

MAY 2021



## RENT ARREARS AND COMMERCIAL TENANTS

The last year has been a difficult one for both landlords and tenants in the commercial property sector. Many tenants have struggled to pay rents while their businesses have been closed, whilst landlords reliant on the rental income have been restricted in what they can do to recover arrears that are often substantial. Many of the usual enforcement options open to landlords have been restricted by emergency legislation introduced as a result of COVID-19.

As a reminder:

•The moratorium on forfeiture has been extended until 30 June 2021;

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- Commercial Rent Arrears Recovery (CRAR) can only be used where tenants owe at least 457 days' rent between 25 March - 23 June 2021, and 554 days' rent between the 24 - 30 June 2021.
- The temporary ban on issuing winding-up petitions where the inability to pay debts is caused by COVID-19, has been extended until 30 June 2021.

The Government has been consulting on what should happen as 30 June approaches. It is feared that a complete lifting of the restrictions will result in a sudden surge of tenant insolvencies at a time when tenants need time for their businesses to recover from the impact of the pandemic.

We will cover the changes after 30 June 2021 in a future edition.

## BRINGING A MONEY CLAIM FOR RENT ARREARS

One of the few enforcement options open to landlords for rent arrears is simply to bring a claim for a money judgment in the High Court or County Court.

The first of these claims have recently been decided by the court.

The landlord of Westfield Shopping Centre in London brought a claim against its tenant, The Fragrance Shop, which held a retail unit in the centre under a five-year lease. As a result of the COVID-19 pandemic, the tenant had been obliged to close its shop between:

- 26 March 2020 and 15 June 2020.
- 5 November 2020 and 2 December 2020.
- 19 December 2020 until 12 April 2021.

The tenant had not paid any rent since April 2020 and the monthly service charge for April, May and June 2020 was also outstanding.

The tenant defended the landlord's claim arguing that

• The claim was issued prematurely contrary to the Code of Practice for Commercial Property during Covid-19 which requires landlords and tenants to work together, and they had been a reliable tenant and the pandemic had created exceptional circumstances.

- The claim was a means of circumventing the government measures put in place to prevent forfeiture, winding up and recovery using CRAR. The landlord was attempting to exploit a "loophole" in the government's restrictions on the recovery of rent.
- The landlord was obliged to insure for loss of rent resulting from forced closures or denial of access due to notifiable disease or government action. The landlord had to claim under the loss of rent insurance policy before commencing proceedings to recover rent.
- The rent suspension provisions in the lease, properly construed, applied to the COVID-19 pandemic. The pandemic was a suspending event for the purposes of the lease.

Unfortunately for the tenant, the High Court did not accept its arguments and granted summary judgment for the landlord. The Government's restrictions did not restrict the landlord's ability to pursue a debt claim and there was no basis for concluding that a landlord's right of access to the Court was restricted.

Commercial landlords will welcome the court's confirmation that they may still sue for rent arrears incurred during the COVID-19 pandemic.

This decision also confirms that the Code does not affect the legal landlord and tenant contractual relationship.

This judgment also highlights that landlords and tenants have separate insurable interests. The tenant lost its argument that it was reasonable to expect the landlord to obtain cover for the tenant's business losses. If tenants want to be covered for this type of loss, they should arrange their own business interruption insurance.

# BUSINESS LEASE RENEWALS IN TIMES OF COVID

When a business tenancy comes up for renewal under the Landlord and Tenant Act 1954 the landlord and the tenant will typically negotiate the terms of the new lease. In most cases an agreement is reached for the length of the term and the new rent, perhaps a landlord or tenant break option. Commonly the other terms will be agreed in line with the old lease (subject to any modernisation needed). Lease terms other than rent and term are only rarely considered by the court.

This may change in a continuing pandemic environment where many tenants will be looking for a rent suspension clause to be included in their new lease which would be triggered for example by a pandemic/COVID-19 shutdown of non-essential businesses.

Is a tenant going to be able to persuade a court that a rent suspension clause is a reasonable term when the old lease did not contain one?

The first case on this type of issue has recently been reported, but we expect this to be a developing area over the next months.



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**If you would like to discuss or need any help or support on any of the issues above then please contact the Machins' Property Litigation Team on 01582 514 000.**

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