



A presentation by

HILL DICKINSON

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Retail leases update 2021

15 September 2021

Bill Chandler

Hill Dickinson LLP

HILL DICKINSON

SHOP AGENTS

SOCIETY

Welcome

The screenshot shows the Hill Dickinson website's retail sector page. The browser address bar displays <https://www.hilldickinson.com/sectors/retail>. The navigation menu includes: Expertise, Our people, Offices, About us, Careers, Insights, Events, Media, and a Contact Us button with a 24/7 indicator. The main content area features a blue banner with the text: "A legal solution from experts who understand the issues facing the retail sector". Below this, the word "Retail" is centered in a large font. Underneath, there is a paragraph of text: "Get added-value solutions that can save you time and money, minimise financial risk and protect and enhance your reputation - especially when you opt for a single, multi-disciplinary source for all your legal needs." followed by another paragraph: "Whether you are a retailer, manufacturer, haulier or financier, our experts will provide commercial, solutions-orientated advice to meet your specific requirements."

The screenshot shows the Hill Dickinson website's profile page for Bill Chandler. The browser address bar displays <https://www.hilldickinson.com/people/bill-chandler>. The navigation menu is identical to the previous page. The main content area features a large portrait of Bill Chandler on the right. On the left, there is a blue information box containing the following details: "Bill Chandler", "Legal Director", phone number "+44 (0)151 600 8725", email "bill.chandler@hilldickinson.com", and location "Liverpool". Below this, a short bio reads: "Bill is the professional support lawyer to the national property and construction team, providing technical legal support to the team and its clients." There is also an "in" logo and a "Download card" button.

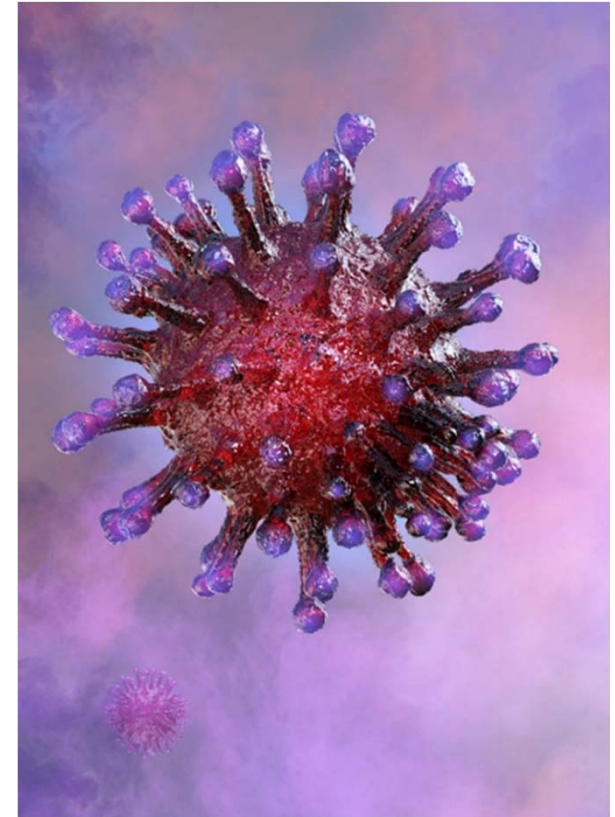
A game of 2 halves

- COVID-19
 - Latest position on Covid rent arrears
 - Ringfencing proposals
 - Impact on lease renewals
- Everything else
 - Tenant insolvency
 - Updates from last time
 - Landlord and Tenant Act 1954
 - Break clauses
 - Use classes
 - VAT



COVID-19 – the story so far

- Business tenants protected from:
 - Forfeiture (non-payment of rent)
 - Commercial Rent Arrears Recovery (CRAR)
 - Statutory demands/winding up
- Were due to expire on 30 June 2021
- Covid-19 Code of Practice



Latest developments

- Covid rent arrears will be 'ringfenced'
- Legally binding arbitration if parties can't reach agreement
- Forfeiture and CRAR extended to 25 March 2022*
- Stat demands/winding up extended until 30 September 2021*
- Wales taking a different path?

Ministry of Housing,
Communities &
Local Government

Policy paper
**Supporting businesses with commercial
rent debts: policy statement**
Published 4 August 2021

Contents

1. Introduction
2. Aims
3. Support to date
4. Rent arrears
5. Call for evidence
6. Code of Practice
7. Binding arbitration
8. Extension to the existing measures
9. Territorial extent

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1. Introduction

The government will legislate to ringfence rent debt accrued during the pandemic by businesses affected by enforced closures and set out a process of binding arbitration to be undertaken between landlords and tenants.

This is to be used as a last resort, after bilateral negotiations have been undertaken and only where landlords and tenants cannot otherwise come to a resolution. Ahead of the system being put in place, we will publish the principles which we will seek to put into legislation in a revised Code of Practice, to allow landlords and tenants time to negotiate on that basis.

Section 82 of the Coronavirus Act 2020, which prevents landlords of commercial properties from being able to evict tenants for the non-payment of rent, will continue until 25 March 2022, unless legislation is passed ahead of this, in order to provide sufficient time for this new process to be put in place.

Government is clear that those tenants who have not been affected by closures and who have the means to pay, should pay. Additionally, government expects commercial tenants to begin paying rent as per their lease from the point of restrictions being lifted for their sector.

As soon as legislation is passed, the commercial tenant protection measures will only apply to ringfenced arrears. This includes rent debt accrued from March 2020 by commercial tenants affected by COVID-19 business closures until restrictions for their sector are removed.

This means that landlords will be able to evict tenants for the non-payment of rent prior to March 2020 and after the end of restrictions for their sector and who have not been affected by business closures during this period.

The measures announced by government – the extension of current provisions, publication of a strengthened Code of Practice, and the development of a system of binding arbitration – triggers the start of a return to 'business as usual', by balancing protecting landlords and supporting those businesses most in need.

It will ensure that many viable businesses can continue to operate, and that debts accrued as a result of the pandemic are quickly resolved to mutual benefit.

Meet Larry Landlord and Tina Tenant



Forfeiture

- Not currently available for non-payment of rent
- More widely available once ringfencing legislation in place

CRAR

- Currently available if at least 554 days rent owing
- More widely available once ringfencing legislation in place

Winding-up

- Not currently available against companies based on statutory demands
- Available against individuals

Rent deposits

- No restriction on landlords utilising rent deposits
- What if those rents are subsequently ringfenced?

Suing for arrears

- Several landlords have successfully sued for arrears
- Less likely now, at least for ringfenced rent arrears?

Guarantors

- No restriction on landlords pursuing guarantors
- What if those rents are subsequently ringfenced?

Ringfenced arrears

- What arrears will be ringfenced?
- What will happen to those arrears?
- How will arbitration scheme work?
- Will other remedies be prohibited?

- When will this actually happen?
- Is it risky to negotiate now?

“Landlords are expected to make allowances for the ringfenced rent arrears...and share the financial impact with their tenants.”

Lease renewals

- Recent cases
 - *WH Smith* (Westfield)
 - *S Franses* (Jermyn Street)
 - *Poundland* (Twickenham)
- Pandemic clauses
 - Rent suspension for forced closure
- Valuation / rents
 - Rebasing in certain sectors
 - Valuation date
 - Interim rent



Tenant insolvency

- Liquidation – disclaimer
- Administration – moratorium
- CVAs
 - New Look (and others)
- Part 26A - ‘cross class cram down’
 - Virgin Active



Landlord & Tenant Act 1954

- *TFS Stores Limited -v- BMG (Ashford) Limited and others*
- Outlet village leases
- Contracted out?
- **Court of Appeal upholds pragmatic High Court decision**
- LTA1954 review promised in 2021



Break clauses

- *Capitol Park Leeds Plc -v- Global Radio Services Ltd*
- 'Vacant possession' condition
- Removal of landlord's fixtures prevented VP being given
- **Court of Appeal disagreed – break valid**



User clauses

- Use Classes Order changed 01.09.2020 (England only)
- Shops now within new use class E (Commercial, business & service)
- Impact on leases?
- **Judicial review appeal due to be heard 5 October 2021**



Value added tax

- Business brief 12/20
- VAT on early termination fees and compensation payments eg lease break premiums
- Deferred until
 - ~~February 2021~~
 - ~~March 2021~~
 - September 2021?
- What about dilapidations?

HM Revenue & Customs
Policy paper
**Revenue and Customs Brief 12 (2020):
VAT early termination fees and
compensation payments**
Updated 25 January 2021

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Background
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Purpose of this brief
To give an update on the VAT treatment of compensation and similar payments following recent judgments of the Court of Justice of the European Union (CJEU).

Who needs to read this
Anyone who charges their customers to withdraw from agreements to supply goods or services.

Background
VAT is a tax on the supply of goods and services. Previous HMRC guidance said when customers are charged to withdraw from agreements to receive goods or services, these charges were not generally for a supply and were outside the scope of VAT.
Following the CJEU judgments in [Ipsos \(C-235/17\)](#) and most recently in [Opinion in Porro \(C-443/19\)](#), it is evident that these charges are normally considered as being for the supply of goods or services for which the customer has been contracted for. Most early termination and cancellation fees are therefore liable for VAT. This is the case even if they are described as compensation or damages.

What has changed
HMRC guidance on charges described as compensation or early termination fees in a [previous Revenue and Customs Brief](#) and [Revenue and Customs Brief 12 \(2019\)](#) (example: charges made when ending one contract and entering into another to upgrade a mobile telephone package or handset) are therefore liable for VAT.
This does not affect the tax treatment of full or part payments made on account for a taxable supply, which is explained in [Revenue and Customs Brief 18 \(18\)](#).
Businesses making supplies subject to the Four Operators' Margin Scheme, can find out more information in the [Revenue and Customs Brief 08 \(19\)](#).
The new guidance can be found at [VAT3008710](#), [VAT3008820](#) and [VAT3008830](#).
The guidance for VAT3008710, 08720 and 08730 has been withdrawn.

Action
Any taxable person that has failed to account for VAT to HMRC on such fees should [correct the error](#).
Any taxable person that has had a specific ruling from HMRC saying that such fees are outside the scope of VAT should account for VAT on such fees received after the issue of this Revenue and Customs Brief.

Is this page useful?

Thank you

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