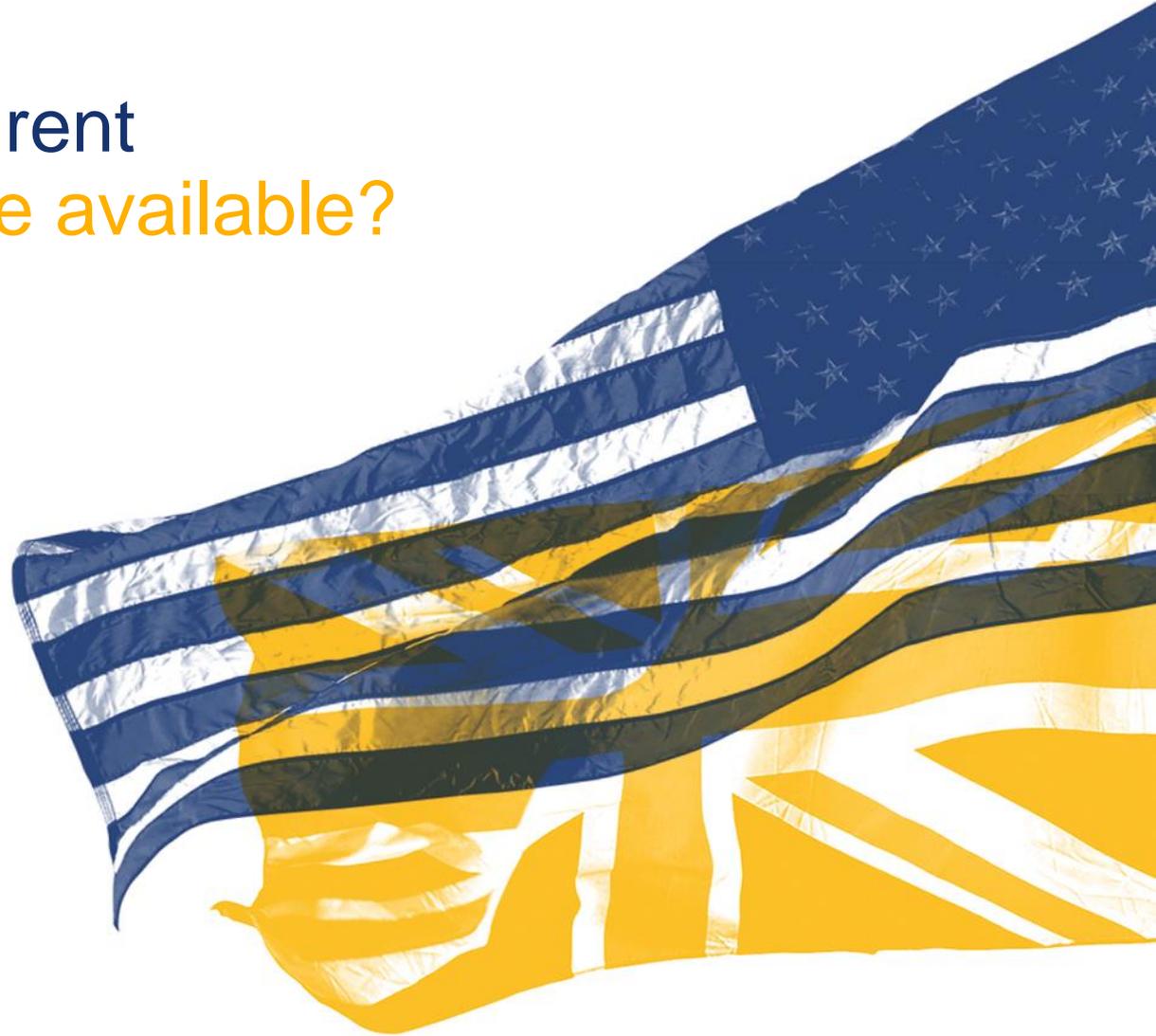


Non-payment of rent What Options are available?

March 26 2021



Big problem for commercial property industry

UK retailers pay less than 15% of rent due

High street chains withhold payments and office landlords see sharpest decline in receipts



Trade on Britain's high streets remains limited by social distancing restrictions © Simon Dawson/Bloomberg

Opinion **The FT View** [+ Add to myFT](#)

Unpaid rents pose a risk to the wider economy

Governments must be alert to a surge in defaults even as shops reopen

THE EDITORIAL BOARD [+ Add to myFT](#)



Many commercial landlords in the UK say their income has fallen by as much as two-thirds © Getty

Introduction

- Number of possible remedies which the landlord can pursue to recover rent arrears but the most effective ones have lost their bite, for now.
- Landlord must assess the most appropriate remedy in the particular circumstances and consider their long-term aim, do they want their property back, or do they want a sustainable arrangement with a good loyal tenant
- Important to consider all of the options available and what the landlord ultimately wants to achieve.
- Void properties should be avoided if possible.
- Good collaboration and communication are key.



Forfeiture (also known as re-entry)

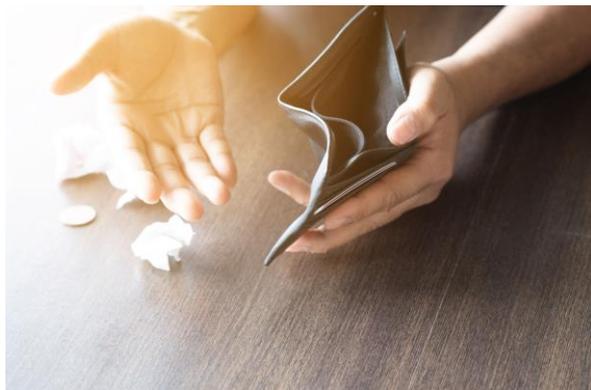
- Is it in the landlord's commercial interest to take the property back?
- Is it likely that tenant will obtain relief from forfeiture for non-payment? It is likely (sometimes automatic) if the tenant pays arrears, interest and costs.



- Peaceable re-entry or proceedings?
- Waiver – can the landlord accept rent?
- Relief from forfeiture.

Commercial Rent Arrears Recovery (CRAR)

- Method of enforcement for recovering rent arrears relating to commercial property – abolished the common law right of distress.
- Allows a landlord to instruct an enforcement agent to take control of a tenant's goods and sell them in order to recover an equivalent value to the rent arrears.
- Landlord must serve notice and unpaid rent must equal or exceed a minimum prescribed amount – currently 457 days rent (used to be 7 days).



- Where the landlord has the right to recover rent from its tenant under CRAR, the landlord also has the right to recover rent from an undertenant.
- CRAR only exercisable against arrears of principal rent – not service charge, insurance rent and other sums due under the lease.

Statutory demand and insolvency

- Serve statutory demand where there is no dispute as to the amount of debt.
- If unpaid after 21 days (and £5,000 or more in relation to a individual tenant or £750 for commercial tenant), deemed evidence of inability to pay debt
- Gives grounds to present a bankruptcy or winding up petition.
- Often the threat of insolvency proceedings can be effective.



Tenant friendly legislation post 23 March 2020

- Moratorium on certain forfeitures – s82(12) Coronavirus Act 2020
 - No forfeiture permitted for non-payment of rent until 30 June 2021
- Suspension of Part 55 possession claims ended 23 August 2020 – CPR 55.29
 - The suspension of possession claims has been lifted although the courts now have a backlog of cases meaning immediate relief isn't likely.
- An increase (to an amount equivalent to 457 days' rent) of the minimum net unpaid rent which must be outstanding before CRAR may take place.



And more.....

- The Corporate Insolvency and Governance Act:
 - Prevents winding-up petitions from being presented to court on or after 27 April 2020 where they rely on a statutory demand served during the relevant period (1 March 2020 to 31 March 2021)
 - Creditor cannot present a winding-up petition, during the relevant period (until 31 March 2021) on the grounds of a company's inability to pay its debts unless they have reasonable grounds for believing that coronavirus has not had a financial effect on the company or that the debt issues would have arisen anyway.

Rent Deposit

- Rent deposit is a source of funds available to the landlord.
- Consider the timing of any drawdown.
- If tenant's long term solvency is uncertain and there are other methods to recover the debt, the landlord might want to maintain the rent deposit for any future arrears.
- Alternatively, if the arrears are an isolated incident and the tenant is able to top up, the rent deposit is a quick and simple method of recovery and allows landlord and tenant relationship to continue.
- Drawdown on the rent deposit will waive the right to forfeit.
- Consider terms of deposit deed and whether landlord may first forfeit the lease and then drawdown the rent deposit if wishing to take property back.

Guarantor or former tenant

- May be able to recover arrears from any guarantors or former tenants either by way of a contractual guarantee or privity of contract.
- Parties which may be pursued dependent upon whether the lease is a “new” tenancy.
- S17 Landlord and Tenant (Covenants) Act 1995 – former tenant (or guarantor):
 - Can only recover the last six months’ worth of arrears.
 - Possible to serve a succession of s17 notices.
 - Former tenant (or guarantor) entitled to ask the Landlord for an overriding lease.
 - Landlord must decide whether it would be satisfied with a new direct tenant.



Court proceedings to recover debt

- Issue court proceedings against the tenant to recover rent or other sums due.
- Process can be expensive and protracted
- If the landlord wants to give the tenant time to get its financial affairs in order whilst maintaining landlord and tenant relationship, court proceedings may be appropriate.
- Limitation period is six years – any claim issued can only seek to recover arrears that fell due in previous six years.



Payment Agreement

- Agree with tenant to pay arrears in instalments, rent reduction, pay rent monthly, rent or service charge holiday
- Payment agreement should be carefully drafted in accordance with lease
- Preserves landlord and tenant relationship and gives tenant time
- If successful, it will achieve full repayment
- If the tenant is generally solvent and the arrears are isolated incident, may be a sensible way to proceed.
- Lease assignment

Code of Practice for commercial property relationships during the COVID-19 pandemic

- It is voluntary (and therefore unenforceable)
- Applies to "all commercial leases held by businesses in any sector which have been impacted by the coronavirus pandemic". It will apply until 24 June 2021.
- "Government has always been clear that tenants who are able to pay their rent in full should continue to do so, whilst those businesses that cannot pay in full should communicate with their landlord and pay what they can. Landlords should also provide support to businesses if they too are able to do so."
- It "encourages tenants and landlords to be transparent in their discussions and to act reasonably and responsibly whilst recognising the impact that coronavirus has had on businesses' finances".

Continued....

- “This code of practice sits alongside other measures, such as the moratorium on forfeiture of commercial leases and changes to Commercial Rent Arrears Recovery, statutory demands and winding up petitions, which provide tenant businesses the **breathing space** to work with landlords and other partners on a plan for a **sustainable future**. But these measures cannot last forever, which is why we have worked closely with leading business groups to publish this code of practice.”
- It has been launched by that high profile Minister for Regional Growth and Local Government (Simon Clarke MP).
- It has been endorsed by the British Property Federation, British Retail Consortium and RICS, amongst other organisations.

Code of Practice not well received by tenants...

Tenants hit out at lack of protection from landlords

UK proposed code of conduct aimed at protecting coronavirus-virus hit businesses called inadequate



A row of closed shops in Cardiff. The code 'isn't worth the paper it's printed on', says James Daunt, chief executive of booksellers Waterstones © Matthew Horwood/Getty Images

Takeaways

- No magic wand, communication and collaboration are key.
- Re-purpose?
- Consider all options.
- Be realistic about both what the landlord can recover in rent arrears and achieve in future rent.
- Consider more dynamic lease structures, shorter in length and based on turnover rents. Are upward only rent reviews, payment in advance and lengthy terms a thing of the past.





Any questions...



Fiona Graham
Managing Associate

T: 0113 290 4486

E: Fiona.graham@wbd-uk.com

