


Getting through lockdown – your real estate questions answered

Find out more about the confusion around the Government's support measures for business tenants and what to do if you have a break right during lock down.

 17 April 2020

Please note: the information contained in our legal updates are correct as of 6th May 2020

In this note we address the confusion around the Government's support measures for business tenants and what to do if you have a break right during lock down.

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2. It is not a moratorium on rent or other sums due under the lease, but against one of the remedies available to landlords where tenants fail to pay rent or other sums;
3. The moratorium means that landlords cannot forfeit (terminate) leases where tenants fail to pay rent or other sums due under the lease until after 30 June 2020. It is possible that this period will be extended;
4. Landlords may still forfeit for other breaches of a lease.
- 5.

What is the Moratorium?

I am a retail tenant, does the Moratorium affect my Head Office?

No it does not. The Moratorium only affects the properties ordered to close – namely, shops, and properties used for hospitality and leisure.

- 6.
7. The two remedies used most frequently by landlords are:-
 8. to serve a statutory demand; this is the start of the process to liquidate;
 9. Commercial Recovery of Arrears of Rent (CRAR) which allows a landlord to instruct enforcement agents to seize the tenant's goods and sell them to settle the debt. CRAR can only be used to recover rent – not service charge or insurance payments.
10. On 23 April, the Government announced it would restrict a landlord's ability to use statutory demands and winding up petitions where a company cannot pay its bills due to coronavirus until at least 30 June 2020. A landlord wishing to serve a statutory demand will have to satisfy the court that the reason that the company cannot pay is not the result of coronavirus.
11. On the same day, the Government announced that landlords would not be able to use CRAR unless there is 90 days or more of unpaid rent (the law prior to the announcement

Is it true that other remedies have been removed too?

required only 7 days of unpaid rent). Again, this restriction will remain in place until at least 30 June 2020.

12. The Moratorium and the restrictions on remedies were intended to level the playing field and allow landlords and tenants time to negotiate how to share the damage caused by Coronavirus. However, the announcement also said that tenants should pay what they could afford. The key point arising from all of this is that landlords and tenants should communicate with one another.

13.

Does the landlord have any other remedies?

Yes; if rent is not paid in full, is paid late or if the tenant changes payments e.g. from quarterly to monthly without the agreement of the landlord, the landlord still has other remedies:-

14. To withdraw money from a rent deposit; where this happens it is very likely that the tenant will be required to top up the deposit to the level before the withdrawal was made. Failure to top-up will be a breach of the rent deposit deed and a breach of the lease;
15. to charge interest – usually at a rate of 4% or 5% above base rate on the unpaid sums;
16. To withdraw money from a rent deposit; where this happens it is very likely that the tenant will be required to top up the deposit to the level before the withdrawal was made. Failure to top-up will be a breach of the rent deposit deed and a breach of the lease. Where this happens, a landlord could serve a statutory demand or exercise CRAR in relation to the top up sum;
17. to charge interest – usually at a rate of 4% or 5% above base rate on the unpaid sums;
18. To issue court proceedings for the unpaid sums.

19.

I am struggling to manage my cashflow; what do you recommend?

20. The first step is for landlords and tenants to begin communicating with one another;
21. Some landlords have already been very proactive in announcing measures to support their tenants, but the timing of the Government's announcement on 23 March meant that many tenants had already paid their March quarter's rent;
22. If landlords have not yet provided support and the March rent has already been paid, the discussion could centre around agreeing that the March quarter's rent is treated as payment for both the March and June quarters;
23. It appears likely that at least some of the lockdown restrictions will have been lifted by the next rent payment in June, but with an increasing number of retailers entering into administration, landlords will be very aware that the retail landscape, in particular, is changing fast.
24. Make sure you understand the nature of any support offered. Does a "rent holiday" mean a rent-free period or simply a deferral of rent to a later date? Whatever concession you agree, it is important that it is properly documented and forms part of your lease.

25.

My landlord is refusing to offer support. Should I simply stop paying rent?

26. This is a high-risk strategy. Whilst some landlords are sympathetic to the plight that tenants find themselves in, others have funders to satisfy and may have no option but to take steps to recover unpaid rent.
27. Some provisions in the lease such as break clauses and options to renew may be dependent on rent being paid on time. In some cases, a single late payment can mean the

right to break or renew is lost.

28. If your lease allows you to pay rent monthly, rather than quarterly, this right may also be conditional on payment of rent on time.
29. **Some of my landlords are being more sympathetic than others. If I pay rent to the more aggressive landlords, could this be treated as a preference under insolvency laws?**
30. Ideally, all creditors should be treated equally, but it will not necessarily be a preference where a tenant takes a different approach in response to the threat of legal action.
31. A preference arises where a company puts a particular creditor or creditors in a better position in the event of insolvency. This is a specialist area and if you think you may be at risk, please speak to a member of our insolvency team.
32. **I understand I may be entitled to 12 months of no business rates.**
33. If you are a retail, hospitality, leisure or nursery businesses in England, the Government has announced that business rates will be suspended for a year.
34. The position is not entirely straightforward as relief is being provided by local councils, not the Government and is in the discretion of the relevant council. Having said that, as the Government has announced the relief, businesses in the relevant sectors are expecting to receive it and as the relief is funded 100% by the Government, why wouldn't the council offer it?
35. Like the Moratorium, this business rates relief only affects the properties ordered to close – namely, shops, and properties used for hospitality and leisure and not head offices.
36. The relief will be dealt with by the reissue of rates demands, but we suggest that you look at the website of the relevant council or speak to your usual ratings adviser. Some council websites we have seen are confusing as they deal with both business rates relief and business grants for small businesses in the same place. To be clear, there should be no cap on the amount of business relief as the Government has not capped the funding to the council in this way.
37. **I have a break right during lock down:-**
38. How can I clear the property? Many break clauses are conditional on the tenant giving up "vacant possession". This expression means that everything has to be removed from the property, including rubbish. During lock down it may not be physically possible to clear the property. There is no easy answer to this but, if you are in this situation, please contact us and we will guide you through some practical steps.
39. How do I know if payments are up to date when our office is closed? Most break clauses are conditional on the tenant paying all sums due up to the break date. This would include not only any sums you have not paid, but also interest on those sums. This is not straightforward so please get legal advice early if a break date is imminent.
40. In both cases, plan ahead and do not leave it to the last minute!
41. **I have a March or June rent review – what should I do?**
42. In prime locations where rents have been rising, tenants' advisers are using Covid-19 as an opportunity to secure concessions now. Rent free periods and discounts on rent are just some of the matters being discussed.
43. In secondary or tertiary locations where rents have not risen, with a standard "institutional" upwards only rent review, tenants will be seeking a nil increase review. Those tenants with upcoming break clauses or lease expiry may be able to use this to their advantage if both

they and the landlord wish the arrangement to continue. Equally, “trophy” or “anchor” tenants may well be able to secure concessions that others cannot.

There is no doubt that the economic climate has changed dramatically for retail, leisure and hospitality business and that the impact of Covid-19 will continue to be felt for months if not years. Could we perhaps see a move to turnover rents, upward/downward rent reviews and monthly rents as standard? Both landlords and tenants will need to start these discussions sooner rather than later, to avoid more administrations in the coming months.

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