

## **Covid-19 Update: Government publishes Code of Practice for commercial L&T sector**

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On 19 June 2020 the Government published a Code of Practice aimed at the commercial landlord and tenant sector. Its stated purpose is to set out a best practice framework by which it is hoped that landlords and tenants will work together constructively to “*negotiate affordable rental agreements*”.

The full text of the Code can be found here: <https://www.gov.uk/government/publications/code-of-practice-for-the-commercial-property-sector/code-of-practice-for-commercial-property-relationships-during-the-covid-19-pandemic#principles>. It has been endorsed by a number of representative bodies who have indicated that they will encourage their members to support it. These include the British Chamber of Commerce, the British Property Federation, RICS, the British Retail Consortium and others.

The Code emphasises more than once that it is a voluntary set of principles, and that apart from the emergency measures that have been introduced (such as the moratorium on forfeiture proceedings, the stay on Part 55 proceedings, and the plan to bring forward legislation to limit insolvency procedures until 30 September 2020) the underlying law has not been interfered with. Rent and service charges continue to be payable in accordance with the terms of each lease, and although enforcement rights may be temporarily suspended or incapable of being exercised, the parties’ rights and liabilities have not gone away. Tenants who can pay their rent in full should continue to do so.

The main thrust of the Code is to recognise that these are extraordinary times for the property sector and to set down some basic principles that both landlords and tenants are encouraged to have regard to when negotiating a way forward. Parties are asked to recognise that they have a mutual interest in business continuity, and they are “*economic partners, not opponents*”. In trying to seek new agreements as to the payment of rent landlords and tenants are asked to act together reasonably, swiftly, transparently and in good faith.

Tenants who need rent concessions should be up-front with their landlord as to why, and that includes explaining their request by providing financial information about their business to “*an appropriate and relevant extent*”.

Landlords should provide concessions where they reasonably can. This includes taking into account “*their own fiduciary duties and financial commitments*”. If concessions are not possible then they should be clear as to why they are unable to do so. This means giving an

explanation which makes it clear that the information that has been provided by the tenant has been taken into account.

The fact that government support in the form of loans and furlough funding has been available to businesses is a relevant factor, but parties are encouraged to recognise that businesses have many different costs, of which rent is one. Tenants' financial positions are likely to have been affected by any one or more of a number of factors. These include: (a) the closure period and/or their ability to trade by other means, (b) the duration and extent of restricted trading due to social distancing measures and extra associated costs, (c) the tenant's track record and any concessions already agreed, and (d) the needs of the businesses other creditors.

A number of possible arrangements are suggested. It is stressed that no inference should be drawn from the order in which they are set out. They include: (a) full or partial rent-free periods, (b) deferral of the whole or part of the rent for one or more payment periods, (c) shorter rent payment periods e.g. monthly instead of quarterly, (d) drawing from rent deposits, and (e) waiver of contractual default interest on unpaid rents.

Service charges are addressed separately. The Code recognises that buildings must continue to be insured and maintained, and that service charges are not designed to be profit-making. Unless otherwise agreed, these should continue to be paid in full – although parties are encouraged to appreciate that there may be pressures that affect the service provision required one way or the other. For example, where commercial premises that have not been in use that may help lower the service charge. On the other hand, the need to equip buildings with appropriate health and safety measures in the context of Covid-19 may add to operating costs. Any reductions that can be achieved should be passed on to the tenants, and management fees should reflect actual work carried out during the pandemic.

It is unlikely that it tells commercial landlords and tenants anything that they did not know already. Well advised, professional parties will no doubt have already taken steps or have engaged in negotiations in line with what this guidance sets out. Insofar as it seeks to set a tone of positive engagement between parties, it is by trying to encourage parties to take a longer-term view of their mutual self-interest. As lockdown eases and the likelihood of overt legislative interference in the sector diminishes, this may be about as far as the Government is able or willing to go.