Business Tenants and Rent Payments and COVID-19

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In this period of Coronavirus, businesses will seek to take steps to reduce discretionary expenditure for the time being.

Rental payments under a lease are not discretionary, but obligations. Those payments are usually fixed sums, and would normally be made at regular periods, for some time in the future. If the lease is for a fixed term, then in the absence of a right to break the term, the payment obligation may be of substantial duration. Even if it is a periodic tenancy, it may continue for some time until the relevant period comes to an end.

You might think that if a tenant can't use the property he has been let, he should not be obliged to pay the rent. Unless the lease makes provision for such an event, which is highly unlikely, a statutory restriction on the use of property is highly unlikely to prevent rent from falling due under a lease. Although the House of Lords decided in National Carriers Ltd. v Panalpina (Northern) Limited [1981] AC 675 that it is possible that some intervening event might bring a lease to an end under the doctrine of frustration, no case has ever held a lease to be frustrated. It is a theoretical possibility only. If you would like more information as to how the doctrines of frustration and force majeure operate, there is an article in the links below.

Although the Government has intervened in the relationships between landlord and tenant by providing that landlords cannot until 30 June 2020 (or such other date as they may specify) forfeit leases for non-payment of rent, all other remedies open to a landlord for non-payment of rent by a tenant remain[1]. So the landlord can sue for rent, and then rely on the court's enforcement process. It can apply the Commercial Rent Arrears Recovery procedure to seize the tenant's goods on the premises[2], or it can apply the nuclear option and seek to wind up the tenant (if a company) or make him bankrupt (if an individual). In some cases, landlord have already chosen to play hardball[3].

Let's consider how the landlord and tenant can go about avoiding some of the financial pain that the lockdown has caused, and what their rights are if push comes to shove.

The first step is always for the tenant to contact the landlord, and to see whether he will enter into an agreement to reduce the tenant's rental burden. It might be thought that the landlord would have no incentive to give up what is undoubtedly his right to receive full payment on the due date. But in fact the tenant does have some cards to play.

[1] Section 82 Coronavirus Act 2020. Note that forfeiture for other defaults, including failures to make other payment, is not prohibited. Where the default is to make payment other than rent, then the landlord has to give the tenant notice to remedy the breach under section 146 Law of Property Act 1925. Section 82 also prevents a landlord from relying on arrears of rent accrued during the relevant period of suspension when opposing a renewal of a tenancy under section 30(1)(b) Landlord and Tenant Act 1954 (section 82(11)); however, other defaults in paying rent may be taken into account.

[2] Under section 72 and Schedule 12 Tribunals Courts and Enforcement Act 2017.

[3] *'Dogfight' looms as landlords start suing restaurants over unpaid rent* – This is Money 4 April 2020

First, the landlord usually wants the tenant to keep paying. If the consequence of a full demand for rent is that the tenant is going to enter into insolvency, then the lease may become essentially valueless.

Secondly, the landlord wants the tenant to pay, if not on the due date, then as soon as possible. The landlord may have a mortgagee to pay, not to mention staff and other expenses relating to the property. He does not want the hassle of disagreement, delay and possible court action. Most leases which contain service charge provisions do not entitle the landlord to withhold services if not paid by the tenant; the landlord's entitlement is often to recover the costs of the services as 'additional rent'[4].

Thirdly, there is a reputational cost to being hard-nosed in difficult times. If the landlord stands on his rights, then he may acquire a reputation of not being a worthwhile counter-party. Certainly, there will be no goodwill from his present tenant.

If a deal is to be done, what sort of deal might it be? The two that are most frequently mentioned in the media are 'rent deferral' and 'rent holidays'. Neither of these descriptions is a legal term of art. A rent deferral means that the Landlord has agreed not to enforce the payment of rent for a specified period. But the rent remains due, and may be recovered after that period.

A rent holiday probably means an agreement that for a specified period no or a reduced amount of rent will be due and payable – in effect that the landlord will permanently give

[4] See *Lewison's Drafting Business Leases* (ed. Bignell (2013)) at para. 6-10.

up those gales of rent, or a percentage of them, although it is possible that some people will use it to mean a rent delay for the period of the 'holiday'. So it is important that the parties are clear on what is meant, and there is no scope for ambiguity.

Even if the parties are agreed on what form of rent concession they intend, they should also agree on the consequences of that concession. For example, if rent is deferred, does this mean that the landlord will waive any right to interest for non-payment on the due date? If the parties don't want interest to run for the period of the deferment, then they should state that expressly.

Secondly, is this benefit to be personal to the current tenant, or will it be available to a new tenant should the current tenant assign the lease? If the latter then this agreement may amount to a variation of the terms of the lease, and would have to comply with the formality requirements that govern contracts dealing with land, under section 2 Law of Property (Miscellaneous Provisions) Act 1989[5], broadly that the agreement must be:

- In writing;
- Containing all the terms the parties have expressly agreed; and
- Signed by both parties.

If the parties agree to defer rent for a period, they should consider whether the consequence is going to be that the tenant will have to pay a lot more rent when the deferral ends. That may be even more difficult for the tenant than making the payment on time, and the tenant will then be relying on the landlord's goodwill. A more sensible approach might be to switch the obligation to pay a fixed sum to one to pay a smaller

[5] See McAusland v Duncan Lawrie [1997] 1 WLR 38

fixed sum plus a percentage of income, and for that arrangement to continue until either party gives notice to bring it to an end. That has the advantage of reducing the impact on the tenant, whilst giving the landlord a hope of recovering larger sums if the business either ticks over or picks up. If this is the route the parties go down, then the terms of the lease should be varied either by a formal written contract or by deed as appropriate. Any such agreement should also provide for the landlord to have access to the tenant's trading books and accounts.

One other, technical, problem with the landlord granting a rent holiday or deferral is that English law regards a binding contract as being in the nature of a bargain, or a two-way street. A simple promise is not a contract. In technical terms, someone who is to receive a benefit must provide 'consideration' for the benefit he is to receive. But in a simple rent deferral or holiday the benefit goes all one way, from the landlord to the tenant. Such an agreement, where there is no quid pro quo from the party receiving the benefit, is not a legally enforceable agreement because there is no consideration for it. Therefore in such a case the landlord can as a matter of contract law change his mind if he wishes, and not go through with the agreement.

Where this gets particularly tricky and possibly unjust is where the promise is not to give something, but to give up something the giver was entitled to receive, such as rent or any other debt.

It has been the law since 1602 Pinnel's Case (1602) 5 Co. Rep 117a that part payment made and received in purported satisfaction of a larger debt does not operate as a

discharge of the debt, even if that is what the parties intend – the balance remains payable.

The House of Lords held in Foakes v Beer (1884) 9 App. Cas. 605 that a simple agreement to pay and take part only of an existing debt is not a binding agreement[6]. There have been various attempts to get around this rule[7], but these are still regarded as difficult cases, and the rule remains generally effective. In D & C Builders v Rees [1966] 2 QB 617 Danckwerts LJ said this:

> '[Foakes v Beer] settled definitely the rule of law that payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt, *unless there is some benefit to the creditor added so that there is an accord and satisfaction.*'

The words in italics show one way out of the problem – the tenant should ensure that the landlord gets some other benefit by way of the agreement. It does not matter what benefit it is, as long as it is of some benefit to the landlord, or detriment to the tenant. He might get p[aid his reduced rent a day earlier, for example. Alternatively, the agreement may be made by deed, which is binding even without consideration.

However, a tenant may not be at the mercy of the landlord where simple, non-binding agreement has been carried through. In such circumstances the court would probably be open to an argument based on promissory estoppel. If one person agrees to forego or waive his contractual rights, and the other party relies on that agreement such that it

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[6] Pinnel's Case (1602) 5 Co. Rep 117a, approved by the House of Lords in Foakes v Beer (1884) 9 App. Cas. 605.

[7] See *Treitel – The Law of Contract* (14th. ed.) at paras. 3-100 *et seq*; Williams v Roffey [1991] 1 QB 1; Re Selectmove [1995] 2 All ER 531; Stevensdrake v Hunt [2016] EWHC 1111 (Ch). Foakes v. Beer is considered in detail in *Landmark Cases in the Law of Contract* (2016) Ch 8 (Lobban).

would be 'unconscionable' (or, in ordinary English, unfair) for the first person to go back on his agreement, then a court will prevent him from doing so. In cases like the present, where the tenant is trying to pay a number of creditors, or keep on his staff, it is highly likely that he will rely on his landlord's promise; and if he does so it would normally be thought unfair for the landlord to go back on his word[8], and the court would bar (or 'estop') him from asserting his legal right to payment of the rent, or the balance of it.

But even this is not the end of the matter, because the bar on the landlord's claim might only be a temporary one. If you want to look at this further, it is set out in the textbooks[9]. The point I am making here is that these deals are not always as straightforward as they look. So, what you should consider is the following:

(1) Get legal advice. If you have a legal department, then use it. If not, get a solicitor to assist in drafting the agreement;

(2) Always put the agreement in writing;

(3) If you are drafting a bargain, put some benefit in it passing from the tenant to the landlord (however small); or draft the agreement as a deed. In these cases the agreement will be immediately binding.

(4) Have both parties (or their duly authorised agents) sign it.

[8] This is the doctrine known as promissory estoppel – see *Treitel op. cit*. at para. 3-080 onwards

[9] See *Treitel op. cit.* at para. 3-086, -087