration processes in the Bill?

Dominic Curran: No, I think it is a reasonable set of stages. There is a helpful flowchart in the revised code. The only point I would make is that we have a situation where the arrears, at least in retail, are historical in that they go up only to April 12 or the end of March, given rent payment dates. We want the legislation to be passed as quickly as possible, the arbitrators to be announced as quickly as possible and the process to start sooner rather than later, because it is the uncertainty that is particularly damaging for any business.

Kate Nicholls: I agree with Dominic that the key thing is that we need to have confidence from both parties to be able to and want to use the process to resolve these outstanding matters as rapidly as possible. I am therefore more attracted to using a multiple variety of arbitration bodies, rather than just one, because we need to make sure that there is no delay in appointing arbitrators and their being able to take on the work. I also agree with Dominic that it is hugely important that they have broad-based financial and business understanding and sector-specific—in our case—understanding of the businesses.

This is not necessarily a legal issue or a dispute resolution issue. This is a financial issue that centres on viability and affordability, and therefore an understanding of the nature of the business, the way it operates, the cost of business and the costs coming down the line, as Dominic alluded to, is critical to an understanding of affordability and ability to pay. Those are the key elements that we want to see. Confidentiality, given that you are effectively opening books and sharing financial information, is really important because tenants clearly need confidence that that will be protected. However, I do not see any problems with the Bill as it is currently drafted.

Q11 Sara Britcliffe (Hyndburn) (Con): Ms Nicholls, you touched on templates earlier. What more can we do to make sure that commercial tenants are aware of the arbitration process available to them?

Kate Nicholls: As soon as we have got the legislation through, we need the communication out there as rapidly as possible that this is coming, so that the scope of the Bill, as it goes through the House, is clearly understood. We are doing a wide range of outreach through the trade press and through our own communication channels to cascade that information out, not only through the trade association but more broadly. We are working closely with BEIS and MHCLG to make sure that that communication goes out there.

I think it is then about making sure that we have a communications plan post the Bill being enacted to ensure that there is confidence in the arbitration process and the arbitrators, and that we encourage people to use it. It will then be down to the industry to make this work. We will work flat out to do that, and to facilitate the tools that people need to enter into confidential negotiations, using the code of practice, and then arbitration if they absolutely need to as a last resort. Arbitration should be a matter of last resort in this case. Success for the Bill and the trade associations helping commercial tenants through this will be if a small number of cases actually need to go to arbitration to be resolved.

Q12 Sara Britcliffe: If further restrictions were to come in, what effect would that have on businesses?

Kate Nicholls: Clearly, it affects our ability to pay and it affects viability. It is quite clear, and Ministers have been quite clear about this over the course of the last week, that we now know and understand in full the economic effects of any restrictions on businesses, such as in hospitality, which have been asked to bear a disproportionate burden over the course of

the whole pandemic. It is quite clear that businesses would not survive without further additional support if additional restrictions were imposed. That would be one measure that would be necessary. Your ability to pay your rent on time a quarter in advance is significantly impaired if your ability to trade is restricted. Trading remains quite soft, and consumer confidence remains fragile, so restrictions would have an immediate and significant effect on ability to pay, viability and affordability—all the tests we are talking about. As a minimum, you would need to extend some of these protections going forward.

Sara Britcliffe: Dominic, do you want to add something?

Dominic Curran: Kate said exactly what I would have said; if you just replace "hospitality" with "retail", you are more or less there. The only thing I would add to Kate's comments is that, just as at the peak of the pandemic, with the business rates holiday and restart and reopening grants, when retail and hospitality were able to reopen, you would need to see a package of measures to support businesses in the event of any further restrictions.

Q13 Peter Dowd (Bootle) (Lab): An early-day motion tabled on 27 April 2020 expressed concern—I will not go into the details—about some large pub companies charging rents. You can have a look at it after the meeting. Partly in relation to that, I just want to get a feel of the differences you may have seen between small and large tenant and landlord businesses and how they have handled rent arrears. Have you seen any differences at all?

Kate Nicholls: If you look at the pub-owning businesses and the tied pub companies, there has been a far greater degree of forgiveness of rent among those businesses. It might not be 100% for all of them, but significant rent concessions have been granted throughout the periods of closure, and immediately granted. There has also been a greater willingness to defer rent, allowing rent debt to be accrued and rescheduled over a longer period of time.

If you look at the commercial sector, there has been a variety of different approaches, and there is not anything that really reflects the size of landlord or of tenant businesses in terms of a willingness to negotiate and to reach agreement. Some very small landlord companies have been very willing to give rent holidays, concessions and deferments, and some large commercial companies have been very difficult and intransigent in coming to the table and negotiating, and are taking further enforcement action. It is less to do with the size; it is more the nature of the landlord that has caused the biggest challenges, and the ones that we have found taking enforcement action tend to have been the larger commercial landlords, who have taken a more robust line.

Q14 Seema Malhotra: Could I ask your views—perhaps I will start with Mr Curran—about the 10 November cut-off? We have had some evidence suggesting that there are landlords who are choosing not to engage and are ignoring the code, and who have applied for court order judgments for full arrears to be paid. Do you have a view about whether the Bill should treat all claims equally, whether they were issued pre or post 10 November, and have you seen in practice behaviour that could end up getting around the protections that the legislation is intended to bring in?

Dominic Curran: Thank you very much for asking that. That is a really important issue for our members. We have been asking for action on county court judgments and High Court judgments since October last year. We are very pleased that the Government listened and took account of our concerns to the extent that it was announced alongside the Bill that there would be no ability for landlords to pursue court processes for rent arrears after 10 November, when the Bill was introduced. Unfortunately, that means that any landlord who started those proceedings before 10 November is now in a more advantageous position than any landlord who was perhaps negotiating in line with the code and taking a more reasonable approach with their tenants.

We have the slightly perverse situation that the "more aggressive" landlords are actually better off now than those who might have been taking a longer, more reasonable and more timely approach. I do not see why it should be impossible for there to be a direction to courts to stay any court hearing—county court or High Court—for rent arrears pending the outcome of any arbitration process, or the period in which you could make an arbitration process after the Bill gets Royal Assent. I do not see why it is right that those landlords who have been more aggressive are able to carry on their approach.

We saw that problem early on in the process. The Government rightly and laudably made it effectively impossible in England for landlords to take properties back, to seize goods to the value of the debt, and to effectively start the process of winding up a tenant. That was the rent protection moratorium, which was very welcome and was extended, but it left, as we have been saying since October last year, a gap in the ringfence that unfortunately some landlords sought to exploit very early on. Landlords' lawyers were sending tenants letters demanding rent arrears, and they could effectively impose the costs of that process on to the tenant.

The tenant was therefore liable for not only the rent arrears and any interest due but their landlords' lawyers costs, which some suggested might have been slightly inflated, as well as their own legal costs in defending themselves. One member said to me, "It's a bit like a water running downhill; it will always find a way." That was the situation with CCJs. While it is fantastic that there has been recognition of that loophole, unfortunately it applies only from 10 November. Any CCJ that had not reached a final decision but was in train in the courts should be stayed pending the outcome of the arbitration process.

Q15 Seema Malhotra: Ms Nicholls, have you had similar concerns? I would also be very interested to know whether this has been a subject of discussion in the consultations that you may have had with Government, and what the outcome of that was.

Kate Nicholls: I would echo everything that Dominic has said. CCJs have remained a cause for concern throughout this process, and we have been flagging it as a potential loophole that some landlords are exploiting. The key point about a CCJ is that it seeks to establish that the rent—a debt—is due in full, and the confirmatory judgment that it is due in full cuts across the arbitration process, which talks about a fair sharing, a fair split or

fair dealing with the rent debt, so you are pre-empting that discussion. There are significant effects for the business that has a CCJ against it, in terms of credit rating, so there is an onus on a business to try to resolve the matter and prevent it from being heard in court. So this has always been a major source of concern. What we have seen is landlords—even after the date of the ministerial statement that the Government intended to legislate and about the intent on the code of practice and the arbitration process—tabling and starting CCJ processes. That is a particular cause for concern when the intention and the direction of travel are quite clear.

So I agree with Dominic. The concern is that you have this cut-off date of 10 November, which is when the legislation was published, but we would want to see direction to courts to stay all those proceedings, to avoid unnecessary costs to businesses in having to defend cases that should not be being brought and should be set to one side. I think it would be helpful if that was taken forward. Yes, we have raised that as part of the consultation process and we have raised that repeatedly with Ministers and officials over the course of the last year. As Dominic says, we have been highlighting CCJs since October of last year, but, more importantly, highlighting the continued use of them since spring of this year, when the intention was announced. I understand the challenges of legislating retrospectively, but I think it would be helpful to give direction to the courts, and clarity and certainty around that.

Q16 Seema Malhotra: Thank you for the clarity on that. It certainly seems extraordinary that litigious landlords should in the end be doing better than those who may have acted fairly. That seems to go against all the principles and intentions of the Bill as well. I am sure the Minister has also heard the comments today. Could I ask, then, a specific question? I think you have alluded to this. Would you be supportive of arbitrators being able to also award adverse costs where one side or the other has made the process of reaching agreement more difficult?

Kate Nicholls: Yes, I think that would be helpful to take into account, in terms of both arbitration fees and more general costs, if people are having to incur costs to go to arbitration because of a refusal to negotiate. I think that would be a sensible, pragmatic principle to put into the guidance to arbitrators in order for them to be able to take that into account.

Q17 Seema Malhotra: Mr Curran, you made very helpful comments in relation to the skills and experience that you would expect to see from arbitrators. Have you had the opportunity to share that with officials previously, and has there been any discussion about, perhaps, a small discussion or consultation with you about what the skills and experience should be? It is clear that the arbitrators will be making some critical decisions about the viability of businesses. Do you think this is something that should have some more specific definition and expectations from the Secretary of State prior to the panel and the appointment of arbitrators?

Dominic Curran: We certainly have been making representations to officials since it was clear that this was the direction of travel the Government wanted to go in, and I am sure they have heard loud and clear the points that we have made, which will have been made by UK Hospitality and others. I think they completely understand and appreciate that.

It would probably be helpful, as I think I said earlier, for the Government to set out as far in advance as possible, or as early as possible, who they are thinking of as eligible bodies that could undertake the arbitration process, or whose members could undertake the arbitration process, and perhaps some of the principles that they would like to see for arbitrators—as I said earlier, making sure that there is a strong understanding of accountancy issues, rather than property dispute issues. I am sure that there will be an announcement as soon as the Bill allows the Government the freedom to make that announcement. It will be all set out in secondary legislation. We want people with a strong understanding of the financial issues, rather than property issues.

Q18 Seema Malhotra: Finally, you alluded to the question of viability and how it should be determined. As you mentioned, from April next year the new national insurance hike, or jobs tax, and other increased costs to businesses will come in. How should those extra costs for businesses be considered when determining viability? Some sectors may well recover but will have a slower tail of recovery, particularly with the ongoing uncertainty around covid and covid variants. What is your view of how viability should be assessed, and within that context, the impact of the extra costs to businesses that are coming?

Dominic Curran: The Government were right not to put in a clear definition of viability, because I think it will be different for every business, let alone every sector. However, at the same time, there needs to be reflected in the guidance to arbitrators as broad a definition of viability as possible, or as broad a set of criteria as possible to be taken into account when assessing viability. Not only will there be the known knowns, if you like, of higher business rates and tax costs, but there will still be a great deal of uncertainty. Who knows where we will be in March and April, but consumer confidence still has not returned to the levels we saw pre-pandemic. While in retail, particularly, there were reasonably good sales figures for October and November, those are perhaps reflective of people spreading out their December purchases and so are not necessarily reflective of a higher level of consumer spending in the economy generally. In that context, I think it is wise to build in as much of a buffer as possible within the assessment of viability and affordability, because we are still dealing with a hugely uncertain situation, in terms of the ability of businesses to trade.

19 Seema Malhotra: I ask Ms Nicholls the same question.

Kate Nicholls: The questions that you raise on issues pertinent to future trading, future recovery and the costs coming down the line are more relevant to a discussion about affordability, rather than viability. Go back to the principles and the ministerial foreword to the legislation and the call for evidence, which talk about making sure that businesses that would otherwise be viable, had it not been for covid, are able to continue trading through the covid recovery period. That means that you need a longer timeline. I think it is helpful to look at, in our case, the hospitality strategy and the tourism recovery plan, which talk about the length of

time it will take our businesses to recover. The domestic and international tourism recovery will be in 2023 to 2024, so you need to look at businesses that will be viable over that longer period and will return to a level of viability that they enjoyed previously.

The questions you ask are much more related to ability to pay and affordability, and the key thing we need there is that longer timeline that looks at the sustainability of making this rent debt payment, either in full or in part, at an immediate point or over a longer period. Those are the questions that the arbitrators will look at. For the tenants' businesses, it is about making sure that you can factor in all those costs that are coming through and the recovery. That is where I go back to the templates and the benchmarking that business organisations and trade associations are able to provide, so you can look at what happens to the margin.

What we know has happened over the course of covid and over the course of the recovery period since reopening—the point at which the rent debt is fixed; it is 19 July, in our case—is a significant increase in the costs of doing business. Revenues have not tracked upwards to the same level, and we are not back at 2019 levels, and therefore the margin of profitability has been squeezed quite dramatically. It takes more sales to make a profit and to break even at this point in time, when you are looking at cost-price inflation of about 13% in hospitality businesses and revenues that are still around 75% to 80% of 2019 levels. Those are the factors, and that is why it is so important that the arbitrators who are making those judgments about affordability and ability to pay can take account of and understand all of those issues and plug in the future changes.

As Dominic alluded to, you have got the business rates, which need to be looked at site by site, as well as on a business basis. You have got changes in the VAT rate that are plugged in for hospitality. The VAT rate will change from 12.5% to 20%, so there will be a significant cost increase in tax that will be passed on to consumers. Therefore, you need to be able to look at what that will do to the end-point pricing, the affordability and the ability of those businesses to pay if we are not going to have inflation.

The Chair: Order. I am sorry to cut across you in full flow, but I am afraid we are at the end of the time allocated for these questions. I thank the witnesses very much indeed. We will now prepare for the next panel.

Examination of witnesses

Melanie Leech and Astrid Cruickshank gave evidence.

10.11 am

The Chair: Before we start with the next panel, I remind Members that they are expected to wear masks in Committee when not speaking. We will now hear oral evidence from Melanie Leech CBE, chief executive at the British Property Federation, appearing by Zoom, and Astrid Cruickshank, director of Lightstone Properties, also appearing by Zoom. For this session we have until 10.55 am. Can the witnesses please introduce themselves for the record? If there are any very brief introductory remarks, you are more than welcome to make them.

Melanie Leech: Good morning, everyone. Thank you for inviting me to join you this morning. I am Melanie Leech, chief executive of the British Property Federation, which is a membership organisation for all parts of the property sector in the UK, including owners, agents, developers, investors and advisers. We represent an industry that contributes over £100 billion a year to the economy and employs around 1.2 million people. Chair, I will follow the precedent of earlier witnesses by not making any introductory remarks and saving what I want to say for the questioning.

The Chair: Thank you. Astrid?

Astrid Cruickshank: I am Astrid Cruickshank. Thank you for inviting me to join you. I run a small property company called Lightstone Properties. Our investments are mainly car dealerships, retail and leisure. We own all of our investments jointly with joint venture partners, who are all private individuals. I will also wait for the questions.

The Chair: Thank you very much. Seema Malhotra?

Q20 Seema Malhotra: I want to start by asking Ms Leech some questions in relation to the very helpful briefing note that was sent through to the Committee. I would be keen to understand your view about the scale of the challenge, if you like, in terms of the difficulties in achieving agreement between tenants and landlords. What does your recent survey and research show about the scale of the challenge? Do you feel that all parties are generally acting in good faith?

Melanie Leech: We have surveyed our members at various points over the pandemic, and our latest survey, which represents around 16,000 leases across the whole of the UK and within our membership, shows that around 86% to 87% of those leases are now covered by some form of agreement. We believe that the challenge that is left for the arbitration scheme to solve and tackle is a very small part of the total market.

I must caveat that by saying that one of the challenges in all of this for Government, as much as for anybody trying to work to create solutions and outcomes, is that we do not really know how many commercial leases there are in the UK or in the retail and hospitality sector, which is the hardest hit part of the whole market by the pandemic. Business rates data from the valuation office suggests that there are about 620,000, but they vary immensely from very large property owners and very large tenants to individuals who may not be incorporated but who may have invested their savings or their pension pot in a single property and, similarly, sole traders who may be their tenants.

In any of the data that will be shared with you, it is quite hard to get a handle on what that represents in terms of the totality. There will always be a long tail outside any of the data that we present to you. What I can say is that, from the data that I have seen and that is available to me, we think that the vast majority of leases that we surveyed are now covered by agreements.

Q21 Seema Malhotra: Thank you. To understand more about where they are not covered by agreements and what some of the concerns and behaviours of those involved might be, have you come across examples where the code has been ignored or people have not acted in good faith? What are some of the behaviours that you are seeing?

Melanie Leech: In most cases, we have seen people behaving well and coming together—not always immediately, but over time. Increasingly, there is a recognition that the relationship between a property owner and a tenant is an economic partnership and that the two partners need to work together and navigate a way through together. As I say, that has happened as time has gone on and everyone has seen that this is not a short-term hit, but a long-term challenge and problem that needs to be approached in that way.

We have seen a number of examples that have been quite widely reported of tenants who can afford to pay their rent but choose not to do so or to engage in any way, shape or form with their property owners. How do we know that they can afford to pay? Because we can see the backing that they have. We can see that, increasingly, they are now starting to pay dividends and bonuses to senior management and they are starting to invest in new properties. Our view is that if they can afford to do those things, it is a clear indicator that they are not in such distress that they need support with their rent. When they are not even talking to their property owners, they cannot have that conversation.

Q22 Seema Malhotra: Can I ask a slightly different question about the discussion we had with the previous witnesses? I will put the question to you first, Ms Cruickshank. There needs to be confidence in the arbitration process. What is your view about the skills and experience that the arbitrators should have, and do you have a view about how they should be appointed?

Astrid Cruickshank: For me, the absolute key is that they have good, sound financial knowledge; they are able to look at a set of accounts—both filed and management accounts—really understand them and work out from them how the underlying business is performing.

One of the things that helped me enormously in my negotiations was doing a compare and contrast of my landlord companies, because each of my properties is in a different one. I looked at my net assets and my cash balance, and at my tenants' net assets and their cash balance, and then I used that, where I had a much larger tenant, as a way to explain to them our respective positions. I think it is critical that the arbitrators can understand the financial positions of both parties and the financial impact that their decision could have.

For us, insolvency was a major concern, and it has been throughout, because if you have a company that owns just one property and it has bank debt, and that tenant stops paying, you are insolvent. All you can then do is inject additional cash. As I said, my joint venture partners are all private and have their own businesses that were also affected, so it is a difficult thing for me to then send them a note saying, "Please send me £10,000 by Friday," when I know that their main business is hospitality, for example, and they are struggling themselves.

Melanie Leech: I largely agree with Ms Cruickshank. The key decisions that need to be made are about viability and affordability, which require a financial understanding rather than a particular understanding of property contracts and property leases, so I agree.

Q23 Seema Malhotra: Could I follow up with you, Ms Leech, on the issue of confidence in the system? In your evidence to the Committee you alluded to the Government's impact assessment of arbitration, which suggests that there are some key uncertainties that could threaten how the system will work in practice. You referenced the costs associated with arbitration, the number of cases that might enter, and suitably qualified arbitrators. Could you elaborate on that, and on why there could be scepticism that the system will work effectively in practice?

Melanie Leech: My understanding is that the Government want as few cases as possible to reach the arbitration process, and we share that ambition. We agree that that is right. For us, it is quite hard to see how the same scheme will be accessible both to very small landlords—including private individuals, either themselves or through syndicates and so on, and small companies—and to small tenants, as well as dealing with the very complex nature of the relationship between very large property owners and very large multinational tenant businesses.

The aim is for simplicity and a relatively straightforward and speedy system. I think that is more naturally likely to be able to deal with relatively simple relationships and relatively small-scale sets of books. It is much harder for us to see how larger players will be able to enter the scheme, particularly in a situation where there is either one tenant with multiple landlords, and you are trying to deal with multiple different relationships, or the reverse: multiple tenants with a single landlord. It is really hard to envisage how, in practice, the scheme will be able to cope with those kinds of relationships.

I suspect that it is the Government's intention that those kinds of cases should not come to the arbitration scheme so that it can be kept simple. In that case, such things as accessibility and the cost structure, and people's ability to go into it unsupported by ranks of advisers that they cannot afford to pay for, become much more critical. Ms Cruickshank can probably speak more to that.

Q24 Seema Malhotra: It might be helpful to hear from you both on whether there could be modifications to the scheme, or whether there might need to be a sliding fee structure, or some other clearer ways in which the system could work for smaller as well as for larger and more complex businesses. It would be helpful to understand what modifications to the scheme could allow it to be more flexible, in terms of being accessible and affordable for businesses that might need it.

Astrid Cruickshank: I am pretty pleased with the scheme as it has come forward for landlords of my size. I take on Melanie's points about larger landlords—going back 20 years, I was a fund manager, and it is a completely different situation—but for me, I think the scheme works well. I like the fact that it includes references to ensuring that the landlord remains solvent, which was critical to me. In terms of fees, a sliding scale that is somehow related to the rent seems the easiest way to keep it affordable. I appreciate that there will have to be a minimum, but if it could be somehow linked to the sum in question that could work for us.

The Chair: We have a sound issue, Ms Leech. Hold on one second.

Melanie Leech: Can you hear me now? I will abandon the headphones. Apologies. Our view is that for the larger, more complex relationships, this scheme should

not be the way forward. They should be taken as they would have been before the pandemic. Outside the confines of the ringfencing of this scheme, that will be through the courts. These are, ultimately, legal relationships, and the courts are there to resolve legal disputes. I think the scheme can work well for smaller businesses and less complex relationships, but for those larger, more complex relationships, redress should be through the courts, as it always was and will be again outside the confines of the scheme.

Q25 Paul Scully: I have a similar question to that I asked the last panel. From what you were saying, I think you agree that the legislation will be able to bring certainty to landlords. I know it is not a comfortable position to be in, with intervention in, effectively, a private contract, but it will give you some degree of certainty in the sense that you are pricing it into your thinking moving forward.

Melanie Leech: I think what is really important, not only for the individual property owners in the sector but for the market, the health of the sector and the future—I go back to that £1.2 billion GVA that we create every year—is that certainty that you, the Government, understand the importance of contracts as part of what makes UK real estate an attractive investment proposition for pension funds, saving funds and those institutional long-term investors. When we talk about property owners, that is largely who we are talking about. We are talking about our money as individuals, our pensions and savings. In order to protect them appropriately in these circumstances and to secure the future—particularly thinking about the levelling-up agenda, for example, and the investment that will be needed across the country—it was really important that, as part of this announcement, the Government made clear that, if tenants can afford to pay their rent, they should pay their rent in full, and that this scheme is designed to support and facilitate agreement being reached between tenants that are vulnerable and need support and property owners that can afford to give that support. That builds on what has already happened in the market, where millions of pounds of support has already been provided to the most vulnerable tenants. That underlying principle protects the sanctity of the contract for the long term and protects UK real estate as an investment proposition, which we badly need in this country, while also allowing the outstanding cases in which agreement has not been reached to have some kind of resolution.

Paul Scully: Thank you. Astrid, same question to you.

Astrid Cruickshank: I have to say that I think it is quite unfortunate that we need this system at all. I try to speak to all my tenants. I have four who just point-blank refuse to engage. I knew a finance director prior to covid who was always happy to take my call, so it was somewhat disappointing to find, when trying to speak to them to try to agree a way forward, that they just will not engage. I have to say that I have been able to unlock mine now, so unless there are further lockdowns—fingers crossed—I will not need to avail myself of this. I have stuck with the consultation process because I think it is important that there is a voice from a small landlord. People tend to assume all landlords are enormous, and I wanted to make the point that that is not the case.

Paul Scully: That point is very well made as well. Thank you.

Q26 Mark Eastwood (Dewsbury) (Con): I have a question for Melanie. Some landlords have argued that a binding arbitration system would favour the tenant over the landlord. What is the view of the BPF on that?

Melanie Leech: I hope that a binding arbitration scheme will be a neutral process that allows both sides' views to be heard and a resolution to be reached between those two positions. As I said in response to the Minister, the principles should be that someone who can pay their rent should pay it, but if they can demonstrate that they need support, because they cannot afford to pay their rent, that case should be heard, and a landlord who is able offer support should give it. I think those principles, if they remain in place and underpin the scheme, should lead to a fair outcome.

The other thing we have concerns about—although I think the process is designed to avoid this—is that it is not a case of both parties starting in an equal position. We start from the position that there is a contract that says that the tenant should pay rent, and the tenant is seeking support to set aside that contractual obligation. The evidence base is primarily driven by the tenant's position; I have heard concerns that if a landlord wants to go into the arbitration process, they need evidence from the tenant to underpin their position, and, if the tenant does not provide that evidence, the landlord is at a disadvantage in the process.

The process is designed to deal with that by allowing them to initiate the process from a starting position that says the tenant should pay in full. If the tenant gives evidence to demonstrate why they need a concession, the landlord can consider that and put in a revised proposal before getting to arbitration. As long as that is in place, the landlord need not be disadvantaged by not having the information up front. It is important to recognise that the burden of proof for both viability and affordability is primarily on the tenant; it is only at the stage at which the tenant's case is made, as it were, that the question of whether the landlord can afford to give a concession comes into play, at which time they also need to provide evidence. I think that the Government understand that, and that it is built into the process. That is one of the things that property owners will be nervous about.

Mark Eastwood: Do you want to add anything, Astrid?

Astrid Cruickshank: No, I am happy with that. I think Melanie has covered it.

Q27 Peter Dowd: We all know of circumstances in which tenants and landlords may have played the game; frankly, it would be naive to believe otherwise. In that regard, we are in exceptional circumstances. Members here today are supposed to be wearing masks, for example; we have rules in the House, but people ignore them. We are all trying to play the game in this sort of situation. We are all trying to be responsible.

There is an issue about landlords. I think you accepted that landlords agree with the principle that both landlords and tenants might have to share the burden of rent arrears that built up during the period of coronavirus restrictions, in the light of the examination of evidence. Do you accept the principle that there may have to be a

sharing of the loss for both the tenant and the landlord? Unlike Government Members, I do not think that this is a laughing matter.

Astrid Cruickshank: May I answer that? Our tenants have had varying experiences throughout the pandemic, and some have made more profit during covid than they did the year before, which is down to their ingenuity—pivoting their business and moving more online. I have had at least five tenants file accounts with Companies House that show a higher profit in the first year of covid than the year before. In such a case, there is no loss to share.

Our tenants in hospitality and the gyms that we own have clearly made losses. We have restructured the leases in all such cases. We have put more money into our entities so that we could give them some rent free to help them through the lockdown. We extended the lease, got a break dropped or got some kind of quid pro quo.

Melanie Leech: In my experience, most larger landlords have been working to a sort of grid. They have tried to look at each of their tenants and see the position they are in, and they have prioritised support to help the most needy. The most support has been given to smaller business, independent businesses and businesses that do not have strong financial backing; it has been given overwhelmingly to the hospitality sector, because everyone has recognised that the majority of those businesses do not have the kind of alternative routes that Ms Cruickshank was just talking about. Millions of pounds have been given in rent write-offs already, as reflected in the data that I referenced at the start.

Forgive me if I was not clear in what I said; let me come back to my point. We believe that those tenants who can afford to pay their rent or who cannot demonstrate need should pay their rent in full. Tenants who can demonstrate significant impact on their businesses and have no way of paying should get support from landlords who can afford to give it. We absolutely believe in that principle, because we believe that property owners and their tenants are economic partners and they should be working together.

It is not, by the way, in a property owner's interest to either evict a tenant or have a tenant go bust if they believe they are a viable tenant, because an empty building is generating no rent at all—whether it is a debt or whether it is being paid. It becomes a business rates liability that the property owner then has to pay. It becomes a dead building. When a month's footfall goes from an area, it does not come back. If you have empty buildings, people leave that area and they forget what took them there in the first place. That has an impact on both immediate rent and on the value of the property. It is not in a property owner's interest not to keep tenants in place wherever it is possible to do so.

Q28 Seema Malhotra: I want to ask you specifically about the definition of "business tenancy" in the Bill. There has been some feedback that the definition is different from and narrower than that of the relevant business tenancy in coronavirus legislation. Do you have any views about the definition and, therefore, what could come within the scope of the Bill?

Melanie Leech: I have not had any concerns about that raised with me by my members.

Astrid Cruickshank: I do not have any concerns about that either.

Q29 Seema Malhotra: Thank you. May I ask for your view on whether the hearings should be in public or potentially in private and what the guidance around the arbitration process should be on that?

Astrid Cruickshank: Personally, I would like to see them be in private if I were to take part in one, because I would be disclosing confidential financial information to make the point about my solvency and what I can and cannot offer. Potentially, that would even go as far as who is behind you, who the actual owners are and their ability to inject money or not. I am pleased to see that the Bill says that you would not be required to restructure, so that is good. I feel that in order to make my case properly, I would want to share confidential information. Therefore, I would like it to be private.

Melanie Leech: I would agree with that. By the nature of this, there is going to be a lot of confidential information that is going to be disclosed.

Q30 Seema Malhotra: Both of you say that there might need to be some private hearings. Would that be something you would want to see the arbitrators have some discretion over? How do you see that?

Melanie Leech: I think there are precedents already in the legal system for dealing with sensitive information. The principle is well understood. I am assuming that the Government will look at those precedents to shape how the scheme will work in practice. There are parts that will not be sensitive, and there are parts that will be. Whether it is better to have the whole thing protected or whether it is possible to split the evidence and have it dealt with in two parts, I am not sure.

The other point to make is that some of this may not be heard, as it were. It may well be a paper process at a desk, in which case it does not seem to me that there is any particular need to do anything other than give the documents to the arbitrator in confidence and for them to deal with it. I assume that there will need to be some kind of public statement on the outcome, because I assume that arbitrators will want to see precedents emerging and a pattern of what is happening, particularly if there are multiple situations of different cases with the same tenant or landlord. As I say, I am sure the Government are well aware of these kinds of issues.

Q31 Seema Malhotra: Could I ask one final question? Do you have any views about how the fee system structure should be put in place in order to make the arbitration affordable and accessible? Do you have any views about how that should implemented and whether there should be a cap on arbitration costs? Secondly, where one side might be making the process more difficult, do you think there should be the power to award adverse costs to either party?

Melanie Leech: We have worked quite a lot with various small property owners, although they are not in our membership, over the last 18 months. What I have heard from them is that unless there is a cap at a relatively modest level, the scheme will not be accessible to them. Clearly it is a different matter for larger companies. As for poor behaviour, yes, we absolutely think that if parties do not go into or act through this process in good faith, the arbitrators should be able to award costs against them as part of the outcome.

Astrid Cruickshank: I would agree with that. If the example that I gave you—three tenants just refusing to acknowledge any attempt to communicate with them—ended up in arbitration, it would seem entirely unfair that I should be picking up the costs, when I was prepared to make them an offer but they were not willing to even acknowledge that I had made it or respond in any way.

Q32 Mark Eastwood: Melanie, you mentioned in your introduction that you represent commercial agents, who as you know offer property management services and rent collections. Have you had any feedback from commercial agents or property management sector, or any consultation with them? Are they fairly agreeable to the Bill?

Melanie Leech: We have a lot of the larger ones as part of our membership, so yes, I think so. They act for both property owners and tenants, so I have been able to draw on their advice about what is happening in the market—what the relationships are—as well as some of the data that is published. The remit data in particular is drawn from the evidence that they collect. The one thing that they would say, and that I would say, is that we were disappointed that service charges were brought within the ringfence and the protection, because that is money that has already been spent by property owners and agents in maintaining buildings. The tenants might not be able to use them for their primary business purpose while they have been shut, but the buildings still need to be maintained and kept safe, and those costs have increased in some cases.

I know that some on the tenants' side have suggested that those costs should be reduced because the buildings cannot be occupied. Where we can see that service charges have been reduced, that reduction absolutely should be passed on to tenants—I am not for a minute arguing against that—but where those costs have been incurred, we think that they should be paid and that they should not have been able to benefit from the protection of the ringfencing in the Bill, because that is money that has already been spent by property owners. That is debt that has already been incurred, so we were disappointed by that, and I think the agents would echo that point of view. Beyond that, I think they are supportive of this Bill, as we are.

The Chair: Thank you. Are there any final questions? No. In that case, I thank the witnesses very much for their evidence.

Examination of witness

Lewis Johnston gave evidence.

10.44 am

Q33 The Chair: We will now hear oral evidence from Lewis Johnston, assistant director of policy and external affairs at the Chartered Institute of Arbitrators, who is appearing in person. We have till 11.25 am on this session. Mr Johnston, could you please introduce yourself for the record? As with the previous witnesses, if you have any brief introductory remarks, please make them now.

Lewis Johnston: Thank you, Chair. My name is Lewis Johnston and I am assistant director for policy and external affairs at the Chartered Institute of Arbitrators. We are a professional body for all forms of alternative dispute resolution. We have 18,000 members across the world, operating across all forms of ADR—arbitration, adjudication and mediation—and we have 6,000 members here in the UK. I will keep my introduction as brief as possible, following the previous witnesses.

Q34 Seema Malhotra: Thank you, Mr Johnston, for coming to give evidence today. In relation to the scheme being set up and the assessments that will be made, what key skills and experience will those who participate in the scheme as arbitrators need to have?

Lewis Johnston: In common with some of the previous witnesses, I suggest that financial and accounting expertise will be quite crucial. Obviously, the Bill makes provision for some quite detailed assessments of viability and affordability. There are provisions about the kind of evidence that would have to be given regard to in reaching some of those decisions and making the award, and one of the impressions we got from digesting the Bill was that some of that analysis might require some reasonably in-depth expertise. Within the arbitration profession, there are experts across lots of different fields: there are surveyors, there are property experts who have already acted in property dispute schemes, and there are also financial experts, accountants and so on, but I would say that financing and accounting are probably near the top of the list, given the nature of the decision-making process.

Q35 Seema Malhotra: There has been some discussion about fee structures and the fact that the Secretary of State may be able to make regulations in this area. What would be an appropriate way to have a fee structure that is affordable and accessible?

Lewis Johnston: The essence of this choice is about the balance between prioritising the scheme's affordability and accessibility—obviously, it is meant to be a simple, low-cost way of obtaining redress and getting a resolution—and the need to ensure an adequate supply of suitably qualified arbitrators. As you mentioned in your previous question, some of the required skillsets would be quite specialised, and may be at premium. There are precedent models for this kind of thing. One example, which is not a direct parallel, is the business arbitration service run by the Chartered Institute of Arbitrators, which is designed for relatively low-value disputes—between £5,000 and £100,000. The costs are fixed at £1,250 plus VAT per party, and that includes the appointment fee and the fee for the arbitrator. It may differ in this regard, but there would need to be certainty and transparency, certainly for the parties involved, and one of the benefits of the business arbitration scheme is that there is no chance of the costs spiralling out of control.

The other thing to mention, which may be a pertinent lesson from the business arbitration scheme, is that it is designed to be a documents-only, very simple, quite streamlined process, which will not require representation for either party, because representation can take up quite a good proportion of the costs. It is done with an assumption against having an oral hearing. Obviously, there is always the option of having an oral hearing if the parties require it; that is in the Bill. I think it is correct that that is open to them, but I suggest that the default assumption should be against that and for it being a documents-only process. Given the simplicity of

the kind of cases that are intended to go to the scheme, that would be a good way of managing the costs. I note that the Secretary of State will have the power to introduce either a cap or a sliding scale, and again I emphasise the need for really forthright clarity. It needs to be very simple so people understand how it would apply to different levels of dispute.

Q36 Seema Malhotra: Thank you for that. I want to pick up on a point you made about the number of those who may be qualified and have the relevant skills and experience, which may come forward in further discussions on the detail of the scheme. In your experience, is there sufficient interest for arbitrators to be involved in the scheme? One of the critical success factors will be that enough are involved so that there is not a backlog in dealing with some of the rent arrears cases. What is your view about the level of interest and the sufficiency of supply of arbitrators?

Lewis Johnston: There is a degree of uncertainty around that, based purely on the pipeline of cases. As the previous witnesses alluded to, most of these cases, most of these disputes over the ring-fenced rent, will be or already have been settled through negotiation, so you are talking about a relatively small proportion, although it is still going to be quite a high number. There is a margin of error to take into account. On the supply side, in terms of the level of interest, there are lots of very well qualified arbitrators out there who would be forthcoming to handle cases like this. As I say, there is quite a strong precedent of arbitrators with the requisite level of skills and experience taking on fixed-fee or low-fee cases like this, but again I point out that the low fee would still have to take account of and cover the fact that a certain skillset and investment of time would be required. It is important that quality is not compromised. I think, overall, there is a good level of interest and there would be a healthy pipeline of arbitrators to take these cases.

Q37 Seema Malhotra: What is your view on how arbitrators should be guided in going through the process? What needs to be in place, in terms of guidance or otherwise, to make their role clear, so that there is some consistency? I imagine that confidence will come with clarity and consistency. Do you have any concerns or any message for us about what you want to see in place—what kind of guidance needs to be brought forward? Could I extend that to how assessments might need to be made of viability and ability to pay, with other costs—business rates and other costs, like the jobs tax—that might be coming on stream for businesses as well?

Lewis Johnston: Certainly. I was pleased to see, in clause 21 of the Bill, that guidance will be provided. There are several areas in which guidance might be necessary. The first is something that I know will be coming when applications open for approved bodies to appoint arbitrators, and that is around the precise skillsets needed. We have a reasonably good idea of what that would entail, but a bit more detail would be helpful. For the arbitrators themselves, I think the crux point is around viability and affordability. The Bill and the code of practice go into a bit of detail about the kind of evidence that could be assessed as part of that. I think there should be clarity over exactly how much power the arbitrator will have to be inquisitorial as part of the process, the extent to which they can order discovery and so on, and the kind of evidence they can ask for from the parties.

The Bill is very clear about its intention to balance the interests of tenants and landlords and to maintain the viability of otherwise viable businesses, while also having regard to the solvency of the landlords. There may need to be more guidance, and I appreciate that that might come when cases start to go through the system, about balancing the request of the tenant on what is viable for them with what is consistent with maintaining the solvency of the landlord, when those are at odds. Exactly how that could be decided is a bit of a moot point at this stage.

Q38 Peter Dowd: Partly linked to this one is clause 7(2) and (3). Subsection (2) sets out the requirement for the Secretary of State to approve those bodies suitable to become approved arbitration bodies to carry out the functions under section 8. The disapproval of arbitration bodies is in subsection (3). Have you had any conversations with the Department about the parameters of approved arbitration bodies—who they should be associated with, registration and all the rest—given that there may well be substantial amounts of arbitration going through the process?

Lewis Johnston: That is a good question, and the discussions we have had with the BEIS team initially focused on the question of capacity, because obviously we are talking about quite a large number of cases. The decision to go for more of a market-based approach, with a list of approved bodies rather than a single monolithic provider, was probably the right one. I appreciate that the Bill is taking more of a principles-based approach than saying that the arbitrators have to be accredited in a certain way. It is more about having the competency and impartiality.

Each of the bodies, if they are to be approved, will have to meet the criteria in one way or another. Speaking just for the Chartered Institute of Arbitrators, all our members are bound by our code of ethical and professional conduct, which covers issues such as integrity and fairness, disclosing conflicts of interest, ensuring that you are competent to take on the appointments you are given, trust and confidence in the process, and transparency around fees. That would address a lot of things.

Also, anyone that we were to appoint—should we become one of those approved suppliers—would have to make clear and sign a declaration at the outset, which disclosed any potential conflicts of interests or anything that might be perceived as such, as well as declaring they were competent and had the capacity to take on these cases. That would mitigate the risk of them having to resign or of delays in processing the case.

Q39 Peter Dowd: Would you welcome further, more detailed discussions with the Department on these matters? It is important that we try to get this right, because we do not want to create more problems down the line. I think we have been here before in relation to those people who are regulated—whether that be social workers, doctors or nurses—so it is important that we get that right. Would you welcome more significant or more substantive discussions with the Department about how this should pan out?

Lewis Johnston: I would welcome more detail on exactly what the approval criteria would be and what the role of the approved suppliers under the scheme would be. There has been a good degree of engagement from the Department so far, but what the criteria would be has not yet been published. However, I know that they are coming shortly. That will be the crucial point in terms of assessing what the role of these appointing arbitration bodies would be.

Q40 Paul Scully: In the last sitting, Melanie Leech expressed concern about having a system like this set up for small landlord and tenant issues, compared with some of the bigger and more complex ones. How do you think arbitration services could cater for both sides?

Lewis Johnston: I understand the intention is that it would be the simpler, perhaps smaller party cases going through to the scheme, and I think that is correct. Given that the emphasis is on simplicity, accessibility and managing the costs, any scheme that had to accommodate the intricate, large-scale cases would encounter some problems in terms of balancing the two. Again, I point to precedents with things like the business arbitration scheme. It is difficult at this point to assess exactly what the appropriate fee level would be, because you would have to properly assess exactly how much work will be involved in each case—obviously not until they had come through—but I think that in the simpler cases that could be set at a level that was affordable. As some of Melanie's members had made clear, it needed to be at quite a modest level for it to be accessible to them.

In terms of how the arbitration bodies would manage a variation in the complexity of cases, even it was perhaps the smaller, more simpler end of the spectrum, there will still be variation. We would maintain—this would apply to other bodies as well—lists and databases of arbitrators who would be suitable. Based on the nature of the case that came through, there would be a shortlist drawn up based on who had the requisite skill sets to handle that case. The pool that we would draw from should be broad enough to be able to cater to different types of cases and different sectors and so on.

Q41 Sara Britcliffe: In the simple case that you talked about, from your perspective what is the likely cost of that, including the legal fees of the tenants and landlords?

Lewis Johnston: I would not want to commit to exactly what it would involve until we got to that stage, but I refer again to the precedent set by our own business arbitration service, which is designed to produce an award within 90 days. It is meant to be documents only, and that is £1,250 plus VAT per party. If it was a very straightforward case—if it was documents only and it followed the same processes—I imagine it could be in the same ballpark in terms of fee level. The best thing would be to have real clarity around what the fees were and how they apply to each case, and for there to be perhaps an assumption against having a hearing, and, if there was a hearing to be requested, very clear guidance on what fee that would entail. Perhaps for a half-day hearing, a certain level. For the business arbitration scheme, there is an option for that. It is £500 for a half-day hearing. Again, the assumption is that the cost could be fixed at those initial costs per party, and that a hearing would not be necessary. It would be documents only.

Q42 Sara Britcliffe: Can I clarify that, in answer to a previous question, you stated that you would want documents only?

Lewis Johnston: I think so. I think that would be the assumption. I think it is right that there is an option to go for a hearing if it is requested, but I think that the default assumption should be that it is documents only. That is most in keeping with the intention and aim of the Bill, which is to have very clear, rapid-fire means of redress.

Q43 The Chair: Given that there are no further questions and we are not pressed for time, Lewis, do you have any other observations that have not been drawn out in the questions that you have received so far?

Lewis Johnston: No, that has covered most of it. The Chartered Institute of Arbitrators will be making a written submission to the Committee later this week as well, so that might clarify or refine some of the points that I have raised. We are very pleased to have been invited to give evidence here today, and we will be pleased to engage with the Committee as you continue with the work of refining exactly what the scheme and the process will be.

The Chair: Thank you very much for your evidence.

Ordered, That further consideration be now adjourned.—*(Felicity Buchan.)*

11.6 am

Adjourned till this day at Two o'clock.