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Property Week

The Code of Practice is still the best guide for commercial landlords

By Matthew Spring Fri 25 June 2021

If the pandemic had lasted one to two quarters, the non-interventionist approach of UK PLC in March 2020 might have worked.

Matthew Spring

Yet in an 18-month plus period, a moratorium on action could only be a placeholder for the policy needed to address the financial imperative: that landlords need to be paid and tenants need time to pay when they cannot trade.

The clear conceptual issue is ability to pay. Despite having the money, some larger tenants abused that principle, held back and sought to impose their will on landlords on payment timing. Smaller tenants freed from forfeiture, CRAR and more, knew they did not need to address arrears in the short term. This became their "borrowing" of choice, with the worst outcome being a court judgment but at least no business closure.

In the face of woolly announcements of "binding arbitration" to enable parties to "agree" (a contradiction in terms), how should tenants and landlords act? Well, first, they should act responsibly. Landlords cannot fantasise that tenants with income streams long shut off can pay as if we are in an economic boom. And tenants cannot expect their lack of reserves to weather an economic shock to be an excuse not to pay something now. The solution lies somewhere in between.

The Australian model looks prescriptively at drop in turnover compared with the last pre-Covid trading year and reduces the rent by the same percentage for the whole Covid period and a reasonable period for business recovery – but with the landlord permanently losing 50% of that reduction, while the tenant pays the balance over time.

A best guess from the mood music is to anticipate that the presently voluntary Code

of Practice for commercial property relationships, taken up by only a minority, will effectively become compulsory as the bedrock of any negotiation and binding arbitration decision. There might be a process similar to PACT on lease renewals for a determination of rent payment across time.

References to landlords sharing the pain might not mean the fully prescriptive formula from Australia, but any landlord not agreeing something sensible must consider the risk that if they do not agree something sooner, this might come in. Of course, tenants might hold out and gamble that they might see some of their rent burden written off.

All of that should become clearer when the legislation is laid before Parliament, but until then the imperative of the Code is probably still the best guide. Tenants should be open with their landlords and if they expect time to pay that is truly bespoke to their circumstances, open their books and provide certified trading information. Sharing information is preferable to losing the ability to trade at all.

Landlords might seek to use this time to negotiate variations to leases that could possibly provide benefits, such as creating landlord breaks or varying tenant break clauses, in return for more generous short-term support. Or you could just wait and see and hope you are not the one disadvantaged by binding arbitration.

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