

**COMMERCIAL PROPERTY AND THE VARIOUS ALTERNATIVES AVAILABLE TO
DEAL WITH PROBLEMS ARISING FROM THE CORONAVIRUS AND THE DOWNTURN IN INCOME OF THE
TENANTS OF COMMERCIAL PROPERTIES**

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This information is provided as a general commentary only.
Please note that it is not intended to represent specific advice as each situation is unique.
We will be happy to assist you with any specific matters.

We live in a competitive society. The free market differs from a society where everything is regulated and ordered and prices are fixed by central government.

To an extent, the free market keeps prices down which does mean that in the event of a catastrophe happening and businesses either being forced to close or people deciding not to frequent them, cash can soon dry up.

The commercial property market had given every impression of being in a reasonably healthy state recently. This was helped by a degree of stability and reasonably good employment figures which in turn pumped money into the general economy.

The problem that the current pandemic poses for the commercial property market is two-fold. On the one hand tenants may find problems in affording to pay the rent and on the other, premises may become vacant as tenants go into liquidation and their leases are disclaimed whilst at the same time there is no demand for prospective new tenants to take up empty shops, offices, etc.

The purpose of this fact sheet is not to wave a magic wand and find a solution but to face the facts as I see them and to suggest just a few ideas where people can mitigate the damage done and not end up with empty premises on their hands with, often, a loan to pay from the rent but no rent with which to pay it.

There are a few situations which may well arise as follows:-

- 1 Many tenants will request that a quarterly in advance rent situation is converted to monthly. I have been in the legal profession for longer than I would like to admit. I recall from my early days commenting that payment of rent, quarterly in advance, seemed to me psychologically bad. The reason is you literally have a whole three months during which you don't pay anything and then suddenly a quarter of the annual rent is payable in one go. It has always seemed to me that a more sensible arrangement would be to pay monthly in advance as it is not quite so painful for the tenant and it becomes a regular 28/31 day event. If that is offered at present by a tenant, my personal view is that it should be accepted.
- 2 Following on from 1, this may seem a slightly unusual suggestion but what if landlords anticipated a general downturn and wrote to all of their tenants offering them a chance to change the rental payments from quarterly in advance to monthly in advance. It is just a thought that the gesture may well cement relations between the landlords and tenants and who knows, may even ease things a little when the next rent review comes along. However, one shouldn't perhaps get too excited as if what is happening continues for a year or two I am not thinking that rents are going to increase at all in the foreseeable future and market rents may well go down somewhat causing problems generally.
- 3 I have seen that some tenants are suggesting not only the monthly rental payment basis but that it is in arrears. So, for example, the 25 March payment would be made by three instalments on the 25 April, 25 May and 24 June. The June rental payment due on the 24 would then be payable on the 24 July, 24 August and 29 September. As well as the likelihood, in view of the government guarantee of the inability for tenants

to be removed for arrears of rent for a period of three months for non- payment, there may well be a whole three month holiday granted so it may be worth considering this on a temporary basis only.

- 4 The situation with regard to some tenants is such that they are already asking for a holiday which varies from one quarter to an extended holiday until the crisis is over. In the case of cafes, pubs, restaurants, nightclubs, theatres, cinemas, gyms and leisure centres, the landlord may be given little or no choice other than to consider this or risk the tenant going bankrupt or into liquidation and the lease being disclaimed. The problem I see is that many landlords will have to consider the advisability of an extended non-rental payment period, but with the tenant coming back at the end of the period, as opposed to what may still be an extended period but the premises being empty, business rates being payable unless the local authority and government agree to waive empty property rates indefinitely, and difficulty in re-letting in the foreseeable future.
- 5 It may be that the tenant has some sort of business left or reserves and would be in a position to continue to pay rent but at a reduced rate. It is fair to say that it is better to have something rather than nothing. I think whichever financial arrangement a landlord comes to with a tenant who is having problems, there should be some sort of ability to be provided with monthly accounts by the tenant to see how things are progressing. In the case of those properties where they have been told to close there won't be much point. Take what the tenant can offer but always allow for catch-up later and record this in writing to avoid creating the impression you are writing off the unpaid balance.
- 6 In many cases, rent deposits have been paid and are held by landlords. They may need to be used to top up the position. However carefully advise the tenant that you will use the deposit but that it is temporary and would need topping up again eventually. It may never happen but keep the door open.
- 7 The landlord could take a stake in the tenant's business.
- 8 There are properties which are over rented. This can happen as a result of an historic major expenditure by a landlord which was reflected in a particular rental calculation. That calculation may end up with a market rent which is way below the actual rent being paid. The over renting can then be accelerated by having indexation or even rent reviews at market rent plus 10% or 15% to cover the initial capital expense. The fact is that this is highly beneficial for landlords but may be a substantial drain on the tenant's income and profitability. In those circumstances, a one-off open market rent review in the future might be a good idea in a rising market, although that might be quite a long way away given the present circumstances. In addition, if there is an adjustment back to a market rent then, as compensation, an extra five years added at the end of the lease period may give capital value to a landlord and help the tenant.
- 9 Turnover rents can be useful because once a sensible percentage of turnover is agreed it can adjust itself to the market. Provision of accurate figures can normally be semi-adjusted by making sure that one has a sight of the tenant's VAT returns.

It can also prove problematic where you have a turnover rent where the property the landlord is letting to the tenant is just one of a number of properties which the tenant is occupying, not all of which are on turnover rents.

- 10 You can of course involve bailiffs. However, what happens next quarter?
- 11 You could liquidate the tenant or make them bankrupt, but then either a Trustee in Bankruptcy or liquidator will disclaim the lease and that's it, you've got an empty unit on your hands.

You will gather from the above that there is no simple way of dealing with the catastrophe which has happened and which is, I think, potentially going to devastate our economy for several years to come. I think it may be important to liaise very closely with your commercial tenants so that, although you may not necessarily become part of their business, you are provided with full details of their turnover, expenses, etc. This will mean that you can discuss with them on a sensible commercial basis what is a fair and reasonable rent to collect. However, if albeit if the business is closed down completely it can be difficult to know what to do. If the premises are clearly highly desirable and another type of business could go in which is unlikely to be closed down by the government, then there's your solution.

There are just a few additional points which should be borne in mind if one needs to come to terms with a tenant:-

- 1 Be careful of a tenant doing a really good deal with a landlord and then promptly selling the business on the open market. I heard the other day of a case where someone gave the tenant a particularly beneficial rent free period and the next thing that happens is the tenant sells for £500,000.
- 2 Make any agreement contingent upon a personal relationship between you and the tenant. In other words, it is not the property, it is the tenant that is benefitting. If the tenant assigns the lease or sub-lets the property then rental must go back to what would be the rent payable under the lease terms and there is a catch up.
- 3 Following on from 2 above, if of course you have a situation where your tenant is very weak and they come to you and offer you a stronger covenant with someone you would rather have as a tenant, then be flexible.
- 4 The effect of online shopping has already diminished the income many shops are deriving from high street positions. With this in mind it is worth examining the leases to retail outlets of the whole of a property in a High Street situation where they only perhaps use a basement for storage and the ground and first floors at best for retail. Often as not the upper floors attract a very low rental value because they are basically storage or staff amenity. One way of dealing with this is for landlords to take back the upper floors which are not really necessary for the retail outlet and to obtain consent for them to be let of as single letting rooms or flats. There is a shortage of residential accommodation in this country and if you had say eight or ten lettings rooms let for £1,000.00 a month that could quite conceivably give you a substantially higher rental income than you would be getting from the market rent for what is sometimes surplus accommodation to the needs of the retailer.
- 5 Where the amounts involved justify it and if they are to be substantial rent holidays which are not to be immediately repaid, the landlord may wish to take a legal charge over the lease of the property and possibly even a debenture by way of fixed and floating charge over the tenant's assets which are used in the business.
- 6 It is important that any arrangement put into place with the tenant is recorded in a side letter or agreement which is in turn then considered to be incorporated as a term of the lease. The side letter needs to take into account the fact that it is personal to the tenant in possession and any concessions will come to an immediate hold on an assignment or subletting. People tend to take side letters casually but they should not be because they are in effect part of the lease.
- 7 In those cases where there is to be an empty shop because of government requirements so that the business ceases then it is important that the empty property is secured with appropriate alarms and that staff attend once a week and keep a log to produce to the insurance company to ensure that the insurance is not avoided. This aspect is quite important. The insurance premium is likely to increase somewhat as a result of the property being empty. Make sure your insurers approve the arrangements in writing.

Whatever arrangement is come to it should be recorded in writing and signed for and on behalf of or by both landlord and tenant. It is advisable to record that appropriately and it is probably worth a landlord paying a reasonable fee to draft in a format that would become part of the lease. It can not only be incorporated as part of the lease but also made clear that it is a personal arrangement, not one that runs with the lease.

DAVID ENGLEHART.

I have a number of solicitors who work with me on commercial property matters, namely:-

Jack Englehart
Julia Macey
Tony Morcowitz
Warren Robertson
Michael Williams
Helen Wood

Our address is as below, together with points of contact. The extension numbers of the people mentioned above are set out, as well as their email addresses.

We are happy to discuss matters on the telephone or by suitable platform eg Zoom or Skype.

Engleharts Solicitors
Vallance Hall
Hove Street
Hove
East Sussex
BN3 2DE

T: 01273 204411
F: 01273 204207
DX 59252 Hove

www.engleharts.co.uk

Contact	Extension No.	Email Address
David Englehart	230	david@engleharts.co.uk
Jack Englehart	258	jack@engleharts.co.uk
Julia Macey	241	julia@engleharts.co.uk
Tony Morcowitz	233	tony@engleharts.co.uk
Warren Robertson	229	warren@engleharts.co.uk
Michael Williams	247	michael@engleharts.co.uk
Helen Wood	267	helen@engleharts.co.uk