

Covid-19: Should Commercial Tenants Still Pay The Rent?

Yes they should, where possible, but less than 30% of commercial property rent was received by landlords for the March 2020 quarter. There is an urban myth in circulation that tenants no longer need to pay their rent to landlords; that the government has instructed them not to; that they can shut up shop, cancel the rent payment, and with any luck, pick up where they left off when things are back to “normal”.

Tenants should be very clear however, that the government has not just mandated a rent holiday. Tenants who can pay the rent should do so, and indeed, landlords are examining their options, and drawing on rent deposits, particularly where non-payment has nothing to do with the current coronavirus pandemic.

These are the basics of how the government has moved to help tenants with measures in the Coronavirus Act 2020 (the Act):

- **s.82(1)** of the Act was introduced to assist commercial tenants i.e. those within Part II of the Landlord and Tenant Act 1954 (the 1954 Act) (and to be clear, those contracted out of Part II). The legislation does not apply to tenancies at will, those shorter than 6 months, or licences.
- **s.82(1)** of the Act applies from 26 March 2020 up to 30 June 2020 and suspends the right of landlords to forfeit commercial leases by reason of non-payment of rent or other sums. Tenants should note, interest accrues on unpaid sums in the usual way. It's possible that the application period for **s.82(1)** will be extended, and there had already been a pre-Covid call by the Law Commission for an abolition of forfeiture for non-payment of rent.
- **s.(82)(2)** of the Act assists landlords by providing that their conduct during the forfeiture suspension period will not amount to a waiver of their right to forfeit a lease, save where they explicitly waive it in writing.
- **s.82(11)** of the Act assists tenants in providing that where leases are not contracted out of the 1954 Act and are due for renewal, landlords may not cite the non-payment of rent as their statutory ground for non-renewal.

Theoretically, other landlord remedies for non-payment of rent are available, including suing in court for unpaid rent, and the Commercial Rent Arrears Recovery (CRAR) process, though the logistics of the latter are essentially impossible during any form of lockdown and the use of CRAR is set to be prevented by further protective measures in the pipeline.

The service of winding up petitions, and recourse to guarantors or to sub-tenants, are all still available too, but all of these methods would undoubtedly increase the pressure on a tenant, whether through a guarantor's own recourse, diversion of sublease rent direct to the landlord, or in the case the of winding up, directly threatening a tenant's very existence.

The government is set to help tenants further, with a temporary ban on the use of statutory demands (made between 1 March 2020 and 30 June 2020) and winding up petitions presented from Monday 27 April, through to 30 June, where a company cannot pay its bills due to coronavirus. There will also be legislation to prevent the use of CRAR.

Any landlord looking to have its tenant in place by the end of this crisis will no doubt look to support a "good" tenant, rather than to make life more difficult, and the government is asking for, and has been pleased to see collaboration between parties.

Co-operation, a "sharing of the pain", is almost the only route to possible mutual survival. Australia has imposed a mandatory code of conduct around commercial lease administration, insisting on co-operation and good faith negotiations. Closer to home, for now, tenants need to look to pay what they can, and landlords need to make the concessions that they can, perhaps in return for tenant concessions. These might come in the form of the removal of a future tenant break, or perhaps settlement of an outstanding rent review or the like.

Parties must take sound advice when documenting any concessions – whether around rent payment terms, service charge reductions, or anything else. Care must be taken around binding either party's successors in title (or not), any guarantor will need to be a party to documentation, and all the usual consents will be needed – from lenders, superior landlords and so on. Break options should be examined here too, with care taken to deal with those dependent on rents or other sums needing to be paid in full up to the break date.

On the subject of termination, some tenants may be "lucky" enough to be close to the natural expiry of their lease, or the opportunity to serve a break notice. Here, they must take care to understand their obligations around these crucial dates, especially any pre-conditions to any breaks. It may be that these obligations are difficult, if not impossible to comply with during lockdown because they require physical action at the property. Again, early, open dialogue with the landlord will be essential.

HOW CAN CONEXUS LAW HELP?

Businesses and individuals will need legal advice to help them understand the risks they may face and the options that may be open to them.

We are available to assist in reviewing the laws in many jurisdictions across the world, and to review specific contracts. We are also available to provide practical, business-orientated advice on how to best protect yourself from the ongoing commercial effects of Covid-19.

Contact

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ABOUT CONEXUS LAW

Conexus Law is an independent specialist law firm providing legal and commercial advice to clients who work in sectors where the built environment, technology, engineering and people converge. We work on projects across the globe.

Built environment: We work on complex or mission-critical projects, where the "normal rules" may not apply. These projects might present complex procurement challenges, might be one-of-a-kind, or might relate to the construction of mission critical facilities where the risks of project failure far outweigh the initial capital outlay.

Connected world: This is where the built environment and the digital and virtual worlds operate and converge. Our work relates to projects such as data centres and other digital infrastructure, cloud deployment, smart cities, internet of things, blockchain and the like.

Cutting edge: Our clients in this sector are visionaries and entrepreneurs; autonomous cars, drone technology, artificial intelligence, new energy, big data and virtual reality. Clients might be early stage companies looking to move from proof of concept to early deployment, or the innovation teams of more established players.