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The Commercial Rent (Coronavirus) Act 2022 and Other Current Issues

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BACKGROUND

On 25 March 2020, the **Coronavirus Act 2020** came into force. **S.82** banned forfeiture for non-payment of rent in relation to commercial leases which fell within **S.23** of the **Landlord and Tenant Act 1954** (including excluded leases). In addition, the **Corporate Insolvency and Governance Act 2020** banned statutory demands and serving of winding-up petitions if the reason for the debt was Covid. The amount of rent due before Commercial Rent Arrears Recovery was possible was increased from 7 days, eventually to 566 days. In England, forfeiture became available and Commercial Rent Arrears Recovery went back down to 7 days arrears on 25 March 2022. Statutory demands and winding up petitions became possible on 1 April 2022. In Wales, on 22 March 2022, the **Coronavirus (Alteration of Expiry Date) (Wales) Regulations 2022** extended the banning of forfeiture for non-payment of rent to 24 September 2022.

The **Coronavirus Act 2020** expressly provided that the actions of the landlord, eg. in making a rent demand, would not give rise to a waiver of the right to forfeit. This could only be done expressly. Be careful making rent demands post 25 March 2022 as this would waive the right to forfeit.

Whether a landlord would want to effect forfeiture is another matter as empty properties will incur full business rates liability after three months, or six months in relation to industrial unites and warehousing. For the rating year 1 April 2022 to 31 March 2023, there is a 50% discount on business rates in the hospitality, leisure and retail sectors up to a maximum of £110,000 per business. This will not be available for empty properties.

DEBT CLAIMS

Other remedies have always been available but see the **Commercial Rent (Coronavirus) Act 2022** below.

Commerz Real Investmentgesellschaft v TFS Stores [2021] EWHC 863

TFS Stores had been closed during the various lockdowns. Since April 2020 it had not paid any rent. The landlord sued for non payment of rent. In a summary judgment the High Court found for the landlord. Although Commercial Rent Arrears Recovery is suspended it was clear that this did not stop the landlord from suing for the arrears.

The tenant also argued that the landlord had not adhered to the Government Code of Practice for commercial property relationships during the Covid-19 pandemic. The Court held that this is merely voluntary.

The tenant also argued that the landlord should have insured against notifiable disease. This claim failed as there is no such term in the lease and it would not be implied.

Bank of New York Mellon Limited v Cine-UK Limited [2021] EWHC 1013

This involves further summary judgments in relation to Cine-UK, Sports Direct, Mecca Bingo and Deltic, a night club chain. The main question for the Court was whether rent suspension provisions covered pandemic. The Court decided that they did not but merely covered physical damage or destruction. The Court also decided that the contract had not been frustrated as the leases were for between 12 and 13 years and the maximum closure was likely to be 18 months. For another case where a 25-year lease was not frustrated due to Brexit see ***Canary Wharf v European Medicines Agency [2019] EWHC 335.***

The tenants also argued that the landlord was not out of pocket because they could claim off their business interruption insurance. The Court held that this was irrelevant as it was open to the tenants to have taken out business interruption insurance (see below).

On 22 September 2021 the Court of Appeal gave leave to appeal this case.

London Trocadero (2015) LLP v Picturehouse Cinemas [2021] EWHC 2591. The tenant had a lease of a cinema in the Trocadero Centre in London. A company in the same group, Gallery Cinemas, also had a lease and the holding company, Cineworld, were guarantors. Rent had not been paid since June 2020 and the arrears were £2.9 million. This was due to the various lockdowns.

The landlord sued and the tenant argued that there must be an implied term that the rent would not be due in these circumstances. This failed. The tenant also argued that there was a partial lack of consideration as they were legally unable to run a cinema. This also failed as the basis of the lease was the premises and not the cinema business. Finally, the tenant argued that the case should be adjourned until the ring-fencing provisions come into force next year (see below). This also failed.

Atmore Centres v TFS Stores (2021) Liverpool County Court. Here, the landlord was able to recover rent and service charge. The then Code of Practice made clear that it is merely voluntary and could not be used by the tenant as a defence. The tenant also failed in an argument that rent suspension provisions would apply in relation to non-physical damage. Moreover, the landlord was not obliged to insure for loss of the tenant's business and the lease required the rent to be paid and thus the landlord's business interruption insurance would not pay out if there was a claim.

Note: ***FCA v Arch and others [2021] UKSC 1.*** The High Court held that certain business interruption insurance policies would cover closure through lockdown. On 15 January 2021 the Supreme

Court confirmed the first instance ruling. The FCA has now issued detailed guidance on various business interruption insurance policies and their effect. In ***TKC London v Allianz (2020)*** this case made clear that there would be no claim if there was no business interruption insurance within the policy.

COMMERCIAL RENT (CORONAVIRUS) ACT 2022

On 9 November 2021 the Government produced a new **Code of Practice on Commercial Property Relations** following the Covid-19 pandemic. This came into force with immediate effect.

A new Code of Practice replaced this on 7 April 2022. Part 1 is non-statutory and applies to commercial rent arrears generally. Part 2 applies to protected rent debt in the hospitality, leisure and retail sector (see below) and is legally binding. The **Commercial Rent (Coronavirus) Act 2022** applies to businesses that have been adversely affected by Covid-19, ie. the hospitality, leisure and retail sectors. They must also come within the definition of a business tenancy within **S.23** of the **Landlord and Tenant Act 1954** (including excluded leases). The tenant must occupy under a lease as opposed to a licence, at least partly for business purposes. If there is a sublease, the subtenant is almost certainly the person in occupation: see ***Graysim Holdings v P&O Holdings [1996] AC 329.***

On the same day the **Commercial Rent (Coronavirus) Bill 2021 – 2022** received its first reading in the House of Commons. The Welsh Government are also adopting the legislation received the Royal Assent on 24 March 2022 and came into force on that day. Protected rent debt will be ring-fenced. This includes rent, service charge, interest, VAT and insurance rent where arrears fell due during a period when legislation required the tenant to close the premises or cease trading whether in whole or in part. This will include, for instance, shops which were open for click and collection or pubs and restaurants with limited or at seat service or which able to remain open as takeaways. It will also include theatres and cinemas which are limited as to number of attendees. It will include times when premises could temporarily reopen between lockdowns. The commencement date was 21 March 2020 and the very end day 18 July 2021 in England and 7 August 2021 in Wales. Annex A of the Code of Practice has a table as to the relevant dates for various types of business. There is provision whereby this may be extended if there are any future statutory closures. If, for example, a whole quarter's rent is not paid but statutory restrictions ended during the quarter, the protected rent will be apportioned on a daily basis as will interest.

If the rent debt is protected then the parties should negotiate how much payment should be made. If there is no agreement either side can apply for arbitration within six months of the legislation being passed. If the tenant's business is not viable and would not be viable if relief was granted then the claim cannot be heard. If it would be viable, arbitration can write off the debt, give further time to repay including in instalments (for no more than two years), or reduce interest potentially to zero. If the tenant is able to find the arrears then they should pay immediately.

If there is an approved Company Voluntary Arrangement or Individual Voluntary Arrangement or compromise or arrangement then there cannot be arbitration.

The Arbitration Process

Either side can apply for arbitration but there must have been engagement or an attempt to engage with the other side beforehand. The Code recommends a written letter to the other side who then has 14 days to respond. If they do so and agreement cannot be reached, either side can apply for arbitration after 14 days. If they do not respond, then application can be made after 28 days. These time periods may be extended by agreement or by the arbitrator. The arbitrator cannot make a decision if the tenant's business cannot become viable. A non-exhaustive list of factors to take into account include management accounts, gross and net profit margins, bank account information and liquidity ratio. The Guidance suggests that a major factor in determining viability would be whether the tenant has been able to pay their debts after the restrictions have been lifted. The Guidance also states that full bank account details would be preferable as would an audit.

Arbitration will be through an open hearing unless the parties both agree otherwise. The person applying for arbitration will usually pay the costs but at the end of arbitration they will be split

equally subject to reasonable behaviour of the parties. As of the end of March 2022 the Government recognised arbitrators are:

- The Chartered Institute of Arbitrators;
- Royal Institution of Chartered Surveyors;
- Consumer Disputes Resolution;
- Falcon Chambers Arbitration;
- Disputes Resolution Ombudsman;
- Consumer Code for Online Disputes Resolution; and
- London Chamber of Arbitration and Mediation.

The starting point for arbitration is that it should be intended to preserve or preserve and restore the tenant's business but should also have regard to the landlord's solvency. The tenant would not be expected to go into debt to pay the rent. Guidance suggests that if there are multiple debts owed by the tenant to the landlord then they all should be joined together. It is not clear whether viability is based on the tenant's whole property portfolio or not.

The parties should submit their proposals. In Annex B of the Code of Practice there is a non exhaustive list of factors to take into account.

On 11 April 2022 statutory guidance replaced the previous non-statutory guidance 28 February 2022.

The Moratorium Period

The moratorium period will last for six months but may be extended further. If arbitration has commenced prior to the end of the six months on 24 September 2022 the application will continue to be heard. During the arbitration period the landlord will not be able to sue in debt, will not be able to enforce a prior judgment debt, enforce Commercial Rent Arrears Recovery, serve a statutory demand or winding-up or bankruptcy order, nor will they be able to draw down or require top up of rent deposits. If an application is made in relation to debt the court must stay proceedings between 10 November 2021 and the date the Act is passed. Current proceedings will continue, but the tenant may apply for relief within six months of the Act being passed and the debt will not be able to be enforced.

Some Points to Note

1. If rent concessions are agreed between landlord and tenant, the landlord may try to include provision that the concessions will end in the event of a Company Voluntary Arrangement as otherwise they will not qualify as a creditor.

2. Break clauses normally have a condition precedent that the rent must have been paid by the break date. In spite of the protection, tenants in arrears may be unable to break the lease (see late).

3. If there are rent arrears, the landlord may be able to reasonably refuse consent to alienation.

4. **S.82** of the **Coronavirus Act 2020** had provision whereby a landlord would not be able to oppose a new **Landlord and Tenant 1954** renewal on ground (b), persistent delay in payment of rent if the delay was during the relevant period from 21 March 2020 to 25 March 2022. This is repeated in the 2022 Act for the moratorium period but only in relation to protected rent debts. This may deter tenant's from requesting new leases under **S.26** where the rent debt is not protected. With this provision tenants in the hospitality, retail, and leisure sectors may be wise to serve **S.26** requests if market rents are falling. See for example, ***WH Smith v Commerz Real Investmentgesellschaft (2021)*** where the passing rent based on a 2013 rent review was £953,000 and the new rent was £404,666. The tenant also successfully argued that the new lease should have a rent suspension provision whereby the rent would be halved in the event of mandatory closure of any shop in the shopping centre due to pandemic. The landlord failed in changing the lease whereby the tenant would be responsible for the cost of any Energy Performance Certificate, energy audit or work required. See also ***S Franses v The Cavendish Hotel (2021)*** where the passing rent from 2011 was £220,000 per annum and the new rent on a renewal was £102,000 per annum.

5. The **Coronavirus Act 2022** provides that if the rent is written off then there can be no claim against guarantors, or the original tenant in a pre 1 January 1996 lease for privity of contract or post January 1996 under an Authorised Guarantee Agreement, nor can any third party be required to indemnify the landlord. It does not seem to prevent guarantors being pursued otherwise, dependant on the terms of the guarantee agreement and whether the tenant must be pursued first. Remember **S.17** of the **Landlord and Tenant (Covenants) Act 1995** provides that if the landlord wants to sue an original tenant then they must serve a prescribed noticed on them within six months of the amount becoming due. Notice provisions incorporate **S.23** of the **Landlord and Tenant Act 1927** whereby recorded delivery, amongst other possibilities, may be used. See ***Commercial Union v Moustafa [1999] 2EGLR 44*** where recorded delivery was used, but the letter returned by the post office, the notice had been effectively served.

BREAK CLAUSES

Conditions to Exercising the Clause

Conditions precedent

If conditions precedent are prescribed the tenant must fulfil them strictly. It is common for an option to provide that the tenant must have paid all the rent and performed all the covenants. If this form is chosen even a trivial breach of covenant will defeat the tenant's option ***(West Country Cleaners (Falmouth) Ltd v Saly [1966] 3 All ER 210; Bairstow Eves (Securities) Ltd v Ripley (1992) 65 P & CR 220)***. However, a breach for this purpose means a subsisting breach, not a 'spent' breach in respect of which the landlord no longer has a cause of action ***(Bass Holdings Ltd v Morton Music Ltd [1987] 2 All ER 1001)***. The strict approach was questioned but nevertheless applied in ***Kitney v Greater London Properties (1984) 272 EG 786***. In almost all cases an obstructive landlord will be able to find some subsisting beach of covenant on the tenant's part and thereby defeat the option. This form may, therefore, work hardship to tenants, particularly where there is a genuine dispute as to liability. The tenant's adviser should, therefore, insist that the requirement be that the tenant shall have reasonably performed his covenants. In such a case the exercise of the option will be good if the tenant has performed his covenants to the extent that a reasonably minded tenant would have done ***(Gardner v Blaxill [1960] 2 All ER 457)***. The inclusion of the word 'reasonably' gives the court a discretion which will be exercised in the tenant's favour where for example he has made one or two late payments of rent, but not where he has been persistently in arrears throughout the term: ***Bassett v Whiteley (1982) 54 P & CR 8***.

In one case, a tenant who had decorated using two coats of paint instead of the three coats required by the lease lost its right to break as a result: ***Osbourne Assets v Britannia Life (1997)***.

Fitzroy House, Epworth Street v The Financial Times [2006] EWCA Civ 329

If a lease contains an absolute condition of compliance with terms of the lease before the break can be exercised then no solicitor may allow this to be accepted as any landlord will be able to find a minor breach, usually in relation to dilapidations which allows the tenant to be held to the lease. More commonly, therefore, a lease will require material, or substantial, or reasonable compliance with the terms of the lease. This was the case in the present scenario. The question for the court was what does material compliance actually mean?

This case involved a very valuable site on the outskirts of the City of London. The cost of failure for the tenant if he was held to the lease and had to pay the remaining rental was in the region of £3.5 million.

A break clause was dependent on material compliance with the terms of the lease. The court stated that not every defect had to be remedied. Regard should be had to the age, type, location, and use of the premises in determining what was expected.

The landlord could only refuse consent if it was fair and reasonable to do so and the purpose of limiting the right to break was to enable a landlord to preserve its legitimate interest in being able to re-let speedily thus maintaining the value of the reversion.

The Court of Appeal partly reversed this decision. There is a difference between reasonable compliance, where a reasonably competent surveyor's report may be relied upon and material or substantial compliance where this is not so. Here the test as to whether the landlord loses rental is the appropriate one.

A better solution, it is suggested, and one which is becoming increasingly acceptable to landlords, is to allow the tenant to break the lease without conditions. If needs be, the tenant may still be sued for antecedent breaches. Some landlords put forward a defence to this line of reasoning that the tenant may not be worth suing. This rather begs the question: if the tenant were not worth suing, why would the landlord wish to keep him?

In ***Sirhowy Investments v Henderson [2014] EWHC 3562*** planning permission for a second hand car business was granted subject to conditions that a scheme would be agreed with the local authority in relation to turning facilities to enable car transporters to unload cars without causing obstruction to the highway. Three years after the lease had been granted the council served notice for a breach of a planning condition. On this happening, the tenant was entitled to serve a break notice if they could show that they had acted reasonably in procuring the scheme. However, the tenants had breached a condition as to exercising the break in that they had to keep the premises in good and substantial repair and as part of a fence had fallen down exercise the break.

In ***Avocet Industrial Estates LLP v Merol Ltd and another company [2011] EWHC 3422*** a condition precedent to exercise the break clause was that the rent had to be up to date. Over the previous six years the tenant had on a few occasions been late in payment of the rent and interest had accumulated, although the landlord had not demanded this. As the interest had not been paid at the break date the tenant had not effectively brought the lease to an end. Here the tenant's interest amounted to £130, the cost to the tenant in extra rent was £300,000. On occasion the landlord had demanded rent but not always. The landlord held £20,000 of rent deposit but this was irrelevant as was the fact that the tenant had asked the landlord to confirm that no other money was owed. The landlord's agents did this but there was no estoppel as they themselves did not realise that the £130 was owed.

Note: Leave to appeal to the Court of Appeal was given but case was settled.

In ***Quirkco Investments Ltd v Aspray Transport Ltd [2011] EWHC 3060 (Ch)*** it was stated that dependent on the terms of the lease any insurance premium which was reserved as rent may have to be paid for the whole year if the payment date fell before the break day. In ***PCE Investors Ltd v Cancer Research UK, [2012] EWHC 884 (Ch)*** the Court of Appeal held that a break could not be exercised when the break day fell between rent days and the whole quarter in advance had not been paid. It is essential in these circumstances that the tenant is only responsible for basic rent, or as a lesser alternative, the lease deals with apportionments after the break date.

In ***Canonical UK Ltd v TST Millbank [2012] EWHC 3710 (Ch)*** the tenant had to pay the rent quarterly in advance and also had to pay a one month penalty in order to exercise the break. They paid two months' rent and claimed that the third month could be offset against the penalty. It was held that on an interpretation of the clause this was not so and the break was not successfully exercised.

Marks & Spencer v BNP Paribas [2015] UKSC 72 - The Supreme Court has now heard this case. The tenant, Marks & Spencer, had to pay rent quarterly in advance and also insurance charge and a car parking licence in advance. They also had to pay monetary payments owed to the landlord as a condition precedent for exercising their break clause. There was also a premium payable in relation to exercise of the break. The break did not correspond with a quarter day. The tenant paid the rent and other monetary payments in advance and then claimed that it must be implied that they could recover back money relating to the period beyond the break date.

The High Court agreed with this but on appeal the Court of Appeal disagreed. The Supreme Court has now agreed with the Court of Appeal. There is no scope for implication of such a term, especially as the parties had agreed in great detail the terms of the lease and not expressly included

anything. Lord Neuberger also confirmed that the case of ***Ellis v Rowbottom [1900] 2QB 740*** was correct in that the Apportionment Act 1870 applied to rent payments in arrears but not in advance.

The RICS Code for Leasing Business Premises from September 2020 states that good practice is to return rent due after a break date to the tenant.

Vacant Possession

NYK Logistics (UK) Ltd v Ibrend Estates [2011] EWCA 683

The break clause required vacant possession. The tenants gave notice and cleared the premises. Arrangements were made to surrender keys and the tenant agreed to carry out some repairs. The landlord did not collect the keys on the date and the contractors did not complete the repairs until six days afterwards. They also employed security staff on the premises over a weekend. The tenant had not given up occupation and could not break the lease.

See the Code for Leasing Business Premises. The Code suggests that conditions precedent should not be used with the exception of the basic rent being up to date, the tenant giving up occupation, and any subleases ending. In the current Code from September 2020 the Royal Institution of Chartered Surveyors has included mandatory terms for surveyors. This, amongst other requirements, means that written heads of terms must be produced. These must give the tenant, subject to contract, details of break rights and the duration of the lease. Nothing in the Code will allow the court to reinterpret an unambiguous term in the lease.

Riverside Park Ltd v NHS Property Services [2016] EWHC 1313 The tenant was required to give up vacant possession as a condition of exercising the break clause. The premises contained a large number of partitions, floor coverings and kitchen fittings which were not removed. The court decided that as they were not substantially attached and could readily have been removed they were fittings belonging to the tenant who had therefore failed to vacate and could not exercise the break. The court went on to say that even if they had been fixtures there was no provision in the lease whereby they had been part of the demise. They were therefore tenant's fixtures which should have been removed.

In ***Capitol Park Leeds plc v Global Radio Services [2021] EWCA 95*** the High Court held that a condition precedent as to vacant possession had not been complied with when the tenant vacated but removed ceiling tiles, window frames and grids which belonged to the landlord. The Court of Appeal have now reversed this decision. All that is needed is that the tenant removes fittings and tenant's fixtures, people, and there is no legal interest remaining. If the tenant has removed landlord's fixtures or is in breach in any other way they can be sued in damages.

Time for Exercising the Clause

Trane (UK) Ltd v Provident Mutual Life Assurance Association [1994] EGCS 121

A lease was expressed to commence on 28 August 1981. It was executed on 6 January 1982. There was a break clause exercisable after 10 years on giving six months' notice.

The tenant was assured by the managing agent of the landlord that the notice must expire in January 1992. The tenant served notice but the landlord refused to accept it. The judge agreed that the notice should have been given to expire in August 1991, i.e. the tenth anniversary of the date of commencement. However, the landlord was estopped from denying his managing agent's representation even though given 'without prejudice'.

The tenant would thus have won but for the fact that there was minor disrepair at the date of exercise of the break clause.

Micrografix v Woking 8 Ltd [1995] 37 EG 179

The break clause to determine lease was exercisable on 23 June 1995. The tenants erroneously stated in the notice that the lease would determine on 23 March 1994 and referred to the relevant clause in the lease.

Held: The mistake was obvious to someone with the landlord's knowledge. The landlord would not be misled by the wrong date. The notice was valid.

Mannai Investment Co v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945, HL

The tenant entered into a ten year lease of office premises subject to a right to exercise a break clause terminating on the third anniversary of the commencement date.

The commencement date was 13 January. The notice to break was expressed to terminate on 12 January. The House of Lords reversed the decision of the Court of Appeal by a 3:2 majority. Break clauses should be treated no differently from notices to quit periodic tenancies.

As long as a reasonable receipt of the notice made clear what was intended, the notice was valid. It was sufficiently clear that the tenant intended to exercise the option to break.

Reference to the clause allowing the break would presumably be sufficient, at least in the case where the lease contains only one break. Mistakes are still made, however, e.g., where breaks are served in the name of the wrong tenant, in particular where there is an associated company in occupation.

MW Trustees Ltd and others v Telular Corporation [2011] EWHC 104

A lease provided for a tenant to terminate it by giving six months' written notice by hand or special delivery to the landlord. The tenant served an invalid break notice as it was addressed and sent to the former landlord.

The tenant subsequently emailed the new landlord attaching a copy of the original notice. The landlord forwarded the email to its managing agents, who confirmed to the tenant that they accepted the notice and were happy for the tenant to terminate the lease. However, they asked the tenant to re-address the notice to the landlord.

The tenant prepared a replacement notice but it was not received by the landlord. The landlord argued that no effective break notice had been served. The High Court held that:

- Applying the principles in ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] UKHL 19***, a reasonable recipient would not have been misled as to the tenant's intention to terminate the lease even though the notice was addressed to the wrong person. On the court's construction of the lease, although notice had to be given to the landlord, it did not need to be addressed to the landlord.

- Although the lease did not permit service by email, the landlord was estopped from challenging the validity of the notice.