

YOUR QUICK QUARANTINE Q & A WITH SOLOMON TAYLOR AND SHAW

LANDLORD AND TENANT LAW AND COVID 19

We have seen many drawn out articles about this topic in the media and we want to make life a little simpler with our Quick Quarantine Q & A regarding this much talked about topic. We cover both residential and commercial leases in this article.

How are commercial and residential tenancies affected by the new COVID-19 measures?

For commercial tenancies, landlords will be unable to forfeit a lease and commence possession proceedings if a tenant fails to pay rent (or other sums, including service charges and insurance rent) until 30th June 2020.

With regards to residential tenancies, landlords will be required to give at least three months' notice for any notice seeking possession or notice to quit until 30th September 2020.

Changes in the lockdown period may well effect this and you will need specific advice as to whether the above protections apply.

Is a tenant therefore entitled to withhold rental payments in the next two (commercial) or five months (residential)?

No – present legislation may protect non-paying tenants from eviction for now, but it does not remove the obligation, unless the terms of the lease allow the tenant to withhold payment of rent which is unlikely or unfortunate for a landlord!

Remember landlords can still bring possession proceedings for non-payment of rent after June (in the case of commercial tenancies) or September (in the case of residential tenancies) for accrued rent and interest.

As a landlord, do I have to waive rent during the COVID-19 outbreak?

No- whether you are a residential or commercial landlord, you do not have to but can if you want to. Network Rail, in their landlord capacity, have agreed to waive their tenants' March quarter rents. Others have simply suspended rent payments.

Landlords have a discretion here, although, most commercial leases contain provisions which explicitly prevent tenants from withholding or off-setting rent or other payments.

As a residential or commercial tenant, can I decide how much rent to pay without consulting my landlord?

No- you cannot do this unilaterally and this must be done with the landlord's agreement.

How can this be agreed?

A change in rent payment terms can best be recorded in a side letter. The side letter should contain:

- the new rental payment terms including the terms, if any, of repayment of the accrued arrears;
- the length of time for which these new arrangements will last and the situations when the landlord can revoke the concession;
- a statement that the other lease terms remain unaffected by the concession and that the letter will be disregarded on rent review;
- agreement as to what happens when either party assigns their interest;
- confidentiality provisions; and
- the agreement of any guarantor (including guarantors under AGAs) to its terms.

What can I do if my landlord does not agree to an alternative payment plan?

Force Majeure, which we have covered in our other articles, will only be relevant if your lease contains a specific clause. You may be able to argue frustration in that you have not been able to use the premises. However, a temporary inability to use premises will not amount to frustration of a lease. Both doctrines apply to commercial and residential leases but rarely found in the latter.

In commercial leases, if your landlord has shut the premises without your agreement, you may be able to argue that there has been a breach of your common law right to enjoy the premises for which damages are owed but given the current circumstances, a judge is unlikely to look too sympathetically to this argument.

As a commercial landlord, if I accept a month's pay over what should be a quarter's payment, have I then prejudiced my position?

Due to the present climate, many tenants have paid a single month's rent rather than a full quarter, which most leases will stipulate. If a landlord accepts one month's rent, it will not lose the right to recover the additional two month's rent as a debt if it remains unpaid. The landlord will be able to do so once the moratorium lifts (after 30th June 2020).

Similarly, if you are a residential landlord and accept less than what you are owed in the relevant payment period, this will not waive your right to forfeit the lease at a later date.

If a landlord cannot forfeit a lease for now, what else can be done?

A commercial landlord may make use of any Rent Deposit or Personal Guarantees that it has to recover any unpaid rent. Clearly, this could leave a landlord in a precarious position at the end of a lease if a tenant fails to pay the final quarter's rent or if there is a dilapidations claim to deal with when the lease has come to an end.

Another remedy is for a landlord to recover a fixed charge from a former tenant (or former guarantor) by serving a section 17 notice on the former tenant (or former guarantor) within six months of the fixed charge becoming due.

From an insolvency law perspective, the law is to be amended so as not to permit petitions to be presented, or winding-up orders made, where the company's inability to pay is the result of COVID-19. The new legislation will be in force until 30th June and may be extended in line with the moratorium on commercial lease forfeiture.

Landlords will also be prevented from using commercial rent arrears recovery (CRAR) unless they are owed 90 days of unpaid rent. The measures will be included in the Corporate Insolvency and Governance Bill.

A residential landlord can also make use of any Rent Deposit or Personal Guarantee in place, but it is exposed to costs if the condition of the property is poor or if there are rental arrears when the tenancy comes to an end.

Normal debt claims can be put through the county or high court, but the process is likely to be slow and expensive.

What happens if possession proceedings have already commenced?

The UK government has suspended existing notices seeking possession until 30th June 2020 for business tenancies, and for 90 days from 27 March 2020 for residential tenancies. These dates are again subject to review and may be extended.

What can I do if I am struggling to make my mortgage repayments because of COVID-19?

Many mortgage lenders have agreed to offer payment holidays of up to three months to residential homeowners and buy-to-let landlords, but they have yet to provide the same facility to commercial landlords. Borrowers should discuss the specific details of their payment holidays with individual mortgage lenders.

How will COVID-19 alter my repair obligations under the lease (residential and commercial)?

It will not. The emergency COVID-19 measures do not alter a tenant's or landlord's existing repair obligations under a lease. Repairs should therefore be carried out where necessary if required under the lease. However, in accordance with the published guidance for landlords and tenants, residential landlords should only carry out repairs when urgent and should ensure that they take all the necessary precautions to keep safe.

If a tenant or landlord is unable to meet their repairing obligations, it will be best practice to engage in productive talks with the other party as soon as reasonably possible. There is no legal safeguard that prevents a landlord or tenant from bringing proceedings against the other for unreasonably refusing to comply with their contractual obligations in the aftermath of the pandemic.

Commercial landlords should be aware of the restrictions placed on them by the Leasehold Property (Repairs) Act 1938. Under the 1938 Act, an action for damages for a tenant's failure to meet their repairing obligations can only be brought if a landlord gives the tenant at least one month's notice that complies with the statutory requirements. The 1938 Act will apply to all leases for a term of not less than seven years, provided there are three years or more to run from the date proceedings are commenced. The government has not introduced further legislation to change this provision or similar provisions in light of COVID-19.

Am I still required to comply with my health and safety obligations?

Yes. Landlords and tenants still must comply with their health and safety obligations under the law. For example, residential landlords must provide tenants with all necessary gas and electrical safety certifications at the beginning of a tenancy.

If a landlord or tenant is unable to meet their obligations, due to social distancing measures, then they should document this in writing and engage in productive talks with those to whom the duty is owed.

As a commercial or residential landlord, am I required to provide additional cleaning facilities during the outbreak?

No. There is no legal obligation for landlords to provide additional cleaning services due to COVID-19. Nonetheless, some landlords have taken proactive steps to do so (such as installing additional washing facilities or increasing the frequency of cleaning services) to ensure the safety and wellbeing of their tenants.

Can I add the extra cleaning costs in service charges?

This will depend on the drafting of the service charge provisions in a lease. Most leases will allow recovery of costs incurred by a landlord in relation to compliance with statute, regulations, health and safety measures, and the well-being of tenants. What is almost always arguable is whether such charges are reasonable.

Can we change the terms of the commercial lease permanently because we expect difficult trading conditions?

A tenant is not entitled to seek a permanent variation of a lease without the landlord's agreement. However, some landlords may be willing to vary leases given the poor state of the economy that we are expected to see.

Can we terminate our commercial lease?

If you would like to terminate your lease and a landlord would like to recover premises, now is likely to be an opportunity to do so. This is more likely to be attractive for a landlord if it already has plans for development works to the building. If not, then a landlord is unlikely to want a vacant unit in the current climate.

Can I exercise a break clause in the lease (residential or commercial)?

This will depend on the wording of the break clause itself. Some break clauses will allow a tenant to walk away as long as they have paid all rents due up to the date of the break. Others expressly provide that they will only operate if the tenant gives up occupation and terminates any underleases they may have granted.

A tenant break right is interpreted strictly against the tenant exercising it, to the extent that if the clause specifies a notice on stripy paper and one is given on plain paper, the break will not have been validly exercised!

What if I continue to trade my business amid this pandemic?

Directors have a duty not to trade once they conclude or should have concluded that their company cannot avoid an insolvent liquidation or administration. They must minimise loss to the company's creditors. This duty can be enforced directly against a director by means of disqualification from acting as a director for up to 15 years.

The Government has proposed legislation to suspend directors' liability for wrongful trading. This is likely to protect directors continuing to run companies that at present could not avoid insolvent liquidation or administration, but it does not remove their duties to their shareholders.

This note is not intended to constitute to legal advice. Please get in touch with the author, Priya Sejpal, if you require more specific advice on the matter.

PRIYA SEJPAL

Senior Solicitor

27th April 2020

Priya@solts.co.uk

DDI: 020 7317 8688

WWW.SOLTS.CO.UK

3 Coach House Yard
Hampstead High Street
London NW3 1QF

Tel 020 7431 1912 Fax 020 7794 7485

DX 144580 Hampstead 2

Solomon Taylor & Shaw, a firm of English solicitors, is regulated by the Solicitors Regulation Authority (SRA No. 0006190)
