

COVID-19: PRESSURE POINTS: RESTRICTIONS ON LANDLORDS' RIGHTS TO FORFEIT LEASES AND RECOVER POSSESSION OF COMMERCIAL PREMISES (UK)

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Legal Briefings

On 26 March 2020, the Coronavirus Act 2020 (the "Act") came into force with immediate effect. The special measures contained in the Act aim to protect tenants of commercial premises who are experiencing interruption to their businesses as a result of forced closures, restrictions on trade and social distancing. To this end, the Act introduces restrictions on landlords' rights to forfeit leases of commercial premises, where a tenant has failed to pay the rent due under the lease¹.

KEY PROVISIONS

The Act introduces an absolute prohibition on a landlord forfeiting a lease of commercial premises where a tenant has failed to pay its rent, whether the motivation for non-payment relates to COVID-19 or not. It applies to all tenants and lawful occupiers of commercial premises, whatever the sector in which they operate, whether the tenant is permitted to open for business or faces any restrictions on trade, and regardless of the tenant's financial standing and resources. The definition of 'rent' is broad, and includes any sums a tenant is liable to pay under a lease, whether reserved as rent or not. It therefore includes primary rent, service charge, and any contribution to insurance payments. The basis under which a tenant is occupying premises is also widely drafted as the restrictions apply to 'relevant business tenancies'.

OCCUPATIONAL INTERESTS

The policy objective behind the new legislation is "to cover all commercial leases", whether

contracted out of the Landlord and Tenant Act 1954 or not, and all "lawful occupiers". We consider that this will include tenants commercial leases and underleases, tenancies by estoppel, periodic tenancies (whether express or implied), agreements for lease and agreements for underlease. It seems that tenancies at will and licences will not be included. Neither will service tenancies, home business tenancies and tenancies granting Code rights under the Communications Act 2003. There is however some uncertainty as to whether tenancies granted for a term of six months or less will be included within the restrictions.

TIMING

The restrictions will remain in place until 30 June 2020 (although this date may be extended²). The landlord's right to forfeit for non-payment of rent is effectively suspended until the restrictions are lifted. In relation to leases where rent is payable on the 'usual quarter days' (which are 25 March, 24 June, 29 September and 25 December of each year), the restrictions will therefore cover the non-payment of any rent due on the March and June quarter days. In relation to leases where rents are due on 'modern quarter days' (which are 1 January, 1 April, 1 July, 1 October of each year), or monthly on the first day of each month), the restriction will not cover non-payment of any rent due on 1 July 2020. As the restrictions limit the action that the landlord can take during this period, rather than simply the rent that falls due within this period, the restrictions also prevent landlords from taking forfeiture action in respect of historical arrears where possession proceedings in relation to those historic arrears are not currently on foot (see below).

The legislation restricts a landlord's right to forfeit by way of peaceable re-entry or by proceedings. A breach of these restrictions will render any attempted forfeiture ineffective. The landlord's right to forfeit for non-payment of rent is reinstated after the restrictions are lifted (subject to any grace period in the lease following non-payment of rents due during which forfeiture cannot be effected, or the landlord having expressly waived his right to forfeit in writing) should rents remain unpaid on or after 1 July 2020 (see below).

OTHER LEASE PROVISIONS

The restrictions in no way act as a removal of a tenant's obligation to pay rent; they merely suspend a landlord's right to forfeit a lease should a tenant delay in paying the rent that remains due. A landlord's right to forfeit has only ever been one of its available remedies to enforce non-payment of rent.

Further restrictions have been imposed in relation to a landlord's ability to exercise rights under the Commercial Rent Arrears Recovery scheme for non-payment of principal rent and directly enforcing against tenants' assets, and serving statutory demands and issuing winding-up petitions for non-payment of rents and other sums due under a lease. At present, the legislation does not limit a landlord's right to pursue its other traditional remedies available to it should a tenant fail to pay any sums due under its lease. Other key enforcement remedies that remain available are:-

- Drawing down on rent deposits and seeking top-ups;
- Claiming against current guarantors;
- Claiming against AGA or GAGA guarantors for post-1996 leases;
- Claiming against former tenants or guarantors for pre-1996 leases; and
- County Court/High Court commencement and service of proceedings for debt.

The remaining rights and obligations of both landlord and tenant under the lease remain. If provided for under the lease, interest will accrue at the specified rate if payments are not made on time. Any tenant wishing to exercise a break right that is conditional on not being in breach of any term of the lease, or rent having been paid in full, will want to continue to pay rent as it falls due. Landlords may forfeit within this period for breach of any other covenant or condition, including any tenant obligation to put or keep the premises in repair. However, landlords should be mindful of the difficulties tenants might face on the ground when considering how long a 'reasonable time' would be to remedy any breach of covenant or condition. The restrictions do not interfere with any agreements made privately between a landlord and tenant for reductions or deferment of rent.

During the period ending 30 June 2020, a landlord will not be able to rely on a tenant's non-payment of rent to oppose renewal of a business tenancy under section 30(1) of the Landlord and Tenant Act 1954. However the remaining six other grounds on which a landlord may oppose renewal remain. Non-payment of rent was in any event a rarely used ground of opposing the grant of a new lease, and this restriction is expected to produce little impact.

Tenants will find it difficult to simply walk away from their leases and lease obligations. For more on this, please request a copy of our "COVID-19: Advice to Landlords" briefing.

EFFECT ON FORFEITURE PROCEEDINGS ALREADY EXTANT?

The restrictions also effectively suspend any forfeiture proceedings for historical non-payment of rent.

Where a landlord had already, prior to the Act coming into force, issued County Court or High Court proceedings for possession of premises under the forfeiture provisions in a lease due to non-payment of rent, the Court will not grant possession of the premises within this period ending 30 June 2020.

Some County Court proceedings to enforce a landlord's right to possession for non-payment of rent due under a lease may already be at the stage where an order for possession has already been made requiring that a tenant give back possession of the premises on a date before 30 June 2020. In such cases, possession will not have to be given until 1 July 2020.

Additionally, some High Court proceedings to enforce a landlord's right to possession for non-payment of rent due under a lease may already be at a stage where an Order has been made, stating a date before which a tenant has to give back possession unless he complies with a named requirement by a named date, eg to repay rent arrears by X date. In such cases, tenants may apply for extensions of time to comply with the named requirement so that a tenant does not have to give possession of premises before 1 July 2020. Again, these dates may be extended.

PROTECTION FOR LANDLORDS

The Act makes an attempt to create some protection for landlords, so that they are not prejudiced after the restrictions cease to be in force. Normally, faced with a tenant's breach of any lease provisions which give rise to a right to forfeit, a landlord must take care not to 'waive' that right by doing anything that acknowledges that the lease is ongoing, eg demanding or accepting rent. The restrictions provide that the right to forfeit that would otherwise have been gained during this moratorium period will continue after it ends, and no conduct by the landlord during this current period (other than an express written waiver) will be regarded as waiving that right. A landlord's right to forfeit is therefore preserved, but as soon as the restrictions end, landlords should ensure that they are in a position to make a decision on how to approach the issue of non-payment, rather than inadvertently waiving a right to forfeit and limiting options for recovery.

Landlords who foresee a risk that trespassers or any other unauthorised occupiers may enter their premises will also take a degree of comfort from the limitations on taking action for possession³. The restrictions on applying for possession of premises through the court system do not apply where a landlord is seeking possession where 'persons unknown' have unlawfully entered premises and landlords wish to take action to remove them.

FINALLY

Forfeiture of a lease has always been a powerful weapon in a landlord's armoury. However, given that it terminates the future income stream, it may be less attractive to commercial landlords if there is a lower prospect of re-letting swiftly for an equivalent or higher rent, or if the landlord has other reasons to want to take the property back, for example because of intended redevelopment plans. In this interim period, landlords and tenants are advised to keep lines of communication open, and to document properly any compromise agreements or forbearances (for example, any instalment plan) that are reached.

¹The relevant provisions are continued in section 82 of the Act.

²The Act anticipates that this period may need to be extended, possibly more than once. It allows any extensions to be made by way of statutory instrument (Regulations), which would allow an extension to take effect with reduced procedural formality compared to the passing of the Act itself.

³Civil Procedure Rules, Practice Direction 51Z.

[More on COVID-19](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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