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# Commercial Property Moratorium

A note for commercial landlords and tenants (England and Wales)

Due to the impacts of COVID-19 (“Covid”) on commercial business, the UK Government introduced a moratorium on a Landlord’s ability to forfeit a commercial lease.

This note sets out the practical consequences of this moratorium for both commercial landlords and tenants within England and Wales.



## 1. Forfeiture

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The Coronavirus Act 2020 (“the Act”) under Sections 82 and 83 introduced the first moratorium as a response to the initial impacts of Covid and prevented forfeiture of any commercial leases for an initial period of 3 months from 26 March 2020.

The initial moratorium period of 3 months has recently been extended until 31 December 2020 under the 2020 Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No 2) Regulations and the 2020 Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No 2) Regulations (“the Regulations”) in both England and Wales.

As the impact of Covid continues, this moratorium may be extended further.

## 2. Which Tenancies does the Act apply to?

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A business tenancy is defined as a tenancy to which Part II of the Landlord and Tenant Act 1954 (“LTA”) applies, or to which that Part would apply if any relevant occupier were the Tenant.

The Act will therefore apply to tenancies that satisfy the criteria within Section 23 of the LTA and includes: a lease, an Underlease, a tenancy by estoppel, a periodic tenancy, an agreement for lease and an agreement for Underlease.

Even if the Tenant cannot occupy the premises within the lease due to Covid restrictions, it is likely they will still be considered to be in business occupation; particularly if the Tenant has expressed their wish to occupy the premises as soon as possible to conduct business.

A licence, tenancy at will, agricultural holding, mining lease and tenancies of 6 months or less are examples of instances in which the Act does not apply.

These Regulations are applicable to most commercial leases with the exception of the majority of leases that are for a term of less than 6 months.

## 3. What does non-payment of rent refer to?

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The Act specifies that rent includes any sum the Tenant is liable to pay under the business lease.

This means that, besides the basic rent payable towards leasing the premises, any service charge payable by the Tenant or insurance contributions are included in the definition of rent.

It is also worth noting that this may also cover any claims for a recovery of costs for breach of repair and maintenance obligations within the lease (often referred to as a Jervis v Harris clause).

The reason(s) for the non-payment do not have to relate to Covid/the business does not have to have been impacted by Covid for the moratorium within the Act to apply.

## 4. What does this mean for Landlords in practice?

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Under the Act, Landlords cannot forfeit commercial leases due to Tenants’ non-payment of rent.

Landlords also within existing High Court (“HC”) or County Court (“CC”) proceedings that commenced before 26 March 2020 cannot be granted a possession order before 31 December 2020.

If the HC or CC has already made a possession order for non-payment of rent, which is to be given between 26 March and 31 December 2020, the Tenant can apply to vary the order. The HC, on receiving the Tenant’s application, must ensure that the tenant does not have to give possession before the 31 December 2020.

However, Landlords can continue to demand rent under the lease without waiving the right to forfeit for non-payment of arrears. The Act therefore does not prevent a Landlord’s right to rent or payments due under the terms of the lease.

Landlords are also able to charge interest at the rate specified within the lease on the rent that is unpaid during the moratorium period.

It is also important to remember as a Landlord that, if you want to forfeit for some other breach of the lease, the usual rules apply in order to do so.

For example, Landlords are still able to forfeit by way of peaceful re-entry for breaches other than the non-payment of rent. The impacts of Covid should be considered in providing the Tenants a reasonable time to remedy a breach of the lease which is of concern.

## 5. What other actions are available to Landlords?

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The Act does not prevent a Landlord from pursuing actions against the Tenant such as: claims for debt, commercial rent arrears recovery (“CRAR”), claiming against guarantors, utilising rent deposits or serving a statutory demand.

However, it should be noted that on 25 April 2020 The Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (“Enforcement Regs”) were introduced to impose restrictions on such further actions listed above.

The Enforcement Regs initially imposed that the minimum net unpaid rent that must be outstanding before CRAR may take place is to amount to an equivalent of 90 days’ rent. However, an amendment on the 24 June 2020 increased this to 189 days’ rent and a further amendment on the 29 September 2020 increased this further to 276 days’ rent.

The Enforcement Regs therefore impose that, from 29 September 2020, the minimum amount of net unpaid rent required before you can exercise CRAR in England and Wales is an amount equal to 276 days’ rent. This will increase further, to 366 days’ rent, on 25 December 2020.

In addition, the Corporate Insolvency and Governance Act 2020 (“CIGA 2020”) came into force on the 26 June 2020 and restricts a winding up petition in relation to debt where a company cannot pay rent due to Covid. It could be difficult in the current climate as a Landlord to demonstrate that Covid has had little or no impact on the Tenant’s ability to pay rent and therefore making a winding up petition as a Landlord is restricted. The initial period of this restriction was until 30 September 2020, but has now been extended until 31 December 2020.

Also under CIGA 2020, a company (as the Tenant) can apply for a moratorium that prevents creditors from taking enforcement action while a company’s directors, overseen by a licensed insolvency practitioner referred to as ‘the monitor’, seek to rescue the company as a going concern. If the company is eligible, this moratorium can last for an initial period of 20 business days and can be extended more than once by majority secured and unsecured pre-moratorium creditor consent (by no more than 12 months from the first day of the initial moratorium). During this moratorium, the company (Tenant) is granted a ‘payment holding’ from pre-moratorium debts, which includes rent. However, during the period of the moratorium there are certain expenses that must still be paid and rent is one of them.

## 6. Code of practice for commercial property relationships

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In addition to the introduction of statutory legislation to deal with the impact of Covid, on 19 June 2020 the Government issued a Code of Practice (“the Code”) for commercial property relationships during the pandemic.

The Code is voluntary and sets out a framework to encourage greater responsibility and collaboration between landlords and tenants with a focus on encouraging the parties to resolve issues pragmatically and seek to agree terms where possible.

The Code reinforces Government guidance that tenants who can afford to pay their rent should do so and those who cannot pay in full should engage with their landlord and pay what they can. Landlords are expected to provide support to tenants where possible. In an effort to facilitate that objective, the Code helpfully sets out a non-exhaustive list of practical arrangements that could be agreed between landlords and tenants to mitigate the impact of the current crisis, including:

- rent free periods and deferral of rent payments;
- rent reductions to current market rate and/or payment of some or all of the rent on a turnover basis (to include any period during which the premises were closed);
- shift from quarterly to monthly rent payments and/or payment in arrears;
- sharing the cost of the rent for unoccupied periods; and
- landlords waiving interest on unpaid rents or rents paid in arrears.

The Code will apply until 24 June 2021.

*If you have any queries on the content of the above, please contact a member of our Commercial Disputes and Regulation or Commercial Property teams.*

### Key contacts



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