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InBrief: Tenant FAQs during Covid-19

Inside

Introduction

The impact of Covid-19 is constantly changing for the real estate sector, from construction sites and developments being shut down; to new approaches for planning inquiries and a mutable landscape for lease negotiations. Nothing is set in stone. Therefore, we have pulled together a selection of the questions we are being asked by clients and will be updating this regularly.

Termination

Can I terminate my lease by exercising a break clause?

Whether or not a tenant can terminate its lease by exercising a break will depend on the terms of the lease and, specifically, the break clause.

Ordinarily when exercising a break, the tenant needs to give notice to its landlord. Notice periods can often be three months or more, and so any termination of the lease will not be immediate. This means that a tenant needs to consider whether this will provide any assistance to them in current circumstances. Occupiers with multiple premises are taking a holistic view across their portfolios to determine whether now is the time to divest of surplus space and consolidate, whether to sit tight, or to explore other options . A break at the right time and for the right premises could be a less expensive alternative to approaching a landlord for a surrender.

The terms of any break clause will also have to be closely reviewed to ensure that, if exercised, the tenant can comply with any conditions. Conditions will often include: vacating the premises; removing all furniture; and, possibly, the removal of any alterations fitted by the tenant - all of which may be difficult to comply with at the moment. Another common condition is for the tenant to have paid all the rent (which may include service charge, insurance and other payments under the lease) up to the break date. This condition may cause difficulty for those tenants who have experienced a drop off in their businesses due to Covid-19 and have struggled, or been unable, to pay rent to their landlord.

It should be noted that the conditions of a break clause are interpreted very strictly indeed. If the conditions are not fully complied with (whether due to issues with cash flow or restrictions preventing access to the premises for the purposes of vacating) then the break will be very likely to fail - unless the tenant has been able to reach an agreement with the landlord to modify, or waive, the break conditions.

What about force majeure clauses?

Force majeure clauses are often found in contracts as a way of removing liability for natural and unavoidable catastrophes that interrupt the course of events and prevent individuals from fulfilling their contractual obligations. They are not, however, a means of rescuing a party from a bad bargain.

At present, most commercial leases will not include any such provision, however if they do, what is covered will be determined by its drafting. If the clause refers to epidemic or pandemic, then it is possible that Covid-19 will be covered, but the drafting of such clauses are not always clear cut. For example, if it relates to events "beyond the parties' reasonable control", there will be a question over whether Covid-19 is included.

Can Covid-19 cause a lease to be terminated by frustration?

Generally, where parties have contracted to do something, they are bound to comply with their obligations; even if circumstances change and make compliance with such obligations more onerous than originally envisaged. Frustration is a possible way around this, and has the effect of bringing a contract to an immediate end. Frustration generally applies to events that occur after a contract has been agreed and will cause the contract to be terminated where the event makes compliance with the parties' obligations impossible, or it otherwise undermines the purpose of the contract.

The courts have, historically, been very reluctant to find that a lease has become frustrated. The bar is set extremely high for frustration to be proved; the party arguing for frustration of its contract needs to demonstrate that there had been "such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for". This was recently examined in the Canary Wharf v European Medicines Agency case from 2019, where the Court held that, despite Brexit meaning the Agency would not be able to occupy its premises, the lease was still not frustrated. The general view is that it will therefore be difficult for tenants, particularly those with longer leases, to claim that their leases have been frustrated. The position in respect of tenants with shorter leases (i.e. with less than 6-12 months left to run) and whose premises have been forced to shut by the Government might be different.

Rent and other payments

Can I simply stop paying my rent?

Failure to pay rents, or other payments due, without the landlord's prior consent, will be a breach of the lease.

Most commercial leases include a rent suspension provision, which is triggered when the premises are incapable of beneficial use/occupation. These clauses are typically (though not always) linked to physical damage to, or destruction of, the property (e.g. where a fire destroys the property), being in turn tied to the landlord's building insurance cover for rent in such circumstances. Such clauses are therefore unlikely to apply to Covid-19.

Nevertheless, tenants should check (or ask their landlord to check) the buildings insurance policy to see whether it covers pandemics such as Covid-19 (or 'Notifiable Diseases', which may, depending on the definition, include Covid-19 or similar). If it does - and providing that the insurance policy is broadly drafted and the rent suspension clause in the lease provides for rent to be suspended in relation to an insured risk (and not just in situations where the building has been damaged or destroyed) - then the landlord ought to be making a claim on its policy and should not be demanding rent from its tenants. If landlords do not do this, they could potentially be exposing themselves to a future claim from their tenants. Another potential avenue to explore is whether the landlord's (or tenant's own) policy includes a "Denial of Access" provision. This may - depending on the wording – extend the meanings of loss or damage to include the denial of use for the intended purpose for an extended period, even if there is no physical damage. The access itself needs to be hindered; loss of amenities within a space (e.g. use of a gym in an hotel) would not be included. This could therefore mean that, where a landlord has actually closed the building, or if a tenant occupies the upper floors of a tall building, where the lifts are inoperable due to social distancing measures, this provision would apply.

Separately, the Government has put in place a statutory moratorium on lease forfeiture (currently up to June 2021, though this could be further extended). This means that a landlord will be unable to evict a tenant for non-payment of rent during this time. "Rent" includes any sum a tenant is liable to pay under a lease (which will include service charge and insurance rent, for example). Please note that this moratorium will not affect a landlord's right to claim forfeiture, or recover rent, after the expiry of the existing moratorium period, unless the moratorium is further extended.

The Government has imposed a separate statutory moratorium to include a ban on commercial landlords from issuing statutory demands and winding-up petitions against tenant companies unable to pay rent, or other sums under the lease, due to the impact of coronavirus. This currently runs until 31 March 2021. Whilst a landlord can still present a winding up petition against a tenant company, under the new measures the petition must first be reviewed by the court to determine why the company is unable to pay its debts. If the court is satisfied that the inability of the tenant to pay the rent relates to the coronavirus, the petition will be dismissed. The ban also extends to landlords exercising Commercial Rent Arrears Recovery (CRAR). The current protections currently run until 30 June 2021 and state that:

- if a notice of enforcement is given, or where goods are taken control of, on or before the 23 June, then 457 days' rent must be in arrears
- if a notice of enforcement is given, or where goods are taken control of, on or after 24 June, then 554 day's rent must be in arrears.

It should be noted, however, that while landlords are urged to give their tenants the breathing space needed, the Government has called on tenants to pay rent where they can afford it. Indeed, if a tenant fails to pay rent the landlord will still have its other remedies available to enforce the debt against the tenant, including issuing a court claim, drawing down on a rent deposit and enforcing against a guarantor (including, importantly, former tenants under an AGA). Also, nothing has been put in place to stop landlords bringing claims under s81 Tribunal, Courts and Enforcement Act 2007, which requires subtenants to pay their rent directly to the landlord. That said, the timings for CRAR (i.e. 457/554 days) still need to have passed before this becomes available, so it is not of immediate assistance, but is worth bearing in mind as the fallout from Covid-19 continues to spread.

What should we do if we are unable to pay our rent?

- Keep an open dialogue with your landlord - The Government has published a voluntary code of practice to encourage commercial tenants and landlords to work together to protect viable businesses. Whilst the code is only voluntary, Landlords are aware of the unprecedented trading difficulties being faced by their tenants and will appreciate/be advised that there may be little to be gained by rushing to take enforcement action. Some of the larger institutional landlords are taking a pragmatic, long term approach, whereby they look to work together with their tenants to overcome the immediate crisis. There are a range of rent concessions that can be discussed – from moving to monthly payments, to a rent reduction/suspension/waiver or agreeing a turnover rent. Tenants should be prepared to disclose everything to their landlords. A landlord needs to be sure that the tenant is not acting disingenuously in asking for a reduction when it can afford the rent.
- Insurance – Tenants should check their own insurance policies for general liability, business interruption, crisis management and/or mitigation cover to see if this might apply to the present situation. Tenants should also ask their landlord whether its insurance policy covers pandemics and/or request a copy of their landlord's insurance policy so that their legal advisers can check it.
- Contingency planning - Most businesses are now actively looking at general contingency planning and this will include analysing all business overheads, debt/cash collection and opening discussions with stakeholders/ employees/ banks/suppliers as well as seeking advice from accountants and lawyers. It is also important to keep an eye out for measures, assistance and reliefs being introduced by the Government – which are in a constant state of flux.

What about if the Landlord restricts access to common parts?

Tenants might find that access to common parts in their buildings has been restricted. It is likely that a lease will permit the landlord to restrict access

to common parts in unique situations, which could cover Covid-19. If so, tenants could find themselves unable to access their premises, yet still having to pay rent. It is worth checking the landlord's obligations under the lease to identify if they are obliged to grant access to the premises: if it is restricted, although the tenant will still be required to pay rent, they might have a claim for some form of compensation.

Are landlords prevented from drawing down on rent deposits during the pandemic (akin to the statutory moratorium on forfeiture)?

No – landlords can still draw down on rent deposits during the pandemic.

This is a relatively inexpensive procedure and, depending on the terms of the rent deposit deed, may also be used to cover dilapidations and costs. However, whether or not a landlord is able to withdraw amounts from the rent deposit will depend on the terms of the associated rent deposit deed and how the deposit itself is held.

Also, a withdrawal usually comes with a requirement that the tenant tops up the deposit amount – this will be governed by the rent deposit deed. The government code of practice for commercial property relationships during the Covid-19 pandemic notes that landlords can draw on a rent deposit during the pandemic, but suggests that this should only be on the basis that a tenant will not have to "top-up" the rent deposit until it is "realistic and reasonable" to do so. It is also important to note that drawing down on the rent deposit may waive a landlord's right to forfeit a lease for rent arrears.

If a tenant has entered into insolvency, there may even be restrictions on withdrawals but, again, this depends on the terms and structure of the rent deposit deed and the type of insolvency that the tenant is facing. If a tenant has entered into administration, and a landlord withdraws amounts from the rent deposit to cover rent payments, a landlord cannot then claim a rent-deposit top-up as an administration expense. In these circumstances, it may be preferable for a landlord to preserve the rent deposit funds for as long as possible to meet other potential claims under the lease, such as dilapidations, which do not qualify as expenses of the administration.

Yielding up premises

What should a tenant do if their lease expires and they are required to vacate their premises?

Once a lease comes to an end a tenant is, more often than not, obliged to yield up and give the premises back to its landlord, vacant. Depending on the precise terms of the lease and the landlord's intentions for the premises, a tenant may be required to remove its furniture and any plant and equipment it has installed. The lease will often include an express provision dealing with these obligations and will, more than likely (after a specified time), permit the landlord to dispose of or sell the tenant's furniture, plant and equipment and even claim for costs of storage and disposal.

With the Government taking a strict approach to social distancing and further lockdowns being implemented, the practicalities of being able to yield up premises in accordance with the terms of a lease might be tricky! Tenants might find themselves faced with obstacles preventing them from being able to fulfil these obligations, such as contractors required to remove furniture or decommission IT systems being unwilling, or unable, to take on the job.

So, if this happens what is a tenant to do?

If the tenant fails to vacate in accordance with the terms of its lease, it is at risk of the landlord disposing of its goods. The tenant would, in theory, also be liable to the landlord in damages.

What a landlord is permitted to do, will largely depend on the terms of the lease.

Commercial leases often include provisions entitling the landlord to dispose of property left at the premises for more than a specified number of days, or will stipulate that the landlord will become the owner of the property after a certain point. If goods are left on site at the end of a tenancy and the lease expressly sets out what the landlord can do, then it is key to review the exact wording to determine what is and is not possible.

If, however, the lease is silent on this point the landlord becomes an 'involuntary bailee' of the items.

What does this mean?

In essence, the landlord is unable to deliberately or recklessly damage or destroy the tenant's property. Simply disposing of the items is not an option, and the landlord will have to serve notice on the tenant requesting them to collect their goods within a reasonable period and let them know what will happen if they do not. If the tenant fails to remove their goods within the period set out in the notice, the landlord can then proceed to deal with the items, which will include selling them.

The key point here, is that the landlord needs to provide a '*reasonable*' period for the tenant to collect their goods and, in the current climate, landlords should not be setting unrealistic time frames.

Separately, a tenant could also be liable to a landlord, either in damages under the lease for failure to vacate the premises, or in trespass for mesne profits (i.e. the sums properly payable to the landlord as a result of the tenant's wrongful use or occupation of the premises). In theory, a landlord's claim could include loss of rent (if it has a new tenant lined up ready to take occupation), any contractor-cancellation costs incurred by the landlord, together with the costs of removing/disposing of the tenant's goods.

However, quite how the above rules apply during the Covid-19 pandemic is unknown. If a tenant is unable to dispose of its goods for reasons beyond its control, and/or where the landlord has closed the premises, it may be able to argue that it has the benefit of an implied licence or tenancy at will, until such time as the premises are reopened and contractors can be found to remove the goods. In those circumstances, the tenant would not be trespassing, and the landlord would be unable to dispose of the tenant's goods or claim damages, albeit the tenant would probably still be liable to pay for its use and occupation of the premises by virtue of its goods still being on site.

Regardless of what the lease does or does not allow, it is safe to say that, if faced with any such difficulties, it is best to have an open discussion with your landlord. If you are unable to find contractors to remove your goods, it is a fair assumption that the landlord will be in the same position. Landlords are trying to compromise in amongst this chaos, so it is well worth discussing your options in a commercial way.

Lease amendments

Can I and amend my lease and, if so, how?

Yes, but only if all parties to the lease agree.

Options available include a:

- **Side Letter:** normally used when documenting a change which is meant to be temporary.
- **Deed of Variation:** normally used where the terms of an agreement are going to fundamentally change on a long-term basis.
- **More frequent rent reviews:** instead of five (or three) yearly rent reviews, perhaps one or two year intervals will become more commonplace in future. There has also been some suggestion of upwards-only reviews becoming a thing of the past, though institutional landlords/those with financing arrangements are highly likely to resist this.

The changes being sought as a result of Covid-19 are (hopefully) only going to be needed on a temporary basis, so parties may be inclined to use a side letter which will, in the circumstances, be easier to put in place.

What are the key elements of a side letter?

- **The parties?** Should include the landlord and tenant as well as any guarantor (if relevant).
- **Consent?** The consent of a superior landlord may be needed if the lease is an underlease along with the consent of a lender if the property is charged.
- **Personal or binding on successors?** If the changes granted are temporary, the side letter will only need to be personal to the landlord and tenant. This will mean that if the lease is assigned or the landlord changes the variations agreed will no longer apply. If the amendments include a proposed payment plan that is to last for a longer period, then it may be beneficial (for the tenant) for the side letter to bind the landlord's successors.
- **Acceptance?** An email attaching the side letter should be sent from the landlord (or advisor) to the tenant and any guarantor. The tenant (and any guarantor) should reply to that email to acknowledge receipt of the email and its contents. Alternatively, a side letter can be signed with an e-signature. It is important to remember that where a signature requires a witness *that witness must be physically present at the e-signing* and anyone e-signing the side letter, or confirming in an email exchange, *must have the authority to do so*.
- **Knock-on effects?** If the lease has a pending rent review, it is best to stipulate in the side letter how any rent concession will be dealt with on rent review under the lease. Otherwise, the rent could be reviewed at an artificially high or low level on review. Also, if the lease has an impending break clause, that too should be addressed in the side letter. If not, it may lead to confusion and uncertainty when the parties try to operate the break.

Lease obligations

Will I breach the "keep-open" clause in my lease if I must close, or reduce operating hours?

If there is a clause in your lease that provides that you must comply with all statutory and legal requirements, it is likely to override your keep-open clause. However, it will very much depend on the drafting of the lease.

Does my landlord have to provide any additional cleaning services?

This is unlikely, unless there is a specific obligation contained in your lease. If extra cleaning services are being implemented, it is important to check service charge provisions to see if the extra costs incurred will be recoverable by your landlord. Additional services can usually be added at the discretion of the landlord and those costs may be recoverable if they are reasonable and properly occurred in accordance with good estate management principles. However, there may be a limit to the amount that can be recovered if, for example, there is a service charge cap, or certain services are excluded.

Landlords will also need to consider their obligations to provide services. If they are unable to provide required services, they may be in breach of covenant and a tenant may wish to claim for damages. Where it becomes impossible to provide services where necessary staff (such as security and cleaning) and/or materials have become unavailable, a landlord may also have to try and source alternative personnel or equipment in the first instance, even when more expensive to do so.

If there is a Covid-19 outbreak in my building, can my landlord prevent access to it?

No. It is likely that commercial leases will include a "quiet enjoyment" covenant in the lease, or it will be implied. So, if a landlord disrupts a tenant's use and enjoyment of their premises, they may be found to be in breach of this covenant.

However, all landlords will have to follow the advice of the Department of Health and Social Care and Public Health England ("**PHE**"). If necessary, a landlord may consider amending any building regulations which could cover, for example, limiting access to certain common parts.

Does my landlord have any statutory obligations in respect of Covid-19?

There are no explicit requirements that a landlord must follow in order to control Covid-19 in its premises. However, as mentioned above, landlords will want to follow the advice of PHE. A landlord may also want to increase the frequency of cleaning in common parts of the building; especially where they have been informed that someone with a suspected or confirmed case of Covid-19 has entered the building.

Where a property is leased to a sole tenant, and there are no common parts that the landlord controls, the landlord's duties will be reduced further. In this instance it would be sensible for a landlord to ensure that their tenant is following any relevant health and safety guidelines.

Notices

I want to serve a notice under my lease, does Covid-19 impact the serving of notices?

Yes, it is very likely that it will. Not only are postal services being disrupted, but as more and more people are working from home, post may not be monitored as regularly as usual.

If you do want to serve a notice under your lease, you need to check your lease provisions and statute very carefully. This will help you to establish whether alternative methods of service may be used. It is vital that legal advisers are informed of the need to serve a notice over the next few months so that the appropriate preparation can be undertaken.

Do I have to monitor my post if my building is closed?

If possible, yes. You may receive property notices or court papers that need a response within a specified period – a notice may be deemed to be validly served even if you receive it but have not read it.

Options may include:

- continuing mail collection, if safe to do so, but only if this is in line with Government guidance;
- instruct Royal Mail to redeliver post to an alternative address; and
- formally vary contracts to change addresses for service or permit service by email (but this option may be impractical).

For further information on this subject please contact:

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