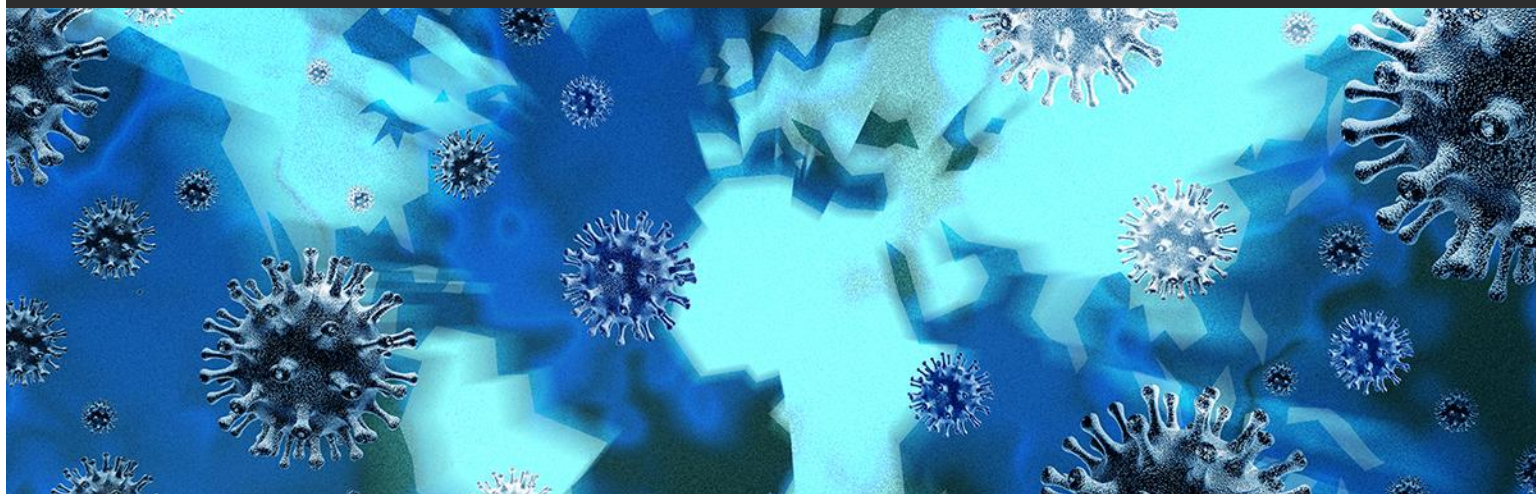


**Alert | Health Emergency Preparedness Task Force:
Coronavirus Disease 2019**



March 2020

COVID-19 Impact on Landlords and Tenants in England and Wales

The COVID-19 pandemic presents a real threat to the global economy. In England and Wales, commercial landlords and tenants are assessing their respective rights and obligations.

Commercial Leases

Without a contractual right to do so, landlords and tenants cannot simply terminate leases early.

Force majeure

Force majeure clauses, which typically operate to excuse one party from performing their obligations following the occurrence of a specified event, are not usually seen in commercial leases under English law.

Frustration

A contract is deemed frustrated and therefore terminated if something, which is not the fault of either party, occurs after the contract has been entered into, rendering the contract impossible to fulfil, or the contractual obligation becomes something radically different.

The doctrine of frustration made headlines recently in the context of leases, when the High Court ruled that Brexit was not a frustrating event, preventing the European Medicines Agency (EMA) from terminating their Canary Wharf lease.

Frustration has a narrow application, and although each case would be assessed on its facts, it is unlikely the English courts would rule in favour of a tenant claiming frustration due to COVID-19. Indeed, such a ruling might open the floodgates for a barrage of similar claims.

Break rights

A tenant could consider exercising a contractual break right in their lease if the tenant was *sure* they wanted to terminate (even with landlord's consent, break notices cannot be withdrawn). Unless specified to the contrary, the tenant would still be liable to pay rent for the duration of the break notice period.

Assignment / subletting

A tenant may be permitted to assign or sublet their premises in accordance with the terms of the lease and often with landlord's consent. Whether a tenant could find a willing assignee or subtenant in the current climate is a different matter.

Rent suspensions & concessions

Rather than terminate their lease, many tenants may look for temporary solutions to ease financial pressures.

Tenants are typically only permitted to withhold the payment of rent where damage or destruction has been caused to the premises by an insured risk (and sometimes uninsured risks, too) such that the tenant cannot occupy or access the same.

Instead, tenants could request temporary reduced rents or short rent-free periods. Although landlords do not have to enter into negotiations, many landlords and tenants are already reaching voluntary arrangements about rental payments. If accepted, concessions should be personal to the relevant tenant, with appropriate rent acceleration provisions for any deferred rents upon any future lease assignment.

Non-payment of rent

Most commercial leases provide that the landlord may re-enter the premises and terminate the lease upon breach of a tenant covenant and, specifically, non-payment of rent. However, on 23 March the government announced that commercial tenants who cannot pay their rent over the next three months because of COVID-19 will be protected from eviction. This change will come into force when the Coronavirus Bill receives Royal Assent. It will last until 30 June, with an option for the government to extend if needed. This provision will only delay the right of forfeiture and does not otherwise impinge on a landlord's right to claim forfeiture or recover rent at the end of this period. The government is also actively monitoring the impact on commercial landlords' cash flow and continues to be in dialogue with them.

On a case by case basis landlords could also consider other options, such as drawing down from existing rent deposits to cover arrears or pursuing guarantors or former tenants.

Other clauses

It is as yet uncertain whether a tenant could bring a claim against their landlord for derogation of grant and/or breach of the quiet enjoyment clause in response to closure of their premises due to the pandemic or whether a retail tenant could be deemed in breach of their “*keep open*” clause. The government’s announcement on 23 March where shops selling “non-essential” goods should close immediately, casts even more uncertainty on this.

Agreements for Lease

Landlords and/or tenants procuring the carrying out of works to premises prior to a lease being granted will typically be subject to an obligation to complete the works within a certain timeframe. As the COVID-19 crisis escalates, parties may seek to rely on force majeure mechanisms to extend deadlines.

COVID-19 would need to be a specific force majeure event (epidemic, pandemic, or other analogous term) or fall within one of the more general definitions, e.g., an “*act of government*” to lockdown. The party claiming force majeure will need to show causation – a high hurdle to satisfy where there needs to have been a prevention of performance as opposed to a delay or hinderance. The claiming party may wish to check for contractual exclusions and track mitigating steps taken to avoid the effects of COVID-19.

Health & Safety

In relation to the obligations of landlords and tenants, health and safety duties must be considered. Health and safety duties are generally either based on actual control (and the ability to implement measures) or presumed control implied by law.

The situation with COVID-19 is, however, somewhat different: while outbreaks are a health and safety matter, they are, at least in part, outside the scope of normal health and safety practices. That is, whatever the construction of the building or the management of the infrastructure of the building, it should not have an effect or impact on COVID-19, which is passed human to human and is not linked to buildings or their infrastructure per se (in the same way as, for example, legionella is). However, health and safety law may apply to COVID-19 to some extent (depending on how the relevant property is being used).

While the operator of a hospital (which could be a tenant) may have duties under health and safety law (for example in relation to how health workers could be exposed to a virus), with respect to something like COVID-19 exposure, a typical landlord may not have sufficient “control” to be able to impose strict hygiene regulations or control the movement of persons, for example, in the way in which the owner of a hospital can (where the occupiers are employees and patients). The situation could be different where a landlord is providing services above and beyond the simple provision of a rental property. For example, a landlord may also be operating in capacities other than as bare landlord – it may be acting as an employer, or in a property management capacity. In such cases, the landlord may have obligations in respect of their own employees that attend at the property and in respect of other persons who may be present in parts of a property under their control (such as common or retained parts).

In relation to a property where a COVID-19 case has been identified, entities involved (e.g., landlord, managing agent, or other entity operating at the property, including affected tenant(s)) should make direct contact with Public Health England and follow the specific requirements promulgated by the Department of Health and Social Care and Public Health England. In relation to more general risks, the day-to-day advice issued by the authorities outlined above (in addition to, as usual, the Health and Safety Executive) should be followed.

Insurance

Landlords and tenants should check the terms of their business interruption insurance policies. Claims may potentially be made for non-damage business interruption, which may cover the payment of rent in the event (now a reality) premises were closed by a government body due to an infectious or contagious disease such as COVID-19. However, standard business interruption cover does not include forced closure by authorities, as such coverage is intended to respond to physical damage at the property which results in the business being unable to continue to trade. In each case, however, the specific wording of the policy dictates. Most policies will as a minimum require the government to declare a disease as notifiable.

Business Rates

On 18 March, as part of the government's updated plans for economic support, a further £330 billion worth of government-backed loans and guarantees for businesses small and large was announced. The business rates holiday originally announced in the Budget has therefore been extended. Regardless of rateable value, retailers, pubs, and those in the hospitality sector will not pay business rates for 12 months. The details of how this will work are yet to manifest, but it should take some pressure of tenants in those sectors.

Conclusion

This is a constantly evolving situation and landlords and tenants should keep the lines of communication open and stay up-to-date with the government's recommended guidance. The government has already announced various packages of support and the emergency Coronavirus Bill is currently going through Parliament to deal with the economic issues that have and will arise due to the spread of COVID-19. As of this writing, the government has announced that people should only be allowed to leave their homes in the future for very limited purposes and there is a lockdown of most hospitality, leisure and retail outlets in the UK. The situation has therefore become even more complex for those landlords and tenants who will want to understand and assess their ongoing liabilities.

Disclaimer

This alert was prepared on the basis of the information available at the time of drafting on 24 March 2020 and should not be taken as individual legal advice. In particular, as developments progress, legal implications may need to be reassessed. Furthermore, the individual circumstances of a landlord and/or tenant must always be taken into account when considering and implementing legal measures. No liability is assumed for the information presented in this alert.

This GT Alert is limited to non-U.S. matters and law.

For more information and updates on the developing COVID-19 situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

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