

COVID-19: TENANT INSOLVENCY

NEW REGULATIONS AND PROPOSED AMENDMENTS TO THE INSOLVENCY ACT 1986 ARE LIKELY TO BE APPROVED BY PARLIAMENT IN THE COMING WEEKS.

These will have the further effect of restricting a landlord's ability to forfeit a lease in the event of an insolvency event, which is prevalent in most commercial leases.

In previous articles we have already talked about the moratorium on winding up proceedings for non-payment of rents and the inability of landlords to exercise their rights to make use of the Commercial Rent Arrears Recovery ("CRAR") regime.

The further proposals go wider.

Any arrears of rents (which would include service charges and insurance under most institutional commercial leases) will in effect be subject to a payment holiday (but, importantly, not a waiver of the rent). This is because the landlord will not be able to take any enforcement action.

However, there are certain exceptions:

1. The landlord has to demonstrate, on reasonable grounds, that the tenant is unable to pay its rents for reasons other than the effect of Covid-19; or
2. Covid-19 has not had a financial effect on the tenant.

Accordingly, if a landlord wants to present a winding up petition, it has to certify that either of the two grounds above apply. This is unlikely in the current circumstances.

The proposed new legislation will provide a moratorium to allow a tenant some breathing space from landlord actions if it is unable to pay its debts because of Covid-19. The moratorium will last for an initial 20 days but can be extended in the following circumstances:

1. By the directors for a further period of 20 days;
2. With consent of the creditors up to a period of one year; or
3. For an unlimited period set by the court.

There may well be an unforeseen advantage to a landlord in that the effect of the moratorium will not incur unnecessary costs of an insolvency practitioner involved in a winding up, administration or creditors' voluntary arrangement. Such costs can substantially limit the amount of recovery for a landlord. In most cases it will be beneficial for a landlord to allow a tenant to trade through the current circumstances and generate a cashflow that will eventually put it in a position to pay the arrears.

FOR FURTHER INFORMATION



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