

# COVID-19 - Forfeiture Moratorium

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A note for landlords to ensure that they are acting in the spirit of the Coronavirus Act 2020 (“the Act”).

## The Act

- The Act introduced a forfeiture moratorium for commercial properties.
- On 23 March 2020, the Government announced that commercial tenants who cannot pay their rent because of coronavirus would be protected from eviction and went so far as stating that no business would be forced out of their premises if they miss a payment in the next three months. However, whilst this may have been the aim of the legislation, the Act does not do this. It simply provides that, if a payment is missed, any forfeiture action is suspended for three months (or longer, if extended) but, after that period, a business may well be at risk of been forced out of their premises for missing a rent payment. It may well be that many tenants have not picked up on this subtle difference.

## Forfeiture Moratorium

1. Section 82(1) of the Act 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*”.
2. A relevant business tenancy is defined with reference to the Landlord and Tenant Act 1954 (“the 54 Act”), therefore, the Act will apply to those tenancies which would have the protection of the 1954 Act and includes a lease, an underlease, a periodic implied tenancy, an agreement for lease and/or an agreement for an underlease provided that the tenant is occupying for the purposes of their business. The Act will also apply to leases which have been “contracted out” of the protection of the 1954 Act.
3. The Property Litigation Association recently raised queries with the Ministry of Housing, Communities and Local Government (MHCLG) regarding the objectives of the Act and, in particular, whether all commercial occupiers (who may not be a tenant but may, for example, be a sub-tenant or licensee) would be protected by the Act. MHCLG responded that the policy objective is to cover all commercial leases with someone in occupation for the purposes of their business. Therefore, the Government’s objective through the Act was to extend the protection afforded under it as widely as possible.
4. A business occupying under a licence would not normally have the protection of the 54 Act, therefore as drafted, a true licence would not fall within the scope of the Act. However, given that MHCLG have indicated that the thrust of this legislation is to provide protection to all commercial occupiers, we would suggest exercising caution when dealing with a licensee.
5. By analogy with previous case law, it is anticipated that a tenant will be deemed to be in business occupation where it is unable to use the premises or it is unsafe to do so due to Covid-19 provided that the tenant confirms to the landlord that they intend to re-occupy the premises as soon as it can.
6. It is unclear whether the Act will apply to leases of less than six months (which fall outside the scope of the 1954 Act). MHCLG was asked whether the Act would apply in these circumstances and, again, responded that the “*policy objective is to cover all commercial leases*”. Therefore, it seems that the thrust of the Act is to protect all commercial leases of whatever length even though on a strict interpretation of the Act it does not provide for that.
7. The relevant period is from 26 March 2020 to 30 June 2020. This period may be extended by the Government. Therefore, the earliest any forfeiture action can be undertaken is 1 July 2020.
8. Section 82(12) of the Act defines rent as “*any sums a tenant is liable to pay under a relevant business tenancy*”. Therefore, this includes all basic rent payable and any other payments which are to be paid under the lease such as service charge, contributions towards insurance, interest and administration charges.
9. The moratorium applies regardless of the tenant’s reasons for non-payment.
10. The Act does not protect the tenant from forfeiture for other breaches of the lease e.g. for a breach of a repairing covenant.
11. Section 82 of the Act therefore allows the tenant a very short period of time in which it is protected from forfeiture if it fails to pay rent but may not offer the level of comfort to tenants envisaged by the Government’s press releases.
12. It is important to note that the Act does not **extinguish** the tenant’s liability to pay the rent and all other sums due under their lease.
13. As soon as the moratorium comes to an end, a landlord will be able to forfeit a lease for non-payment of all accrued arrears together with any contractual interest payable.
14. The Act does not prohibit a landlord from taking other enforcement action such as serving a statutory demand and/or

Commercial Rent Arrears Recovery (CRAR) during the relevant period.

15. A landlord can also draw down on a rent deposit or pursue a guarantor or former tenant for any rent arrears during this period.
16. That being said, consideration must be given to the practicalities of acting on these methods of recovery during the outbreak given that bailiffs are not currently entering properties and there will be a delay in issuing claims and/or serving proceedings during this time.
17. It is expressly provided within the Act that the no conduct by or on behalf of the landlord during the relevant period will be taken to waive the right to forfeit for non-payment of rent (for example by demanding or accepting further rent during the relevant period or undertaking other enforcement action) unless that waiver is given in writing. However, it is not clear how the Courts will interpret this and landlords should exercise caution before pursuing the rent via one of the other enforcement methods.
18. Further, MHCLG confirmed that they are “*monitoring the enforcement of non-payment closely and (are) keeping this under review*”. Therefore, it is possible that further guidance/legislation will be forthcoming in this respect.
19. For these reasons, it is recommended that landlords consider the impact of the COVID-19 pandemic on a case by case basis and seek to reach an agreement with their tenants accordingly.
20. Before reaching an agreement, it would be appropriate for the landlord to ensure that the tenant has fully considered the assistance being offered to businesses by the Government and that this is factored into any projections and/or forecasts provided to support a request for a rent deferment. The guidance for businesses can be found [here](#).

## Summary

To summarise, it appears that the Government envisaged (or, at least, promoted the notion) that no commercial tenant would lose their premises due to a failure to pay rent during the pandemic. However, the Act instead simply suspends forfeiture for a period of three months.

It follows that if a tenant does not pay their rent now, they may be storing up problems and risking forfeiture action in the near future. However, outside the provisions of the Act, the Government has requested that all parties try to approach matters pragmatically in light of the unusual circumstances.

A landlord will, of course, have to weigh up its own commercial position against that of its tenants before deciding how to approach such matters.

The position is constantly evolving and it is likely that further guidance will be given by the Government as the situation progresses.

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