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The Ides of July (15th) – now or never to avoid commercial real estate insolvencies?

There may now be little time for the voluntary re-scheduling of lease payments due on and after the June 2020 quarter day. Andrew Walker QC explores the reasons why.

On 7th May, the Government published its 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency'. This had no legal effect. On the basis that "*The Covid-19 emergency requires all of us to work together in the national interest*", it asked parties to contracts to "*act responsibly and fairly, support the response to Covid-19 and protect jobs and the economy*". It ran to five pages, but apart from repeated "*strong encouragement*" of "*responsible and fair performance and enforcement of contracts during this public health emergency*", it said little of substance. It told us that the Government would "*continue to review behaviours*", but there was no indication of what that veiled threat might lead to if the 'guidance' was not followed.

Should we expect any more from the new Code of Practice for the commercial property sector which was published today? The short answer is, 'No'. It is expressly voluntary, with no greater potential threat than that the Government, "*will continue to monitor the economy to determine whether further intervention is necessary*".

What is the purpose, then, of the new Code of Practice?

Exhortation, certainly. That is made clear both in the text of the Code and through the list of supporting organisations who are going to encourage their members to comply with it.

An attempt to plug the media gap between the problems of commercial landlords and tenants and the absence of hard measures to address them? Perhaps.

The Code might also give fresh impetus to a few stalled negotiations, but it is difficult to see voluntary good practice guidance having a deeper impact in desperate times.

While governments in other countries, such as Australia, have been able to introduce mandatory measures, the UK Government has floundered. The UK real estate situation is undoubtedly highly complex, with a wide range of occupiers, owners and investors facing different challenges, but what the Government has left us with is a much more voluntary, case by case approach, without much to underpin it apart from the risks and realities of insolvency and restructuring procedures. There is no legal force in a voluntary Code from the Government or in statements of support for commercial landlords from UK Finance. Many landlords and tenants will continue to have no choice but to trust to the best intentions of others as they struggle to find a way to stay on the right side of the dividing line between solvency and bust.

Their only comfort if they fail to agree – and only threat to bargain with – will be the possibility of some form of collective restructuring (e.g. a CVA or a restructuring plan under the new scheme to be introduced under the Corporate Insolvency and Governance Act 2020), either straight away or after first taking advantage of the new moratorium scheme to be introduced under that Act.

I fear that too many tenants and landlords will need to take this course if they cannot reach agreement soon, particularly in the retail, leisure and hospitality sectors. From the tenant perspective, there are several reasons for this.

The reasons why (and the Ides of July)

First, a moratorium under the new scheme will not be effective or extendable unless the company can pay its way (including its rent) during the moratorium period, so it has to be put in place while the company can still find enough cash. If companies' cash position is continuing to deteriorate, decisions may need to be made soon.

Second, there are several deadlines looming.

- The first in time is a contractual one. Under most leases, the right to forfeit arises 14 or 21 days after the quarter day. That will be 8th or (perhaps more commonly) 15th July.

- The second deadline concerns the stay on possession proceedings. This is about to be extended (this time in a more appropriate way, by amendment to Civil Procedural Rules) until 23rd August.

- The next deadline is under the Corporate Governance and Insolvency Bill. On its current wording, two elements will exist only during an initial period: more lenient provisions applying to a moratorium (as regards the impact of the virus on the company's financial position), and the restrictions on statutory demands and winding up procedures. As originally introduced, the Government had set this period to end on 30th June or 30 days from when the Act comes into force. Based on the Bill's progress through Parliament, that 30 day period would be likely to expire towards or at the end of July. If this remains the case, the window for reaching a solution on the best available terms is shrinking quickly.

- However, amendments to the Bill have finally been put forward, and if they are passed in the House of Lords (which seems likely), then these deadlines under the new Act will now become 30th September.

- The final deadline is the expiration of the moratorium on forfeiture. Until this morning, this was due to expire on 30th June, but the Government has now announced that this too will be extended until 30th September.

Any measures which postpone these deadlines until 30th September will no doubt be welcome to tenants, and may help by providing some breathing space and perhaps adding a little strength to their bargaining positions, but those three months or so are not much time in which to reverse your commercial fortunes. Economic circumstances will remain outside everyone's control. The Government's measures to respond to the pandemic have proved impossible to predict, and have been announced piecemeal and at short notice. So, too, have its decisions on whether and for how long to continue temporary measures. So the pressure will still be on, and a simple postponement of creditor action will be cold comfort to those whose circumstances cannot be transformed quickly.

Fourth, if a tenant's ability to pay its debts is dependent on the re-scheduling of its rent and other lease payments as from the June 2020 quarter day, then any failure to achieve that will

at least require the directors of a corporate tenant to start to give priority to the interests of creditors. That may lead the tenant inexorably into one of the insolvency or restructuring procedures. This may be something that both the tenant and its landlord will wish to avoid. On the other hand, there may be at least some landlords who see advantages for them if their tenants enter a moratorium if they can, given the priority that will be given to payments which have to be made during a moratorium. Either way, the pressure will be on the tenant to secure an agreement with its landlord as soon as it can, if it wishes to avoid the insolvency route, or at least to retain flexibility.

Finally, any wish to cater for the various possible insolvency and restructuring schemes, including the new moratorium, is likely to make rent re-scheduling arrangements even more complicated to draft and agree. Even with forfeiture and other creditor remedies put on hold for a little while longer, time may still run out.

The Ides of March brought about a crisis in 44BC. Will the Ides of July (15th) do the same in 2020? Even if not, then the Ides of August and September are just over the horizon. The metaphorical knives may yet be out for tenants at risk.

Andrew Walker QC

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