



THE IMPACT ON COMMERCIAL LEASES

26 March 2020

Landlords and tenants are facing unprecedented challenges in the wake of the rapidly evolving COVID-19 pandemic. Many retail and leisure premises are now closed and office buildings are increasingly empty in light of the latest guidance from Government. It is in that context that billions of pounds of rent due yesterday went unpaid.

Are tenants required to pay their rent?

Suspension of rent

Leases commonly provide for rent to be suspended if the premises are damaged by insured, and in some cases uninsured, risks. The detail should be checked carefully, but if physical damage is the trigger, a suspension is unlikely to be engaged by COVID-19.

Frustration

Currently, it seems very unlikely that the results of the current pandemic will be sufficient for a lease to be set aside on the basis of “frustration”. While it is possible for a lease to be frustrated, the bar is a very high one. This was demonstrated in last year’s High Court decision confirming that Brexit was not a frustrating event for a 25-year lease to the European Medicines Agency. Indeed, there are no reported examples of it being reached. This is something that may well be challenged, particularly if the COVID-19 restrictions are prolonged.

Agreed concessions

That said, many landlords are agreeing rent deferrals, monthly payments or other concessions in the circumstances. Service charges may also be reduced if savings can be made as a result of reduced services, although that may not always be possible.

Landlords are likely to be able to draw on any rent deposits, but many are electing not to do so (at least for the time being). If they do make a withdrawal to cover rental shortfalls, landlords may be willing to defer or waive their entitlement to a top up.

Early and frank engagement between the parties will be critical in the face of the current challenges, as the British Property Federation has urged.

Protection for tenants

In addition, the Coronavirus Act prevents a landlord from forfeiting a lease of business premises on the grounds of non-payment of rent from tomorrow until at least 30 June 2020. It is perhaps unlikely that forfeiture would be pursued in the current circumstances in any event. But this will not change the obligation to pay rent (or interest on late rent). The landlord remains free to take other enforcement action, including under rent deposits or guarantees, and even to forfeit if rent remains unpaid once the restriction ends.

Will landlords close their buildings?

The position so far

Government guidance to date has been addressed primarily to individuals and to certain businesses, such as retailers. As such, landlords have not yet been required to close buildings (such as multi-let offices or shopping centres).

A lease confers a right for the tenant to occupy its premises. It is not generally permissible for a landlord to prevent a tenant's access to its premises, even if that may be a prudent step in light of current guidance. Many leases will, however, contain protections for landlords who are unable to provide certain services due to the effects of COVID-19, such as a shortage of key staff.

It is also worth noting that many leases will contain "keep open" covenants on the part of tenants, which are unlikely to be enforceable in the current circumstances.

What next?

The Coronavirus Act contains powers for the Government to close or restrict entry to premises. The Government will be able to impose requirements on owners and occupiers. Both landlords and tenants will therefore need to monitor carefully any further guidance or directions issued and take steps to ensure compliance.

What other support is the Government offering for commercial property?

The main support directly related to property is in relation to business rates. Retail, hospitality, leisure and nursery businesses will be granted a 12-month business rates holiday for the 2020 to 2021 tax year. Properties that will benefit include shops, restaurants, cafes, drinking establishments, cinemas and live music venues; estate and letting agencies; assembly and leisure venues; and hotels, guest and boarding premises and self-catering accommodation.

There will also be cash grants for businesses in these sectors which occupy property with a low rateable value (below £51,000).

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



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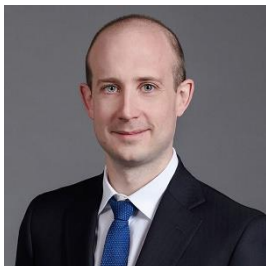
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