

Commercial Property Update

MAY 2020

On 23rd April 2020, the Government announced further emergency measures to protect commercial Tenants from winding up proceedings and enforcement action by Landlords, where both have been unable to successfully negotiate revised terms in respect of payment of rent, service charges and any other sums falling due under a business Lease during the coronavirus pandemic lockdown.

The Corporate Insolvency and Governance Bill will include restrictions on issuing statutory demands, winding up petitions and the making of winding up orders if the Tenant is unable to pay its debts as a direct result of the Covid-19 pandemic¹.

The pending legislation is intended to operate alongside the Coronavirus Act 2020 ("the Act") which protects commercial Tenants from eviction and forfeiture for non-payment of rent for a three month period, with the power to extend if necessary. Landlords will be able to claim forfeiture after the 90 day period and will be protected for that period of moratorium of forfeiture. Non-collection of rent will not

act as a waiver of the right to pursue the Tenant after the suspension has ended. Rights of forfeiture for other breaches, save for rent, will not be affected.

The Government has urged Landlords and Tenants to work together to reach agreement through compromise as to the payment of rent until, at least, 30th June 2020 (or such later date as may be determined by Government). Tenants must continue to pay rent where they can afford to do so, since their obligation is not diluted or removed by this Act, nor, the pending legislation. Any accrued interest on late payment will still become payable by the Tenant following 30th June 2020.

So, what does this mean for Landlords and Tenants in practical terms?

Below and on the pages that follow is a chart which highlights and summarises some of the ways in which Tenants may seek to reduce their liabilities under a business Lease, how a Landlord might react in those circumstances and what this might look like in practice.

Tenant request	What the Landlord's response might be	How this works in practice
Rent concession	From a commercial viewpoint, a Landlord might want to consider whether it is better that the premises is tenanted and that some compromise can be reached in respect of rental income (albeit reduced) than for premises to be vacant at this time.	Once an agreement as to rent has been reached, it is advisable to document the arrangement with the completion of a Deed of Variation or a Side Letter ¹ . The latter is preferable since it requires less time and negotiation and will not bind successors in title. It is important that the side letter makes clear the concession is not a variation of the terms of the Lease nor a waiver by the Landlord of its rights pursuant to the Lease.

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Tenant request	What the Landlord's response might be	How this works in practice
Temporary suspension of rent	Again, from a commercial point of view, this option may be preferable to a Landlord in that the premises will remain tenanted and that some rental income is forthcoming, albeit at specified periods.	It is advisable for both Landlord and Tenant to record the arrangement with a Side Letter. This must confirm the terms and the dates upon which rent will become payable, provide assurance that the Landlord will not take other action to recover rent for the period of suspension and, in turn, the Landlord will want to expressly document the fact that it is not waiving its entitlement to forfeit the Lease for non-payment and that it can recover arrears at a later date.
Refusal to pay elements of the service charge which have been affected by Covid-19	<p>The Landlord will need to look at the wording of the Service Charge provisions within the Lease. Where Landlords have incurred costs outside of usual service charge expenditure as a result of Covid-19, it might seek to pass these on to Tenant(s) through the service charge.</p> <p>Tenants will want to argue that these costs should be recoverable under the Landlord's insurance policies. However, most insurance policies will only accept a claim if for an insured risk, which Covid-19 will not be.</p>	<p>How successful this argument will be will depend on the wording of the service charge provisions. For example, is there flexibility which provides that the Landlord can recover costs incurred in its compliance with statute, regulations, health and safe and security of its Tenants?</p> <p>However, a Landlord cannot forfeit the Lease for non-payment of service charges until 30 June 2020 (or such later date as specified by Government).</p>
Request to change or terminate the Lease	A Landlord will likely resist a permanent variation to the Lease. However, if it would benefit the Landlord to recover the premises, for instance, to refurbish or redevelop it, then it might grant an early request to terminate. The Landlord and the Tenant must come to agreement regarding the yield up obligations in the Lease.	A Landlord can document a temporary change in terms by way of a side letter. If terminating a Lease, the Landlord can deal with this by formally documenting this with a Deed of surrender.

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Tenant request	What the Landlord's response might be	How this works in practice
Withhold Rent and arguing terminating event	<p>In most Leases, rent can only be suspended on the occurrence of damage to a building or Property from an insured risk. Pandemics such as Covid-19 would not be covered. In addition, commercial leases expressly prevent Tenants from withholding or off-setting rent.</p> <p>The Landlord may be willing to temporarily suspend or reduce rent in order to keep a Tenant or agree to an early termination if it is preferable to the Landlord that it recovers the Premises.</p>	<p>The Tenant could make the following arguments when requesting rent be withheld or the Lease is terminated - breach of quiet enjoyment, forfeiture, frustration and/or force majeure. The latter is unlikely to succeed because a Lease would, almost certainly, not contain provisions extending to a pandemic as an argument of force majeure.</p> <p>However, on the question of quiet enjoyment, if the Landlord has closed the Premises without first notifying and agreeing this with the Tenant, the Tenant may argue that the Landlord has breached its covenant in the Lease of allowing the Tenant quiet enjoyment of the premises. The Tenant could then be entitled to compensation.</p> <p>Similarly, if the Landlord closes the Premises without Government requirement and the Tenant is prevented access, the Tenant could claim that the Landlord has illegally forfeited the Lease. If the Landlord failed to notify the Tenant prior to the closure, then the Tenant is likely to succeed in a claim for costs and damages.</p> <p>An argument that the Lease is frustrated is unlikely to succeed as a temporary inability to use the Premises will not give rise to a claim for damages.</p>

What the above illustrates is the need for consensus between Landlord and Tenant when agreeing concessions. Whilst Tenants will welcome this legislation, Landlords are likely to be more anxious about further restrictions being placed on their ability to recover rent arrears given their own liquidity issues and many suffering as a result

of reduced rental income.

What, therefore, can a Landlord do if it too wants to reduce its liabilities at this time and is reliant upon the rental income from business Tenants?

Overleaf is a chart which illustrates some of the remedies a Landlord might be able to use:

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Landlord's remedy	What a Tenant's response might be	How this works in practice
Using all or part of a Rent Deposit and request for top up by Tenant.	The ability to draw on the rent deposit will be governed by the terms of the Rent Deposit Deed. The Tenant might decide for cashflow reasons to stop paying rent and allow the Landlord to draw on the rent deposit. There may, however, be an obligation in the Rent Deposit Deed for the Tenant to top up the rent deposit.	The Landlord can draw upon the rent deposit if the Tenant fails to pay amounts due under the lease, provided that the Landlord complies with the terms of the Rent Deposit Deed. These may include giving notice to the Tenant before drawing down the money. It may be difficult to enforce any obligation on the Tenant to top up the deposit.
The ability to recover under Guarantees.	A Guarantor will have the same rights as a Tenant during the period of Government enforced closure. However, the Landlord can recover rent, service charge and all other sums due under the Lease from a Guarantor at all other times following the implementation of the lockdown and timeframe imposed by the Act, provided the Tenant has committed an enforceable breach	The Landlord will refer to the Guarantee and/or Authorised Guarantee Agreement annexed to the Lease.
Recovering rent as a debt claim	If the Landlord closes the Premises without first notifying the Tenant and the closure arises outside of Government requirements, then a Tenant will be likely to make a successful counterclaim for losses resulting from closure of the business.	With the moratorium on forfeiture for unpaid rent resulting from Covid-19, the Government is still to provide recommendations and requirements for how rent arrears occurring now are to be recovered.
Commercial Rent Arrears Recovery ("CRAR")	Further information is awaited as to which commercial tenants will benefit from these arrangements and what evidence a Tenant would have to provide to show it cannot pay sums falling due under its Lease. Landlords are likely to be concerned at the 90 day restriction to claim, up from 7 days.	The Government is to put in place legislation preventing Landlords using CRAR unless they are owed rent for 90 days or more. This means that this system cannot be used for non-payment of the March quarter's rent until 30 June 2020 (or such later date as specified by Government).

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Landlord's remedy	What a Tenant's response might be	How this works in practice
Threat to wind up	On 23 April 2020, the Government announced temporary measures to protect commercial tenants from statutory demands and winding up petitions for non-payment of rent. This will strengthen the bargaining power of the Tenant in striking a compromise with the Landlord in respect of payment of rent until at least 30 June 2020.	<p>A Landlord can issue statutory demands for rent arrears and petitions for winding up after 30 June 2020 (or at a later date if specified by Government).</p> <p>However, further clarity is awaited as to which commercial tenants benefit from this temporary suspension of petitions and demands under the Corporate Insolvency and Governance Bill.</p>
Forfeit the Lease	The Act prohibits forfeiture of leases and The Ministry of Housing, Communities and Local Government has applied this to all commercial leases and not just those falling within Part 2 of the Landlord and Tenant Act 1954, in respect of rent arrears until 30 June 2020 (or such later date as determined by Government). This, together with the temporary ban on statutory demands and winding up proceedings, means that Tenants are in a better negotiating position when requesting rent reductions or suspensions or termination.	<p>In practice, a Landlord is not prevented from exercising its rights to forfeit on the grounds of breaches of other obligations in the Lease, for example in the event of insolvency. However, it is possible that the Ministry for Housing, Communities and Local Government may prevent forfeiture in the event of insolvency if that insolvency has resulted from Covid-19.</p> <p>Whilst Tenants are protected from eviction in the short term, they will have to pay arrears of rent in full, together with accrued interest, once the protection is lifted after 30 June 2020 (or such later date as may be determined by Government).</p>
Request to Keep Open	If the Lease does not include a "keep open" covenant then there is no obligation on the Tenant to keep open for trading. Where it does contain a "keep open" covenant, the Tenant may nevertheless be forced to close by Government restrictions or may choose to close as a result of decreased footfall.	It might be difficult for a Landlord to enforce a "keep open" covenant, particularly where the Tenant has no option but to close. Some "keep open" clauses are linked to turnover rents and it is possible that the Landlord would be able to seek specific performance or (more likely) claim damages in such cases. The Courts may, however, be reluctant to award damages where a Tenant has been forced to close.

Please remember that whatever steps are taken to renegotiate or restructure the terms of a lease could have tax implications and in particular with regard to Stamp Duty Land Tax and VAT. Accordingly we strongly recommend that before agreeing anything with your landlord or tenant that take suitable legal and/or accountancy advice

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We have seen here some of the ways in which a Landlord can seek to mitigate its losses where a compromise with the Tenant cannot be reached.

In considering these options, a Landlord must first obtain consent from any third parties with an interest in the premises, such as Superior Landlords or Mortgagees. Thus, the Landlord must review any headlease and/or financing documentation and consider whether it is entitled to take action to mitigate or recover losses as a result of this pandemic, in tandem consideration with the Government's moratorium on forfeiture, statutory demands and petitions for winding up until at least 30 June 2020.

The Government has reiterated the importance of dialogue and documentation between Landlords and Tenants, in order to reach mutually acceptable compromises in respect of sums owing and falling due during the coronavirus lockdown.

Landlords are encouraged to take, it is hoped, a short term commercial view to achieve a longer term commercial objective in its efforts to assist Tenants who may be struggling at this time.

However, recourse for claims against opportunistic Tenants seeking to take advantage of the legislation are still available to a Landlord.

BTMK Solicitors have one of the most experienced commercial property teams in the region

We have huge experience in acting for landlords and tenants in relation to commercial property matters, whether it's taking on a new lease, opposing a renewal, bringing or defending disputed renewal proceedings, dealing with issues relating to dilapidations and the myriad of other disputes that can arise in a commercial property scenario.

Matters have just become more complex by the emergency legislation brought in by HM Government and at the end of June 2020, there are likely to be huge numbers of landlords and tenants uncertain of their position relating to all of these issues.

Commercial Landlord & Tenant law involves hugely complex and technical legislation and it's vital that you're advised correctly.

BTMK are here to help. Our team and their contact details are all set out here and you can be sure to get the right legal and commercial advice at all times.



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