

## **Impact of Coronavirus for retail tenants – some basic questions and answers**

Following the Prime Minister's announcement on 23 March that all shops selling non-essential goods must close. Will we be breaking the terms of our lease?

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**Please note: the information contained in our legal updates are correct as of the original date of publication**

### **Following the Prime Minister's announcement on 23 March that all shops selling non-essential goods must close, we have been forced to close our premises. Will we be breaking the terms of our lease?**

Many retail leases contain a 'keep open' covenant which requires the tenant to keep its premises open for trading. Some of these covenants have exceptions where there are circumstances beyond a tenant's control. Even if they do not, the lease will include a covenant to comply with applicable law and forced closure will meet that qualification. Even if a keep open covenant is not qualified, we believe the requirement to comply with applicable law will override the keep open covenant. As a result, closure will not be breaking the terms of the lease.

If you closed before the Prime Minister's announcement was made, landlords will argue that you broke your 'keep open' covenant, but there may be other arguments that you were entitled to close.

### **We are not on the list of businesses that are required by the government to be closed. However, we have taken the decision voluntarily to close our premises to protect our staff. Will this put us in breach of our lease?**

This will only be an issue if your lease contains a keep open covenant. If it does, closing voluntarily will break the keep open covenant. Having said that, a court will not order a tenant to keep trading against its will (known as an order for 'specific performance'). A landlord may be able to claim damages (compensation) from its tenant, but would have to show that it has suffered loss as a result of the tenant's breach of covenant. Unless the rent is based on a tenant's turnover from a property, that will be very hard for a landlord to establish and quantify. In any event, from a public relations perspective, we would be very surprised if a landlord chose to pursue a tenant for breach of a keep open covenant in the current climate.

### **If we do remain open, who is responsible for managing the virus?**

Tenants will be responsible for managing the spread of the virus within their premises and this will include taking responsibility for employees, customers and visitors. Any tenant that does remain open will need to be very strict about following the Government's guidelines around social distancing, cleaning of premises and handwashing. Landlords will be responsible for managing the spread of the virus in relation to the shared parts of a building, shopping centre or estate.

## **If our landlord incurs additional costs in complying with its obligations (e.g. deep cleaning, extra hand sanitisers etc.) will it be able to pass the cost on to its tenants under a service charge?**

This will depend on the exact wording of the service charge clause in question. However, most service charge clauses in business leases will allow landlords to recover the cost of complying with applicable law in relation to communal areas. So unless a tenant's annual service charge liability is fixed or capped or included within its rent payments, most landlords will be able to recover the cost.

## **Money is clearly tight at the moment and we have little or no income coming in to our business. Will we be able to reduce or suspend our payments of rent, service charge etc.?**

Not unless you reach agreement with the landlord. Most business leases suspend rent in certain circumstances, but those circumstances invariably require physical damage or destruction of property.

Having said that, a number of landlords have already relaxed their tenants' obligations and large High Street retailers are requesting concessions from their landlords. These take many forms. Some landlords have granted an immediate rent "holiday" for the next 3 months. Others are offering reduced rent for a fixed period whilst others are offering restructuring of rent payments (e.g. paying monthly rather than quarterly). Whilst a landlord is not obliged to agree to any concession, it is to be hoped that, in the current climate, landlords are prepared to 'share the pain' with their tenants. Where a landlord is highly geared (has a large amount of debt) it cannot agree concessions without support from its funders.

If your landlord offers the benefit of a concession, the concession must be clearly and properly documented to avoid impacting any "break" clause you may have. Before agreeing anything, you need to understand how the concession operates (e.g. does a rent 'holiday' mean that you never have to pay the rent for that period, or does it just defer payment of that rent until the current crisis has passed). It is also important that any concession commits anyone the landlord transfers the property to.

At the end of the day, this all comes down to what you can agree with your landlord (and its funders), but given that 'we are all in this together', we expect more and more landlords to make concessions.

We have also commented below on the new law which stops landlords terminating leases for non-payment of rent for the next 3 months. However, you should not simply stop paying rent without taking advice as non-payment can impact tenant break clauses and landlords have other remedies.

## **If the Landlord won't help us on the rent, have you got any other ideas?**

The Government has announced a substantial package of support for businesses and there is guidance on these issues elsewhere on our Coronavirus Hub.

If you are permitted to stay open, but are worried about substantially reduced footfall, you could ask your landlord about reducing your hours of trading and saving some staff costs that way. If your landlord offers the benefit of a concession, the concession must be clearly and properly documented to avoid breaking any keep open covenant or impacting any break clause.

Or can you re-think your model and offer home delivery?

## What about business rates?

Where a tenant is responsible for business rates under a lease, the obligations last for as long as the lease continues. However, last week, the Chancellor announced that business rates will be suspended for a year for all retail, hospitality, leisure and nursery businesses in England. This relief will be applied by local Councils and the detailed guidelines given by the Government to those Councils refer to it as a discretion. Given that the relief will be funded by the Government, it is expected that Councils will apply the relief. The guidelines describe which properties should benefit from the relief. If you believe that the relief will apply to you, we suggest that you immediately contact your specialist ratings adviser, or the relevant Council as each Council will deal with this in their own way.

## If we are unable to pay our rent and other sums due under our lease (and cannot come to an amicable agreement with our landlord), could we be evicted by our landlord?

Under the Coronavirus Act 2020, a landlord cannot forfeit (terminate) a lease because a tenant fails to pay rent or any other sums it is required to pay under its lease until at least 30 June. There is power in the Act for the Government to extend this period. Please note that the Act does not suspend the rents and other sums, which will remain due and payable. This means that once the moratorium is lifted, landlords will still be able to forfeit (or threaten it) for any rent arrears built up during the 3 month period.

You should not simply stop paying rent without taking advice as non-payment can impact tenant break clauses and landlords have other remedies.

The other remedies are:-

- A - Seizing goods in settlement of outstanding arrears;
- B - Charging interest on arrears;
- C - Suing a tenant in Court for the arrears;
- D - Taking steps to wind up a tenant (putting them into insolvency).

It may be that a landlord would suffer PR damage if it pursued the remedies above, but there is no guarantee it will be concerned about this. In addition, a landlord who has borrowing secured on the property may be required by its funders to pursue the remedies mentioned above..

## So does that mean that our landlord cannot sue us for those payments?

A landlord can still sue for rent and other sums, as this is not covered by the Act. Again, from a public relations perspective, it would be surprising if a landlord decided to go down that route.

## Will we be able to claim on our business interruption insurance?

Most business interruption insurance policies only cover physical damage, but contingent policies may cover pandemics and Coronavirus has been designated a pandemic by the World Health Organisation. However, this will depend on the exact wording of your policy and needs to be considered on a case-by-case basis.

## Can we unilaterally terminate our lease?

Under English law, contracts may be 'frustrated' (brought to an end automatically) when something occurs after formation which makes it impossible to fulfil the contract or transforms the obligations under it into radically different ones from those undertaken at the start of the contract. Unfortunately, there are no reported cases where frustration has been successfully argued in relation to leases (it didn't work for Brexit!) and we doubt that a court would regard the outbreak of the Coronavirus as a frustrating event.

You may of course be able to terminate your lease using a break clause if a break date is imminent. If so, please take legal advice at an early stage, well in advance of the break date, to ensure that you fully comply with the requirements for exercising the break right. There have been numerous cases over the years where landlords have successfully argued over a technicality, that a break right has not been properly exercised. There may also be difficulties in serving break notices, when there isn't anyone physically present at the landlord's premises to sign for the notice.

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