PROPERTY LITIGATION ASSOCIATION RESPONSE ON COMMERCIAL RENTS AND COVID 19: A CALL FOR EVIDENCE

The Property Litigation Association (the PLA) is an association made up of approximately 1,400 lawyers specialising in property disputes in England and Wales. Our members act for significant numbers of both landlords and tenants of varying size and sophistication in relation to those disputes. These include but are not limited to commercial and residential debt recovery, business lease renewals, possession claims, dilapidations claims, residential and agricultural matters and various other claims seeking damages and/or declaratory relief.

We come from a variety of firms in terms of size and location. Many cases that are issued or defended by our members are dealt with in both the High Court and the County Court. The lawyers who represented each landlord and tenant in the recent two High Court summary judgment cases on the ability of landlords to recover pandemic era rent arrears from their respective tenants, are members of the PLA. As a result the PLA has considerable experience of giving both legal and commercial advice on and dealing with debt claims under leases.

Accordingly, the PLA is extremely well placed to comment on the legal and commercial aspects of the proposed Options, within the Government's Call for Evidence, for measures to put in place after expiry of the various moratoria on the recovery of rent and other arrears at the end of June 2021.

By reason of the fact that we are an association of lawyers, the on line survey does not lend itself well to our providing comments through that portal. We will leave the provision of evidence of the effect of measures to our members' respective clients. For our part, we have conducted a survey of our members providing them with the questions for each Option and Government's narrative regarding what each Option is intended to achieve. Respondents were also asked to indicate whether they acted predominantly for landlords or tenants, in order to ascertain whether there is any commonality, as well as differences, between them. In this response, we refer to members predominantly acting for landlords as "landlord lawyers" and those acting predominantly for tenants as "tenant lawyers".

An analysis of our members' responses to the Government's questions is set out below in the same order as raised in the consultation.

DO THE CURRENT MEASURES ENCOURAGE NEGOTIATIONS BETWEEN LANDLORDS AND TENANTS?

Overall, our members' views were mixed with 54% saying no as against 46% saying yes. Of those, however, landlord lawyers were more ambivalent than tenant lawyers with 51% saying no, as against 59% of tenant representative members.

HAS THERE BEEN ENOUGH TIME TO ENABLE THESE NEGOTIATIONS TO TAKE PLACE?

Both sets of representative members agreed that there has. Landlord representative members are more emphatic with 100% agreement as opposed to 59% agreement from tenant representative members.

IS THE GOVERNMENT'S CODE OF PRACTICE EFFECTIVE?

Again, there is consensus across the board of our respondents, with 72% saying that it is not. That figure comprises 70% of landlord lawyers and 88% of tenant lawyers. Whereas a fifth of landlord lawyers were unsure, only 6% of tenant lawyers were.

ARE FURTHER CHANGES NEEDED?

Both sets of lawyers generally agree that there should be, although there are a few detractors. There is a general acceptance that a voluntary code has no teeth, as has been confirmed by the recent decision of Chief Master Marsh in *Commerz v TFS Shops Limited* when determining that a landlord is not bound to follow it before being able to seek the court's assistance in recovering rent arrears.

Example comments of landlord lawyers:

The two recent decisions of the High Court masters might help swing the balance back and encourage tenants to negotiate, although some landlords might now see this as a reason not to engage. To increase use it would be useful if it could be linked to the cost jurisdiction of the court allowing the court to penalise on costs if there is a failure to engage with the guidance note.

Policy at present does not reflect the economic reality of landlord and tenants. It has no teeth and is not underpinned by any kind of financial support, so the core issue of extensive rent arrears, where landlords have been prevented from mitigating losses for more than a year, is not addressed.

Possibly – a difficult balancing act is required to differentiate tenants who are struggling as a direct result of the pandemic versus those who were failing anyway or those who are simply using the pandemic as an excuse not to pay – while remaining well-capitalised.

Yes, if there is to be real and significant protection for tenants. The effectiveness of the current measures turns on whether or not landlords are willing to be pragmatic, commercial and realistic. Those who do are negotiating with tenants and granting concessions to tenants whose underlying businesses are strong. However, the current measures do not encourage tenants to play fair. A significant minority of tenants are looking to take advantage of the pandemic to extract concessions from landlords, who have their own financial commitments and costs.

Many parties have negotiated with the current legal framework in mind therefore any further change benefits those that have chosen not to reach agreement or escalate as yet which seems unfair – so on balance no.

Example tenant lawyer responses:

The Code of Practice has been very instrumental to enable negotiations to take place to get the landlord and tenant relationship through the worst of the crisis period. However, it is now at the point where landlords are subsidising tenants businesses and that situation cannot continue.

The Code of Practice is lovely in a morals-led business but not one where it could become insolvent and or face repercussions form shareholders for doing "deal" it has no legal obligation to do. It is also important to reflect on the investment in commercial properties and ensuring values are not downgraded too much.

OPTION 1 – ALL RESTRICTIONS LIFTED

Perhaps unsurprisingly, landlord lawyers consider that this option would be fairer to their clients, whose remedies have been curtailed for so long. However, Government should recognise that most landlords would not take steps to forfeit their tenants leases even if the power is available to them. This is because

it could well result in empty premises and with them acquiring a rates liability. It would also be detrimental to the bricks and mortar retail environment generally, which already suffers from competition from online retailers, on which many landlords rely. There is an acceptance that some tenants would, as a result of this option being introduced, be forced out of business, but some tenants may have been failing for some time in any event and have been kept afloat by the moratoria.

Many landlords have acted pragmatically during the pandemic. They do not take lightly the issue of proceedings for the arrears (that being the only remaining remedy). From a commercial perspective, there is no point in throwing good money after bad if the tenant is unable to meet their obligations. They have, therefore, initiated the Code and asked for financial information from the tenants to support their claims for concessions or waivers of rent. If the tenant fails to provide financial information, but insists on concessions, their only recourse is to issue proceedings to try and force the issue along. In effect, the landlords no longer have anything to lose.

Certain sectors would be more affected than others by Option 1, in particular those who have been prevented from opening and whose businesses do not lend themselves to online trading, such as hospitality and leisure. The concern is that these businesses are unable to pay and would not be able to satisfy the debt in order to obtain relief from forfeiture, were their landlord to take that step.

This issue is voiced by a number of tenant lawyers who fear that their clients will be pushed into insolvency and that what is really required is time to pay off their debts alongside the opportunity to start making money again. Some were in favour of reinstating forfeiture provided that protections are applied for tenants in certain sectors, alternatively a means testing is introduced to assist those genuinely unable to trade.

OPTION 2 – REINSTATEMENT OF FORFEITURE BUT CONTINUED CRAR AND INSOLVENCY RESTRICTIONS

This option does not take matters much further forward, given that most landlords are unlikely to effect forfeiture without the certainty either of the tenant applying for relief or another tenant to take the space. There is a risk that savvy tenants with a chain of properties will use the reinstatement of forfeiture, without other measures, as the basis to offload properties of their choosing.

The only way to recover arrears would be, as is the case now, by the issue of proceedings in court. This takes time and the landlord incurs further costs to recover what is due to them. The courts have confirmed that the law is clear: the arrears are owed to the landlords by the tenants.

A compromise might be that forfeiture should only be available if the tenant has not paid a certain percentage of the arrears (as opposed to all).

From the tenant lawyer perspective, the threat of insolvency still remains as well as the pressure to find the funds to pay the arrears more quickly than they are able. As with option 1, means testing is suggested as a way forward, although how that can be achieved raises more questions than it answers: how would this be tested, what level of detail must be provided, who would do the testing, should it be limited to the tenant in question or extend to any group companies which are financing it?

As regards a period of time for which CRAR and insolvency restrictions should be in place, a loose majority consensus appears to be between 3 and 6 months.

OPTION 3 – TARGETING OF MEASURES

There is common ground between landlord and tenant lawyers that measures should be targeted towards those who were fully closed during the pandemic (circa 90% for both sets of lawyers) and, to a lesser degree towards those who could trade but on a restricted basis (65% for landlord lawyers and 76% for tenant lawyers).

The difficulty is how to measure who has and has not been affected. In the same way as retailers forced to close are affected, so too are those essential retailers who were forced to remain open. For example, WH Smith's premises in Westfield shopping centre, containing a Post Office, were required to keep open, despite there being very little footfall in the centre due to all surrounding non-essential shops being closed. The court in *WH Smith v Commerz*, a business lease renewal claim, accepted that the tenant's income had been detrimentally impacted. Yet, the position might have been different if the premises had instead been located on a High Street. At the other end of the spectrum, the perception might be that supermarkets will have gained by the pandemic. Sainsbury's financial results confirm sales increased year on year by 8.1 percent, yet it made a loss of in excess of £250m due to additional measures it had to put in place in order to continue to trade and to look after shielding staff.

One possibility might be to extend the moratorium for recovery of arrears only for periods of time in which businesses were forced to close/could not trade from their premises due to the Covid restrictions. Any arrears for periods where businesses have been able to open and trade from their premises would be recoverable (on an apportioned basis) when the current moratorium comes to an end. However, there would be some difficult areas such as the "dine-in" hospitality sector who have only been able to open to a limited extent since 12 April, but equally have, in many cases, been able to continue trading by offering takeaway services when their premises were closed. There is no realistic "one size fits all" solution and tailoring by sector may well become unduly complicated and lead to further grey areas.

Other methods of targeting the moratoria were suggested by respondents:

Landlord lawyers suggested

- Phased withdrawal of restrictions, starting with the oldest arrears
- The ringfencing of Covid period arrears, with all measures being lifted for new debts arising from 1 July 2021
- Comparing pre and post Covid trading revenue of tenants to see who was failing before Covid, and thereby only apply measures for Covid related failings
- Providing landlords with incentives to make compromises to their tenants
- Writing off the first 6 months of Covid arrears in the most affected sectors in tandem with a requirement that the remainder of the arrears should be paid within the following 12 month period
- Toughen up the Code of Practice to incorporate cost sanctions in subsequent proceedings if the Code is not complied with by either party
- More flexible terms for relief from forfeiture (not dissimilar to the payment plans that the courts use under the Administration of Justice Act in relation to mortgage possession claims). Provided that a sensible repayment plan is proposed and kept to, a tenant should get relief from forfeiture.

Tenant lawyers suggested

- Means testing of tenants, to include online sales
- Targeting of the worst debtors ie those with more than 6 months of debt because they are unlikely to have long term survival prospects and this would encourage tenants to make a payment to below the 6 month threshold
- One detailed suggestion is

- *Option 3 sounds unwieldy. Would an alternative be to keep the current restrictions in place for say 12 months from end June 2021? There would be no restrictions for arrears accruing post June 2021. For existing arrears, the restrictions would remain in place on a staggered basis. For example, if £100 of arrears are owed, then by 6 months from end June 2021, 50% of the arrears are to be paid. Therefore if the tenant has paid £50 by December 2021, restrictions should remain in place. However, if no payment or payment of less than £50, the moratorium will not apply. The mechanism could be structured on quarter day lines (25% arrears to be paid by September; 50% by December; 75% by March 2022 and 100% by June 2022). This gives tenants a time window to sort arrears out and gives the landlord ease of enforcement if the tenant is looking like failing. If nothing else, it will encourage negotiations between the parties to come up with a state-encouraged payment plan that has actual teeth.*

56% of landlord lawyers are in favour of targeted measures for 6 months with the remainder favouring 3 months. 62% of tenant lawyers also favour 6 months, but the majority of those against that favouring 12 months instead.

OPTION 4 - MEDIATION

The majority of all respondents recognise that mediation is not the way forward for rent arrears. 55% of landlord lawyers and 53% of tenant lawyers acknowledge that mediation has its uses in resolving disputes especially where the outcome is unknown for both parties and there is therefore litigation risk for both. However, the courts have clearly shown that there is negligible if no litigation risk for landlords regarding rent arrears. The risks are therefore commercial only: will the tenant go out of business and will the landlord be left with an empty unit, no rental income and a reduced ability to recover the arrears?

One landlord lawyer commented:

Where a dispute relates to a pure debt and liability is uncontested, I'm not convinced mediation is the best way of cutting through the dispute and it seems to me that it is more a question of commercial discussions between principals, that, by and large, has worked throughout the pandemic. Where it has not tends to be either because the tenant simply cannot pay (and all mediation will do is add extra cost) or won't pay (in which case, debt proceedings have proved a more fruitful way of recovering arrears).

Mediation is not a cost free exercise: the mediator's costs need to be met. If the parties have not been able to resolve their issues in 15 months, it is doubtful that mediation will provide the panacea solution. This is not least because it is a consensual process which therefore requires willingness on the part of both parties.

Where a landlord's concern has been the lack of transparency regarding a tenant's financial ability to pay, that becomes ever more important in a mediation. There will need to be honesty between both parties and, particularly, full disclosure of all information by the tenant to evidence the extent of any ability to pay the arrears. As mediation is consensual, how can the honesty be ensured? Further, unless a tenant has been able to trade, on what basis can it offer a repayment plan? This suggests that immediate mediation is not the best tool but that it might be once trading has resumed for a sufficient period of time.

90% of landlord lawyers and 87% of tenant lawyers have not used mediation to settle Covid rent arrear disputes. Of those that had, 80% of landlord lawyers and 71% of tenant lawyers reported that they had been largely unsuccessful. The predominant reason given was the lack of engagement by the parties, particularly the tenant. Indeed one landlord lawyer respondent commented that their firm had conducted over 500 rent mediations, which were mostly unsuccessful due to the tenants not engaging or simply "using" the process for their own advantage.

The three common factors for both sets of lawyers for not using mediation were lack of faith in the process, lack of agreement by the parties and cost.

OPTIONS 5 AND 6 – ADJUDICATION (NON-BINDING AND BINDING)

We consider it best to treat these two options together, as the only difference between them is that one offers a non-binding determination whereas the other a binding one. The proposed powers of the adjudicator in each case are the same.

Adjudication is used predominantly in the construction industry to provide a swift determination of parties liabilities under a building contract without incurring the time and cost of court proceedings. It is required as a first port of call under building contracts but either party is then entitled to take their claim to court and have the issue considered afresh.

The Government proposal contains no guidance regarding the principles that an adjudicator is able to take into consideration in reaching a fair and reasonable determination. The courts have very recently made the legal position clear. If the adjudicator is to decide purely on the legal merits, then the adjudication process seems unnecessary and adding to the delay for landlords to recover arrears. If the adjudicator is to be permitted to take into account other factors, such as financial ability to pay, and write off proportions of debt, then that process will be different from what the courts can do. What factors will an adjudicator be able to take into account? Where are they going to be recruited from? How are their respective decisions going to be consistently applied across the board? What then will be the full effect of the binding basis of the adjudicator's determination? Will their decision be incapable of challenge in the court? If application is allowed to court, which decides the case purely on the law, will the adjudicator's fairness determination be overruled? If so, the binding nature of the adjudicator's determination is of limited effect.

The opposition of landlord lawyers to a non-binding adjudication is 71% of respondents, with 17% in support and 12% undecided. However, the opposition to a binding adjudication falls to 55%, with 25% in support and 20% undecided.

For tenant lawyers, 53% of respondents were against non-binding adjudication, 35% in favour and 17% undecided. For binding adjudication, the percentages change to 53% in favour and 41% against, with 6% undecided.

Our members felt strongly that it would be wrong, as a matter of principle, for an adjudicator to be able to interfere with the contractual bargain between the parties, since freedom of contract is a fundamental principle of law in this jurisdiction. Such interference would create a long term remedy to an urgent short term problem.

Of the additional powers proposed for an adjudicator, the PLA has concerns regarding the legality, practicality and consequences of these. Annexed to this submission is a schedule of commentary on these aspects.

Both our landlord lawyer and tenant lawyer members are predominantly in favour of giving tenants more time to pay rent arrears, whether as part of a non-binding or binding determination by an adjudicator. More time to pay service charges received less support . Tenant lawyers also favoured waiving of a proportion of arrears, whereas that found only a minority of support from landlord lawyers. The least favoured options for either was changing the lease term or future rent, as well as rent deposit terms.

One landlord lawyer commented

Binding adjudication is effectively ousting the court's jurisdiction to deal with relief from forfeiture. The is an existing mechanism and body of case law to deal with relief from forfeiture- the wheel does not need re-inventing, just investment in the court service.

A tenant lawyer's response

It won't be used by landlord if there is an ability to re-write the terms of the lease, it needs to give more time or actually provide a remedy to get tenants back on track after the last 12-18 months.

OPTIONS RANKED IN ORDER OF PREFERENCE

Landlords

Option	Pref 1	Pref 2	Pref 3	Pref 4	Pref 5	Pref 6
Option 1	**13**	6	5	2	2	6
Option 2	6	**9**	9	5	2	1
Option 3	9	6	**13**	4	1	0
Option 4	1	2	2	**13**	9	5
Option 5	1	5	2	1	**10**	**11**
Option 6 Time to pay service charge	4 1	4 2	2	6	7	8
Additional time to pay arrears	2					
Time to pay rent		1				
Adjudication didn't specific opt 5 or 6		1				
defer/waive obligations to replenish rent deposit			1			
Wave proportion of rent			1	1		
Allow forfeiture only to expire on 30 June				1		
None of rest are acceptable				1		
waive proportion of service charge				1	1	
Extend term on lease					1	
Reduce term on lease						1
total	37	36	35	35	33	32

Tenants

Option	Pref 1	Pref 2	Pref 3	Pref 4	Pref 5	Pref 6
Option 1	**3**	1	**4**	1	0	4
Option 2	2	**5**	3	2	2	0
Option 3	**3**	2	**4**	3	0	0
Option 4	1	0	1	**4**	**6**	1
Option 5	2	1	1	0	3	**5**
Option 6	2	3	0	3	2	3
Waive a proportion of the rent arrears	1					
Waive a proportion of the service charge arrears		1				
Adjudication didn't specific opt 5 or 6		1				
Defer/waive obligations to replenish rent deposit			1			
Reset future rent under the lease				1		
Reduce the term of the lease					1	

Extend the term of the lease (and give additional time to pay arrears)						1
Total	14	14	14	14	14	14

CONCLUSION

The majority of views of our members who responded to the survey – both landlord lawyers and tenant lawyers - is that tenants who need it should be given more time to pay Covid arrears. Recently, Landsec and British Land, two large institutional landlords, alongside the British Property Federation suggested that Covid arrears be ringfenced and the PLA endorses that suggestion.

However, this proposal cannot be adopted at the expense of fresh arrears which accrue post the lifting of the moratorium, currently set for 1 July 2021. All landlords remedies should therefore be reinstated for these.

Further, the ringfenced arrears cannot be left in abeyance. Rather, there is required a disciplined regime over a specified period of time whereby, if instalment payments of arrears are paid on time, landlord remedies (such as CRAR and insolvency procedures) should remain restricted. However, it those payments are not met, then landlord remedies should be reinstated. That should redress the imbalance currently at play in what we consider to be a fair and reasonable way.

PROPERTY LITIGATION ASSOCIATION
4 May 2021

SCHEDULE

The purpose of this schedule is to highlight some significant legal and commercial consequences of some of the remedies suggested for adjudicators under Options 5 and 6. We suspect that these are not intended and may have been overlooked in putting together proposals that focus mainly on the immediate problem of tackling COVID-related arrears. We have seen the response prepared by two major commercial landlords, LandSec and British Land, and note their pragmatic approach to ring-fencing arrears, allowing the market to return to normal as soon possible and accepting arbitration as a backstop remedy.

The proposals we refer to are those that would result in a change to the terms of the lease contract itself. At the most basic level, the commercial lease market relies on two principles:

- Landlords and tenants are broadly free to make whatever commercial bargain they choose and to reflect that in the terms of the lease contract they enter into. There are some statutory controls, to reflect public policy: notable examples are the right for commercial tenants to continue in occupation and renew their leases under the Landlord and Tenant Act 1954; and the release of tenants following a lawful assignment of a lease under the Landlord and Tenant (Covenants) Act 1995. Within this statutory framework, landlords and tenants agree lease terms appropriate to the particular property and the commercial context, which may be different from terms agreed between the same parties at a different site or between the landlord and a different tenant for a neighbouring property. The key point is that lease terms are often bespoke and will have been agreed following careful commercial analysis by both parties and detailed legal negotiation.

- Once a lease is agreed, it is fundamental that landlords and tenants have confidence that it will remain binding and that the terms cannot be changed, unless the parties agree a variation. The parties are free to do this and have been using this approach throughout the pandemic to document the many emergency rent cessers and reductions and other changes to lease terms that have been agreed. Beyond this though, a suggestion that an arbitration to deal with arrears (or any other breach or dispute) might end with the terms of the lease contract being altered would undermine that very significant principle.

If landlords could no longer rely on these two principles, it could change their entire approach to investing in commercial property, with lasting adverse effects on the wider economy, not least high streets and town centres. While tenants might benefit from changed lease terms in this particular context, they should be equally keen to uphold the principle that a lease, once agreed, will not be changed unexpectedly.

Changes made to the terms of a lease during its lifetime might affect not just the landlord and tenant but also lenders who have advanced funds to the landlord on the basis of predicted rental income over the term of the lease; and any guarantor of the tenant's obligations.

The impact on guarantees applies to any change to the terms of a lease. Unless the guarantor agrees and joins in any documents implementing the change, there is a danger that the guarantee is released. This would be a significant financial blow to the landlord, who will have requested a guarantee to deal with concerns about the tenant's financial position. In an economic climate where tenant businesses are understandably struggling, it becomes more important than ever for landlords to have the reassurance of a robust guarantee should it be required.

In addition, if the lease in question is in fact an underlease, there will usually be a contractual obligation not to vary it without the consent of the superior landlord. At best, changes imposed by an adjudicator would create admin and legal costs in getting the necessary consent; at worst, the landlord of the lease being varied would be put in breach of covenant.

Some of the proposals would have more far-reaching effects than others, so we make some additional detailed comments below.

Reset future rent under the lease

Predicted rental income is fundamental to a landlord's commercial analysis of any investment in commercial property. If the landlord has loan finance, this will typically have been advanced on the basis of an agreed ratio of the value of the loan to the investment value of the property and the landlord borrower will have given covenants to the lender to maintain that ratio. An enforced change in the expected rent, which in the context we assume would be a reduction, would undermine the whole economic basis of the landlord's investment and could put the landlord in breach of its loan covenants. This might lead to finance being withdrawn, enforced sale of investment property and even landlord insolvency.

Extend the term of the lease

One of the fundamental principles of the law of leases is that any action which purports to extend either the extent of the property included in the letting or, as in this case, the length of the term in fact takes effect as a surrender of the existing lease and a grant of a new one, on the altered terms. That might seem unremarkable on the face of it but it has a range of implications:

- The tenant would have to prepare and submit a new SDLT return.
- A guarantor of the original lease might be released.
- If the lease in question is in fact an underlease, it will have been granted for a term deliberately shorter than the headlease. This is because as a matter of law, any action which purports to create an underlease which is longer than the lease from which it derives instead takes effect as an assignment of the headlease. This creates unintended and unwelcome consequences for the landlord and head tenant as well as the undertenant.

The usual way to avoid these problems is to grant an additional lease (a "reversionary lease") which takes effect immediately the existing lease ends. If an adjudicator ordered the grant of a reversionary lease, this would avoid a surrender and regrant of the existing lease but would create other issues:

- The parties would incur legal and admin costs in drafting and negotiating, preparing final documents, getting them signed and registered at HM Land Registry and dealing with any SDLT return.
- The grant of a new lease might require consent from a superior landlord or a lender, which would again create admin and legal costs.
- The new lease would enjoy security of tenure under the 1954 Act (the statutory right to renew the lease) which may well have been excluded by agreement from the original lease and reflected in the rent and other terms agreed between the parties
- The tenant may be released from the obligation to re-instate any alterations carried out under original lease leaving the landlord with the expense of doing so in order to re-let.
- If the premises are part of a larger mixed use premises, the landlord might be put in breach of the rights of pre-emption provisions of the Landlord and Tenant Act 1987, which require an immediate landlord who intends to dispose of part of its property to first offer that part to its residential tenants. A breach of these provisions is a criminal offence and could therefore have serious consequences.

Reduce the term of the lease

There is no settled case law on whether a reduction in the term of a lease might also take effect as a surrender and re-grant but some practitioners and at least one judge have expressed concern that it

might. Even if that is not the case, a reduction in the term would have a similar impact on valuation to a reduction in the rent, so our comment above about the impact on the landlord's investment analysis and any loan to value ratio could equally apply here.

Defer/waive obligation to replenish rent deposit

A rent deposit is a useful addition to the range of remedies available to a landlord faced with a tenant unwilling or unable to perform its obligations under the lease. It allows the landlord to draw down funds to remedy breaches, without either party incurring the costs involved in a court action and without the more draconian threat of forfeiture. It is standard to require the tenant to top the deposit back up to the agreed level (typically a sum equivalent to the rent for an agreed period) if the landlord has to draw down part of it to remedy a tenant breach. Without an obligation to top up promptly (or at all), the rent deposit could become a way for a tenant effectively to cap its immediate liability. Changing this retrospectively would have a disproportionately adverse impact on the landlord.

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