

Transcript: Property Discussion

**Ron Myers, The Consulting Room Group with Aaron Bennett and Tom Morrison,
Temple Bright. Recorded 30/03/2020**

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Ron Myers:

Hi there, my name is Ron Myers and I'm one of the Directors of The Consulting Room group and in this podcast we're going to be exploring some of the issues that are facing many clinic owners around the subject of leases and the inability of being able to use their clinical salon for the foreseeable future due to the COVID-19 lockdown. The Consulting Room have used the services of Bristol based law firm Temple Bright a lot over the past year in conjunction with the sale of one of our businesses. They have a team of 70 lawyers specialising in various aspects of business law and I'm really grateful that Aaron Bennett and Tom Morrison could spare some of that time today to provide some guidance for our members. Aaron specialises in real estate matters including negotiation of commercial leases and the acquisition and sale of commercial property and Tom handles dispute resolution matters involving property which includes rent review, service charge disputes, business lease renewals and tenant insolvency.

Ron Myers:

So, before we start, I just want to state that this recording is for general information purposes only and is relevant for the topics discussed with information available as of today, which is the 30th of the March 2020. The guidance given is not intended and should not be used as a substitute for specific legal advice which obviously should be independently sold before acting on any of the topics covered. So before we get into answering some specific questions that many of our members have, Aaron, is there any general advice that you could give tenants about how they should approach their landlord if the landlords haven't already approached them?

Aaron Bennett:

Yeah, sure. Hello Ron and everybody. Thanks very much for your kind introduction. I think as a starter, if you are having difficulty paying rent or think you may be getting into difficulty and you do think a conversation with the landlord is going to be helpful, the best thing to do is contact them directly, if you have a contact at the landlord to open the conversation or if previous communication was through their agent, you might want to go through their property agent as well. And that would be the best way I would say of quickly agreeing commercial terms and getting to the best person to speak to. You could go through your solicitor or another professional advisor, but I think they would probably advise you to try and contact the landlord directly or as I say, their agent so you can agree some sort of commercial terms such as a rent relief arrangement. I think that's probably the headline point. Tom, anything you wanted to add on that?

Tom Morrison:

Equally, with landlords that they should be looking to approach tenants at an early stage to see whether their businesses are struggling or whether that it's anticipated that they're not going to be able to meet their lease commitments. And then just maintaining that dialogue between the parties and understanding each other's respective positions is important and will feed into hopefully commercial terms that can be agreed to get them through this temporary emergency period.

Ron Myers:

That's great. Thanks for that advice. And in fact, actually our own landlord, which is the Warwickshire County Council, approached us last week and it was great because they offered us an initial three month rent holiday basically for any of their tenants and that we'd be working as sort of a business park that they feel they're going to be affected by the financial situation. So at least they have approached us with an outline kind of offer. So just to get on some specific questions, Aaron, what are the options out there for tenants who are struggling to pay their rent at this time?

Aaron Bennett:

Okay. Well, the first thing to do if you are having a problem is, it might sound quite obvious, but not everybody goes to it. If you look at your lease, check what the lease terms are, check what rent you should be paying, check if there's any variation in the rents coming up or which have passed, and check also that you've been paying the right amount of rent during that period and that goes to service charge amounts as well. Then also see if you have any break options in the lease, which are coming up. Now, in commercial leases, you have to ensure you strictly comply with the break conditions and the requirements for serving of a break notice.

Aaron Bennett:

So if for example, you had a break notice coming up in September, October time and you needed to serve, say three or six months' notice, you need to be getting on the phone to your solicitor pretty quickly to make sure, if you do want to serve a break and terminate your lease, that you're doing it strictly in line with the lease requirements. Otherwise, you don't do it correctly, you would lose that right to break. So that's a headline point just to check what's in the lease, to check if there's anything in there that could help you. And then moving on from that and assuming there isn't anything in there that's going to be helpful in this situation, you may want to start approaching the landlord as we just said, to agree something like a rent paying holidays or rent free period.

Aaron Bennett:

If they're willing to agree that or perhaps it would actually be a rent deferral. And the benefit of that from your point of view is obviously you'll get a bit of relief on your obligation to pay rent, help with cash flow for the time being and from the landlord's point of view and we're seeing this quite a bit, landlords are willing to come to the table and to talk to tenants about this sort of thing because if they don't or if they get too aggressive with the tenants and take steps to try and kick them out, then ultimately they're going to be having to go back to the market to find a new tenant. And to be honest, there isn't going to be too much in the way of options available for them out there at the moment.

Aaron Bennett:

So, open those communications with the landlord as we said previously. Another option which in the past and when we look back to the financial crisis previously, tenants who are paying rent on a quarterly basis, so a good advantage and asking landlords if they could change to paying on a monthly basis instead and that's become relatively common to agree terms along those lines. And it does help with tenant cashflow. So you could always put that to the landlords. And the other point I suppose is landlords being landlords may well be thinking, well, what can we get in return here if we're going to agree this rent free period alternative with the tenant, what can we get back?

Aaron Bennett:

And you might just want to have in mind maybe what you've got in your back pocket, what maybe you could offer to landlords if you think that's going to free things up a little bit on negotiation. So, for example, if you were to agree a rent free period, it might be the landlords would say, well, okay, but you've got to give up that break right you have in X number of years in the lease, so we'll give you a rent free now, but we agree to remove that break right from the lease. Another point we were talking about earlier on was possibly to defer a rent review.

Aaron Bennett:

So it might be there's a rent review at you under the lease coming up imminently and it might suit the landlords to push that rent review back to a later date so that when you're assessing what is the current market rent, you're not in a COVID-19 scenario where market rents are presumably going to be a bit lower, but you push back the rent review to a more attractive period when hopefully the markets get more volumes and the landlords can be arguing for higher rents. And so that's a few things that you could bear in mind in discussions with the landlords. Tom, anything else you wanted to jump in with or what the landlord need to be aware of?

Tom Morrison:

If a simple rent deferral isn't going to be a runner for cash flow reasons and to avoid simply kicking the can down the road, you want to offer something more non-monetary in relation to the lease, then yes, the removal of a tenant break option or perhaps amending one to a fixed option rather than a rolling one. The landlord's got more certainty then that any break right that the tenant has is now a once and for all as opposed to a rolling one. The rent review point is definitely something that you can bring to a landlord in terms of a proposal. Even where you are coming towards the end of your lease, you may be prepared to commit to what's known as a reversionary release. A lease that comes into place after the expiry of your term.

Tom Morrison:

If you're looking for options here rather than simply deferring the rent. I just want to go back to looking at the lease and dusting that off because I know from experience that tenants are coming to me and saying, well, is there anything contractually here that means I can escape liability to pay rent here? And yes, you may have heard things such as rent suspension or force majeure clauses, where such clauses can exist in leases, and especially rent suspension.

Tom Morrison:

Most modern leases, however, rent suspension is only likely to apply if the premises are damaged or destroyed by what's known as an "insured risk". It's going to be unlikely that COVID-19 is going to be defined as an insured risk. Even if it was, it won't be easy to demonstrate the premises have been physically damaged in that regard. So it really is that early contact with a landlord and looking to see whether a commercial settlement can be reached going forward. One other thing I should say is if the premises are closed, then check your business interruption insurance to see whether that would cover losses during a premises closure.

Ron Myers:

That's great. Thank you very much for that. Now, obviously as I said before, we've been offered a three month rent holiday, so could we just clarify the difference between a rent holiday, a rent free arrangement, and a rent deferral, please Aaron.

Aaron Bennett:

You've got to be cautious, especially in the circumstances we're talking about today. When you agree something with the landlord and the landlord says, yes, that's okay, we'll let you off paying the rent for the next three months or something like that. What does he mean by that? Does he mean by rent holiday, he's giving you a complete rent free for that period, meaning that the rent that would have been due under the lease is now no longer due whatsoever and he will never come back and ask for that rent ever again? Or is he saying, well, you don't have to pay it right now and to help you with cashflow, we won't insist that you do, but come three, six months down the line, we will be expecting that rent to be paid.

Aaron Bennett:

So, don't think you're being let off the hook by this arrangement. And the precise and detailed terms that go into whatever you agree with the landlord really do need to nail down that point and I think in your discussions with the landlord at the beginning and as I say, ideally you're having a commercial discussion with the landlord, it would be helpful if you really underline that point with them at the beginning and check what they mean when they say they'll give you a rent holiday because it will impact on the way things should be documented and of course it impacts on what your own liability would be. Tom, anything else to add?

Tom Morrison:

I think it is important because these terms have been used interchangeably and there is that risk that confusion would arise over what's been agreed by the parties or what they may be seeking to agree. So, ensure that if you want it to be effectively extinguished, then you are asking for a rent free period or how many months the landlord may be prepared to agree. Alternatively, if you're prepared to roll-up those rents into the June quarter or whatever your next payment date is, that it's clear how they're rolled up, whether is it a lump sum or spread across a longer period of the lease term to make it more manageable from a cash flow perspective.

Ron Myers:

Okay, thank you. So it seems quite clear really that there could be some confusion here. So obviously trying to actually nail down these terms and exactly what they mean is really important. How should they be documented though so that everyone really knows, so the both parties know and understand exactly what has been agreed.

Aaron Bennett:

Yeah. I'll let Tom largely lead and chip in on this. I'll just say from my point of view as a transactional lawyer and in documenting items like this, tenants really should make sure they're taking legal advice and getting their solicitor or board just to say the obvious point because even though ... And Tom I'm just going to go on and talk about deeds or signed letters signed as a deed or not. We very strongly wouldn't advise that you go away and agree things separately with a landlord without ensuring a solicitor has looked over it just to check that things are being signed properly and you are following the correct procedure in crossing the t's, dotting the i's because we do unfortunately see countless examples where people have done things themselves and it just hasn't really hit the nail on the head in terms of what you're trying to achieve. And just for that, I suppose legal advice, this lease desire looking over it I think could save you a bit of pain in the future. In terms of the actual documentation, Tom do you want to explain a bit on that?

Tom Morrison:

Yes, of course. Well, I mean be it a licence or a lease being completed by deed, whatever's agreed between the parties is effectively going to be treated as a variation to what the lease/licence says and notwithstanding the obligation to pay rents on certain times, certain dates. So we will have that documented in what's called a side letter or formal deed of variation that varies a lease. A lease being a deed, it can only be varied by a deed. Then the parties have it clear in writing what the terms are because what is also important is what happens if the tenant fails to pay the varied rent on time.

Tom Morrison:

There have to be termination provisions in there and what we found from the 2008 recession when we had these side letters, promotion letters or rent concession letters going around. Some of the more DIY versions had termination provisions that were very onerous and subsequent cases had shown that if you don't draft those termination provisions correctly, then some of the automatic termination rights can be seen as what's known as "penalties" and make them unenforceable. So, it really is, as Aaron said, important that you take legal advice and properly document not only in terms of the formal requirements, but the content to ensure that you cater for every situation within that agreement such as termination.

Aaron Bennett:

And you do, just to chip in again, just reminded from what Tom was saying, you said, previous financial crisis or when tenants are in difficulty and they approach the landlords to agree terms like this, landlords will then take the opportunity maybe to slot in additional provisions into the documents they're putting forward, which may seem to be relatively painless, but actually the consequences of agreeing to them can be unfortunate if you haven't had them properly looked over. So just watch out for that in any discussions with landlords and again, make sure you're getting legal advice.

Ron Myers:

Thank you. That's really good advice because obviously that's coming from a perspective of what happened in the last crisis and looking at where people run into issues and problems. So I think that's obviously something that our members really should take away from this is that anything that has been agreed should be properly documented with the advice and input of a solicitor. Okay. So in the event that discussions with a landlord maybe sort of don't come up with an agreement and a tenant feels that they can't or are unable to pay the rent, what actually might be available to landlords if the tenant does fail to pay under the agreed terms?

Tom Morrison:

I think I am best placed to answer this one from a disputes perspective, unless you wanted to...

Aaron Bennett:

No, no, please do.

Tom Morrison:

I'm increasingly finding myself at the coalface on this, especially since where we obviously had our last quarter day on the 25th of March. So clearly if an arrangement isn't made, as we've discussed, to defer or suspend or waive rent, then landlords are entitled to try and enforce what is effectively a breach of covenant to pay rent under the lease and any other sums. I've already seen landlords seeking to initiate, for example, insolvency proceedings by serving statutory demands or threatening the presentation of winding up proceedings. Now, I don't agree that that's an appropriate measure to use and it's very heavy handed. It just gives you a flavour of what landlords are seeking to do and institutional landlords are seeking to do because as you can appreciate, they have their own banking covenants, et cetera, that if they're not getting the cash flow in from the tenants, they're in breach of those and subject to enforcement action by their lenders. So there is a real furtive climate at the moment where landlords are looking in the absence of an agreement to take action to try and recover what they can.

Tom Morrison:

For example, they may also seek to issue debt proceedings or dip into rent deposits and start making deductions there. They may look to pursue personal guarantees given by individual directors or former tenants who may have assigned their lease but are still on the hook via guarantee agreements. I don't think in the current climate they would use what's known as CRAR or formerly known as distress for rent, which is getting enforcement agents into the premises to try and seize goods. I think for health and safety reasons, such action would be inappropriate, but you can appreciate landlords are instructing lawyers and taking advice as to what action they can take subject to the new statutory restrictions that have come in recently.

Ron Myers:

Okay. Just to look at that, because obviously that's quite concerning for anyone who is a tenant. I was aware that there was some potentially new Coronavirus legislation revolving around this, does that help at all?

Tom Morrison:

Well, I think you're referring to the Coronavirus Act 2020 which came into force last week and does provide protection to "business tenants" and that's an important definition there. So tenants with business leases effectively, that provides them protection from forfeiture for non-payment of rent. So landlords can't carry out forfeiture, whether by peaceably re-entering or issuing court proceedings - for a period up until the 30th of June this year. That's also subject to further extension by the government if it deems necessary. But it's important that that's forfeiture for non-payment of rent only, so not other breaches, and that it's in relation to business tenants. So if you're occupying under a licence, then you don't fall within that protection. And when I'm referring to rent, rent is defined under the Coronavirus Act as including all sums payable under the lease. So we'd include things such as service charge.

Ron Myers:

Okay.

Tom Morrison:

The act also prevents landlords serving what's known as hostile termination notices under the Landlord and Tenant Act 1954 so that's when you're going through a renewal process where a landlord seeks to deny you a new tenancy based on non-payment of rent, they're not allowed to serve a section 25, or hostile termination notice in respect of non-payment of rent during this emergency period. Also, very recently, last Friday, the courts, have introduced the new practice direction, which effectively suspends all possession proceedings for the next 90 days. So that, in conjunction with the Coronavirus Act 2020, means that tenants will not be faced with possession orders during the next 90 days, whether it's for non-payment of rent or other breaches of their lease. So we do have effectively a moratorium here on forfeiture, but that doesn't provide the protection against the other remedies I discussed earlier with you about statutory demands and insolvency or debt proceedings that may be issued by landlords who are taking an aggressive rather than a collaborative approach here.

Ron Myers:

Okay. All right. So is there any other advice that you could give tenants at this point in time then with the situation as we now do at the moment?

Aaron Bennett:

The other thing Tom and I had just touched on before we did this meeting was just in relation to insolvency. Just the point that there are, and we have at Temple Bright and other law firms will have the same specialist in solvency practitioners and solicitors. And the point being that you need to be cautious about falling foul of any wrongful trading or trading whilst insolvent rules and regulations, which Tom and I current advise on and you need to take specialists advice. The government announcement over the weekend talked or hinted about something maybe coming in that might be some additional protections around that. So just to keep in mind if you are a tenant who is in difficulty and difficulty is potentially going to the extent of insolvency to make sure you do take the correct advice so that as a director and as people responsible for that company, you're sure of your own responsibilities.

Ron Myers:

Okay. And that's probably also even more important as a sole trader as well, I would imagine.

Tom Morrison:

Yes.

Ron Myers:

Okay.

Aaron Bennett:

Yes.

Ron Myers:

All right. Again, I really appreciate your time. I think this has been really, really useful and I know that it's not a hundred percent clear, but I think that's given us a lot of really good guidance towards those individual questions that we've got here that will help members. Obviously, as I stated earlier here, this is guidance and it's certainly not a substitute for specific advice. If any of our members wants to contact you for specific advice concerning their own individual situation, would that be possible?

Tom Morrison:

Yes, of course.

Aaron Bennett:

Yeah, absolutely.

Ron Myers:

Right. Okay, fine. Well, what I'll do, I'll include your details in then when we distribute and publish this podcast out, but thank you again for your time and I hope all of you stay safe and healthy and maybe we'll touch base again at some point in time if the situation changes. Thank you very much.

Aaron Bennett:

Great, thanks Ron.

For specific advice and information, please email Aaron Bennett at Aaron.Bennett@templebright.com or contact your property solicitor professional to ensure that you have the correct documentation for any lease variation agreed.

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