Commercial Tenancies and Covid-19

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PD51Z and *Arkin v Marshal*

- Per CPR PD51Z all proceedings to enforce an order for possession by a warrant or a writ of possession are stayed for 90 days from 27th March 2020
- This was amended by PD51ZA which created an exception for an application for agreed case management directions
- Detailed consideration of PD51Y, 51Z and 51ZA can be found in the note on our website

Arkin v Marshal [2020] EWCA Civ 620

- The validity of PD51Z and PD51ZA were considered by the Court of Appeal in a judgement published on the 11th May. The key points from it are:
  - Both practice directions were not made *ultra vires* and should be followed
  - A court *does* have a discretionary power to lift the stay, but this power is expected to be largely theoretical
    - The CoA could not think of an example where it would be appropriate to lift the stay and noted that the only exception they could think of would be where the failure to determine the proceedings might itself endanger public health
  - Per PD51Z(2A) parties can make an application for case management directions which include dates within the 'stay' period, they just cannot be enforced during the currency of that period

Moratorium on forfeiture

- Section 82 Coronavirus Act 2020 introduced a temporary moratorium on the forfeiture of commercial leases for the non-payment of rent during the relevant period, which runs until 30th June 2020 unless extended
- This applies retrospectively to proceedings commenced before the legislation was passed but an order was not made, and orders now made must ensure that possession does not have to be given up before the end of the relevant period (at least 30th June 2020)

Moratorium on forfeiture

- Key points to take away from the legislation:
  - The legislation has a wide scope, in that 'rent' is defined as including any sum a tenant is liable to pay under a relevant business tenancy- as such it will include service charge, insurance etc and could include payments for breach of a repairing covenant. The protection does not distinguish between those unable to pay do to coronavirus and those unable to pay for other reasons
  - The legislation has a narrow scope, in that it *only* applies to failures to pay and does not prevent forfeiture proceedings on other grounds
  - This does *not* equate to a rent holiday and rent remains due. Rent and other monies will continue to attract interest as per the relevant provisions in the lease
  - No contact by the landlord, short of express waiver in writing, will be regarded as waiving the right of re-entry or forfeiture for non-payment of rent

Alternative approaches to enforcement

- Because of the moratorium, emphasis had shifted to alternative methods of enforcement
- On 23rd April 2020 the government announced new proposals to limit the use of such methods:
  - The use of statutory demands will be banned between 1st March 2020 and 30th June 2020
  - Winding up petitions will not be able to be presented between 27th April 2020 and 30th June 2020
- BUT *only where a company cannot pay its bills due to coronavirus*
- These proposals are yet to be turned into legislation

Alternative approaches to enforcement

- Key points arising:
  - It appears the enabling legislation for these changes will be narrower than the moratorium on forfeiture, in that they will be limited to cases of non-payment due to coronavirus
  - Although it maybe narrower, there will be practical problems in trying to take advantage of that- cases will have to be listed and evidence heard to determine the cause of the inability to pay. It is likely that the relevant periods will expire before the court actually determines the issue
  - These proposals do not affect the ability to sue any guarantor if sums due are not paid nor to withdraw sums held on rent deposit in accordance with the terms of the lease

Alternative approaches to enforcement

- Where the governments proposals have been turned into legislation is amending the commercial rent arrears recovery rules:
  - Landlords are now prevented from using CRAR unless they are owed 90 days of unpaid rent (will not assist those paying rent quarterly)
  - Some timings have been extended
  - Enforcement agents are prevented from taking control of goods at residential premises or on highways while the lockdown restrictions are in place

Wider considerations with non-payment

- Simply put, given the protection that now exists, what are the potential problems of not paying rent (beyond the debt including interest accruing)
  - Are there any concessions or side agreements in place? Such agreements (for reduced rent or turnover only rent) are often predicated on the continuing payment of rent as agreed. Default could mean reverting to the rent as set out in the lease and a considerable hike
  - Is the tenant looking at exercising a break clause? Break clauses often require all rents to be up to date as of the date of the break and if rent is outstanding landlords may be able to argue that the break notice is of no effect

Frustration and commercial leases

- Few commercial tenancies contain force majeure clauses so it unlikely the lease itself will come to the rescue
- If their business is shut down, can a tenant rely on frustration to avoid having to pay their rent?
- The short answer is that it is unlikely, but there may be situations where it could be arguable

The test for frustration

- The test to establish whether a contract is frustrated is a high one and can be summarised as follows:
  - Performance of a contractual obligation must be rendered *impossible* or the operation *radically different* to what was envisaged at the time of contracting due to an unforeseen and supervening event;
  - The supervening act cannot be due to either party; and
  - The contract must not provide an appropriate force majeure clause or provide for the allocation of risk arising in the event of a pandemic

Canary Wharf v EMA [2019] EWHC 335 (CH)

- The High Court considered the doctrine of frustration in the context of Brexit. It was due to be appealed but the case was settled.
- Some key points from the case:
  - The fact the tenant could not use the premises for its intended purposes did not mean the lease had no value, consideration should be given to trading in a different way or sub-letting
  - If a business could have continued to trade in some form and did not, this is likely to be regarded as self-induced frustration
  - Break clauses are likely to be seen as an indication of how the parties allocated risk
  - It will be an uphill battle to convince a court of a common purpose going beyond the terms of the lease

A persuasive case for frustration?

- Where the period of non-occupation is relatively temporary in comparison to the term of the lease, the court is unlikely to find frustration
- The best case for frustration is likely to be where:
  - The lease has a limited period remaining (or was a short lease to begin with, although that may lead to arguments about foreseeability);
  - User provisions are restrictive such as to prevent or limit the ability to 'pivot' usage, such as from a retain store to an online offering; and
  - User provisions also restrict the ability to assign or sublet the balance of the lease to a business which would be able to make use of it; or
  - Market demand is such as to make the ability to assign or sublet effectively worthless

Contact Details

- Any Questions?
- THANK YOU

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