



FORFEITURE OF COMMERCIAL LEASES FOR RENT ARREARS OFF THE TABLE DURING “CORONAVIRUS MORATORIUM” – WHAT OPTIONS ARE STILL AVAILABLE TO LANDLORDS TO RECOVER ARREARS?

OVERVIEW OF THE MORATORIUM

- Last night the government issued the Coronavirus Bill, which includes emergency measures to help business tenants by preventing the forfeiture of business tenancies during the coronavirus emergency. The Bill is expected to be passed into law by close of parliamentary business on Thursday at the latest.
- The key provisions of the Bill (relevant to this article) provide that there is to be no forfeiture of business tenancies during the coronavirus emergency period (the “relevant period”). This period is currently anticipated to last until 30 June 2020, but the government has the power to extend it.
- “Rent” under the Bill is defined as any money which the tenant is liable to pay under the lease. This would include service charge, insurance rent, administration fees and indemnities for landlord’s costs.

WHAT ARE THE RESTRICTIONS DURING THE RELEVANT PERIOD

- No forfeiture of business tenancies for Rent arrears by peaceable re-entry (i.e. changing the locks).
- No new court proceedings to be issued for the forfeiture of business tenancies for Rent arrears.

TO WHAT TENANCIES DO THEY APPLY?

- The restrictions on forfeiture apply to all business tenancies – there is no distinction between tenancies that are within Part 2 of the Landlord and Tenant Act 1954 (the “1954 Act”) and tenancies that are contracted out of the provisions of Part 2 of the 1954 Act.
- The restrictions also apply to scenarios where the named tenant is not in occupation and wouldn’t therefore have 1954 Act protection, but the premises are occupied by another entity carrying on business there such as a licensee, a concessionaire, a group company etc.



WHAT ABOUT EXISTING FORFEITURE ACTIONS?

- Existing forfeiture actions where possession proceedings have already been issued either in the High Court or in the County Court will not be able to obtain an order which gives possession before the end of the relevant period. *On a practical point, the courts are currently adjourning all hearings to a date to be fixed. It is therefore unlikely that orders will be made in any event.*
- Any possession orders for arrears which have already been made by the court but not yet enforced will be treated as if the date for possession is not before 30 June or any amended end date for the relevant period.

ARE THERE ANY TENANCIES TO WHICH RESTRICTIONS DO NOT APPLY?

- The restrictions do not apply to tenancies which are not business tenancies for the purpose of the 1954 Act. These include tenancies for a fixed term of less than six months, tenancies created by mining leases, tenancies of agricultural holdings, and residential tenancies.

WHAT ABOUT WAIVER?

- The Bill also includes restrictions on the circumstances in which a landlord will be held to have waived their right to forfeit during the relevant period.
- A landlord will not be held to have waived their right to forfeit a business tenancy unless they have given an express waiver in writing.
- Other actions which would in normal circumstances amount to a waiver (e.g. demanding rent) will not amount to a waiver during the relevant period.
- However, landlords need to be careful if they send letters to tenants granting rent holidays that they are not giving an express waiver in writing.

WHAT OPTIONS REMAIN AVAILABLE TO COMMERCIAL LANDLORDS TO RECOVER RENT ARREARS DURING THE CORONAVIRUS MORATORIUM?

A variety of options to recover arrears remain available to landlords throughout the moratorium on forfeiture. These include:

1. Commercial Rent Arrears Recovery ("CRAR"):

- If there is stock at the demised premises which is known to be owned by the tenant and has easily convertible cash value, CRAR may be an attractive option.



- CRAR is the successor to the old law of distress, and allows a landlord to instruct an enforcement agent to take control of a tenant's goods and sell them to realise an amount to cover the rent arrears.
- There must be a written lease in place in order to exercise CRAR, and various notices are required to be served before an enforcement agent can actually go in and take control, but in principle CRAR is a fairly simple process.
- CRAR is, however, only available in respect of rent itself. It cannot be used to recover any sums due/outstanding in relation to service charge or insurance rent *etc.*, even where such sums are reserved as rent. It is also not possible to exercise CRAR in respect of mixed-use premises (unless the residential use is in breach of the lease).

2. Guarantor:

- Did the tenant provide a guarantor on whom the landlord can call for payment of the arrears? Are they solvent?
- If so, a letter before action, requiring payment within, say, 14 days will usually be the first step to consider when pursuing a guarantor for arrears.

3. Former tenants and guarantors – s.17 Landlord and Tenant (Covenants) Act 1995 (“LT(C)A 1995”):

- Is the lease an “old tenancy” (broadly, one granted *before* 1 January 1996)? If so, the landlord is entitled to pursue all former tenants/guarantors under the so-called privity of contract rules for all sums which fall within the category of a “fixed charge”. Rent and service charges are both “fixed charges”.
- Alternatively, if the lease is a new tenancy (broadly, one granted *after* 1 January 1996), have any authorised guarantee agreements been given by the former tenant/guarantor on assignment? Again, if so, s.17 LT(C)A 1995 allows a landlord to recover fixed charges from any former tenant/guarantor who remains bound by such an agreement.
- Strict notice requirements apply when pursuing former tenants or guarantors under both old or new tenancies – and a prescribed “s.17 notice” must be served within six months of any such fixed charge falling due to preserve the right to recover such sums. It is therefore essential to diarise payment deadlines to avoid the same being missed.

4. Rent deposit:

- Did the tenant provide a rent deposit on which the landlord can draw down for the arrears?
- Most rent deposit agreements contain “top-up” provisions, which will require the tenant to top the rent deposit fund up within a specified time to preserve the security afforded by the arrangement following draw-down.



5. Recovering the arrears from a sub-tenant under s.81(1) Tribunals Court and Enforcement Act 2007:

- Are the demised premises sub-let? If so, the landlord could consider serving notice on any sub-tenants to effectively “divert” the sub-lease rent to them as the superior landlord.
- As with CRAR (see above), only rent itself can be recovered via this avenue (i.e. not service charges *etc.*).
- Notice on a sub-tenant takes effect after 14 clear days and will give the superior landlord the right to receive and give good receipt for any rent payable by the sub-tenant in accordance with their sub-lease.

6. Insolvency:

- Often the mere threat of insolvency proceedings will be sufficient to extract payment from the tenant. As an unsecured creditor, however, careful consideration will need to be made in relation to the tenant’s assets before the landlord considers issuing any bankruptcy or winding up proceedings.
- Serving a statutory demand giving 21 days for payment will, however, be the first step to take regardless of whether that demand is then followed up by a petition for bankruptcy or winding-up.

7. Debt proceedings:

- Court proceedings for rent arrears can still theoretically be issued for arrears, although it may be that the courts will not have the staffing to process the same during the pandemic.
- If the proceedings are not defended then a default judgment can be obtained at various points starting 14 days after service, which can then be followed up by an application for a charging order to secure the judgment.

8. Payment plan?

- Given these unprecedented times - and in the interests of preserving good landlord and tenant relations - landlords may be prepared to consider working out a payment plan with tenants to clear the arrears.
- Any payment plan should, however, be clearly recorded in writing to ensure that ongoing obligations are preserved, and set out clear provisions as to termination in the event of default.



9. An alternative option - surrender?

- If there is little prospect of the tenant being able to continue its operations at the premises, and it is desirable to take back possession due to demand, negotiations could be undertaken with a view to agreeing a surrender of the lease.
- Any such negotiations should strictly be undertaken on a without prejudice basis, but could include a requirement for the tenant to pay all arrears as part of the surrender deal.
- Surrender is, of course, a consensual process and will therefore require the tenant's agreement.

A detailed review of the tenancy documents and all surrounding circumstances will need to be undertaken when deciding what option(s) it is likely to be best to pursue in any given case, and prior advice should be taken in all cases.

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