

The Coronavirus Act - provisions to protect business tenants from forfeiture

Under the Coronavirus Act a right of forfeiture (in which a landlord ends the lease early and takes back the premises) cannot be exercised in respect of non-payment of any rent (or other sums payable by a tenant to a landlord under a lease) until 30 June 2020.

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Please note: the information contained in this legal update is correct as of the original date of publication

Under the Coronavirus Act a right of forfeiture (in which a landlord ends the lease early and takes back the premises) cannot be exercised in respect of non-payment of any rent (or other sums payable by a tenant to a landlord under a lease) until 30 June 2020, though this could be extended.

There is no requirement to demonstrate a Coronavirus link or indeed show any level of hardship in order to benefit from this protection.

The protection only applies to the prevention of forfeiture and so other methods of enforcement are seemingly still open to landlords at present. For example another route for landlords is the statutory demand process under which a landlord can make a formal demand for payment of a debt within 21 days failing which a winding up petition can be presented. However, it has been reported that the Insolvency Service is currently considering similar adjustments designed to prevent companies currently unable to meet debts due to Coronavirus from being forced into insolvency processes in the coming months. And though it has not been ruled out at present presumably the government would not have intended that Commercial Rent Arrears Recovery (CRAR) be used as an alternative to bypass this protection. CRAR allows a landlord to take control of a tenant's goods and sell them in order to recover an equivalent value to the rent arrears. We may see more guidance on this in due course.

Any failure to pay rent during the period of protection will be ignored when considering if the landlord has established a statutory ground under Part 2 of the Landlord and Tenant Act 1954 for refusing to renew a lease enjoying the protection of that Act. This is welcome protection for tenants who would otherwise have feared that non-payment during the protected period might be used against them by their landlord as a reason to refuse a statutory lease renewal.

The Coronavirus Act gives some welcome clarity around waiving rights of forfeiture. The term 'waiver' means that a landlord can lose its right to forfeit by taking action that recognises the lease as continuing to exist (e.g. by demanding rent or exercising CRAR). The Act states that, during the period of protection, no conduct by the landlord (other than an express waiver in writing) will be regarded as waiving the landlord's right of forfeiture. Landlords may otherwise have felt the need to be more defensive in their actions and correspondence for fear of inadvertently waiving this right.

Non-payment of rent will still be a tenant's breach of the lease and the rent remains due. It therefore must be paid in full at the end of the protection period otherwise a landlord will once again have the right to forfeit. For example any tenant that has not paid the March quarter's rent will need to pay the March quarter's rent as well as the June quarter's rent by the end of the current protection period (or as extended). So while this is a welcome initial protection for tenants, there will be problems further down the line if a large amount of rent will still be due before businesses have had an opportunity to resume trade and recover sufficiently to meet this liability. It is also worth bearing in mind that the protection relates to non-payment of rent (and other sums due under a lease) specifically, and forfeiture is therefore seemingly still a possibility during this period if the trigger was insolvency of the tenant, or another breach of the lease such as damage to the premises by the tenant.

As can be seen, these measures do not mean that non-payment of rent is entirely without consequence. In particular, one thing a tenant should check is the wording of any future break provision it may wish to operate to ensure that the conditions are not so widely worded as to prevent the operation of the break because of the tenant's historic failure to pay the rent when it fell due. We have found this more likely to be an issue in older leases.

We have seen a mixed response from landlords to tenants' proposals for reduced rent, monthly rent and deferred rent. The clarity of this forfeiture protection coming into force will hopefully now give some time for landlords and tenants to reach agreement on fair rent adjustments, to ensure that everyone shares the pain during this unprecedented period.

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