Changing the locks during lockdown: The Coronavirus Act 2020, Commercial Property and Forfeiture

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UPDATE: 27 APRIL 2020: This article has been amended in light of the Government's announcement and press release on 23 April 2020 entitled: *"New measures to protect UK high street from aggressive rent collection and closure"*.

In recent years the rise of e-commerce has challenged the traditional High Street model as we know it. The high attrition rates on the High Street have been widely reported. For those retailers who have sought to avoid closing their businesses, Company Voluntary Agreements ("CVA's") and administrations have become popular in order to allow shops to keep trading either with a view to recovery or sale.

As a result of the above, the conditions under which commercial landlords and tenants were operating at the start of 2020 was challenging and often uncertain.

This situation has been exacerbated by the coronavirus pandemic and the associated lockdown. The Coronavirus Act 2020 ("the 2020 Act") is the first piece of legislation to modify existing legislation in response to the pandemic.

It appears that the Government will be introducing further legislation which implement a temporary *"ban"* on the use of statutory demands made between 1 March 2020 and 30 June 2020 or winding up petitions presented between 27 April 2020 and 30 June 2020 where the outstanding sums (in this context, rent) are not paid *"due to COVID-19"*. The *"ban"* itself in essence requires the Court to determine, upon a winding up petition being presented, why the company is unable to pay its debts. If the company is *"unable to pay its debts"* because of COVID-19, then the Court will not allow the petition to be presented. It is unclear at this stage as to how the Court will determine such a matter or who would bear the burden of proving that the debtor company (in this context, the defaulting tenant) was unable to pay as a result of COVID-19.

This guide aims to provide:

a. a summary of some of the rights of commercial landlords and their tenants, both prior to the 2020 Act and after its enactment, and;
b. to offer practical solutions to both.

This guide is an overview of the law and is not a replacement for formal legal advice tailored to your specific query. If you seek further information, please contact 3PB Property & Estate's clerking team by emailing mark.heath@3pb.co.uk or calling 0330 332 2633.

The position prior to the 2020 Act

If a commercial tenant is either (1) in breach of a condition of the lease; or (2) is in breach of a covenant contained within a lease and the landlord has expressly reserved the right to do so, the landlord will be entitled to forfeit the lease.

Generally, a landlord can only forfeit a lease upon service a notice under section 146 of the Law of Property Act 1925 ("a Section 146 Notice"), which will allow the tenant time to remedy the breach. The major exception that applies is where there is non-payment of rent: a Section 146 Notice need not be served.

Upon discovering the breach, the landlord must elect whether to forfeit the lease or treat the lease as continuing. The courts have dealt with a number of cases regarding whether a landlord has waived the right to forfeit the lease (for example, by continuing to accept rent after discovering the breach) and advice should be sought to ensure that the landlord's position is protected during this time. It should also be noted that a waiver of a right to forfeit does not mean that the landlord completely loses its ability to pursue a defaulting tenant. For example, a landlord can bring a claim against a tenant for damages on account of breaches of the relevant lease in the usual way. These options are explored more below.

Forfeiture arises, either upon:

a. expiry of a Section 146 Notice or;
b. upon the landlord being entitled to exercise the right to forfeit for rent arrears in accordance with the lease.

Once the right to forfeit is established the landlord can either peaceably re-enter the premises or commence possession or alternatively forfeiture proceedings. Again, specific advice should be obtained relevant to the landlord's particular circumstances prior to electing to take either step, for example, there are issues which need to be considered in the event that the landlord wrongfully re-enters the property.

If a tenant has received a Section 146 Notice or is facing forfeiture proceedings, it may be appropriate to apply for 'relief from forfeiture'. The aim of such an application is to obtain an order which puts the tenant back in the position it would have been in if the forfeiture had not occurred. Again, the tenant should seek specific tailored advice as to its particular case.

The 2020 Act

Section 82 of the 2020 Act applies to tenancies which are or would have been governed by Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act"), which in broad terms means business tenancies (including those where the parties have expressly excluded the 1954 Act).

From 26th March 2020 until 30th June 2020 or such later date as specified in a subsequent regulation ("the relevant period"), where there is non-payment of rent under a business tenancy, a landlord:

a. cannot enforce a right of re-entry or forfeiture on the basis of non-payment of rent; but
b. will not be regarded as waiving its right to re-entry or forfeiture for non-payment of rent, unless the landlord has provided an express waiver in writing.

If a landlord began proceedings prior to 26th March 2020 to enforce a right to re-entry or forfeiture for non-payment of rent, any order made by the High Court granting possession to the landlord will set a date after the relevant period (i.e. after 30 June 2020), or such later date as may be specified in a subsequent regulation. Similar provisions apply for orders made in the County Court (see section 82 of the 2020 Act for further details).

Aside from the right of re-entry and forfeiture based on non-payment of rent, the 2020 Act contemplates applications for renewals and/or the continuation of existing tenancies under the 1954 Act. In circumstances where a landlord has opposed a tenant's application for a new tenancy in view of the tenant's persistent delay in paying rent under section 30(1)(b) of

the 1954 Act, it is not possible for a landlord to rely on any failure to pay rent during the relevant period.

It is notable that the 2020 Act does not appear to prevent a landlord from enforcing a right of re-entry or forfeiture for other purported breaches of covenant. This is likely to be particularly useful to both landlords and tenants where the opportunity to use self-help remedies arise.

There are two caveats to this. Firstly, in the Explanatory Notes to the 2020 Act, it is noted that the moratorium only applies to non-payment of rent; however, other breaches of the lease *"may be linked to cash flow issues or Covid-19 problems; for example, the breach of a 'keep open' clause in the lease requiring the tenant to keep their premises open. In practice, the protections afforded by the Act should help protect such a tenant"*. Yet there is no such protection afforded in the 2020 Act itself and it remains to be seen whether there will be cases testing the wording of the 2020 Act on this point.

Secondly, the greatest challenge that a landlord may practically face in the present climate is accessing the courts to pursue a claim. On the one hand, the courts and tribunals have been consolidated into fewer buildings and established categories of work that must be done versus work that could be done. On the other hand, the courts and tribunals are adapting to this new reality and are conducting some hearings remotely. It will be necessary to consider on a case by case basis whether it is worthwhile commencing proceedings presently.

Update in light of the Government's announcement on 23 April 2020

Prior to the Government's announcement, in addition to or in the alternative to forfeiture, the landlord could otherwise:

- use the commercial rent arrears recovery process under Part 3 of the Tribunals, Courts and Enforcement Act 2007; or
- serve a statutory demand and/or present a winding up petition against a defaulting tenant.

These were useful as a commercial tenant going into liquidation, administration or other Insolvency Act company rescue (e.g. CVA) would typically be grounds on which a commercial landlord could bring a lease to an end. None of these steps will be available to the landlord once the Government's announcement is placed on some statutory footing. As mentioned above, the Government intends to introduce temporary legislation to restrict the ability of landlords to present winding up petitions against defaulting tenants and to prevent

landlords using the commercial rent arrears recovery process unless 90 (or more) days' unpaid rent is owed.

Factors to consider for landlords

If you are a landlord and your tenant has failed to pay you rent, the 2020 Act does not prevent you from trying to recover that rent. For example, you could:

- bring proceedings against your tenant for rent arrears;
- if there is a personal guarantee for the rent, bring proceedings; or
- recover any rent arrears from any deposit held by the landlord (subject to the terms of the deposit).

Any of these actions are likely to be criticised in light of the Government's most recent announcement on 23 April 2020. However, the Government has not introduced legislation to prevent such means of recovery at this time, so such criticism would be unjustified.

It is recognised there may be some practical challenges and delays in litigating in the current climate and so you are encouraged to seek advice on how the courts are operating presently.

If you are a landlord and your tenant is otherwise in breach of the terms of the lease, the 2020 Act does not prevent you from bringing a claim for possession/forfeiture upon expiry of a Section 146 Notice (as detailed above) or bringing a claim for a debt/damages in the usual way. However, before taking those steps and given the present landscape, it is worth considering:

- is there a provision under the lease which will allow you to remedy the breach and recover those sums as a debt (rather than damages), that might better suit your aims?
- will you be able to find a new tenant straightaway?
- will you be able to finance the outgoings prior to finding a new tenant (for example, rates, insurance, utilities)?
- will forfeiture release any third parties (for example insurers or guarantors) from any liability to you?
- will you be able to make use of vacant possession of the property to fulfil other plans for it (for example, demolition or redevelopment or own use)?

If you are a landlord and wish to make the most of the lockdown by forfeiting the lease due to a technical breach of the lease by the tenant (for example, the tenant's breach of a "keep open" clause), this may present an opportunity for you; however, there are clearly risks involved in taking this action if the legislation changes prior to you evicting your tenant or if your lease has a provision protecting your tenant in these circumstances.

Factors to consider for tenants

If you are a tenant and you are in default of your rent obligations under the lease, you will be protected from forfeiture/possession proceedings whilst the 2020 Act is in force. However, you will still be liable to pay your landlord for the rent.

If you are a tenant and you are in default of other obligations under the lease, you will be at risk of a Section 146 Notice and eventual forfeiture. If your landlord is relying on the lockdown to find you in technical breach of the lease (for example, a provision in the lease requiring you to "keep open" between certain hours, which you are in breach of to comply with the Government's guidance to remain closed) thereby justifying forfeiture, you should seek advice on what steps you should take next. The landlord may be overlooking other provisions in the lease which protect you in these circumstances.

If you have received a Section 146 notice, you will need to comply with it. However, if there is a good reason for not complying with it, for example, if a landlord is requiring you to do something that is not required under the lease (such as the landlord is requiring you to repair common parts of a building which the landlord has the obligation to repair under the lease), you may wish to seek an injunction to prevent forfeiture.

If forfeiture has already been enacted, you may wish to apply for relief from forfeiture.

Before taking any of the above steps, you may want to consider:

- can you vary the existing lease to remove any onerous conditions? For example, given the climate, your landlord may be willing to accept a lower rent so that it does not have a void property;
- can you obtain consent from the landlord to sub-let the property?
- can you surrender the lease to bring your obligations under it to an end?
- do you need to enter into an insolvency arrangement (for example a CVA)?

- are there any personal liabilities which you will be exposed to if you default in your obligations under the lease?

Charles Irvine and **Rebecca Farrell** are both barristers in 3PB Barristers' Property & Estates team. Both are regularly instructed in commercial and residential landlord and tenant matters in the High Court and County Court; and also receive instructions on other real property and private client work. **3PB's Property & Estates team, with a 30-strong team of barristers, provide court representation and advisory work for clients ranging from FTSE 250 companies and property management companies to developers and individuals. We also act for large institutions such as insurers, local authorities and registered providers of social housing.**

To discuss your Covid-19 options or to book a videoconference or call with Charles or Rebecca, please email Mark Heath on mark.heath@3pb.co.uk **or call him on 0330 332 2633**

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