

Let's All Play (Extraordinarily) Nicely..

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Landlords who are already feeling aggrieved by the raft of restrictions that have been or will be imposed on their usual remedies against defaulting tenants may be riled further by a recent government announcement.

On 7 May 2020, the Cabinet Office and Infrastructure and Projects Authority issued non- statutory guidance entitled 'Guidance on Responsible Contractual Behaviour in the Performance and Enforcement of Contracts impacted by the Covid-19 Emergency'. The government is strongly encouraging everyone (and specifically includes within this funders and public authorities) to act responsibly and fairly, in particular in respect of potential disputes. In short, the message is 'Bad behaviour will be bad for jobs and impair our economic recovery'.

The guidance is aimed at those matters where performance of contracts (including an obligation to make payment) is 'materially' impacted by Covid-19. This ties in with the recent announcement confirming a temporary ban on statutory demands and winding up petitions where tenants 'cannot pay' their debts due to coronavirus. With the unprecedented grinding to a halt of many sectors of the economy across the UK, there may be many businesses that are able to argue a material impact.

Responsible and fair behaviour is strongly encouraged in numerous scenarios that cover a large remit of potential contractual disputes and would therefore catch many property related disputes, such as requesting and giving relief for impaired performance, the making of payments, requesting and allowing extensions of time, making and responding to claims for damages, including liquidated damages, calling of bonds or guarantees, enforcing events of default due to insolvency, giving notices, making and responding to requests for contract changes, variations and responding to requests for consent. Ultimately, the objective is to try to ensure that contractual and economic activity can be preserved and will be ready to continue in a sustainable way once the current emergency is over, supporting the restart of the economy and maximizing UK productivity and growth. The guidance must surely also address the concern that an already under resourced and currently compromised court system would crack under the strain of a deluge of claims.

The guidance is not binding but will no doubt be referred to readily by parties threatened with enforcement action. Yet, they need to appreciate that the guidance to behave responsibly also applies to them, particularly if they are taking advantage of the pandemic to avoid contractual liabilities which they can in fact meet. The important point is to ensure that the objective of the guidance is passed through the contractual/liability chain. The requirement to explore other avenues of ADR is now greater than ever so that the 'extraordinary' response that the government is asking for from businesses can be achieved.