PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

COMMERCIAL RENT (CORONAVIRUS) BILL

Second Sitting

Tuesday 7 December 2021

(Afternoon)

CONTENTS

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

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

(Afternoon)

[Stewart Hosie *in the Chair*]

Commercial Rent (Coronavirus) Bill

2 pm

The Committee deliberated in private.

Examination of witnesses

Jack Shakespeare, Andrew Goodacre and Martin McTague gave evidence.

2.1 pm

The Chair: Good afternoon, gentlemen. We will now hear oral evidence from Jack Shakespeare, director of research, policy and communications at UK Active, Andrew Goodacre, chief executive officer of the British Independent Retailers Association, and Martin McTague, national vice chair of the Federation of Small Businesses. We have until 3 pm for this session. Could I ask you to introduce yourselves? If you have any brief remarks to make, please do so now.

Jack Shakespeare: My name is Jack Shakespeare. I am the director of research, policy and communications at UK Active. We are the membership body for the health and fitness sector.

Andrew Goodacre: I am Andrew Goodacre, chief executive officer of the British Independent Retailers Association. We have 4,000 members throughout the UK.

Martin McTague: I am Martin McTague, vice chair of the Federation of Small Businesses. We have 150,000 members across all four nations of the UK.

The Chair: Thank you. Mick Whitley.

Mick Whitley (Birkenhead) (Lab): Good afternoon, panel. I think we met last week, didn't we?

Andrew Goodacre: We did.

Q44 Mick Whitley: Many businesses continue to experience significant covid-related disruption to their businesses, even following the end of the lockdown restrictions. Do you think that the protected period for rent debts should be extended, and if so, for how long?

Andrew Goodacre: The period we have is about right, actually. Part of the challenge is in scope of what is covered here. Some businesses that have been able to operate throughout the pandemic—essential businesses—but have been in the wrong location have suffered badly with trade. That is still ongoing. Even though businesses are open, if they are in a location near a travel hub or something, footfall will be considerably lower than they are used to—certainly pre-pandemic levels. There is an argument that those businesses are not being protected enough because of that.

Q45 Mick Whitley: Do other witnesses have anything to add?

Jack Shakespeare: Absolutely. I would echo that. The extension and the timescale seem about right; that is the message we are getting from our members. Each sector has its own characteristics. Our sector has a unique recovery curve, in that it is largely subscription focused. Recovery does not cover the cost of service straight away. That impacts recovery. The extended period of time is welcome. I am sure that we will come back to it today, but a guiding principle that needs to sit at the heart of this process is the message of sharing the burden. This is clearly a collective problem that needs a collective solution.

Martin McTague: I think it was about right when we first started discussing this, but omicron has changed all that. It is clear that we are now into a lot more uncertainty. It would be nice to have the flexibility to be able to move that date to respond to what seems to be an ever-changing virus.

Q46 Seema Malhotra (Feltham and Heston) (Lab/Co-op): Thank you for coming in to give evidence. Perhaps I could start with Mr McTague. On the 10 November cut-off date, we have had some evidence of concerns about landlords who have not engaged with their tenants, and who may have ignored the code and started to apply for court judgments to pay the full rental arrears. Those who started proceedings before 10 November could be in a more advantageous position than those who played it fair. Have you come across that at all through the FSB, and what is your view about whether there should be a retrospective change to the 10 November date?

Martin McTague: Around the beginning of November, most landlord-tenant arrangements—probably close to 90%—had settled, but the hard-core 10% had got into an acrimonious stand-off. We engaged with the Department for Business, Energy and Industrial Strategy to try to find a way in which those more acrimonious relationships could be dealt with. As for the cut-off date, I realise that it will leave some people on the wrong side of it, but I think that it was about right when it was chosen.

Andrew Goodacre: On the cut-off date, you have to choose a date. There is never a good time, from that point of view. It comes back to an understanding of what negotiations were taking place beforehand, and how they were being managed. Martin referred to a hard-core 10%—we are probably hearing about 15% to 20%. There is a hard core of people on both sides who seem unwilling to reach a negotiation. It would be good to include at the arbitration point an insight into what negotiations and actions were taking place beforehand, and whether those actions were reasonable in the circumstances.

The arbitrator has to decide how to resolve the debt issue. We have heard stories of landlords seeking side agreements or even being willing to write off a level of debt if the tenant gave up their secured tenancy. That kind of negotiation is going on as well. Is that fair? I do not know, because the security may be worth a lot more than half the rental debt, but it is not explained properly. If evidence of what was being said before the ninth can be put forward as part of the arbitration process, that may be a happy halfway house.

Q47 Seema Malhotra: That is interesting, because some other witnesses have suggested that they would want to go further and see a greater incentive to use the

scheme and to be treated more fairly within it. The more litigious landlords seem to do better for acting less fairly.

Andrew Goodacre: Most of our members deal with smaller landlords, who are possibly not quite so difficult.

Q48 Seema Malhotra: You may not have come across the same ones. Mr Shakespeare?

Jack Shakespeare: I would support that notion. I think this comes in two parts. I think it comes back to that notion of sharing the burden, and we think the process of county court judgments does not chime with the spirit of the initial code of practice and, obviously, the revised one. I also think that a ringfence should be just that and should not have holes in it. It feels like CCJs are a hole in the ringfence. I would—we would—support the notion that the CCJs process prior to 10 November should be looked at and should be included in protection.

Q49 Seema Malhotra: Do you have any concerns or suggestions about what the skills and experience of arbitrators should be? That is a slightly open question at the moment. What perspectives do you have? What experience do you think they would need to have in order to carry out the function effectively?

Andrew Goodacre: Looking at what their task is, I would expect arbitrators to have knowledge of leases and the legality around that side, but the biggest judgment that they probably have to make is one before the process starts: is the business viable? So they would need to have a good insight into business. Not all retail businesses operate on the same business model and the same margins and with the same overheads. If the first crunch question is whether the business is viable, because only viable businesses can go to arbitration, they really need to understand business knowledge and business expectations and profitabilities.

Martin McTague: I would endorse that. I think, in this particular form of arbitration, what you are looking for is to protect the interests of both parties, and clearly, if it is not a viable business, that undermines the position and enhances or makes the risk worse for the landlord, but I think most arbitrators are able to take evidence on that kind of issue anyway.

Q50 Seema Malhotra: That is helpful. Mr Shakespeare, I wonder whether you could come back on that point. I would also be interested in your view about how much arbitrators should be able to charge and what would be a fair, accessible and affordable system, perhaps for those whom you have experience of and their situations.

Jack Shakespeare: To go back to the first question, I would endorse the responses from my fellow panellists. For the first question, around viability, that business sense is utterly crucial. The first arbitration case is very important, because it is going potentially to set a precedent, so of course it is incredibly important that these people are chosen correctly.

With regard to cost, I think my answer would be "low", for understandable reasons. Just because of the wide scope and the differences in size of the businesses that are included in the scope, I think the cost needs to be low. I think that there needs to be an opportunity or option for fees to be re-awarded in the face of bad practice or ineffective decision making. So my answer would be "low", but of course the affordability of it is down to each business.

Q51 Seema Malhotra: Was that alluding to adverse costs as well in cases of making it difficult?

Jack Shakespeare: Yes.

Andrew Goodacre: On the cost side, I agree with what Jack is saying: the lower the better. If it is too high, it becomes a barrier to the business, the tenant initiating the action, because it is payable on initiating the arbitration, as I understand it. If a landlord thinks that it is prohibitive to the tenant, the landlord could well play the long game and keep waiting and waiting, because if you do not get the application within six months of the Act being passed, you have missed the opportunity for arbitration. It could well be that if it is too much of a barrier and too high for the individual tenant, they miss that opportunity, so it needs to be kept as low as possible.

Martin McTague: The reason why we are trying to avoid legal action is that when there is an asymmetry of power, when the landlord can use the muscle that they have to try to bully their tenant, you get unfair solutions. I think the principle must be that the cost is as low as possible. I would not want to put a number on that, but I think it needs to be as low as possible.

Q52 Seema Malhotra: I have a final, very quick question. Do you have any concerns that any part of the scheme would make it less likely to work, not in theory but in practice?

Martin McTague: My biggest concern is the cut-off date. Given that we are now entering another period of uncertainty, if we ended up with squeeze, where cases were being brushed or pressure being put on because we were getting close to that cut-off date, that could lead to some unfair outcomes.

Q53 Seema Malhotra: Do you mean the six months after the start?

Martin McTague: Yes. In other words, that is a hard cut-off. We all know that the current situation is changing rapidly.

Q54 Seema Malhotra: I think it is important—in the context of increased business costs next April, whether from business rates or the jobs tax—that your view is that those six months may not be long enough to have the scheme in place.

Martin McTague: We are seeing a lot of retail businesses hanging on by their fingernails, hoping for the best in this last quarter, and trying to get through the Christmas period, which is often make or break for them. If they get even a partial success, and start creeping towards a solution at the end of spring next year, it would be disastrous to try to drive those businesses under when they have survived all the trials and tribulations of covid so far.

Andrew Goodacre: I think the way the code of practice and the Bill have been put together is not bad, and they really try to cover all eventualities. The cost element of arbitration is a barrier to businesses, and puts the legislation at risk. The viability question—how you determine viability, and the clarity and transparency around that—needs to be addressed early on.

I know that we have asked this question and been given the answer, but there needs to be absolute clarity that the Bill applies to all businesses in scope, including those that are contracted out of the Landlord and Tenant Act 1985. That was one of the earlier questions that came back from some members, and we were told that it does include all those contracted-out businesses, but we need to be clear on that, because we do not want to end up with an unnecessarily ambiguous area that leads to legal argument.

There are also tenancy-at-will situations. When negotiations on a new lease are ongoing but have not been resolved during the closure period—the protected period—the tenant is operating on a tenancy at will. Arguably, there is no guarantee that that tenancy at will is covered by the Bill. Again, that will need clarity and understanding.

Martin McTague: There is another point that I should have raised. A lot of supply-chain businesses supply those that are directly affected and covered by the scope of the Bill—they have been seriously affected by what has gone on so far. If you take a retailer, for example, virtually everybody who is supplying that retailer has gone through the same sort of trauma as the retailer, but none of them will be protected in the same way.

Jack Shakespeare: I echo and endorse Martin's point: one of the prospective risks is the uncertainty around the next few months. It feels like a bit of a "hold your breath" moment. You could talk about it being make or break for our sector and for different characteristics across sectors. A make or break part of the year for the gyms, pools and leisure centres sector is January to March. That is a hugely important quarter of the year, and it rolls into that time period. I would just echo that: the uncertainty of the next few months is a major risk.

Q55 Peter Dowd (Bootle) (Lab): I want to tease out a little bit more on the extent of the impact on the Landlord and Tenant Act 1954. How wide is it? How many businesses are we talking about?

Andrew Goodacre: Contracted out?

Peter Dowd: Yes.

Andrew Goodacre: I would not know the percentages. Over the years, people have come out of it, sometimes incentivised by the landlord because it is preferential for the landlord to have the tenant contracted out. This is not my absolute field of expertise, but there is a wider view that the Landlord and Tenant Act could be rewritten as well in the near future, to reflect a more modern business environment. There are concerns about that Act in general.

On the issue of whether a business is in or not, we are told that everyone is in—it does not matter. The tenancy at will is slightly different. That is where a temporary tenancy agreement is created because the negotiation for a new one has not been completed, but a tenant is given the opportunity to operate at will until such time as a new one is agreed. A tenancy at will gives no protection whatsoever to either party. Either person could walk away at a week's notice—at very short notice.

Q56 Peter Dowd: Do you think that is a significant lacuna?

Andrew Goodacre: We need to be clear that the Bill is designed, I believe, to protect businesses that were mandated to close in the timeframe of March '20 to, depending on the sector, August '21, and it should not matter whether that business is contracted out under the Landlord and Tenant Act—we are told it does not matter—and it should not matter if they have, through circumstances during that timeframe, ended up on a tenancy at will, simply because they could not agree their new tenancy under normal circumstances. Those are the areas where we want to make sure that the legal loopholes do not exist for highly paid lawyers to exploit.

Q57 Peter Dowd: I am sure the Minister is listening to that. I think he has clearly got that tagged.

Andrew Goodacre: I am sure he has. What we have been told is absolutely correct and reassuring. We just want to see it written with absolute clarity.

Peter Dowd: I am sure the Minister has got that tagged and will be paying due attention to it.

The Chair: I think for today, Mr Dowd, we will just ask the witnesses questions.

Q58 Peter Dowd: Thank you, Chair. In terms of the sectors that you think are most indebted, how are they currently coping? What are those sectors? We have touched on that a bit today. Which are the sectors that are currently most in debt? How are they managing?

Martin McTague: There is a very clear dividing line. The retail, hospitality and leisure sectors are the ones most badly damaged by this whole crisis. It also reflects the point I made earlier. There are extended supply chains within those sectors as well, which have also been affected. In terms of the top of the supply pyramid, retail, hospitality and leisure are without doubt the most affected sectors.

Q59 Peter Dowd: In terms of arbitration and the process available to commercial tenants, what can be done to ensure that they are aware of that process? We have lots of businesses under stress and strain, which we all understand—the Government understand that; we understand that. What do we need to do to get that message out and to give some reassurance?

Martin McTague: You will probably anticipate my first answer, which is that trade bodies are probably a good way of getting the message out. I think lawyers as well. The first thing that most people in this situation will do is to refer to their lawyer. There has to be a clear duty on lawyers to explain that arbitration is an option that they can take up.

In our experience, the smaller businesses tend to respond better to social media, so a BEIS publicity campaign based on social media contacts. The other obvious one is local government, which could do a lot to get this message back to retailers, especially in their area.

Jack Shakespeare: I support that, absolutely. As a trade body, engagement from the Department to us has been very positive. That communication has been great. We have been able to disseminate as much information as we could accurately and efficiently. I would echo that starting point. Again, use local government, lawyers and social media, recognise the characteristics across each sector and work with trade bodies to get the right messages across. They are obviously the experts in talking to those different businesses.

Andrew Goodacre: The communications have been covered well by my colleagues. To go back to your earlier point on what people have done to get through the crisis, we only do retail businesses, and they worked really hard as always. They have shown great creativity and determination, but one telling fact is that their level of debt has increased five times, by taking out bounce back loans, for instance. The larger retailers would have taken out a business interruption loan.

There was some research done in the summer of this year that suggested that the debt in independent businesses —which is not the usual business model; they do not normally do debt—is five times higher. It is estimated at about £2.2 billion. That has to be repaid. Then you have got rental debt on top of that. It leads back to this argument of viability. When you are assessing a business, you take a cold, hard look at its balance sheet. If a small business has a business loan or rental debt on there—and you have to counter the liability—before you know it, it is technically balance-sheet insolvent. It still may be viable as an operation, but there is a technical balance-sheet insolvency because of the level of liability it is are carrying, which it would not normally be carrying.

Whether it is rental or business loan debt, debt is a problem. Businesses have had to do it because they needed to survive. They wanted to trade and give themselves the chance of re-establishing themselves. Many are doing that. If we get a good Christmas, hopefully they can look to '22 with some positivity.

Q60 The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy (Paul Scully): We talked a bit about the scale of the problem. Government signalled that we were going to legislate in this area. Can you give us an idea of what that did? Did it kick-start conversations? Did you see results that are now priced into the debate between landlords and tenants? Do you have any reflections on that?

Martin McTague: I saw a definite change in the atmosphere. I know the Minister will be aware of this, but I think there was some doubt as to whether you, as a Department, would go this far. Free-market instincts would suggest that you would not. As soon as you had made it clear that compulsory arbitration was going to play a part, the whole atmosphere in these negotiations seemed to change. People entered into much more constructive arrangements. Some of them completely avoided or did not want to go down an arbitration route and settle on payment terms, which I do not think they would have done prior to that decision, so I think it has had a wholly positive impact.

Andrew Goodacre: I would say that when we first started looking at the problem in 2020, it was 40% to 50% that had experienced challenges with trying to negotiate something with landlords. I said earlier that we are down to a hard-core 15%—maybe 20%, but it is probably nearer to 15%. There is entrenchment on both sides at that point. The message about sharing a burden that Jack referred to earlier is really crucial in that. People on both sides, where they are entrenched, realise that they stand the risk of losing something from that position. People are beginning to come to it now.

If I have a concern, it is about things I have been hearing from tenants who are saying that landlords are trying to leverage negotiations before getting to arbitration. I mentioned asking people to give up security, or even saying, "We'll write off part of that debt, but we're going to increase your overall rent up to this level." They are using a bit of power, fear and the realisation that cash is king to the business in order to influence a decision that may not be in the best interests of the business in the longer term, but in the short term looks like a natural solution. Some of that may be right. I am not saying that it is not, but there is an indication of some of those behaviours starting to manifest.

Jack Shakespeare: To endorse that, I think it has changed the atmosphere. It has certainly turbo-charged the conversations. It goes back to a few things. The ability to disseminate the information is really important. You have picked up on the clarity before. How that comes out through trade bodies and goes out through lawyers and local government is really important. That will maintain the pace of conversations. It is really important that it does not drop, so that people access that information. The overriding sense of uncertainty looking ahead is a massive dynamic right now, but holistically it has really changed the atmosphere and advanced the conversations.

Q61 Paul Scully: To follow up on your point, Martin, about businesses that are not within the scope, it is a really difficult balance to get right without swamping the system such that it is not satisfactory for anybody. Obviously the code of practice remains there for all businesses. What are your reflections on how the code has worked, whether the changes that have been made recently improved it, and which other areas would be useful within it?

Martin McTague: The code of practice has worked, in that it has set an expected behaviour and the way in which the parties should relate to each other. I accept completely that if you tried to expand the scope dramatically it would damage the impact, but clearly it does not stop with the retailer; a lot of people are impacted by this.

Q62 Paul Scully: Jack and Andrew, do you have any other reflections on the code?

Andrew Goodacre: This code is so much stronger than the previous code in 2020. We are moving in the right direction. It links into your earlier question about changing behaviours, and the code has been instrumental in that. On what would enhance the code, I appreciate that the information is not entirely available yet, but it is about who will be arbitrating, the costs of that arbitration and the decisions around the viability, so that people get to know as early as possible what they need to do to submit, if they feel that they will end up in that situation. Preparing for arbitration will be quite scary to some people—the mere thought of putting all that information together. As soon as we can release what they need to have recorded and prepared, the earlier they can start doing it. You do not want to try to collate all the information with two months to go on the process.

Jack Shakespeare: I have nothing to add to that.

Q63 Mick Whitley: Are you concerned that the potential costs of arbitration might put business tenants, especially small and independent businesses, off engaging in the arbitration process, thereby leading to their closure?

Martin McTague: It might do, but the alternative is that they would have to take legal action, which is likely to be much more expensive and protracted. It is not an ideal solution, but it is certainly a step in the right direction.

Andrew Goodacre: Yes, it could do. If you were looking at costs in the hundreds instead of the thousands that would obviously be better. You have to put it in context. As I think one of your colleagues said, next year an awful lot of cost increases are coming through to business, whether it is the national minimum wage or energy costs, which have tripled for many businesses. Suddenly, whether it is £1,000 or £2,000, it looks like a lot of money. That may lead to a better negotiation and solution before you get to arbitration, but it plays to the landlord to play the waiting game at that point in terms of initiating the arbitration. That is the threat of it.

Jack Shakespeare: To go back to one of Andrew's last points, as much foresight and clarity on that up front would be beneficial, so that people can make informed decisions on how they go forward.

The Chair: Given that there are no further questions, I thank the witnesses for their evidence. That brings us to the end of today's oral evidence session. The Committee will meet again on Thursday at 11.30 am in Committee Room 10 to begin line-by-line consideration of the Bill.

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

2.36 pm

Adjourned till Thursday 9 December at half-past Eleven o'clock.

Written evidence reported to the House

CRCB01 Cineworld and Picturehouse Cinemas

CRCB02 Sir Paul Morgan, Arbitrator and Mediator, Wilberforce Chambers, Lincoln's Inn, London

CRCB03 Bill Chandler, Hill Dickinson LLP solicitors