

UPDATE ON ENFORCEMENT MEASURES AND PROPOSED CHANGES ON LANDLORD ACTION

Introduction

Over the past 15 months, the government has introduced legislation aimed at reducing the economic impact of the Covid-19 pandemic. This included a moratorium on many of the usual means of enforcement and recovery of debts owed by businesses to landlords. The government recently announced (16.06.21) further extensions of these moratoriums:

- Statutory demands
3 month extension to 30 September 2021
- Winding up petitions
3 month extension to 30 September 2021
- Forfeiture
9 month extension to 25 March 2022
- CRAR
9 month extension to 25 March 2022

It currently remains possible to issue a court claim for judgment against tenants in arrears. It is an option with teeth. While enforcement options are limited, judgment can still be enforced by a writ of control, allowing enforcement agents to take control of tenant's goods, at any tenant premises. Additionally, our own experience is that the negative impact of a judgment on a tenant's credit score is sufficient to prompt payment.

Landlords will be more concerned about the recent press release announcing proposals to introduce legislation requiring landlords and tenants to enter a binding arbitration process regarding rent arrears. Specific provisions are not yet available, but as always the devil will be in the detail. Landlords are right to be concerned of a shift to a more tenant friendly position. However, the ultimate legislation has not always reflected the suggested intentions. Watch this space.

Statutory Demands and Winding Up Petitions

The moratorium on statutory demands and winding up petitions has been extended for (at least) a further three months until 30 September 2021. It remains open for extension beyond then and should not be considered a hard-stop date for such restrictions to be lifted, given the ongoing impact of the pandemic and prior willingness to extend protective measures. However, such restrictions

will need to be lifted at some point, and it is telling that the moratorium on statutory demands and winding up petitions was only extended by three months, rather than nine months for forfeiture and CRAR.

These restrictions do not apply to individuals. It remains possible to issue a statutory demand to a sole debtor and serve bankruptcy proceedings. Reputational considerations still remain.

Forfeiture and CRAR

Applying specifically to business tenancies, the moratorium on forfeiture is extended by nine months to 25 March 2022. The previous four extensions were only three months. There is expected to be a huge amount of forfeiture proceedings once the moratorium ends, but the government's approach of seemingly endless extensions should be viewed in conjunction with the new proposals detailed below. The longer time frame suggests a willingness to give the proposed mandatory arbitration process a chance to take effect to alleviate evictions.

The moratorium on CRAR will similarly be extended by nine months to 25 March 2022. It is worth noting that CRAR protection is limited to arrears of six quarters and it does not appear that limit has been raised. This means that tenants continue to be protected (assuming no rent has been paid since 25 March 2020, being the first quarter date falling within the impacts of the Covid-19 pandemic) for the June 2021 quarter. If a tenant then fails to pay the September 2021 quarter, it may lose its current immunity from CRAR. However, once again this should be viewed in light of the proposed legislation, and the apparent intention to treat rent arrears accrued until now and future rent arrears differently.

Restriction on Landlord Action

The proposed legislation is likely to be a huge departure from the current status quo and will be worthy of its own update in due course, once the detail of the legislation is revealed. Currently, landlords can issue proceedings in court to recover rent arrears and summary judgment applications have been granted to landlords, with courts ruling that full rent arrears are due and tenant arguments related to the pandemic are not a legal defence.

This would all change should the proposed legislation be introduced. It would force landlords and tenants to enter into a binding arbitration process, outside the scope of the courts. The idea is that rent arrears related to Covid-19 would be 'ringfenced' and dealt with considering guidelines to be set out within the legislation. This 'ringfencing' gives tenants the ability to prioritise paying rent as it arises rather than consistently repaying rent arrears that accrued during the pandemic. However, this may also benefit landlords as the focus of negotiations will be removed from reducing ongoing liabilities under the lease, which it appears tenants would be expected to meet in full, towards dealing with a finite amount of 'ringfenced' arrears. This creates a greater amount of certainty for both landlord and tenant. Specifically, it is stated that *"Landlords are expected to make allowances for the ringfenced rent arrears... and share the financial impact with their tenants"* and *"Covid-related rent debts will be settled fairly... by private arbitrators but in accordance with guidelines which we will set out in the legislation"*. This marks a clear shift towards a regime which is more favourable to tenants than the current status quo. The precise detail of the legislation remains to be seen and important questions remain unanswered, including:

- What are the guidelines/principles that will be considered by the arbitrator?;
- What happens to proceedings relating to Covid-19 rent arrears already in court?;
- What is the timescale of the implementation of the legislation?; and
- Will the process consider tenant companies as a whole or look at the impact at the specific locations where the rent arrears have arisen?

Considerations for Commercial Landlords

The proposals will rightly cause some concern for landlords. It represents a shift towards favouring tenants. However, the following may alleviate the concern:

- It is likely that the guidelines on which any arbitration takes place will be similar to those set out in the Code of Practice for Commercial Property Relationships during the Covid-19 Pandemic, an optional Code which many landlords have adhered to, already sharing the burden with tenants.
- Most landlords have recognised the difficulties faced by tenants throughout the Covid-19 pandemic and the value of a tenant in situ and offered concessions to tenants where possible. Similar considerations are expected to remain key to an arbitrator.

- It is expected that arbitration would effectively take the place of court proceedings. If agreement between landlord and tenant can be reached before that stage (which has occurred in the majority of cases) there will unlikely be much change from the new proposals.
- The key consideration for arbitrators appears to centre around periods of closure. This indicates a sector-specific approach and may take into account many businesses were in fact able to remain open during the pandemic.
- The arbitration process may streamline the process of recovery by circumventing the court. While the overall outcome may end up being less favourable for landlords, it should be quicker and may result in more timely agreements.
- Arbitration is a more collaborative process than adversarial court proceedings, and may benefit landlord/tenant relationships.

The current position favours the commercial landlord and strict wording of the lease. Given the uncertainty surrounding the proposals, it makes commercial sense for landlords to take advantage of the current regime now, rather than risk delay to a potentially less favourable arbitration outcome. Developments in this area will be watched carefully.

CONTACTS



NICK SAVILLE
Legal Director
Disputes
T: +44 (0)20 7395 3017
E: nsaville@wedlakebell.com



SCHUYLER HILLBERY
Trainee Solicitor
Disputes
T: +44 (0)20 7395 3094
E: shillbery@wedlakebell.com

Business Services

Disputes

Private Client

Real Estate

Wedlake Bell LLP

71 Queen Victoria Street, London EC4V 4AY | DX 307441 Cheapside

T: +44 (0)20 7395 3000 | F: +44 (0)20 7395 3100 | E: legal@wedlakebell.com

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