



### **Administration of estates involving land during the pandemic**

It is common for the estates of deceased persons to have as part of their assets land occupied by persons other than the personal representatives. This property might comprise residential or business premises let to tenants and generating an income for the estate, or, a common case, property occupied by the deceased together with a licensee (such as an adult child of the deceased) until death and which continues to be occupied by that licensee after death. The circumstances of the pandemic and its attendant legislation may complicate dealings with such premises, and those complications are considered here.

#### **Land generally: delay in selling**

Social distancing measures (see e.g. **Reg. 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350**, prohibiting people from leaving their home without reasonable excuse) make dealing in land during the pandemic impractical in many cases: even though moving house “where necessary” is deemed to be a reasonable excuse (*ibid* **Reg. 6(1)(l)**), people will not realistically be able to view properties or have them surveyed.

Normally, personal representatives must realise the property of the estate within one year of the deceased’s death (“the executor’s year”): it is for the personal representative to justify any delay beyond that period: *Grayburn v. Clarkson* (1868) L. R. 3 Ch. App. 605. It is unlikely to take expert legal analysis to deduce that the inability to sell property because of the difficulties mentioned above is likely to be capable of amounting to a reason justifying delay, but personal representatives should be astute to recognise when conditions change such that a sale may be effected so as not to allow a period of unjustifiable delay to follow a period of justifiable delay.

Since the only method of enforcement of this duty is on the beneficiaries of the estate, where the beneficiaries be content to tolerate a greater delay (perhaps because they all wish to delay realising real property so that they will not have to sell in what might transpire to be a temporarily depressed market), there will not be a problem, but difficulties (including, potentially, a claim to remove the personal representatives in sufficiently serious cases) may arise if all beneficiaries be not content with such a course of action. In the case of any doubt, consultation with the beneficiaries is the safest course of action.

### **Business tenancies**

Where the estate is a landlord of a business tenancy, the personal representatives of the estate will need to ensure that any debts owed to the estate by the tenants be paid. It is their duty to the beneficiaries to get in the debts owed to the estate.

In many cases, however, businesses will have difficulty in being able to pay rent during the current pandemic, especially where those business premises are retail premises that have been forced to close.

Further, the ability to obtain possession of business premises for non-payment of rent is abrogated during the “relevant period”, which currently expires on the 30<sup>th</sup> of June 2020, but may be extended by “the relevant national authority” by **Section 82** of the **Coronavirus Act 2020**. During this period, a landlord of business premises, including the estate of a deceased person, is not entitled:

- to forfeit the premises for non-payment of rent (by any means) (**Section 82(1)**);
- to obtain possession of the premises by court order for non-payment of rent (**Section 82(4)-(8)**); or
- to rely on non-payment of rent during the relevant period to refuse to grant a tenant with security of tenure a new lease (**Section 82(11)**).

However, the **Act** is worded in such a way that a court may *make* an order for possession during the “relevant period” providing that the order itself does not take effect during that period (*ibid*).

Nothing in the legislation entitles the tenants to stop paying rent: it merely prevents the landlord from enforcing the payment of rent by one particular means, *viz.* the obtainment of possession. Even if it were not for this legislation, bailiffs are in any event not operating during the pandemic, so any order providing for possession would not practically be enforceable.

Ordinarily, forfeiture of business premises is an effective way of enforcing the obligation to pay rent: however, given that it is unlikely that the premises will be able to be re-let for the same amount in the near future, this would not have been likely to have been an economic remedy in any event.

That debts owed under commercial leases cannot be enforced by forfeiture does not mean that they cannot be enforced at all or that personal representatives of estates have no obligation to enforce the payment of any unpaid rent. Any unpaid rent can still be enforced by obtaining money judgment. Because **Section 82(2)** of the **2020 Act** prevents anything other than an express waiver in writing operating to waive any breach giving rise to a right to forfeit, there is nothing to stop a landlord obtaining a money judgment *and* (after the end of the “relevant period” as may be extended) forfeiting the business premises for the past failure to pay rent, although consideration will have to be given in each case to whether this is economic in light of the prevailing market conditions at the material time.

Any unpaid money judgment, in turn, can be enforced in any of the usual ways, including:

- by an order taking control of goods (although again bailiffs are not currently operating, so this is likely to be delayed);
- by a charging order on any land owned by the debtor;
- by a stop order on any shares owned by the debtor;
- by a third party debt order in respect of any debts owed to the debtor by third parties, including banks;
- by calling upon any personal guarantor of any lease; or
- by bankruptcy, or, in the case of companies, winding up.

Ordinarily, the directors of any company that had continued to trade while insolvent (e.g. by paying suppliers of goods or paying staff knowing that it would be unable to pay its rent) would be liable, on the winding-up of the company, to contribute towards the company’s funds in an action brought by the liquidator. It has been announced by the government that legislation will be introduced to suspend this liability during the pandemic, and that such legislation will be retrospective in effect to the beginning of the pandemic, but, as at the date of writing (the 24<sup>th</sup> of April 2020) this has not been forthcoming, and no details of how this will work are known. Unless and until such legislation be passed, the ordinary position apropos wrongful trading will obtain.

Personal representatives who find themselves as temporary commercial landlords in these difficult times may have no experience of dealing with business tenants in ordinary circumstances and may well find dealing with commercial tenants who are not paying rent in these circumstances especially challenging. They will have to weigh carefully the commercial considerations in favour of taking action to seek swift recovery of sums due against the costs of doing so which may ultimately be unenforceable against a thoroughly insolvent tenant. They will also have to take the potentially highly complex decision as to whether, in their discretion, to be lenient to a tenant in all manner of possible ways (waiving rent for a period, agreeing a deferred repayment plan, etc.) in the hope that, by that leniency, they will be able to prevent the tenant's business from becoming insolvent and thus maximise the estate's long-term financial position, especially if the rental market may remain significantly depressed for many months after landlords again become permitted to enforce their rights by obtaining possession.

For an ordinary commercial landlord, this would be a difficult decision: for a personal representative who may have no experience in acting as a commercial landlord, this may be extremely challenging. In particular, a personal representative may have to weigh the competing interests of different beneficiaries, some of whom need funds quickly, others of whom would prefer to wait longer for their inheritance in order to receive more. If beneficiaries cannot all agree among themselves on a course of action, it may be necessary to seek directions from the court. Likewise, a personal representative seeking to bring proceedings against a commercial tenant for failing to pay rent (or any proceedings, e.g., to enforce a personal guarantee) is likely to be well advised to seek a *Beddoe* order (*Re: Beddoe (Downes v. Cottam)* [1893] 1 Ch. 547) from the court, authorising the bringing of proceedings, so as to avoid the risk of the personal representative being personally liable for the costs of the litigation. Such an application could readily be considered by the court by a telephone or videoconference hearing.

### **Residential tenancies**

Residential tenants, too, may be unable to pay their rent if they have lost their jobs or sources of income, and they, too, have been afforded in legislation a measure of temporary protection (and afforded perhaps a greater degree of such protection by the practical expedient of the suspension of the operation of bailiffs).

**Schedule 29** of the **Coronavirus Act 2020** deals with residential tenancies. Most such tenancies with which private landlords are concerned will be assured shorthold tenancies, to which **Paragraph 7** of

that **Schedule** applies. That paragraph extends the period which landlords are required to give to residential tenants under **Section 21** of the **Housing Act 1988** from two months to three, and the legislation contains a power for the minister to extend this period to six months.

Likewise, **Paragraph 6** of **Schedule 29** requires the same three month notice period for the service of a notice under **Section 8** of the **Housing Act 1988**, likewise delaying landlords' right to recover possession from a tenant for breach of the agreement (no matter what the breach and whether related to the pandemic or not). This period is also extendable to six months.

As with the provisions relating to business tenancies, this does not affect the tenants' obligation to pay the rent, which can be enforced by obtaining a money judgment in the same way.

Also as with business tenancies, landlords will have to consider whether to be lenient or strict on tenants, which may be a complex decision: one factor that may favour leniency is a possible reduction in the demand for residential tenancies if the pandemic has a more than very short-term economic effect, and a possible long-term reduction in demand if, through exigency, employers and employees alike in many businesses discover that remote working was far easier than they had hitherto imagined, and subsequently consider it more to their advantage to abandon office premises entirely and allow employees to work from home, allowing employees to live anywhere in the world rather than near a particular physical location. In such circumstances, there may be benefit to a landlord to be lenient during the pandemic to a good tenant in the hope that he or she will remain on the current rent for long afterwards; but this is a complex commercial decision that requires detailed and careful consideration of the individual circumstances in each case.

As with business tenancies, a personal representative being a landlord would be likely to be well advised to seek a *Beddoe* order before taking proceedings against a residential tenant.

## **Licensees**

The most common situation is where a relative (or even perhaps a friend) of the deceased had lived with the deceased immediately before her or his death and continues to reside in the deceased's property after death; it is on that situation that this article will focus. Where this person inherits the property in full, inherits a life interest in it, or inherits an interest under a trust of land entitling that person to occupy the premises, then the situation is usually straightforward, and the person can normally continue to reside there rent free without difficulty.

The difficult case is where that person is not in one of those categories. Often, that person is a beneficiary of the deceased's will or benefits by intestacy, but shares, whether equally or not, with other beneficiaries all entitled to a share of the deceased's property, which can only be realised by selling that property and first evicting its inhabitant in order to do so. Sometimes, this inhabitant will seek to challenge the will or to make a claim under the **Inheritance (Provision for Family and Dependants) Act 1975** with the aim of establishing a right to remain in the property indefinitely.

Such cases can be difficult in ordinary circumstances, but are complicated further by the current pandemic. Obtaining possession in the short-term is not feasible because the services of bailiffs have been suspended.

Such a person residing with the deceased is likely to have been a licensee. A licence to occupy premises granted by a person is revoked automatically by that person's death. Thus, such a person remaining in premises after the deceased's death is a trespasser. However, having entered lawfully, he or she would have the protection of the **Protection from Eviction Act 1977** and could only be evicted by court order.

However, a trespasser is also liable to pay use and occupation charges ("*mesne profits*") for occupying the premises unlawfully, most usually assessed by reference to a notional market rent for the premises. Where the occupier is also a beneficiary of the estate, the estate can set off any debt owed by the beneficiary against any distribution that the beneficiary may be due from the estate under the rule in *Cherry v. Boulton* (1839) 2 Keen 319. This case applies to an "ascertained" amount, and it is arguable whether a sum due by way of use and occupation charges is an "ascertained" amount or not. However, even if the estate has to bring proceedings against the occupier to ascertain this sum, once that has been done, this (together with the costs ordered in the proceedings) can then be set off against the estate as described.

*Personal representatives should not forget that, in this accounting, where the property be occupied by a beneficiary of the estate, the use and occupation charges payable to the estate by that beneficiary may well, depending on the terms of the will or the relevant law on intestacy, be repayable in part to the occupying beneficiary (generally, where that beneficiary is entitled to a share in the property itself). For example, in a simple case where the occupying beneficiary is entitled to half the entire estate, the occupying beneficiary will be liable to pay the whole of the use and occupation charges to the estate, but be entitled to receive half of these back from the estate, giving rise to a net liability of half the use and occupation charges that can be set off against the beneficiary's share on distribution of the estate assets.*

*Thus, where there is a substantial sum due to be distributed to the occupying beneficiary once the estate has been realised, assuming a sale of the property, the estate may well be no worse off in the long-term for permitting the current occupant to continue to reside there for the time being. A personal representative may well be justified in taking a lenient view of such an occupier in the short-term in these circumstances, especially where there is no dispute or only a limited dispute among the beneficiaries. Considerations may be different, and matters more urgent, however, if the current occupier be at risk of damaging the property, the other beneficiaries have an urgent need for the distributions from the estate that require selling the property, or the property in question should comprise leasehold premises with a limited amount of its term remaining.*

*The **Coronavirus Act 2020** does not make any provisions with respect to claims against trespassers, so there is no legal impediment to instituting proceedings against such a person forthwith should it otherwise be appropriate to do so. However, the fact that bailiffs' work has been suspended will provide a practical impediment in executing any such order, and courts are currently slow to list possession claims. If the matter be urgent, a claim should be made forthwith in any event, and the urgency made very clear in the claim form and particulars. The sooner that an order can be obtained, the sooner that it might be executed following the resumption of bailiffs' activities.*

*Where there is a possibility of settlement (e.g. of an intimated claim under the **Inheritance (Provision for Family and Dependants) Act 1975**), the additional delay might be used to engage in such negotiations, although in some cases at least intransigent defendants may be reluctant to negotiate seriously whilst they are happily in occupation of the deceased's property. Nonetheless, there is no reason not to make some clear attempt to engage in without prejudice save as to costs correspondence, and, especially where there is a money claim, the claimant estate would do well to make a Part 36 offer at the earliest opportunity.*

*Where the occupier is a beneficiary and thus the dispute is between or among the various beneficiaries, a Beddoe order is inappropriate. However, where the licensee is not a beneficiary, the same considerations as to Beddoe orders apply as they do in cases of landlord and tenant, dealt with above.*

## **Conclusion**

*Personal representatives dealing with estates involving land occupied by others often face difficult decisions in ordinary circumstances. The frequency of difficult decisions is likely to be increased by the current pandemic, and the means of resolving them complicated by it.*

*The primary consideration for the personal representatives must always be to act in the interests of the estate as a whole, to consider the economics of any potential course of action weighed against any other and take whatever action is ultimately in the best interests of the beneficiaries generally. There will often be decisions about whether and to what extent to be lenient in respect of a tenant or licensee of estate property, and those decisions need to be made in light of careful consideration of the economics of the consequences in the particular circumstances.*

*Where any potential dispute is with a third party, consultation with beneficiaries is important, and a Beddoe order may well be advisable and sensible. Where the dispute be among the beneficiaries themselves, the personal representative, who may often also be a beneficiary, must make sure to administer the estate and account properly, but need not be discouraged from taking robust action against another beneficiary who is acting improperly vis a vis the estate where appropriate.*

James Petts

36 Commercial

+44 (0)20 7421 8051

[clerks@36commercial.co.uk](mailto:clerks@36commercial.co.uk)

<https://36group.co.uk/commercial>