Life after Lockdown

What will be the problems confronting property specialists once we are back to "normal"?

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Introduction

1. Lawyers and surveyors working in real estate have very quickly become used to working under lockdown conditions over the course of the last month (has it really only been that long?) Some areas of practice – particularly hearings in the county court and some of the tribunals – have taken a bit of a battering, but advisory work has been largely unaffected.

2. But there are two areas where the lockdown will be likely to have a dramatic effect on our field of practice. The first area, which we address at the end of this papers, is the rent moratorium introduced by section 82 of the Coronavirus Act 2020.

3. The second area concerns the effect of the social distancing restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. If a person is unable freely to access its premises as a result of these restrictions, what ramifications will that have? We analyse four areas where there may be problems:

(1) Break clauses: how to satisfy a vacant possession requirement?

(2) How do you occupy in lockdown?

(3) What happens where a tenant seeking to renew its business tenancy is not in material occupation at the relevant date?

(4) What about access rights in a time of COVID-19?

(1) Break clause problems

4. Take for example a ten year office lease with a tenant's break clause allowing the tenant to terminate on June 2020, provided that it shall have given 6 months' notice, and subject to the condition that it yield up vacant possession of the premises on the break date. So far, so normal. Not a bad break clause under normal conditions: all the tenant has to get right is to serve a timeous notice at the right time on the right landlord, and then ensure that it can vacate the premises in an orderly fashion, in good time for the break date.

5. There is no particular difficulty with the concept of vacant possession. In NYK Logistics (UK) Ltd v Ibrend Estates BV [2011] 2 P & CR 9, Rimer LJ, (with whom Moore-Bick and Ward LJJ agreed), said in paragraph 44 of his judgment:

> "The concept of "vacant possession" in the present context is not, I consider, complicated. It means what it does in every domestic and commercial sale in which there is an obligation to give "vacant possession" on completion. It means that at the moment that "vacant possession" is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property."

6. In practice, however, compliance with the vacant possession condition has often led to litigation. At the heart of the problem is the fact that, notoriously, the courts apply a strict test to compliance with break clauses. As Lloyd LJ said in Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd [2007] 2 P & CR 10:

> "It is common ground that, in general, conditions attached to a break clause, as with any other option provision, must be strictly complied with, so that *even a day's delay in giving vacant possession* or a shortfall in the payment of rent of a few pounds would be fatal." (emphasis supplied.)

7. The area that has caused the most trouble in break clause litigation is where one of the break conditions is that the tenant should have complied with its covenants. But even in the case of a simple vacant possession condition, where compliance is rather more obviously within the tenant's control, and is (or so you might think) easily achievable with a bit of thought, problems can arise.

8. First, the tenant may fail to identify the object of the vacant possession condition – almost always "the premises". In paragraph 31 of his judgment in Expeditors at first instance [2007] 1 P & CR 5, Lewison J noted, in relation to a break clause requirement to give vacant possession of premises:

> "The first question arising under this head is vacant possession of what? In this case vacant possession of the premises. The premises will, in my view, exclude anything that is not demised. …"

9. So, it is critical to check how the lease defines the expression. Leases ordinarily stipulate that alterations, additions or improvements that have been made by the tenant to the premises during the term of the lease will be included within the definition – so such alterations will form part of the premises to be yielded up, rather than extra items which must be removed in order to give possession. They may therefore safely be left in situ, without prejudicing the vacant possession condition precedent.

10. By contrast, lease drafting in relation to tenant's fixtures and fittings is not uniform. Some leases include them with the definition of the premises, while allowing the tenant to remove them (so that the tenant need not clear them out in order to give vacant possession); some are silent (in which case the fixtures will continue to form part of the demise if not removed); and some exclude them (thus on the face of it requiring fixtures and fittings to be removed). It will be important to reach an early decision on this point of construction, so that the works necessary to yield up vacant possession can be planned for in good order.

11. In Expeditors, Lewison J held on the facts that the fixtures formed part of the premises themselves. Accordingly, the failure by the tenant to remove its fixtures such as the gas tank in that case could not be said to constitute a failure to deliver vacant possession of the premises. He said:

> "… the premises will include anything which in law have become part of the premises by annexation. A fixture installed by the tenant for the purposes of his trade becomes part of the premises as soon as it is installed, although the tenant retains a right to sever the fixture on termination of the tenancy. Whether something is a fixture depends on the degree and purpose of annexation; in each case looked at objectively. If something has become part of the premises by annexation then it is part of a thing of which vacant possession has to be given. Its presence does not amount to an impediment to vacant possession itself."

12. In such circumstances, the tenant retains the right to remove such fixtures within a reasonable time of the end of the tenancy, without the presence of those fixtures compromising the delivery of vacant possession at the end of the term.

13. Having said that, if there is time for the Tenant to remove all its fixtures, then it would be prudent for it to do so, in order to avoid any argument on the subject should the matter become litigious. It is also worth noting that the Tenant is usually under an obligation to remove its fixtures at the end of the term. Accordingly, removal of its fixtures will achieve two purposes, and should therefore be undertaken if time allows.

14. Where, by contrast, the definition of the premises *excludes* fixtures, then the safe course will be to remove them. A failure to do so may have the result pronounced by Judge Saffman, sitting as a Deputy Judge of the Chancery Division, in Riverside Park Ltd v NHS Property Services Ltd [2017] L&TR 12. In that case, the Judge held that, even if the partitioning in question constituted fixtures, the tenant's obligation was to yield up the premises net of their fixtures, and that accordingly the vacant possession condition precedent had not been complied with.

15. The second problem that can arise with the vacant possession requirement is that the tenant may simply fail to vacate in time. It will usually be to its advantage to remain in beneficial occupation of the premises for as long as it can, in order to defray the rent and other outgoings. Miscalculations are often made as to just how long it will take to carry out the requisite decommissioning works – removal of chattels such as filing cabinets and other office equipment, security cameras, computer cabling and the like. The problem is obviously worse if the tenant has to remove its fixtures as well.

16. Let us suppose that the tenant in our hypothetical case has satisfied itself that it need only empty its premises of chattels and people. There is no problem with people, because everybody is dutifully working at home as a result of the lockdown. But how can it vacate the premises, which are full of cabinets, computers and other chattels, conformably with the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020?

17. As matters stand, the Regulations do not prohibit access to office premises which do not comprise or deliver the functions of any of the premises referred to in Schedule 2 – which will therefore exclude premises fulfilling an ordinary office function.

18. A difficulty will only arise if, when the Secretary of State for Health comes to review the restrictions on 16 April pursuant to Regulation 3(2), he decides that

greater restrictions are in order, and decides to prohibit any access to office buildings.

19. This will place our tenant in great difficulty. It is likely that its chattels and equipment will be an obstacle to the landlord's enjoyment of the premises. As Lord Greene MR said in Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264:

> "The phrase 'vacant possession' is no doubt generally used in order to make it clear that what is being sold is not an interest in reversion. But it is not confined to this. Occupation by a person having no claim of right prevents the giving of 'vacant possession', and it is the duty of the vendor to eject such a person before completion. ... The reason for this, it appears to us, is that the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession."

It is worse still, of course, if the occupation is referable to the tenant itself, and consists of papers and other material over which the tenant would exercise a lien.

20. There are measures that the tenant in such a quandary can take to assist its position: it can write to its landlord enclosing the keys to the premises, explaining that it is physically unable to remove its contents, and announcing that it abandons them, and will pay the landlord their disposal costs.

21. This course will not be practicable (let alone ethical) where the abandoned material includes confidential information. In such a case, the tenant will have to fall back on an implied term. We all know the difficulties that confront those seeking to rely upon such terms following the decision of the Supreme Court in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742. But it strikes me that the tenant would have a rather more favourable argument in this case. Consider:

(a) The incidence of a pandemic compelling lockdown legislation could be said to be unforeseen;
(b) Although the tenant is unable to deliver up vacant possession, the landlord would not have been able to take advantage of vacant possession had it been delivered;
(c) It is unfair to penalise a tenant in such circumstances by locking it into unwanted premises for (typically) another five years, when at some point during that period it is rather more likely that they could be beneficially exploited by the landlord.

22. None of these points is decisive. It would be interesting to argue such a case, were the facts ever to materialise in this way.

Topic (2): How to Occupy without Occupying

Yesterday, upon the stair,
I met a man who wasn't there!
He wasn't there again today,
Oh how I wish he'd go away!

23. Occupation ordinarily connotes a physical presence, but context is king:

(a) In Newnham College v HMRC [2008] UKHL 23; [2008] 1 WLR 888, Lord Walker said at [39] that "occupation":

> "… is in general taken to import an element of physical presence and some element of control over the presence of others. But these generalities are strongly influenced by the statutory context and purpose."

(b) Lord Nicholls explained in Graysim Holdings Ltd v P & O Property Holdings Ltd [1996] 1 AC 329, 336:

> "The degree of presence and exclusion required to constitute occupation, and the acts needed to evince presence and exclusion, must always depend upon the nature of the premises, the use to which they are being put, and the rights enjoyed or exercised by the persons in question."

(c) Diplock LJ in Wheat v E Lacon & Co Ltd [1966] 1 QB 335, 366:

> "The title of [the Occupiers' Liability Act 1957] affords a convenient name-tag for the kind of relationship which does give rise to a duty of care - but it is a name-tag which may be deceptive if it leads one to suppose that the criterion of liability is "occupation" in the sense in which that concept is relevant to the law of property or of landlord and tenant or of fiscal, franchise or rating law."

24. One can identify three separate approaches to statutory tests of "occupation". The usual caveat applies, that it may not be possible simply to translate cases from one context to another. But subject to that:

(a) The Courts have been prepared to accept that limited uses are nonetheless sufficient to constitute occupation;
(b) There is a line of authorities that suggests that discontinuous use will suffice, and that periods of non-use will be overlooked;
(c) At any rate where a tenant has been in occupation, but that occupation has ceased, the Court will treat them as in occupation if either (a) the

reason for absence is not their fault, and/or (b) there is clear intention to resume occupation when practicable. We will look at that in detail in the next section, as those cases appear to us to be most helpful in the present context.

Occupation – Some Illustrations from the 1954 Act

25. One way to tackle the problem of the tenant who can't be physically present is to get creative with what "occupation" means. Where the test is "mere" occupation, *slight facts may be held to suffice*:

(a) A carpet layer fitting carpets for the occupation by the tenant, even if engaged by the outgoing sub-tenant in fulfilment of his obligations under the sub-lease, coupled with two visits by the tenant's personnel will do under the 1954 Act: Pointon York Group Plc v Poulton [2006] 3 EGLR 37; [2007] 1 P & CR 115 CA.

(b) The retention of rubber shoes in a basement of a shop, being the residual stock following wind-down of commercial use: I&H Caplan v Caplan (No.2) [1963] 1 WLR 1247.

(c) Bacchiocchi v Academic Agency Ltd [1998] 1 WLR 1313; [1998] 2 All ER 241 CA (Civ Div): a twelve day interruption was not enough to break the thread of occupation.

(d) Non-occupation for a period of five months was held to be a period of non-activity which broke the thread of continuity of business user: Sight & Sound Education Ltd v Books Etc Ltd [1999] 3 EGLR 45 Ch D.

26. In Bacchiocchi, Ward LJ said that the proper approach in considering whether there had been cessation of business activity, where the period of inactivity was pursuant to the commercial decision to cease trading from those premises, required one to consider the following questions:

(a) What was the purpose of leaving the premises unattended? Was it linked to or part and parcel of the business activity which was then necessarily geared to winding down preparatory to vacating for good?

(b) What was the intention lying behind the decision to leave the premises unattended? Was it total abandonment not only of the premises but also of the accruing right to compensation, or was the intention to quit in orderly fashion in order to comply with the statutory obligation to do so?

(c) As a matter of fact and degree, was the period of non-activity reasonably incidental to the winding down for the purpose of ending all business activity on the day the tenant was required to quit?

(d) Bearing in mind the elasticity of the thread of continuity, did the thread stretch from the commencement of the business for the quitting of the premises looking at it as a coherent whole?

27. *Discontinuous use* may also do the job. The Courts have had to consider whether a seasonal use of premises nonetheless is business occupation for the whole term: Artemiou v Procopiou [1966] 1 QB 878 CA (contrast Teasdale v Walker [1958] 1 WLR 1076, where the tenant was out of occupation because he had sublet).

Occupation – Some illustrations from the Rent Acts

28. Under the Rent Act 1977 (and the Rent (Agriculture) Act 1976) a strand of cases developed in a way that is very similar to the Morrisons line under the 1954 Act. This held that a tenant would remain in "occupation" even if they were not physically at the premises, provided that they had the intention to return (*animus revertendi*) plus some outward manifestation of that animus – like keeping furniture there.

(a) A spell in jail won't deprive a Rent Act tenant of their statutory continuation tenancy: Maxted v McAll [1952] EGD 171; Brown v Brash [1948] 2 KB 247;

(b) In Bushford v Falco [1954] 1 WLR 672, Evershed MR said:

> "[…] if a tenant is forced to leave his home by some sudden calamity, he will prima facie be regarded as doing so as a temporary expedient, meaning and intending to return as soon as possible. This will be, for example, the natural conclusion if he is compelled to leave because he is sent to prison for three months or because his house is invaded by the waters of a flood. But even so, if the absence is long, the conclusion is not inevitable. The tenant may change his mind and come to prefer a new abode. If the absence from the original home be long, the onus, according to the classic judgment of Asquith, L.J. in Brown v. Brash is upon the tenant; though the circumstances may make the onus easy for him to discharge."

(c) In Gofor Investments v Roberts (1975) 29 P & CR 366, the tenant had not been resident for 10 years, but there was evidence explaining this absence and evincing an intention to return; see also Duke v Porter [1986] 2 EGLR 101 and Brickfield Properties v Hughes [1987] 20 HLR 108.

29. Again note that it is critical on these cases that the intention to return is not merely held as a matter of psychological fact, but also that the intention finds its manifestation in the conduct or correspondence of the tenant. Therefore, it is

advisable that those acting for tenants ensure that their clients manifest that intention and write to the landlord on that basis.

Occupation – Problematic Intensifiers

30. Sometimes intensifiers are used – e.g. "*actual occupation*" in Schedule 3 to the Land Registration Act 2002. With that intensifier in place, the Courts will need to get seriously creative to find that the owner of an overriding interest is in actual occupation *in absentia*. As we mention below, given the clear intention of the reforms of the 2002 Act in this regard, that will be a tough task.

31. The effect of such intensifiers was discussed by Lewison LJ in Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755

> [46] […] in some cases (e.g. in the context of overriding interests under the Land Registration Acts) the relevant concept is not simply "occupation" but "actual occupation". The intensifier "actual" emphasises that what is required is physical presence rather than mere entitlement in law: Williams & Glyn's Bank Ltd v Boland [1981] A.C. 487, 505. In other contexts the requirement will include some degree of possession. Thus, in the context of VAT, domestic legislation transposing the EU concept of "a letting of immoveable property" included within its scope a "licence to occupy land". In that context a licence "needs a quality that allows it to constitute a "leasing" or "letting" of land": HMRC v Sinclair Collis Ltd [2001] UKHL 30 at [68]. That quality consists of two characteristics: possession and control: ibid at [73]. This was the same context as that in which the House of Lords considered the meaning of "occupation" in Newnham. When Sinclair Collis went to the ECJ that court held that the fundamental characteristic of a letting of immovable property was the conferring on a person "the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right": See Newnham at [11]. That is why in Newnham at [17] Lord Hoffmann said that the question was whether Newnham had such a right; and why it was necessary to analyse the contractual arrangements with which that case was concerned. I do not consider that it is possible to draw from that case the conclusion that occupation always depends upon contractual rights.
>
> [47] In yet other contexts (e.g. the exercise of an easement), the cases draw a distinction between occupation of land and use of land. In those contexts, the mere presence of physical structures on land will not amount to occupation, especially where those structures have become part of the land: Chaudhary v Yavuz [2011] EWCA Civ 1314. In this connection it is worth noting that paragraph 101 of the Code prevents property affixed to land in exercise of a code right from becoming part of the land itself. This is reinforced by paragraph 108 which provides that "land does not include electronic communications apparatus". This reading is also confirmed by paragraph 500 of the explanatory notes to the 2017 Act; and by the

decision of the UT in Cornerstone Telecommunications Infrastructure Ltd v Keast [2019] UKUT 116 (LC).

32. There will be a limit as to how creative one can get e.g. with Land Registration – the purpose of the 2002 Act was to break the link between actual occupation under the old section 70(1)(g) and equitable concepts of notice, and the deliberate policy choice was made to raise the hurdle of what constituted actual occupation (e.g. Law Com 254, at 5.71 et seq).

Occupation – Rating Cases

33. The classic exposition of what is "rateable occupation" for the purposes of rating law is to be found in John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area [1949] 1 KB 344 at 350 (per Tucker LJ). It has four elements:

(a) actual occupation, which is
(b) exclusive for the particular purposes of the possessor and is
(c) of some value or benefit to the possessor but is
(d) not for too transient a period.

34. There are hard cases, which show that the Court is prepared to stretch the meaning of that term when it suits, notwithstanding the fact that the concept is "actual occupation" and not "mere occupation":

(a) Arbuckle Smith v Greenock [1960] AC 813 – the operator of a bonded warehouse for the sale of alcohol was not in "actual occupation" by reason of its works of fit-out that it carried out in order to bring the warehouse up to Customs & Excise standards, as this was not use of the warehouse as such.

(b) R (on the Applications of Makro) v Nuneaton BC [2012] EWHC 2250 (Admin) – a company was in occupation of a warehouse because it had stored sixteen pallets of documents in it. Note, however, that this finding was beneficial to the company as it allowed it to take advantage of a six month rate-free period.

Topic (3): Lease renewals

35. In order to be able to claim a new tenancy under Part II of the Landlord and Tenant Act 1954, the tenant must be able to show that its premises "are occupied by the tenant … for the purposes of a business carried on by him of for those and other purposes" (see s.23(1)). We have shown in Topic (2) that 24/7 occupation is not necessary. But what is the position where the tenant is simply unable to occupy, because that is the effect of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020?

36. Most apposite are the cases in which the Court had to consider whether *a tenant who, through no fault of his own, is barred from access, is still in occupation*. Unsurprisingly the Courts have taken a benign approach to occupation in such cases.

(a) Cross J in Caplan (above) had the following to say at p. 1260:

> "I think it is quite clear that a tenant does not lose the protection of this Act simply by ceasing physically to occupy the premises. They may well continue to be occupied for the purposes of the business although they are de facto empty for some period of time. One rather obvious example would be if there was a need for urgent structural repairs and the tenant had to go out of physical occupation in order to enable them to be effected."

(b) In Morrisons Holdings Ltd v Manders Property (Wolverhampton) Ltd [1976] 1 WLR 533, Scarman LJ followed that dictum of Cross J. In that case, the holding was destroyed by fire but the tenants, though out of occupation, wanted to go back. Scarman LJ said that where the "*tenants were cherishing the hope of return, but also making clear that [they] intended to maintain [their] right of occupancy and to resume physical occupation*", that maintained the thread of occupation. It is therefore advisable for the tenants to signal their intentions. In another damage by fire case, Flairline Properties Ltd v Hassan [1999] 1 EGLR 138, that reasoning was applied. This is also the position where the tenant is forced out of the premises because of repairs that are the landlord's liability: see Demetrious v Poolaction [1991] 1 EGLR 100.

(c) It is worth drawing attention to this passage from Sir Gordon Willmer in Morrison:

> "So far as the law is concerned, I think it can be taken as axiomatic that in order to be in occupation one does not have to be physically present every second of every minute of every hour of every day. All of us remain in occupation, for instance, of our houses even while we are away doing our day's work. It follows, therefore, that occupation necessarily must include an element of intention as well as a physical element. If I leave my premises and emigrate to the United States of America with no intention of returning, it can well be said that I no longer remain in occupation. But if as a shop keeper I close my shop for a fortnight in the summer to enable my staff to have a holiday, I apprehend that no one would contend that during that fortnight I ceased to be in occupation of my shop."

Topic (4): Access Rights in the Time of Covid

37. A brief word about access and inspection rights in the present time.[1] The general position is governed by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, but guidance for specific cases has now been issued. Under the Regulations, gatherings are permitted if reasonably necessary "to participate in legal proceedings or fulfil a legal obligation" (regulation 7(d)(iv)). There is no definition of legal obligation, and it appears on one reading not to include legal *powers* (such as, perhaps, the exercise of a Jervis v Harris clause).

38. As matters stand, there is express recognition that rights to access can and should be exercised to maintain and repair telecommunications infrastructure, which is critical infrastructure: https://www.gov.uk/guidance/covid-19-guidance-for-telecommunications-infrastructure-deployment-in-england. It seems that this guidance will also apply to new agreements between site providers and operators, and also between those imposed by the Upper Tribunal.

39. More generally, there is Advisory Guidance for Landlords and Tenants: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876500/Consolidated_Landlord_and_Tenant_Guidance_COVID_and_the_PRS_v4.2.pdf. In essence, the Government urges co-operation and asks that access for urgent purposes be permitted, for instance where the works are necessary to preserve the fabric of the building, to fix a boiler or other important matters.

40. The works to be carried out require the Guidance on working in others' homes to be observed: https://www.gov.uk/government/publications/further-businesses-and-premises-to-close/further-businesses-and-premises-to-close-guidance#work-carried-out-in-peoples-homes

Topic (5) The end of the moratorium

41. As will be well known to this audience, the Act, which came into force in record time on 25 March 2020, rendered it unlawful for landlords to launch possession proceedings or recover possession of their rented premises, irrespective of whether their tenants had paid rent.

42. Members of Falcon Chambers have written a series of articles exploring different facets of this legislation, and lockdown generally:

[1] We would direct you to what our colleagues Stephanie Tozer QC and Cecily Crampin said about these issues in the context of receivership: https://t.co/dTXtwJhHgQ?amp=1

(a) James Tipler provides a guide to the new legislation at https://www.falcon-chambers.com/news/government-unveils-safeguards-for-commercial-tenants-in-england-and-wales-a; with Martin Dray and Julia Petrenko supplying further detail at https://www.falcon-chambers.com/publications/articles/possession-all-bets-are-off-at-least-for-now and https://www.falcon-chambers.com/publications/articles/practice-direction-51z-possession-proceedings-stay-coronavirus;

(b) James Tipler describes how the legislation works in relation to commercial premises - see https://www.falcon-chambers.com/news/coronavirus-act-2020-safeguards-against-forfeiture-for-commercial-tenants-i; Martin Dray adds his own thoughts in https://www.falcon-chambers.com/publications/articles/coronavirus-the-impact-on-forfeiture-of-business-leases-for-non-payment-of-;

(c) James Tipler focuses on the residential tenancy impact of the legislation – see https://www.falcon-chambers.com/news/coronavirus-act-2020-measures-to-protect-residential-tenants-in-england-and;

(d) In "(Still) open all hours? Tenants' covenants to keep business premises open and to pay rent during the Covid-19 Pandemic", Jonathan Karas QC and James Tipler analyse whether such covenants have any effect - https://www.falcon-chambers.com/publications/articles/still-open-all-hours-tenants-covenants-to-keep-business-premises-open-and-t;

(e) In "Coronavirus: a frustrating situation", Mark Galtrey and Imogen Dodds consider the role that frustration might play in coming to the assistance of tenants - https://www.falcon-chambers.com/publications/articles/coronavirus-a-frustrating-situation;

(f) In "Does a Tenant really have to go on paying rent during lockdown? Perhaps we should ask the Officious Bystander …", Nat Duckworth examines the same question through the prism of an implied term - https://www.falcon-chambers.com/publications/articles/does-a-tenant-really-have-to-go-on-paying-rent-during-lockdown-perhaps-we-s

(g) In "Receivership in the COVID-19 Crisis", Stephanie Tozer QC and Cecily Crampin look at the legal implications of the lockdown for receiverships - https://www.falcon-

chambers.com/publications/articles/receivership-in-the-covid-19-crisis

(h) In "Coping with Remote Hearings", the Honourable Justice Clyde Croft and Tricia Hemans consider some of the challenges for practitioners dealing with remote hearings and practical ways to overcome them - https://www.falcon-chambers.com/publications/articles/coping-with-remote-hearings;

(i) In "Witnessing Deeds in the age of Social Distancing", Tricia Hemans looks at the challenges that confront those now trying to comply with such formalities - https://www.falcon-chambers.com/publications/articles/witnessing-deeds-in-the-age-of-social-distancing;

(j) In "Check your Email Signatures!", Jamie Sutherland & Imogen Dodds consider electronic signatures & formality requirements - https://www.falcon-chambers.com/publications/articles/check-your-email-signatures;

(k) Caroline Shea QC and Kester Lees address the practical aspects of conducting remote hearings in "Witness actions – press on … or pause for breath? – see https://www.falcon-chambers.com/publications/articles/witness-actions-press-on-or-pause-for-breath.

43. Those articles cover the ground in detail, addressing the practical effects of the moratorium on recovery of possession – and more besides. Once the moratorium is at an end, however, the hostilities are likely to recommence, with tenants with no income with which to fund rent seeking to negotiate waivers; and landlords with banking covenants to observe or pensions to pay seeking to resist them.

44. In that context, the experience of another common law jurisdiction may be of interest. On 7 April, the Prime Minister of Australia issued a press release https://www.pm.gov.au/media/update-coronavirus-measures-070420. This noted that the National Cabinet had agreed that states and territories would implement a mandatory Code of Conduct[2], including via legislation or regulation as appropriate, to implement principles which had been agreed the previous Friday, 3 April. The Code builds on the draft codes submitted by landlord and tenant representative bodies in the commercial property sector. The purpose of the Code is to impose a

[2] A copy of the Code is available here: https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf

set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, in circumstances where the tenant is a small-medium sized business (annual turnover of up to $50 million) and is an eligible business for the purpose of the Commonwealth Government's JobKeeper programme. The National Cabinet agreed that there would be a proportionality to rent reductions based on the tenant's decline in turnover to ensure that the burden was shared between landlords and tenants. The Code provides a proportionate and measured burden share between the two parties while still allowing tenants and landlords to agree to tailored, bespoke and appropriate temporary arrangements that take account of their particular circumstances.

45. In the meantime, the Government is also acting as a model landlord by waiving rents for all its small and medium enterprises and not-for-profit tenants within its owned and leased property across Australia.

46. It will be interesting to see how such ideas play out across the landlord and tenant relationships we have in this country.

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