



What remedies does a commercial landlord currently have for non-payment of rent?

Forfeiture

The Coronavirus Act 2020 ("the Act") became law on 25 March 2020. Section 82 of the Act contains a moratorium on landlords' ability to forfeit leases of commercial property on the basis of non-payment of rent or any other sums due under the lease.

Some points to note:

1. The moratorium started on 26 March 2020 and originally ended on 30 June 2020. However, it has since been extended to 30 September 2020 ("the moratorium period"). There is the ability for the Government to extend the moratorium period further if it so desires.
2. It applies both to forfeiture by way of peaceable re-entry (i.e. changing the locks) and court proceedings for forfeiture.
3. It does not mean that the rent or other sums due are not payable – only that the landlord cannot forfeit for those arrears at the moment.
4. The moratorium applies to the vast majority of commercial leases (irrespective of whether the tenants have been directly affected by COVID-19).
5. It will also protect an intermediate landlord, where there is a commercial occupier.
6. It contains some protection for landlords who may be in discussions with their tenants regarding their rent payments by expressly providing that those discussions will not (unless the contrary is specifically stated) amount to a waiver of the right to forfeit. Further, a landlord can continue to issue rent demands (and accept part payments of the rent) without the risk of waiver.
7. Where forfeiture proceedings have already been started, the court cannot require the tenant to give up possession prior to the end of the moratorium period.
8. Where an order for possession has already been made but the date for possession has not yet passed, it allows a tenant to apply to court to vary the date for possession to a date not earlier than the end of the moratorium period.
9. Finally, it provides that a landlord cannot rely on any missed rent payments during the moratorium period when opposing the grant of a new lease on the ground of persistent delay in paying rent.

Stay of Possession Proceedings

In addition to the above legislation, a new practice direction was issued on 20 April 2020 under the Civil

Procedure Rules (PD51Z). The effect of PD51Z was to immediately stay certain possession claims until 29 June 2020, including all claims for forfeiture of commercial premises (no matter what the breach). The stay has since been extended to 23 August 2020. Accordingly, whilst a forfeiture claim can be issued, it cannot be progressed through the court (even if it does not relate to non-payment of rent or other sums) until after the end of the stay, leaving only peaceable re-entry (for breaches other than non-payment of rent or other sums) as a way to forfeit a commercial lease at the moment.

Other Measures

Whilst the Government has acknowledged that the majority of landlords and tenants are working well together to reach agreement on rent obligations (and certainly that is our experience), it has not stopped there:

- The Corporate Insolvency and Governance Act 2020 prevents the issue of winding up petitions based on statutory demands served between 1 March and 30 September 2020. Further, it prevents winding up petitions (even those not based on a statutory demand) presented from 27 April 2020 to 30 September 2020 unless the creditor can show it has reasonable grounds to believe that coronavirus has not had a financial effect on the company, or the facts on which the grounds for the petition is based would still have arisen but for coronavirus. A statement to that effect would need to be included in the winding up petition. This is likely to be a difficult hurdle to overcome in many cases given that the burden is on the creditor to show that coronavirus has not played a part and the creditor does not have control of the company's financial information.
- The Government has also limited a landlord's ability to exercise Commercial Rent Arrears Recovery (CRAR). The changes (set out in The Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020) came into force on 25 April 2020. The main change, which originally applied to any notice of enforcement given between 25 April and 30 June 2020, was to increase the minimum amount of rent that must be in arrears before a landlord can use CRAR from 7 to 90 days'. In fact, the limit has since been increased by a second set of Regulations from 90 to 189 days' for notices of enforcement given up until 30 September 2020. This does mean that if, for example, a tenant has not paid any of the March or June quarter, CRAR should still be available as this is the equivalent of at least 189 days' rent.
- The Government has also published a Code of Practice for Commercial Property Relationships during the COVID-19 Pandemic. It is however a voluntary code and does not change the underlying contractual relationship. Essentially, it encourages collaboration between landlords and tenants and suggests that landlords should make concessions on rent payments where they can. It does stress that tenants should pay where they are able to do so and, if not, when seeking an agreement with their landlord, should be prepared to disclose evidence in support of that request including financial information. Accordingly, it does at least give landlords something to point to when faced with a tenant that is not being transparent and/or cooperative. Where any rent concessions are agreed, we strongly recommend recording them in a comprehensive agreement setting out clearly the key terms including the circumstances in which the concession will come to an end.

A lifeline for landlords?

There is no doubt that the combination of these measures substantially restricts any action that a landlord can take when faced with a tenant who is refusing to pay rent or engage, and it will be a huge concern for all landlords. Generally, it leaves landlords with no options other than court proceedings for a money judgment,

drawing down from a rent deposit if there is one, or pursuing any guarantors or former tenants who remain on the hook.

The Government said initially that it is actively monitoring the impact of coronavirus on commercial landlords' cash flow and that it will continue to be in dialogue with landlords.

On 17 April and 4 May 2020, representatives of retailers and commercial property owners including the BPF, BRC and Revo wrote to the Chancellor proposing the introduction of a scheme of rental support (The Furloughed Space Grant Scheme) where the Government would support the fixed costs of businesses (including rent) that have experienced dramatic falls in turnover due to the pandemic, similar to schemes introduced in Denmark and other European countries. Whilst we understand that the Government was, certainly at one stage, seriously considering the Scheme, as yet there has been no confirmation that it will be adopted. On 30 June 2020, the BPF also launched a COVID-19 recovery roadmap "Building a Shared Recovery", which includes immediate and longer term policy suggestions to support the real estate sector in its recovery from the pandemic.

For more guidance, and further information visit our [Coronavirus hub](#) or contact Laura Southgate at laura.southgate@crippspg.co.uk.