

THE IMPACT OF CORONAVIRUS ON COMMERCIAL LEASES IN THE UK

The UK Government has announced that "*all non-essential businesses and premises must now close*".

Landlords and tenants must comply with emergency laws enacted by the UK Government. These laws are likely to override any conflicting obligation in their occupational lease (for example, a tenant's "keep open" covenant or a landlord's obligation to provide services).

This briefing considers the key issues arising from this for both landlords and tenants under commercial occupational leases.

WILL A TENANT BE ENTITLED TO TERMINATE ITS LEASE?

Generally, no. However, the terms of each lease must be closely examined for any specific provisions which might enable the tenant to terminate (for example, a tenant's contractual break right).

WILL THE FORCED CLOSURE "FRUSTRATE" A LEASE?

It is unlikely that a tenant could successfully argue that their lease had been frustrated and so, brought to an end. The UK Courts have never held a lease to be frustrated, despite a number of attempts by tenants to argue otherwise. Most recently, the European Medicines Agency argued that its 25-year lease in Canary Wharf granted by its landlord, Canary Wharf Group, had been frustrated as a result of Brexit. The Courts disagreed.

It is possible that the recent Government announcements forcing closures could amount to *supervening illegality*. However, we think it highly unlikely that the Courts would risk opening the "floodgates" to a deluge of claims, which could have a significant impact on the economy and the market.

WILL A TENANT BE ENTITLED TO STOP PAYING RENT?

The usual position is that a tenant is obliged to pay the contractual rent unless any rent suspension provision in the lease applies.

Key issues

- Forced closures are unlikely to "frustrate" leases.
- Tenants who cannot pay their rent will be protected from forfeiture if they miss any payment in the next three months
- Landlords are not obliged to agree rent "holidays", but may wish to agree temporary concessions in the current exceptional circumstances.
- Any rent concession are likely to require lender consent.

Typically, commercial leases provide for payment of rent to be suspended where damage to the Building renders it unfit for occupation and use or inaccessible. It is unlikely that the circumstances and closures relating to the coronavirus would trigger any such tenant rights to suspend payment of rent.

WHAT IF A TENANT STOPS PAYING RENT?

In the usual way, the landlord's remedies for non-payment of rent will include:

- bringing an action to sue for the unpaid rent (plus interest);
- threatening and/or issuing a statutory demand under s.123 of the Insolvency Act 1986, enabling a winding up petition to be made if payment is not made within 21 days;
- forfeiture (if provided for in the lease) by either issuing proceedings for the forfeiture of the lease or peaceably re-entering the premises, potentially with a claim for damages;
- CRAR (Commercial rent arrears recovery procedure);
- injunctive relief requiring the tenant to pay.

However, in deciding which course of action to take, landlords should bear in mind the points highlighted in the paragraph below.

WHAT PROTECTION WILL TENANTS HAVE AGAINST ACTION TAKEN BY LANDLORDS FOR NON-PAYMENT OF RENT?

Protection from forfeiture

The Government have issued a press release advising that commercial tenants who cannot pay their rent will be protected from forfeiture if they miss any payment in the next three months.

These draft measures are included in the emergency Coronavirus Bill. Once passed, this will apply until 30 June 2020.

This Bill also provides that in relation to any forfeiture proceedings commenced for non-payment of rent before the legislation comes into force, any order for possession must not require the tenant to give possession whilst the restrictions are in effect.

Whilst the draft Coronavirus Bill does not impose a rent holiday or rent deferral, these provisions will allow help tenants by effectively shifting the cashflow issue to landlords. The Government's press release notes that it is "*actively monitoring the impact on commercial landlords' cash flow and continues to be in dialogue with them*".

Insolvency

If a tenant is subject to any ongoing insolvency procedure its landlord's rights to terminate for non-payment or tenant are put on hold and the landlord cannot issue proceedings without a court order. In the current circumstances, obtaining any court order will be delayed and the Courts are unlikely to look favourably upon such an application..

Reputational risk

Before taking any action, landlords should also consider the risk of reputational damage. Landlords should be mindful that without some further

assistance in addition to the business rates relief and payment of wages offered by the UK Government last week, many tenants may be quickly forced into insolvency. Landlords should consider the advantages and disadvantages of maintaining good relationships with their tenants and temporarily relaxing lease covenants and seeking to retake possession in the short term.

DO LANDLORDS HAVE TO AGREE TO TENANTS' REQUESTS FOR A RENT "HOLIDAY"?

In short, no. However, Landlords will need to weigh up the impact of the disruption to its rental income and the benefit of keeping a good relationship with its tenants and once the pandemic passes, having an occupied property which is income generating.

Before agreeing to any concession, Landlords should check the terms of their loan agreements carefully; affording these concessions to a tenant without lender consent, may amount to an event of default under the loan, entitling the lender to take enforcement action.

Any concession which is agreed should be formally documented and should deal with the amount and length of any concession and whether or not the unpaid amount is to be repaid and if so, when. If you are considering or making requests of this nature, please contact one of our Real Estate specialists for specific advice.

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