

COVID-19 Briefing: Landlord and Tenant

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It is now clear that we are facing unprecedented challenges as a result of the outbreak of COVID-19. On 12 March the UK Government moved from the “containment” phase to the “delay” phase and although public gatherings have not yet been cancelled in England and Wales, there is a clear message that this is being considered for later in the cycle.

As well as the health risks, the virus is likely to have a significant impact on how we use and manage real estate across England and Wales, with serious legal and practical considerations for landlords and tenants of commercial premises.

Closing/Restricting Access to Premises

At the time of writing there is no guidance from the authorities requiring particular buildings to be closed but this could change at any time.

Landlords wishing to temporarily close premises or require a tenant to vacate must consider the lease and the circumstances carefully. Such action might bring an argument from the tenant of a derogation from grant or breach of quiet enjoyment, and could even be argued as an act of forfeiture. Where premises should be closed as a result of government guidance, then the landlord’s best argument under the terms of the lease is pursuant to the tenant’s obligation to comply with statutes, notices and orders of competent authorities (a standard provision in most commercial leases).

If the closure is taken as a precaution then it is best to document the reasons, communicate with the tenant and (if time permits) seek professional advice. Depending on the terms of the lease, landlords may be entitled to close or restrict access to common parts.

Tenants wishing to temporarily close their premises will be free to do so unless their lease contains a keep-open provision. Such a keep open provision would then need to be balanced against the tenant’s obligation to comply with government guidance. In practice, the landlord’s only likely remedy for breach is likely to be damages, rather than being able to take direct action to force the premises to re-open.

Facilities Management Issues

Landlords responsible for the cleaning and maintenance of common parts will be looking to provide more frequent and meticulous cleaning services, as well as additional resources such as hand sanitiser. Recoverability of the additional costs via the service charge will depend on the terms of the lease.

The question of whether landlords can be required to provide such additional services is more difficult. Leases usually afford landlords a degree of discretion over services to be provided and this will need to be considered on a case by case basis. This is probably best resolved by discussion and any agreement on who is responsible for the extra cost being recorded.

Rent Suspension

Tenants who are unable to use their premises as a result of COVID-19 may look to secure a rent suspension for that period. However, most commercial leases only allow such a suspension if the premises are damaged, destroyed or unusable due to an insured risk. Otherwise the tenant will need to pay the rent without deduction or set-off.

Tenants may be able to look to business interruption insurance to cover losses suffered over this period, depending on the terms of the policy.

Termination of Leases

It is highly unlikely that either landlords or tenants will be able to terminate their leases as a result of COVID-19. The two arguments available in this regard would be force majeure or frustration. Force majeure is available only in the unlikely event that the lease contains a specific provision that is applicable to the particular circumstances. Frustration (a supervening event which either renders the lease impossible to perform, or fundamentally changes the nature of performance) is technically possible but there have been recent failed attempts to end leases for frustration as a result of Brexit, which could be seen as a far more fundamental change from a legal perspective. It therefore seems unlikely that the outbreak of COVID-19 would constitute a frustrating event in the context of a lease.

Construction Issues

Both landlords and tenants may experience issues as a result of the impact of COVID-19 on development programmes. Contractors may be entitled to claim time or money should works be delayed as a result of COVID-19.

Landlords may need to consider the effect of delay on development milestones in agreements for lease which may trigger a liquidated damages clause, and the risk of a disconnect between the potential liability to the tenant and what may be recoverable under the building contract.

Our briefing note [Construction and Covid-19](#) reviews the impact of the virus on the construction sector in more detail.

Other Resources

Landlords or tenants concerned about the impact of COVID-19 on staff and employment issues may be interested in our related briefing [COVID-19: Government Publishes New Guidance for Employers](#).

Landlords or tenants considering the implications of keeping their premises safe as a workspace should review our briefing [COVID-19 Guidance: Safety, Health and Environment](#).

Top Tips for Real Estate

Let's hope that the health risks and disruption caused by COVID-19 are kept to a minimum, but where there are issues then you should carefully consider and keep evidence of:

1. The current government guidance at the time you are making your decision, and notes of your own thought process
2. The terms of the lease - this is key to the landlord and tenant relationship
3. Emails and correspondence with the other parties to the lease, including attempts to seek agreement to a specific courses of action (and get any such agreements in writing)
4. Any written advice from health and safety professionals, solicitors or others.

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