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# Briefing Note: Commercial Property – Breaches of Covenants by the Tenant

## Introduction

This Briefing Note has been prepared for a landlord who is considering the forfeiture of a lease.

When a landlord leases a commercial property to a tenant it is in his interest to monitor the occupancy to ensure that the tenant is complying with his obligations and covenants and the conditions stipulated in the lease. If it transpires that the tenant has breached the terms of the lease then the landlord will invariably want to take steps to protect his position.

This Briefing Note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

**Briefing Note**
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## What type of breach?

There are many covenants which the tenant will have entered into at the outset of the lease and these will deal with such matters as the use of premises, insurance, repair, keeping the business open, alterations, rent, other sums due, the right to assign or sublet, insolvency, planning, illegal or immoral use and the observation of licensing laws. If the landlord establishes that one or more of these covenants has been breached, he will need to ascertain whether or not the breaches are 'once and for all' or 'continuing'. He will then need to ascertain whether or not the breaches are remediable or irremediable.

## Does it matter whether a breach of covenant is a continuing or a once and for all breach?

If the landlord waives (in effect, accepts) a once and for all breach, then the right to forfeit the lease (i.e. terminate it early) for that breach is lost.

Accordingly, so as to preserve the right to forfeit, it is vital the landlord does not do or say anything which could be construed as waiving the right to forfeit in relation to that breach.

If a continuing breach is waived it will continue, as will the landlord's right to forfeit the lease in relation to it.

## Does it matter whether a breach of covenant is capable of remedy or not?

If the tenant breaches a covenant in his lease, other than a covenant to pay rent, the landlord must determine whether the breach is capable of remedy before serving a notice on the tenant under Section 146 of the Law Property Act 1925 (known as a Section 146 Notice). If the breach is remediable (i.e. capable of being remedied) the Section 146 Notice must require the tenant to remedy the breach within a reasonable time.

If the breach is for non-payment of rent and the landlord wishes to forfeit for such breach there is no requirement to serve a Section 146 Notice, at least not in connection with commercial premises.

If the landlord does not allow the tenant the opportunity to remedy a remedial breach in a reasonable time then the Section 146 Notice will be invalid. The result of this is that if proceedings are then taken to forfeit the lease, or the landlord effects peaceable re-entry, it is likely that such forfeiture will be disallowed or open to challenge. It is therefore important that a Section 146 Notice is carefully drafted so that it is valid and enforceable.

## Further requirements in relation to a breach of a covenant to repair

The Leasehold Property (Repairs) Act 1938 applies if the lease was granted for a term of at least seven years and has at least three years left to run.

Section 1 limits the landlord's ability to forfeit the lease in these circumstances. If the tenant claims the benefit of the Act the landlord is unable to take steps to forfeit the lease or claim damages for breach of the

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repair covenant without the consent of the court. When drafting and serving a Section 146 Notice dealing with disrepair it must refer to a tenant's rights under the 1938 Act.

## Considerations prior to forfeiture

A landlord should not demand or accept rent in order to protect his position regarding forfeiture.

It is also important for the lease to be reviewed to establish the exact breach and contractual remedies. It is also important to note the breaches which allow the landlord to forfeit the lease.

The landlord will also need to consider what it wants to achieve; in other words is it acceptable to a landlord to have a vacant property and lose the rental stream that this generates (and very probably to become liable to pay the rates)?

The tenant's solvency may also need to be checked as will the extent of the property, particularly if any part of it is residential as this will affect what forfeiture action can be taken. Consideration will also need to be given to any sub-tenants or other occupiers which may impact upon a forfeiture.

## Forfeiture and the alternatives

Where a tenant is in breach of the lease there are often a number of possible remedies a landlord can pursue. In particular a landlord will need to consider:

- Forfeiture which will bring the lease to an end.
- Self-help for breach of the obligations to repair, which include a landlord's right to enter the property to carry out the works and recover the cost from the tenant.
- Specific performance, which is an action whereby a tenant is ordered to perform its part of the contract, namely to fulfil its obligations - however, the court will not order this if damages would be an adequate remedy.
- Damages to put the landlord back in the position they would have been in if the tenant had complied with his/her obligations.
- Injunctions.

## Deciding how to effect forfeiture

If a decision is made to proceed to forfeit the lease, the landlord will need to determine whether a Section 146 Notice is required or whether to proceed by way of peaceable re-entry or forfeiture proceedings.

## Steps to effect forfeiture

As stated above, if the breach is something other than non-payment of rent, a Section 146 Notice should be served before effecting forfeiture, giving the tenants a reasonable time to remedy the breach. If the tenant does not remedy the breach and the landlord decides to forfeit the lease by peaceable entry then a suitable notice should be placed in a visible position at the property.

## Steps to consider after forfeiture

Once forfeiture has been effected there are further issues which need to be considered:

- The tenant or other relevant parties may apply for relief from forfeiture.
- If there are personal items belonging to the tenant then the landlord may become an involuntary bailee, which means that there are implications for the landlord.

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- Consider if there are obligations owed to third parties who have goods at the property, such as goods on hire purchase.
- Check the position regarding rent, obligations and other liabilities under the lease.
- If the lease was registered then the landlord must take steps to close the leasehold title.

## Summary

For a 'once and for all' and remedial breach the landlord should take steps to avoid waiver and serve a Section 146 Notice requiring the tenant to remedy the breach within a reasonable time.

For a 'once and for all' and irremediable breach the landlord should take steps to prevent waiver and serve a Section 146 Notice, although the landlord does not need to specify that the tenant must remedy the breach.

For a continuing and remedial breach if the landlord waives the right to forfeit a genuine breach will arise again the next day. The landlord should serve a Section 146 Notice on the tenant to remedy the breach within a reasonable time.

For a continuing and irremediable breach if the landlord waives the right to forfeit a genuine breach will arise again the next day. The landlord should serve a Section 146 Notice on the tenant which does not require the tenant to remedy the breach.

The landlord should note that there are further statutory limitations on the right to forfeit a residential lease and where there is a mixed user, i.e. a commercial and residential use.

If you would like to know more about this topic or our other legal services please contact Daniela Bushe on 01323 435900 or daniela.bushe@gabyhardwicke.co.uk

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