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Commercial Tenancies: FAQs from Landlords

by **Clare Dowling**

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Difficulties can arise in a landlord and tenant relationship at the best of times, not to mention when there are the additional pressures and uncertainties of the COVID-19 pandemic and the consequential closure of many retail and hospitality businesses across the country for prolonged periods of time.

We work with many commercial landlords who often contact us with queries regarding their tenants and/or the leases they have in place.

Below are some of the questions that we are most frequently asked, together with a general outline of the courses of action available.

1. My tenant owes me money for rent. What are my options?

(a) Issue legal proceedings for recovery of the outstanding sum.

A landlord can initiate legal proceedings against its tenant to seek recovery of the outstanding debt. Often, the mere threat of legal action and the associated costs, as well as the risk of a judgment against it, will prompt the tenant to pay the outstanding sum or, at the very least, to enter into negotiations with the landlord. It may be possible for the parties to agree a payment plan or a reduced sum if the tenant is in financial difficulty.

(b) Forfeiture of the lease and subsequent peaceable re-entry.

Most commercial leases contain a forfeiture clause entitling the landlord to forfeit and terminate the tenancy if the tenant has committed a breach of the lease. The landlord must first serve a notice on the tenant setting out the details of the breach and calling upon the tenant to remedy the breach within a specified timeframe. If the breach is not remedied, the landlord may then forfeit the lease and effect peaceable re-entry on the premises.

Note that the courts are reluctant to approve the use of physical re-entry as a method of effecting forfeiture and will usually only accept it where the re-entry was entirely peaceable. The opinion of the courts tends to be that a landlord should institute formal proceedings seeking forfeiture and ejectment of the Tenant. See below.

(c) Issue legal proceedings seeking forfeiture and ejectment of the tenant.

A landlord can issue proceedings seeking ejectment of a tenant on the grounds of non-payment of rent where:

(i) the lease contains a clause entitling the landlord to forfeit the lease in the event of a breach; or

(ii) where the tenant is in arrears of rent for a period in excess of one year.

As a result, unless the tenant has been in arrears for a period in excess of one year, any claim by the landlord in this regard would be based on a right of re-entry provided for under the lease.

(d) Petition to wind up the tenant company for failure to pay its debts (if the sum is over €50,000).

A creditor can issue a petition under the Companies Act 2014 (as amended by the Company (Miscellaneous Provisions) (Covid 19) Act 2020) seeking to wind up a debtor company if that company is unable to pay its debts and the debts are in excess of €50,000. An initial 21 day letter of demand must be served on the tenant company demanding payment of the debt, failing which a petition to wind up the company will be made.

Note that the courts do not generally favour this course of action being used as a means of debt collection and so it should only be utilised where the landlord fully believes that the tenant company is unable to pay its debts as they fall due.

2. My tenant is struggling financially and wants to surrender the lease and vacate the property. Should I allow this to happen? And what can I do to protect my interests?

If the landlord is happy for his tenant to surrender the lease, the parties should enter into a formal Deed of Surrender setting out the terms on which the surrender is agreed. But if the landlord is not agreeable, then care should be taken not to do anything which might be viewed as an acceptance of the tenant's surrender. For example, replacing the tenant will amount to a valid surrender of the lease. However, accepting return of the keys or advertising the premises to let are not (in themselves) generally seen as acceptance of a surrender, because the landlord is entitled to seek to mitigate any loss.

Generally, a landlord will be entitled to pursue a vacated tenant for arrears of rent up to the point at which the premises is re-let, and this will be a relief to landlords who do not want to prejudice a potential claim against a tenant, but who also wish to minimise their losses.

3. My tenant's lease has expired but the tenant remains in situ and refuses to leave. What can I do?

Where a tenant remains in situ after the expiry of the term, this is classified as "overholding". If a landlord wants an overholding tenant to leave the premises, a Notice to Quit must be served on the tenant. Commercial leases will often set out the notice period required to be given to the tenant. If not, there are prescribed notice periods based on how the rent is reserved under the lease.

Any rent received after service of the Notice to Quit should be accepted as "mesne rates" only, otherwise the landlord may be seen as waiving the Notice served. Once the notice period expires, the landlord should not accept any further payment from the tenant.

If after the notice period expires the tenant remains in situ, the next step for the landlord is to issue proceedings in the Circuit Court in the form of an Ejectment Civil Bill for Overholding.

4. My tenant has breached a condition or covenant in the lease. I wish to forfeit and terminate the lease but the tenant refuses to leave. Can I re-enter the premises and change the locks?

Forfeiture can be invoked by a landlord for breach of a condition even where there is no such provision in the lease. However, forfeiture may only be used in relation to a breach of covenant where there is a provision in the lease allowing for re-entry. It is important, therefore, to identify at the outset whether the tenant has breached a condition or covenant before forfeiture is exercised.

The landlord must first serve notice of the breach on the tenant and call upon the tenant to remedy the breach within a specified time. If steps are not taken by the tenant to remedy the breach, the landlord is then entitled to take possession by means of peaceable re-entry on the premises.

If peaceable re-entry is not possible (for example, if there is resistance by the tenant), the landlord should not force re-entry. If a landlord re-enters when they ought not to have done so, this may lead to an action for damages by the tenant for wrongful re-entry and/or breach of the tenant's covenant to quiet enjoyment of the property. Similarly, the tenant could bring an injunctive action seeking that possession be restored to the tenant pending the outcome of any claim against the landlord.

Instead of taking the somewhat risky step of re-entry, it is open to the landlord to issue an Ejectment Civil Bill on Title based on forfeiture and seek an order for possession against the tenant. However, the courts can be reluctant to grant an order for possession as it could have a drastic impact on the tenant's business. Generally, the court will give the tenant an opportunity to remedy the breach before granting an order for possession.

Any other questions?

The above is a review of the issues which are likely to become more prevalent for landlords, particularly if a premises is not in use or if a tenant is not paying rent.

If you have any queries in relation to any of these issues, or relating to landlord and tenant law generally, please contact Clare Dowling at cdowling@lkshields.ie.

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