Recovering commercial rent arrears

When faced with a tenants failure to pay rent, a landlords first reaction may be to go to the deposit account. Accessing the deposit account may be tempting as it provides an easily accessible source of funds. In addition, there is no need to take legal proceedings to access the account. These positives may be overwhelming reasons to go down this path.

However, before accessing the deposit account it is wise to examine the rent deposit deed and determine whether the circumstances permit access when the tenant fails to pay rent. It would be a surprise if such a term is not set out as an authorised deduction. In the event that failure to pay rent is not specifically set out, it would be another surprise if the terms were not drafted in a way which allowed the landlord to access the deposit for any breach committed by the tenant, this could, therefore, include non-payment of rent.

Further, landlords should ensure that any grace periods that are permitted under the lease have expired before deciding to access the deposit account. It might also be the case that there is a requirement that notice is given to the tenant before the deposit account is accessed. Although, the tenant will know that they have failed to have paid rent, it is prudent to comply with the notice provisions. It also gives a tenant a chance to rectify the situation before the deposit account is accessed.

Notwithstanding the above, I suggest caution is still exercised before any step is taken and the thought given to whether the rent arears is an isolated incident or is it part of a persistent pattern. If it is an isolated incident, an opportunity to rectify the situation may be appropriate.

Another path to filling the financial gap created by the non-payment of rent is to consider whether there are any guarantors. Generally, a rent deposit deed is made between landlord and tenant. However, a guarantor may be part of the deed. This could provide the landlord with an alternative avenue to fill the financial void.

From a practical point of a view, it is worth determining the financial health of the guarantor. Especially, in the present climate. It is possible the pandemic has not had any adverse financial effect on the guarantor. In such circumstances, landlords may want to pursue the guarantor and leave accessing the deposit account until circumstances become worse.

When a landlord is considering the options, thought should be given as to whether the lease is a “new” tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995 (LTCA 1995). A new lease is one that was granted on or after 1 January 1996.

Section 17 of LTCA 1995 provides that only the last six months of arears can be recovered from a former tenant who is still liable under an authorised guarantee agreement, a former tenant who was not released by the assignment as it was an excluded agreement or a guarantor of either the former categories who has not been released. When the lease is

examined in this light, it is possible that there are still individuals who are on the hook for the short fall created by the tenant.

One further point to bear in mind, is that if a former tenant or former guarantor pay the amount due they will be able to call for an overriding lease. If they are not deemed to be of good covenant strength, it may not be advisable to serve a section 17 notice upon them.

If the landlord has the benefit of an “old” tenancy, it is possible that there is an array of individuals who can be pursued. This is because of an implied covenant contained in section 24 of the LRA 1925:

> *"during the residue of the term the transferee and the persons deriving title under him will pay, perform and observe the rent, covenants, conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed and observed, and will keep the transferor and the persons deriving title under him indemnified against all actions, expenses, and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions or any of them."*

Although the LRA 2002 repeated the LRA 1925, from 13 October 2003 paragraph 20 of schedule 12 of the LRA 2020 provided that than an indemnity would be implied on the transfer of the registered leasehold under the LRA 2002. The indemnity is similar to that which was contained in section 24 of the LRA 1925.

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