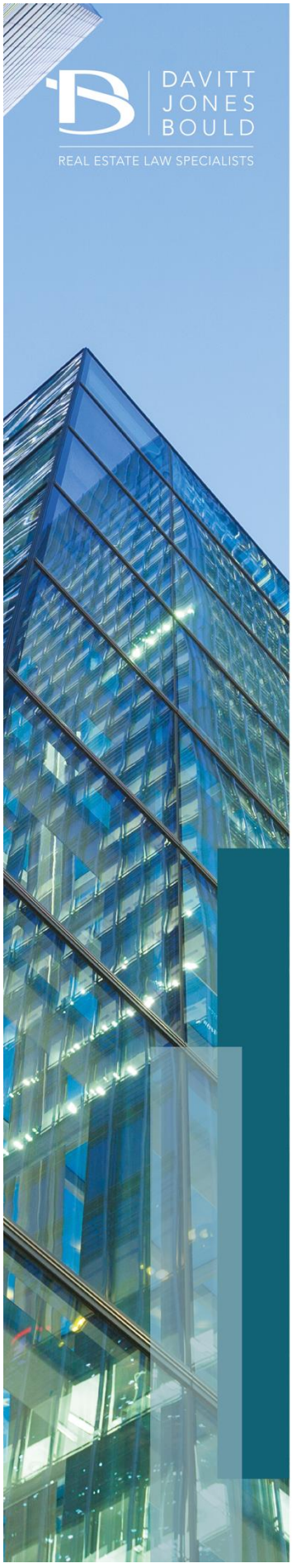


Commercial Leases in Exceptional Circumstances: the COVID-19 Pandemic

For landlords the singular biggest problem in the current post-lockdown economic climate remains how to deal with the non-payment of rent by tenants.

Forfeiture for non-payment of rent

Under s.82 Coronavirus Act 2020, in respect of commercial leases that fall within the scope of the Landlord and Tenant Act 1954, forfeiture for non-payment of rent has been suspended until 30 September 2020.

Some tenants seem to be under the impression that the moratorium on forfeiture equates to a rent holiday and that the rent has been suspended. This is not so. In the absence of a force majeure clause in their lease (which is unlikely), neither will tenants be able to rely on rent reduction or suspension provisions, which usually only apply in the event of damage or destruction to the premises. Likewise with most insurance policies that cover rent.

So although the tenant will not suffer forfeiture of his lease, his rent will still be due and after the moratorium period forfeiture for non-payment of rent will once more be available. This is small relief for the tenant.

And without the threat of forfeiture, what recourse is left for a landlord with a tenant in rent arrears?

Commercial Rent Arrears Recovery

Sending in the bailiffs might be an option in relation to occupied premises only. However, since 18 June 2020 Commercial Rent Arrears Recovery is only available if there are 187 days of rent arrears and not, as previously, 7 days. There are also practical issues here due to the current social distancing measures.

Use of Rent Deposits

It might also be possible to draw down from any rent deposit with the agreement of the tenant that the rent deposit account will be topped up at a later stage, thus alleviating any cash flow problems.

Serving a statutory demand

The Corporate and Insolvency Governance Act 2020 which came into force on 26 June 2020 temporarily bars the making of a statutory demand if the reason for any debt is the Coronavirus pandemic. Likewise in similar circumstances a winding up petition cannot be made.

These provisions are backdated to 27 April 2020. In any event, serving a statutory demand as a preliminary to bankruptcy proceedings may be seen by many landlords as pouring good money after bad due to the tenant's lack of creditworthiness.

The Act also introduces the concept of a Restructuring Plan whereby creditors can apply to restructure a business, for instance in relation to rent by a 75% majority. In some respects this is similar to a Company Voluntary Arrangement, but will be overseen by the Court and applies to secured, and not merely unsecured, creditors.

Forfeiture for other breaches

Section 82 does allow a demand for rent to be made without waiving the right to forfeiture for non-payment of rent. And, in respect of other breaches of tenant covenant, forfeiture is still available.

In terms of user covenants, planning law has been relaxed temporarily so that pubs, restaurants and cafes can now operate as takeaways. A check of the user covenants could still reveal a breach, however.

A breach of a keep open clause is another possible avenue for landlords to explore. Although if the premises have to close under the Health Protection Regulations 2020, there would be a defence to breach of a keep open clause as the tenant has had to comply with statute. This applies to non-essential retail, hospitality and leisure. Post July 4th 2020 the practical difficulties in giving vacant possession should ease somewhat.

Whatever the reason for forfeiture, in view of the current difficulty in vacating a property due to social distancing, the likelihood that a court would grant relief from forfeiture for a breach of repair or a keep open clause, at least temporarily, is high. A recent example is **SHB v Cribbs Mall April 17th 2019.** A company in liquidation occupied a prime site at Cribbs Causeway in Bristol on a 125 year lease. The landlord wanted to effect forfeiture for breach of a keep open clause. The tenant claimed relief and asked to be given time in which to try to assign the lease. The Court gave the tenant three months in which to do so.
From a landlord's viewpoint forfeiture may not, in any case, be an effective remedy in a downward-market. It may be difficult to find a new tenant, especially at the same rent as the previous one. In addition, the following issues may be of concern:

Payment of full business rates on empty properties

In England, it has been announced that for the rating year 2020/21 occupied premises in the leisure and hospitality sector will attract no business rates liability regardless of rateable value. For premises standing empty, on the other hand, under The Rating (Empty Properties) Act 2007, full business rates liability will be incurred after three months (6 months for industrial units and warehousing). This is a major consideration for landlords, although it is worth noting that in order to be considered occupied the premises need only be in use for 6 weeks in any billing period. Thus in **Kenya Aid Programme v Sheffield City Council [2013] EWHC 54** it was accepted that occupation by a charity for storage purposes in two adjoining warehouses could avoid business rates liability even though only 25% and 30% of the floor area was actually occupied. Further, in **Makro Properties Limited v Nuneaton & Bedworth Borough Council [2012] EWHC 2250** the court accepted that storage of 16 pallets for 6 weeks every 3 months was sufficient to avoid business rates.

Buildings Insurance

Insurance may be vitiated or the payments dramatically increased if the property remains empty for a period of time. The landlord should check his policy immediately his property becomes empty and take out specialist insurance if necessary.

Liability for Risk Assessments

Once the landlord comes into control of the premises he will be liable to carry out fire safety and asbestos risk assessments under the Regulatory Reform (Fire Safety) Order 2005 and Control of Asbestos Regulations 2012. Not to do so is a criminal offence and may again vitiate buildings insurance.

Service Charge Liability

The landlord may still have to provide services, subject to social distancing, but most leases require the landlord merely to use their reasonable endeavours. In addition, if the landlord needs to carry out additional deep cleaning of the common parts, he will be able to do so if the lease allows charging for good estate management or where there is provision requiring compliance with notices served by a competent authority.

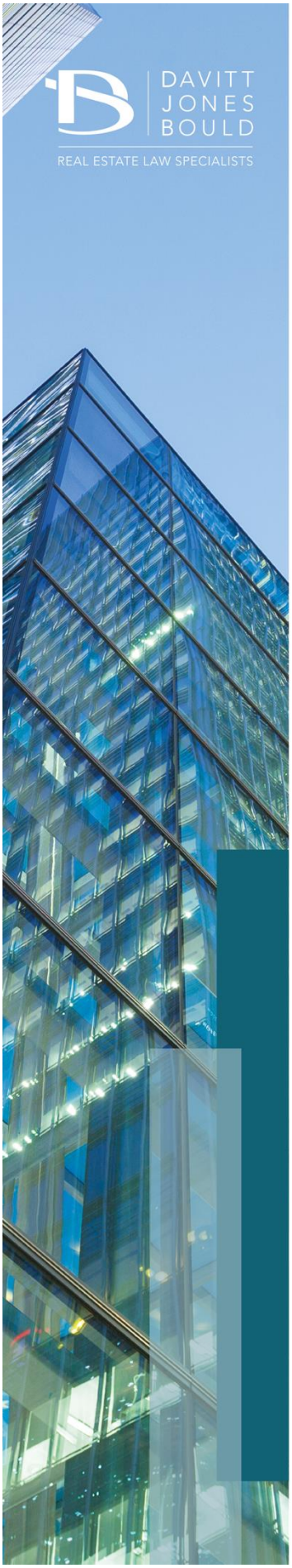
Bearing all these things in mind a landlord may think it expedient to at least temporarily forego rent rather than effect forfeiture.

Break Clauses

From the tenant's viewpoint, a tenant may wish to exercise a break clause, but this is not without its own set of problems. In particular, many break clauses will have a condition precedent that the tenant must give up vacant possession. With social distancing as seen above this may not be possible.

A good example of how giving vacant possession in business leases is not always as straightforward as one might think, is the case of **Riverside Park Ltd v NHS Property Services [2016] EWHC 1313.** The tenant was required to give up vacant possession as a condition of exercising his break clause. The premises contained a large number of partitions, which he did not remove. The court decided that, as they were not substantially attached and could readily have been removed, they were tenant fixtures which should have been removed. The tenant 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.

The new Code for Leasing Business Premises suggests that the requirement for the tenant to give up vacant possession should be modified to the giving up of 'occupation' of the premises. What the attitude of the courts may be in this circumstance is yet to be seen.



Conditions Precedent

It is common for a tenant break clause to prescribe conditions precedent: i.e. that the break will only be granted if tenant has paid all the rent and performed all the covenants in the lease. If such conditions are prescribed, then the tenant must fulfil them strictly and even a trivial breach of covenant, providing it is a subsisting and not a spent breach, will defeat the tenant's option to break. In **Avocet Industrial Estates LLP v Merol Ltd and another company [2011] EWHC 3422** a condition precedent to the exercise of 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 court held that the tenant had not effectively brought the lease to an end, even though the interest only amounted to £130.

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. A tenant's adviser should, therefore, always insist that the requirement be that the tenant shall have reasonably performed his covenants.

In **Fitzroy House, Epworth Street v The Financial Times [2006] EWCA Civ 329 31 March, CA** 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 Court of Appeal held that there was a difference between the reasonable performance of covenants, in which case a competent surveyor's report may be relied upon, and material or substantial compliance where the test is rather one of whether the landlord loses rent on account of the breach.

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.

Time for Exercising the Clause

The law in this area is strictly applied and largely settled. Nonetheless it is worth remembering the case of **Micrografix v Woking 8 Ltd [1995] 37 EG 179.** Here the break clause to determine the 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. The court held that the mistake was obvious to someone with the landlord's knowledge. As the landlord would not be misled by the wrong date, the notice was valid.

Frustration

There have been some suggestions that the Coronavirus pandemic may result in leases being frustrated. In **National Carriers v Panalpina (Northern) Ltd [1981] AC 675** the court recognised that frustration might apply very rarely to leases. However they made a finding that there was no frustration in that case, even though for the majority of the 10 year lease in question the local authority had closed the access road to the premises. **National Carriers** was further discussed in the recent case of **Canary Wharf v European Medicines Agency [2019] EWHC 335 (Ch)**. In the light of both cases, frustration seems an unlikely go-to for tenants in trouble.

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