

Retail landlords face further restrictions on rent arrears recovery

Legal update

[The Corporate Insolvency and Governance Act 2020](#) (the Act) became law on 26 June 2020 and further limits the remedies available to commercial landlords who have tenants who have not paid rent during the coronavirus pandemic.

Government support offered to retail tenants so far during the pandemic

Landlords have faced limitations on the remedies available to them in relation to rent arrears for many months and have seen two rent quarters pass without, in some cases, receiving any rent at all. The Coronavirus Act 2020, which came into force on 25 March 2020 prevents commercial landlords from enforcing a contractual right of re-entry or forfeiture for non-payment of rent from 25 March 2020 until, initially, 30 June 2020, but this has now been extended until 30 September 2020. It does not prevent the rent being payable by the tenant, but it prevents the landlord bringing the lease to an end for non-payment. When the moratorium is lifted, landlords will be able to seek forfeiture for payments which became due during the moratorium period.

While this was positive news for retail occupiers that were forced to close their doors during lockdown as non-essential shops, concerns were raised by tenants of landlords that were overusing alternative remedies, in particular statutory demands and winding-up petitions, to recover rent arrears. As such, the Government announced on 23 April 2020 that it would pass legislation to protect commercial tenants from “aggressive debt recovery tactics”. As we noted in our update [‘Commercial landlords to be prevented from pursuing remedies against tenants’](#) on 24 April 2020, while this was, once again, to act as a support mechanism for retailers and other commercial tenants, the announcement raised several questions. For example, what happens if the tenant has the necessary cash reserves but is still refusing to pay? Furthermore, what happens if the rent arrears occurred prior to the outbreak?

The Corporate Insolvency and Governance Bill: further protection for retailers

The Government has since published the Corporate Insolvency and Governance Bill, which came into effect on Friday 26 June 2020. To curtail the use of statutory demands, the Act prevents winding-up petitions based on statutory demands issued between 1 March 2020 and 30 September 2020 from being presented.

Prove it: The challenge for landlords

Landlords can still present winding-up petitions that are not based on statutory demands, by showing insolvency on a balance sheet basis or cash flow basis, but there are restrictions. For winding-up petitions presented between 24 April 2020 and 30 September 2020, landlords will need to pass a coronavirus threshold, namely that they have reasonable grounds for believing that:

- coronavirus has not had a financial effect on the tenant company, or
- the insolvency of the tenant would have occurred even if coronavirus had not had a financial effect on the company.

Coronavirus has a “financial effect” on a company if the company’s financial position worsens in consequence of, or for reasons relating to, coronavirus. Given this broad definition, it will be difficult for landlords to show that coronavirus has not had a financial effect on the tenant and relatively easy for the tenant to show that it has. Therefore, if the tenant has the necessary cash reserves, but it is nonetheless refusing to pay, it is unlikely the landlord will be able to use the insolvency route to recover rent arrears.

However, if rent arrears arose prior to the outbreak and the tenant was refusing/unable to pay, the landlord will likely have grounds to present a winding-up petition. However, surprisingly, it seems the coronavirus threshold test will still apply.

Other remedies for landlords

There are other remedies available to landlords, but their viability and suitability will vary on a case by case basis.

1. The Taking Control of Goods and Certification of Enforcement Agents (Amendment) (No. 2) (Coronavirus) Regulations 2020 which was passed on 23 June 2020 has increased the number of days for which rent must be due under the provisions of the Commercial Rent Arrears Recovery procedure (CRAR) from at least 90 to at least 189. This method of recovery is still

available to landlords who meet the new criteria and the logistical difficulties of entering premises, seizing goods and selling them posed by the lockdown are now starting to ease as more premises open up, following a lifting of the restrictions. This may prompt more landlords to consider this option of recovery.

2. Landlords can still pursue debt proceedings in the usual manner, although with restricted court opening times and a backlog of cases there will inevitably be long delays.
3. Alternatively, subject to the provisions in the lease, the landlord can draw down from the rent deposit or rely on third-party guarantees as a means of recovery, but these are likely to be available in a limited number of cases.

What happens when the legislative changes end?

It is clear that recent legislation is providing assistance to retail tenants who need to manage their cash-flow during the pandemic. However, the assistance takes the form of not allowing landlords to take certain recovery steps for non-payment, it does not waive the obligation of the tenant to pay rent.

When the legislative changes end, unless the government decides to put in place further changes, landlords' rights and remedies will be restored.

The government clearly hopes that by that time, landlords and tenants will have entered into a constructive dialogue about arrears with the view to reaching agreement about payment. This is reflected in the government's recent [Code of Practice for the commercial property sector](#).

Many have already taken the step of agreeing rent concessions and, in most cases, landlords are supportive of retailers who are experiencing unprecedented financial hardship through lockdown restrictions. However, when landlord remedies are re-instated, there will be some who wish to enforce the obligation to pay rent and we anticipate an increase in forfeiture and insolvency cases. Retailers who have not already engaged with their landlord about missed rental payments should consider doing so.

Need further guidance?

We are advising both tenants and landlords in the retail sector in respect of their options during this time. Please contact our team if you have any questions or need guidance.

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