

## **SECTION 82 OF THE CORONAVIRUS ACT 2020 ("CA 2020") – QUESTIONS REGARDING THE FORFEITURE MORATORIUM**

The Property Litigation Association (PLA) is a members' organisation founded in 1995 and comprising approximately 1400 solicitors and other legal professionals specialising in all aspects of property litigation situated throughout the United Kingdom. Providing advice to property owners and occupiers on the forfeiture of commercial leases is something that PLA members are routinely involved in; indeed, most such forfeiture actions (certainly disputed ones) are likely to involve PLA members at some level.

Therefore, the moratorium in section 82 of the CA 2020 is a matter of considerable interest to PLA members. A number of queries and points requiring clarification have been raised with the PLA by its members, and we are grateful to MHCLG for consideration of the same. Any guidance that can be provided would be disseminated to members via the PLA's website, which should reduce the possibility of disputes over the meaning and extent of the moratorium during the relevant period.

### **Questions and points requiring clarification**

1. The moratorium in section 82(1) of the CA 2020 extends to forfeiture "*for non-payment of rent*". However, rent is defined in section 82(12) as "*any sum a tenant is liable to pay under a relevant business*". There are a range of different charges that might be payable under a lease and, taken literally, this would apply to all of them. It would include not only the landlord's income derived from the property (i.e. the rent) but also the landlord's expenditure incurred in maintaining the property, such as VAT, service charge, insurance premiums, professional fees and accessing the premises to carry out essential repairs.

**Question: Are all payments due under leases included – including VAT, service charge, insurance, professional fees and other payments such as repair costs – or just rent?**

2. It is typical in a commercial lease for certain amounts, such as service charge and insurance, to be "reserved as rent" even though they are not rent properly so-called.

**Question: If the moratorium applies to payments of amounts other than pure rent, does it only apply if such other charges are reserved as rent?**

3. The moratorium applies under section 82(12) to a tenancy to which Part 2 of the Landlord and Tenant Act 1954 ("**LTA 1954**") applies. Landlords may be unable to enforce non-payment of rent by forfeiture as a result of section 82 of the CA 2020, but may themselves hold a leasehold interest under which they are due to pay rent to a superior landlord. In such circumstances, where the premises have been sub-let or licensed to a third party, the landlord may not be in occupation and so its leasehold interest is not one to which the LTA 1954 applies. However, also protected are tenancies "*to which that Part of that Act would apply if any relevant occupier were the tenant*".

**Question: Are *all* commercial leases protected by the moratorium in section 82 provided that someone (who may not be the tenant but may e.g. be a sub-tenant or licensee) is in occupation of the premises for the purposes of their business?**

4. Part 2 of the LTA 1954 does not apply to:

*"a tenancy granted for a term certain not exceeding six months unless—*

- (a) the tenancy contains provision for renewing the term or for extending it beyond six months from its beginning; or*
- (b) the tenant has been in occupation for a period which, together with any period during which any predecessor in the carrying on of the business carried on by the tenant was in occupation, exceeds twelve months"*

(see section 43(3) of the LTA 1954).

**Question: Is it correct that the forfeiture moratorium in section 82 of the CA 2020 does not apply to tenancies for a term of 6 months or less (unless one of the exceptions in section 43(3)(a) and (b) applies)?**

5. Similarly, section 43 also excludes other forms of tenancy from the operation of Part 2 of the LTA 1954 including agricultural holdings, farm business tenancies, mining leases, tenancies granted to office holders and tenancies granting code rights within the meaning of Schedule 3A to the Communications Act 2003.

**Question: Is it correct that the moratorium in section 82 of the CA 2020 does not apply to any of the other excluded tenancies in section 43 of the LTA 1954?**

6. The reference in section 82(12) to Part 2 of the LTA 1954 could be taken to mean the whole of Part 2, in which case leases contracted out of sections 24-28 of the LTA 1954 under section 38A would not be protected by the moratorium.

**Question: does the moratorium in section 82 of the CA 2020 apply to leases contracted out of the LTA 1954?**

7. A tenant may agree to its landlord forfeiting the lease. This may be necessary where, for example, there is a charge attached to the lease which the landlord wishes to avoid attaching to its reversion upon accepting a surrender. The tenant may also be in administration or liquidation and the administrator or liquidator may give the landlord consent to forfeit the lease under paragraph 43 of Schedule B1 or section 130 of the Insolvency Act 1986 respectively.

**Question: Can a landlord forfeit a lease with the tenant's consent (including the consent of its administrator or liquidator) notwithstanding the moratorium in section 82 of the CA 2020?**

8. Section 82 of the CA 2020 applies to England and Wales. An equivalent provision in section 83 applies to properties in Northern Ireland.

**Question: Why has Scotland been excluded from the forfeiture moratorium, and are there plans to introduce a similar moratorium for Scottish properties?**

9. Section 82(1) of the CA 2020 states that a right of re-entry or forfeiture for non-payment of rent "*may not*" be enforced.

**Question: Exactly what is the status of the restrictions imposed on landlords by section 82(1) of the CA 2020 – does a breach amount to a criminal offence, a civil wrong, some other breach of government decree, or does it just render the forfeiture ineffective?**

10. Section 82(1) applies only to "*a right of re-entry or forfeiture*" for non-payment of rent.

**Question: Are landlords free to enforce non-payment by other means, such as enforcing commercial rent arrears recovery (CRAR), winding up proceedings or a debt action and are there any plans to extend the moratorium to such forms of enforcement?**

**Property Litigation Association**

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