

COVID-19 UPDATE: RESTRICTIONS ON ENFORCEMENT EXTENDED

17 June 2021 | Insight
Legal Briefings

We look at what options landlords retain and what factors landlords should take into account.

FORFEITURE: COMMERCIAL LEASES

At the eleventh hour, and despite previously declaring that it was the final extension, the UK Government has today announced that the current restrictions on landlords being able to forfeit commercial leases for non-payment of rent (which protection was due to expire on 30 June 2021) has now been extended until 25 March 2022. The stated intention is to allow commercial tenants, some of which had to legally remain closed during the various lockdowns, extra breathing space to protect jobs and to allow further time for negotiations with their landlords to come to an agreement on how to handle unpaid rent which has built up during the preceding months.

Interestingly, previous extensions to the moratorium on the ability to forfeit have always expired on the day prior to the usual rent quarter days, however the extension to 25 March 2022 would include the March 2022 quarter day. It will be interesting to see if this was intended or if an amendment to this date (so as to omit the March 2022 quarter day) will occur in due course.

RINGFENCED ARREARS

Communities Secretary, Robert Jenrick, has also announced that legislation will be introduced in this Parliamentary session to ringfence this unpaid rent with an expectation that landlords will have to bite the bullet and make a (currently unspecified) allowance for ringfenced arrears during specific periods of closure due to the pandemic (i.e. not applicable to any arrears prior to March 2020 when the first lockdown occurred). The expectation, without any details being given, is that that landlords will need to share the financial burden with their commercial tenants, either by waiving some or all of the total amount of arrears owed or by agreeing a longer-term repayment plan.

However, this is not to be taken as an opportunity by tenants to avoid paying rent when they can do so: the Government announcement is clear that those who can pay, should pay and as soon as restrictions change. Where an agreement on arrears cannot be reached, a binding arbitration process will be put in place so that both landlord and tenant can come to a formal, legally binding agreement. This arbitration process (which is currently very light indeed on detail) is expected to be delivered by private arbitrators in accordance with guidelines set out in the legislation, and arbitrators will have to go through an approval process to prove their impartiality (although it is not clear what will be achieved by this additional hurdle given that arbitrators already need, by definition, to be impartial to do their job). There is an obvious question as to whether suitable arbitrators will be available in sufficient numbers, and whether the process of an arbitration will lead to additional delay and cost.

The Government's response to the recent "call for evidence" on commercial tenancies and how best to withdraw or replace these protective measures will be published "in due course". Although if the tone of the above announcement is anything to go by, it seems that the Government's approach will be that landlords and tenants are in this together.

COMMERCIAL RENT ARREARS RECOVERY?

The Ministry of Justice has also confirmed that the restriction on the use of CRAR will also be extended. The total number of days' outstanding rent required before a landlord can use CRAR will remain at 544 days.

INSOLVENCY RESTRICTIONS

To complete the circle, the Government has also announced that the service of statutory demands and winding up petitions will remain restricted for a further three months until the end of September 2021. Again, the stated intention is to protect companies from creditor enforcement action where their debts relate to the pandemic, and is not limited to landlord/tenant relationships. Again, a point to consider is whether a further extension will or will not be granted after this new one.

WHAT ENFORCEMENT OPTIONS REMAIN AVAILABLE TO LANDLORDS NOW?

Despite the extension of these protections to tenants, landlords still have available to them the following range of enforcement measures either individually or in combination:

- drawing down on rent deposits and seeking top-ups;
- claiming against current guarantors;
- claiming against Authorised Guarantee Agreements (AGA) or Guarantees of Authorised Guarantee Agreements (GAGA) for post-1996 leases;
- claiming against former tenants or former guarantors for pre-1996 leases;
- deploying the remaining CRAR remedies, subject to the additional restrictions imposed and set out above; and
- issuing or progressing proceedings for possession, brought on the basis of breach of covenant other than that to pay rent.

Given the lack of detail surrounding the proposed legislation, the property industry will be waiting with anticipation to see exactly what it says when it is released. However, reading between the lines, it seems entirely possible that opportunistic tenants could try to delay the rent arrears recovery process by going through a disputed arbitration and, if they do not like the answer, they could then propose a restructuring plan under Part 26A to the Companies Act 2006 to absolve themselves of the obligation to pay these historic arrears. Whether that accords with the Government's intention, only time will tell.

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