



COMMERCIAL TENANT DEFAULT IN THE TIME OF COVID-19: WHAT CAN I DO AS A LANDLORD?

With the latest [Government announcement](#) that forfeiture for unpaid rents is to remain off the table to landlords until 31 December 2020 – and with [insolvency action for unpaid rents also substantially curtailed by the Corporate Insolvency and Governance Act 2020](#) - we look here at what options remain available to landlords – both in relation to unpaid rents and other tenant breaches.

HOW CAN I RECOVER UNPAID DEBT?

1. Claim for a money judgment (CCJ)

- Landlords can seek a CCJ against defaulting tenants for any sums due under the lease (including costs) in the county court. Prior to court proceedings the tenant would be sent a letter before action which would highlight the adverse effect on credit rating of a CCJ, and this can prompt some tenants to pay.
- If it does not, court proceedings can be issued. Unless there are disputes over sums due (e.g. in relation to service charges), there would be no obvious defence but some tenants may seek to defend for reasons connected with Covid-19 (frustration of the lease, force majeure etc.).
- Once a CCJ has been ordered, the landlord may have to take further enforcement action if the tenant does not pay the judgment debt.

2. Commercial Rent Arrears Recovery (CRAR)

- CRAR 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 rent arrears. It is available in respect of rent but not service charges or insurance rent etc. It requires a written lease and service of various notices before the enforcement agent can enter premises for this purpose.
- Landlords are currently only able to exercise CRAR where the net unpaid sum is equivalent to 189 days' rent (increased from the previous minimum 90 days' rent threshold as of 24 June 2020). Furthermore, from 29 September 2020 the rent threshold for exercising CRAR is being further increased to a minimum of 276 days' rent (until 24 December 2020 (inclusive)). However, CRAR



may be an attractive option for recovering rent owed to the landlord if there is stock known to be owned by the tenant at the demised premises with easily convertible cash value.

3. Guarantors?

- If a guarantor was provided by the tenant, landlords should consider whether that party is a better bet for payment where the tenant is refusing to pay their rent. A letter before action - requiring payment by a set date - will usually be the first step when pursuing a guarantor for arrears.

4. Former tenants and guarantors?

- As detailed in our [earlier note](#), if the lease in question was granted prior to 1 January 1996, and the lease has been assigned to a new tenant, a landlord will be entitled to pursue all former tenants/guarantors under 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 was granted after 1 January 1996, landlords should check whether any authorised guarantee agreements have been given on assignment by the former tenant/guarantor. As above, such agreements will allow the landlord to recover fixed charges from any parties who remain bound by the same.
- A reminder, however, that strict notice requirements apply when pursuing former tenants or guarantors under both types of lease – a “section 17 notice” of the arrears must be given within six months. Early engagement with missed payments is therefore key.

5. Rent deposit?

- If a rent deposit was given by the tenant, the landlord could consider whether it is the right time to draw down on those funds to recover mounting arrears. Detailed consideration of the agreement pursuant to which the deposit is held should, however, always be made before draw down.
- Most agreements also provide for the tenant to “top-up” the deposit fund within a specified time to preserve the security afforded by the arrangement following draw-down.

6. Recovering arrears from a sub-tenant?

- If the tenant has sub-let the premises, it may be possible to serve notice on any sub-tenants to effectively “divert” their sub-lease rent to the superior landlord.
- The restrictions as to exercising CRAR – both as to amount and type of rent that can be recovered - also apply when seeking to recover rent by this method (see further above).



DO THE CORONAVIRUS ACT 2020 RESTRICTIONS ON EXERCISING FORFEITURE FOR UNPAID RENTS APPLY TO THE RIGHT FORFEIT FOR OTHER BREACHES?

- No - the right to forfeit for other breaches of covenant is unaffected by the restrictions brought in by the Coronavirus Act 2020. Landlords remain able to serve a section 146 notice and thereafter bring proceedings or re-enter premises to forfeit a lease in the event the right to forfeit has arisen.
- Whether landlords will, on the whole, be interested in pursuing forfeiture against defaulting tenants at this turbulent time remains to be seen, but it does remain available if a landlord considers this to be the right option for them.

WHAT ABOUT OTHER REMEDIES FOR BREACH?

- The ability to issue proceedings for e.g. damages or specific performance in the event of tenant breaches (other than unpaid rents) also remains unaffected by the measures brought about in response to the ongoing Covid-19 pandemic. The biggest challenge that many landlords will now face, however, is the delay they will likely face in progressing those proceedings in the already hugely stretched county courts.

WHAT IS THE CODE OF PRACTICE FOR COMMERCIAL PROPERTY RELATIONSHIPS DURING THE COVID-19 PANDEMIC ABOUT?

- On 19 June 2020, the Ministry of Housing Communities and Local Government published the [Code of Practice for Commercial Property Relationships During the Covid 19 Pandemic](#) (the "Code") with the intention of "[reinforcing] and [promoting] good practice amongst landlord and tenant relationships as they deal with income shocks caused by the pandemic".
- The Code - which is voluntary - is to apply until 24 June 2021, and sets down various "Principles" to underpin landlord and tenant relations when considering solutions for the payment of rent during the ongoing Covid-19 crisis. Such Principles include: "Transparency and Collaboration", and "Acting reasonably and responsibly". Various suggestions on how to deal with ongoing rent obligations and arrears are also set out in the Code -including rent deferral and reduction arrangements.
- The Code has no impact on the contractual relationship between the parties (such that tenants will continue to be liable on their covenants to pay rents), but it is possible that the reputational risk to both landlords and tenants in failing to adopt the spirit of the Code's provisions in their dealings with one another during this difficult time may be sufficient to prompt their engagement.



Comment on the Code:

While there are no powers to enforce the Code's provisions, our experience is that landlords and tenants have, in any event, largely been collaborating to find workable solutions for the payment of rents during this difficult period– so just how much of an impact the Code will have on this issue is yet to be seen.

Please note that detailed advice should be taken in every case before considering any legal action.

Position stated as at 24 September 2020

FIND OUT MORE

For further information, please contact:



JOHN MORRISON
PARTNER
T: +44 (0)1865 813722
E: john.morrison@penningtonslaw.com



KERRA JELBERT
SENIOR ASSOCIATE
T: +44 (0)20 7753 3264
E: kerra.jelbert@penningtonslaw.com