CORONAVIRUS: THE IMPACT ON FORFEITURE OF BUSINESS LEASES FOR NON-PAYMENT OF RENT

Section 82 of the Coronavirus Act 2020.

"The rule is, jam tomorrow and jam yesterday – but never jam today."

Key takeaways:

- ✓ Section 82 provides a moratorium in respect of forfeiture for non-payment of rent under relevant business tenancies.
- ✓ "Rent" for these purposes includes any financial payment due under the relevant lease.
- ✓ A "relevant business tenancy" is essentially any tenancy where the demised premises or any part thereof are/is occupied either by the tenant or by any lawful occupier (whether sub-tenant or licensee).
- ✓ The moratorium is just that: it is simply a period within which forfeiture cannot be invoked.
- ✓ The period is 26 March 2020 to 30 June 2020 (unless extended).
- ✓ The rent remains due and payable by the tenant.
- ✓ All other remedies in respect of non-payment remain available to the landlord.
- ✓ When the moratorium expires the landlord will be entitled to forfeit the lease for non-payment of all accrued arrears. The statute is thus simply giving a period of grace now and potentially storing up problems for tenants down the line.
- ✓ During the moratorium the landlord's hands are tied irrespective when the rent which founds the intended forfeiture accrued.
- ✓ The moratorium catches cases in which possession proceedings for non-payment of rent had been brought before 26 March. The court cannot order possession before 30 June.
- ✓ The moratorium also catches those cases in which possession orders for non-payment of rent had been made before 26 March, where the orders would otherwise expire before 30 June. In effect, the date for giving possession is extended to 30 June, although in the High Court the tenant must make an application to obtain this result.
- ✓ The moratorium does not apply to forfeiture for any non-financial breaches; a landlord remains free to proceed in respect of those in the ordinary way.

Introduction

The Coronavirus Bill 2020 had its first reading on 19 March 2020. 6 days later the Coronavirus Act 2020 received Royal Assent and largely came into force that very day (s.87). The Act makes urgent and sweeping changes to many areas of life. This article focuses on its impact on the forfeiture of commercial tenancies for non-payment of rent, a topic likely to be of great important to both commercial landlords (such as pension funds and shopping centre owners) and commercial tenants (such as retail tenants) alike in these troubled times. Everyone is affected by the coronavirus situation and, as ever, many will have competing objectives. What balance the legislation strikes is likely to be crucially important; it may potentially be the difference between the survival and collapse of a business.

Section 82

The relevant changes so far as forfeiture for non-payment of rent is concerned are set out in s.82 of the Act. It is instructive to note what the section covers, what it does, and what it does not do.

Section 82(1) provides that "*a right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent may not be enforced, by action or otherwise, during the relevant period*."

This is the primary provision in section 82 on which the later subsections build.

Central to the reach of section 82 is are definitions of:

- Relevant business tenancy
- Rent
- Relevant period

It is convenient to consider each of these expressions in turn.

Relevant business tenancy

A "relevant business tenancy" means (a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies or (b) a tenancy to which that Part of that Act would apply if any relevant occupier were the tenant: section 82(12).

The first limb of that definition is, in principle, simple enough. By section 23 thereof, Part 2 of the 1954 Act essentially applies to any tenancy where the demised premises (or part thereof) are occupied by the tenant for business purposes (or mixed purposes including business use).

It may be noted that business tenancies which are "contracted-out" of the 1954 Act (i.e. in relation to which security of tenure is excluded pursuant to s.38A of the 1954 Act) are nonetheless tenancies to which Part 2 applies. Therefore, contracted-out tenancies fall within the ambit of section 82 of the 2020 Act.

What if the business tenant is not trading from the premises because of coronavirus and the associated statutory restrictions: see e.g. the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350? The answer is likely to be that, where events over which the tenant has no control have led it to absent itself from the premises, it is sufficient (to demonstrate a continuing thread of 'occupation' for 1954 Act purposes) if it shows that it intends to return to the premises once it is lawfully able to do so: cf e.g. *Morrison Holdings v Manders Property* [1976] 1 WLR 533, CA; *Flairline Properties v Hassan* [1999] 1 EGLR 138.

Less clear is the position where the tenant for whom lawful trading remains has 'voluntarily' closed its doors in the current emergency, perhaps because of a combination of: (a) reduced demand; (b) staff illness or self-isolation; (c) staff inability to travel to work; (d) a desire to abide by and encourage 'social distancing'. I suggest that the courts are likely to take a sympathetic view and regard such a tenant as still in occupation, at least if the tenant (i) has not fully vacated the property (but continues to keep business possessions on site) and (ii) does indeed intend to resume trade when the crisis has passed. However, there is potential scope for argument in such cases, which will invariably turn on their own specific facts. Whether the tenant has furloughed its employees or has made them redundant (and does not plan on rehiring them) may be a material consideration (amongst others).

The second limb of the definition requires an understanding of the meaning of "relevant occupier". That is defined as "*a person, other than the tenant, who lawfully occupies premises which are, or form part of, the property comprised in the tenancy*".

Presumably "lawfully" in this context means that the occupier's presence in the premises is not in breach of (a) the relevant tenancy and, presumably, (b) any derivative sub-tenancy or other contract. It may also connote that the occupier's presence does not offend the public law (e.g. planning legislation), although if that is the case it will usually also connote a breach of the tenancy.

The reference to "premises", used in apparent contradistinction to "the property comprised in the tenancy" (see also subsections (4) & (5)) is worth noting. The latter phrase seemingly refers to the property demised by the tenancy whereas "premises" (itself not defined) could arguably connote only buildings (as opposed to open land) although – having regard to the meaning given by the courts to "premises" in the context of the 1954 Act – it is unlikely to be so construed; it is most likely to be read as referring simply to some part (or, as the case may be, the whole) of the demised property. In any event, even if it were given a restricted ambit, it would only exclude a few occupiers, for most will occupy buildings.

The effect of the second limb of the definition of "relevant occupier" is to broaden the reach of section 82 to cater for cases where the tenant itself is not in occupation for 1954 Act purposes. This thus caters for (amongst other scenarios) the case of a multi-occupied commercial building where there is (i) a head lease of the whole with a non-occupying head tenant and (ii) subleases of the various constituent units occupied by the various (lawful) sub-tenants.

The second limb extends the protection afforded by section 82 to the head tenancy (thus fettering the superior landlord's right to forfeit the head lease for non-payment of rent, which forfeiture would in turn see the determination of the subleases), provided at least some part of the overall property comprised in the head tenancy is occupied by a relevant occupier for business purposes. In this regard:

- For the second limb to be engaged, *just one* relevant occupier need occupy a *part* of the whole property. If there are multiple derivative occupiers, the presence of one will suffice to bring the case within section 82.

- The relevant occupier in question must occupy for business (or mixed) purposes (cf residential purposes only) because otherwise Part 2 of the 1954 Act would not apply to the (head) tenancy if that tenancy were vested in the occupier.

- The relevant occupier need not occupy in right of the "relevant business tenancy" itself. It can occupy under a derivative right or interest.

- The relevant occupier need not be a sub-tenant. Occupation for business purposes by a permitted licensee will suffice to engage section 82.

The second limb also potentially brings within the reach of section 82 a case where a commercial tenancy falls outside Part 2 of the 1954 Act because, for instance, the tenancy is held by an individual but occupied by a company in which the tenant does does not have a controlling interest (so as to qualify for security of tenure by virtue of s.23(1A) of the 1954 Act). Provided always that the company is occupying for business purposes and that (under the terms of the lease, e.g. the alienation covenant) its presence in the premises is lawful, section 82 will apply.

Having established that section 82 applies to a given tenancy, the scope of the fetter imposed by the 2020 Act in relation to that tenancy falls to be examined. Returning to subsection (1), it will be recalled that as regards such a tenancy the landlord is precluded during the relevant period from enforcing a right of re-entry for non-payment of rent.

Rent

For the purposes of the statute, "rent" includes "any sums a tenant is liable to pay under a relevant business tenancy": section 82(12). It therefore embraces <u>all</u> purely financial obligations. Service charges (whether or not reserved as 'rent') are within its ambit. So too are any payments in respect of e.g. interest, administration fees, and (seemingly) amounts payable if the landlord has exercised its rights under a *Jervis v Harris* clause and effected repairs at the expense of the tenant.

Might business rates (if still payable to the local authority notwithstanding the various statutory concessions given of late) fall under the same umbrella? Arguably so because the definition is not expressly stated to be limited to sums which a tenant is liable to pay *to the landlord* – unless the concept of "rent" (even as statutorily extended) is regarded as impliedly so circumscribed.

However, although the landlord's freedom of action is restricted in circumstances of tenant default in respect of a broad range of financial obligations, there is <u>no</u> constraint at all in respect of forfeiture for other (non-monetary) breaches. Thus, the landlord *may* potentially forfeit a lease for *any other breaches* in the ordinary way, e.g. for alienation breaches, subject of course to complying with all the normal requirements, e.g. service of a s.146 notice as a precursor to forfeiture. (Issues may well arise, given the impact of coronavirus, in relation to (a) the efficacy of service and (b) the "reasonable time" allowed to a tenant to remedy any remediable breach: Law of Property Act 1926, s.146(1); these are outside the scope of this article.)

Therefore, although section 82 affords business tenants some measure of relief against the loss of their premises by reason of financial difficulties, it remains to be seen how effective a 'panacea' section 82 is in practice if a landlord should be determined to forfeit a lease. A landlord may well be able to cast around for some other breach, e.g. non-compliance with a keep-open covenant, which will enable it to proceed to forfeit without limitation. (Again, issues such as the effect of e.g. a statutory coronavirus-related requirement to close premises on a keep open covenant are outside the scope of this article.). That said, in non-"rent" cases, the court has a broad discretion in relation to granting relief from forfeiture in appropriate cases and it may be envisaged that the courts are unlikely to be receptive to technically sound but adventitious claims by landlords which stem from coronavirus-induced situations (cf cases where the underlying tenant breaches are entirely independent of the current public health emergency).

Mode of forfeiture

The next point to note is that the restriction is on forfeiture "by action or otherwise". So forfeiture by court proceedings or physical re-entry is equally circumscribed.

Relevant period

As noted above, the temporal extent of the restriction on forfeiture of leases of business premises for non-payment of sums due from the tenant is limited to "the relevant period". This is the period from 26 March 2020 and ending on 30 June 2020: section 82(12). However, the period may be extended by regulations: ibid.

In effect therefore, there is, initially a 3 month *period of grace* within which forfeiture for non-payment of rent is precluded.

Moreover, forfeiture is rendered a proscribed means of enforcing payment of rent arrears during the prescribed window *irrespective of when the arrears date from.* So if a business has failed to pay e.g. a monthly rent due on 1 March, the landlord is now denied the ability to exercise a right of forfeiture in respect of that sum – in just the same way as its hands are tied (in relation to a different tenancy) in respect of the quarter's rent due on 25 March.

The limits of section 82

However, it is important to acknowledge the limitations of the restrictions imposed by section 82(1), even in the context of non-payment of rent.

- The 2020 Act does <u>not</u> extinguish the tenant's liability for the rent itself.

- The statute does not deny the landlord the ability to exercise any other lawful remedies available to it (besides forfeiture). These may include issuing a statutory demand and pursuing an insolvency route against the non-paying tenant.

- When the *moratorium* – for that is all that it is – comes to an end (whether from 1 July or any later date), a landlord will, if it then desires, be able to forfeit the lease for non-payment of *all* the accrued arrears. As a result, section 82 gives a tenant just a short window (during the coronavirus outbreak) in which it is immune from forfeiture if it

fails to pay its rent, but does not give it any long-term relief. Indeed, it is readily conceivable that the Damocles' sword may fall on it at the very moment when it most needs protection from it, i.e. when it is attempting to restart its business).

- In relation to the preceding point, the tenant will not be able to rely on any acts by the landlord during the relevant period (such as demands for successive payments of rent) as waiving the right to forfeit for earlier non-payment. This follows from section 82(2) which effectively abolishes the doctrine of waiver in non-payment of rent cases for the duration fo the relevant period, the only exception being where the landlord gives "*an express waiver in writing*", something which is likely to be very rare indeed.

Application to existing possession proceedings and orders

The later subsections of section 82 supplement and complement the main provision contained in section 82(1), discussed above.

- A landlord which has issued and served court proceedings for non-payment of rent (thereby forfeiting the lease) *before* 26 March 2020 is subjected to the same restrictions on its ability to recover possession earlier than the expiry of the relevant period (currently 30 June).

- This is achieved by stipulating that any High Court order for possession made during the relevant period cannot require the tenant to cede possession before the end of such period: sections 82(3) & (4). In effect, therefore, any possession order must be drawn so as to expire not earlier than 30 June or such later date as may be substituted by regulations.

- A similar approach is taken to county court proceedings. Ordinarily in most (true 'rent') cases, an order made under s.138 of the County Courts Act 1984 will demand the giving of possession by the tenant 28 days after the date the order is made. By sections 82(7) & (8) the county court is obliged to follow the same course; it cannot make a possession order which is enforceable before the end of the relevant period laid down in the 2020 Act.

- Furthermore, section 82 has a degree of retrospectivity about it. It catches cases where an possession order was made by the High Court (subsections (5) & (6)) or the county court (subsections (9) & (10)) *before* 26 March but under which the date for possession would expire *within* the protected window (i.e. before, currently, 30 June). The basic thrust of section 82 is to postpone the date for possession and defer the possibility of eviction before 30 June. However, the procedure set for the two courts is different:

    - In the High Court, the original order remains in force unless the tenant applies (before eviction) to vary it. But if such an application is made, the High Court must allow the tenant until at least the end of the relevant period to yield up possession. This extension is not automatic but, if sought, is mandatory.

    - In the county court, however, if the original order was made under section 138 of the County Courts Act 1984, the date specified therein for the giving of possession "*is to be treated as extended … so that it expires at the end of the relevant perio*d". This extension is *automatic.*

- It is possible that the operation of these retrospective provisions may afford something of an unwarranted windfall to a tenant and a corresponding detriment to landlord in cases where the financial default which occasioned the forfeiture and possession order had nothing whatsoever to do with coronavirus. For example, an order could have been made at the end of lengthy, contested litigation on 1 March, otherwise effective 29 March, in respect of arrears dating from 2018. The tenant is now afforded the right (on asking, in the High Court) to stay in the premises until at least 30 June, whether or not it pays the arrears. Parliament has decreed, by section 82, that this is a price which a landlord must pay in these unprecedented times. It may be a side wind of the attempt to give tenants whose business is affected by coronavirus a measure of relief against imminent forfeiture. It may also reflect a desire (consistent with the hastily enacted public health regulations etc.) to avoid the activity and social contact involved in the vacation and repossession of premises during the current crisis.

Overview

Standing back, it remains to be seen whether section 82 really delivers any significant benefits to business tenants who are financially squeezed because of coronavirus.

The Government's announcement[1] trumpeted:

> Commercial tenants who cannot pay their rent because of coronavirus will be protected from eviction, the government has announced.
>
> …
>
> These measures, included in the emergency Coronavirus Bill currently going through Parliament, will mean no business will be forced out of their premises if they miss a payment in the next 3 months.

It is easy to see why businesses took these statements as a firm assurance that forfeiture in respect of non-payment of rent accruing in the next 3 months (i.e. during the current coronavirus episode) would be prohibited altogether. But it transpires that is not the case. The right to forfeit is merely put into suspended animation. It is *not* the case that no business will be forced out of its premises if it misses a payment in the next 3 months; it is simply that no business will be forced out of its premises in the next 3 months if it misses a payment. The difference in syntax may be slight but the end result is materially different.

Does section 82, as enacted, mean that the Government's announcement is really one of "jam tomorrow"?

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[1] https://www.gov.uk/government/news/extra-protection-for-businesses-with-ban-on-evictions-for-commercial-tenants-who-miss-rent-payments