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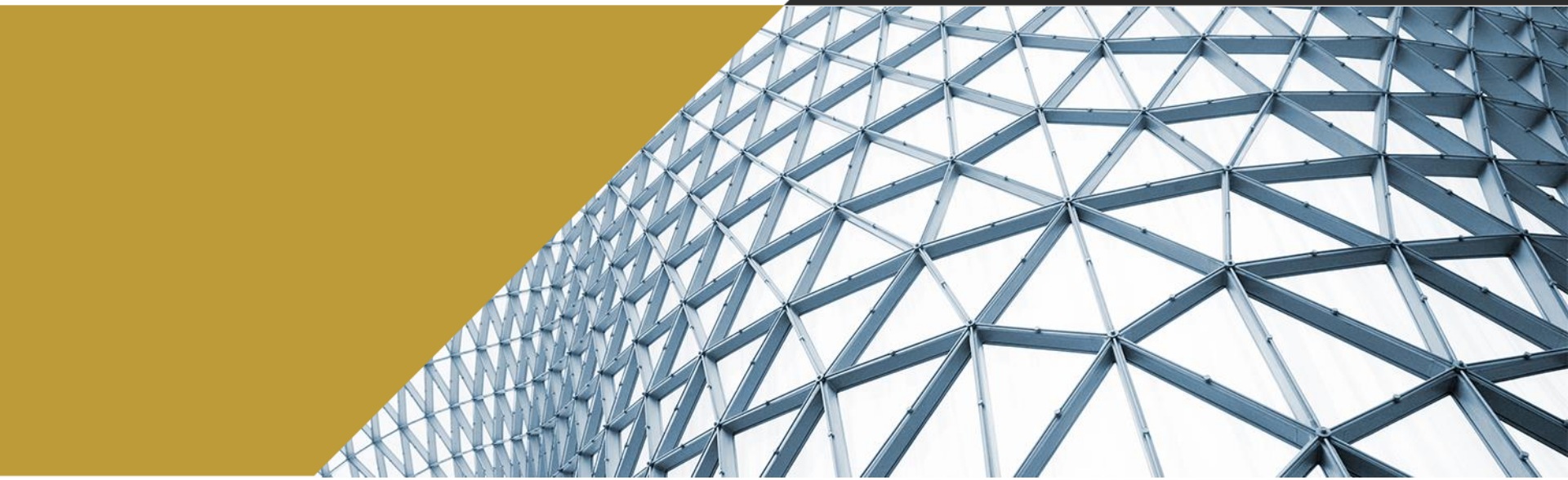

COVID-19 – Reopening Businesses

Key Considerations for the UK Real Estate Industry

28 MAY 2020

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Health & Safety

The Legal Context – Health and Safety

- *The Health and Safety at Work etc Act 1974* (HSWA):
  - Applies to the vast majority of people 'at work' – employers, relevant self-employed people, employees and members of the public affected by work activities
  - Persons in total or partial control of work premises must take '**reasonable measures**' to ensure the health and safety of those who are not their employees (*HSWA s4*) – can apply to landlords or managing agents (electrical safety, fire safety, A/C, water systems, etc) even if not present
  - Employers must ensure, '**so far as is reasonably practicable**' the health and safety of their employees (*HSWA s2(1)*) – can apply to landlords/managing agents in the provision of services
  - Employers must ensure, '**so far as is reasonably practicable**', the heath ands safety of everyone who is not an employee, but who may be affected by the conduct of the employer's undertaking (*HSWA 3(1)*) - can apply to landlords/managing agents in the provision of services

The Importance of 'Control'

- A key pointer towards who bears a H&S duty is who exercises "control":
  - Health and safety duties are generally either based on actual control (and the ability to implement measures) or presumed control implied by law.
  - In the case of legionella for example, the law effectively imposes a default duty on landlords to address legionella risks at a property.
  - Legionella, however, is a disease that is fostered and grows in waterborne systems (i.e., the plumbing systems of a building) and addressing water quality and contributory risk factors is something that a landlord (as opposed to a tenant) can usually only control – same applies to electrical wiring, etc
- It's important to give careful thought to the actual capacity in which you act, not just to how your role is described – the law will look to facts not labels.

‘Reasonably Practicable’ Measures

- ‘Reasonably practicable’ measures have to be taken by various individuals (employers, landlords, etc) – what is ‘reasonable’ in the context of COVID-19 going-forward?
- In England, the Department for Business, Energy & Industrial Strategy ’s 11 May 2020 opening-up guidance constitutes what is ‘reasonable’ – it will be the standard against which legal compliance is judged:
- The guidance states:

  “*Where the enforcing authority, such as the [Health and Safety Executive] or your local authority, identifies employers who are not taking action to comply with the relevant public health legislation and guidance to control public health risks, they will consider taking a range of actions to improve control of workplace risks.* ***For example, this would cover employers not taking appropriate action to socially distance, where possible****.*

  The actions the HSE can take include the provision of specific advice to employers through to issuing enforcement notices to help secure improvements.”

What are the Actual Requirements?

- Government has set out "*5 key points*" to follow when the relevant business/undertaking is allowed to open:
  - "*Work from home, if you can*"
  - "*Carry out a COVID-19 risk assessment, in consultation with workers or trade unions*"
  - "*Maintain 2 metres social distancing, wherever possible*"
  - "*Where people cannot be 2 metres apart, manage transmission risk*" and
  - "*Reinforcing cleaning processes*"
- More detailed guidance available for offices, retail, construction, warehouses, restaurants, etc:

  https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19

Example Detailed Measures – Office

- Coordinating and working collaboratively between landlords and other tenants in multi-tenant sites, for example, shared working spaces
- Providing clear guidance on social distancing and hygiene to people on arrival, for example, signage or visual aids and before arrival, for example, by phone, on the website or by email
- Limiting visitor times to a specific time window and restricting access to required visitors only
- Determining if schedules for essential services and contractor visits can be revised to reduce interaction and overlap between people, for example, carrying out services at night
- Summary? You need to reasonably apply the spirit of the guidance – preventing the spread of the coronavirus - to the specific circumstances under your control

‘RIDDOR’ Reporting Requirements

- Important not to overlook RIDDOR (*The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013*) reporting in relation to coronavirus when:
  - an unintended incident at work has led to someone’s possible or actual exposure to coronavirus
  - a worker has been diagnosed as having COVID 19 and there is reasonable evidence that it was caused by exposure at work
  - a worker dies as a result of occupational exposure to coronavirus.
- Failure to report is a criminal offence – potentially unlimited fine and a custodial sentence
- Difficulty is to balance the risk of over-reporting (which could attract regulatory attention) and under-reporting (which could result in criminal penalties)

COVID-19 & Civil Liability

- Breaches of H&S law are enforced by the Health and Safety Executive and Local Authorities – Government has flagged that checks will take place
- However, also potential for civil claims – an individual (employee, member of the public, etc) suffers an injury as a result of a failure to comply with the relevant guidance
- Unclear how real this risk is – claims will almost certainly be brought, but it may be difficult to bring them successfully (issues of causation, proof etc)
- However, there are English legal principles which could be sought to be used by claimants – modified principles of causation seen in asbestos cases
- Some lobbying for an "*immunity from liability law*" – nothing suggests this will be adopted (unions etc would vigorously oppose it) and it could serve to harm good businesses who invest in following the guidance and take reasonable measures.
- Important to document decisions (also applies to RIDDOR and HSE/LA investigations) – what measures where taken, why were they taken, etc


Data Protection

Data Protection – What has changed?

- **Legislatively – nothing**:
  - GDPR still applies 'directly' in the UK
  - No specific legislative changes in response to Covid-19 yet
- **Policy** – ICO taking 'empathetic and pragmatic approach'
- **What are Controllers doing differently?**
  - More / different personal data being processed
  - New forms of processing
  - Sensitive data relating to individual health
- **What do Controllers need to do?**
  - Update transparency compliance (Privacy Notices)
  - Check lawful basis for new forms of processing. Is it strictly necessary? Is it special category (sensitive) data?
  - Data Processing Impact Assessment

Data Protection – Temperature

- Can controllers routinely check body temperature of (a) visitors? (b) employees?
- To date no Covid-19 specific English law on temperature monitoring (cf. France and Portugal).
- Body temperature is special category 'sensitive' data, the starting point is that processing is forbidden.
- Do owners and occupiers have an Article 9 condition for processing?
- Routine remote monitoring of individual body temperature using infra red cameras definitely not necessary or proportional.


What are the key real estate related provisions of the Coronavirus Act 2020?

Summary & Terminology

- ***What is the relevant provision of the Act?***
  - Section 82 - landlords of "*relevant business tenancies*" cannot re-enter premises, issue or proceed with any current court proceedings to forfeit a lease for non-payment of rent falling due during the "*relevant period*"
- ***What is a "relevant business tenancy"?***
  - a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies
  - A tenancy to which that Part of the 1954 Act would apply "*if any relevant occupier were the tenant*"
- ***What is the "relevant period"?***
  - Begins 26th March and ends on 30th June 2020 but can be extended

Rent & Interest

- ***What is covered by "rent"?***
  - Any sum a tenant is liable to pay under a relevant business tenancy
  - Includes VAT; service charge; professional fees; insurance premiums; costs if landlord has to do essential repairs
- ***Is interest still payable?***
  - Yes, the tenant is still obliged to pay interest on all rent that is not paid

Deferral, Waiver & Other Breaches?

- ***Are landlords deferring or waiving their right to forfeit?***
  - Deferring - the right to forfeit is not lost or waived *unless* expressly done in writing by the landlord
  - Tenant remains liable to pay the rent
- ***Can a landlord still forfeit for other breaches?***
  - Yes, the Act does not prevent the landlord from exercising its right to forfeit the lease for other tenant breaches e.g. disrepair

Corporate Insolvency and Governance Bill 2020

What does the Bill cover?

- ***What is the overall effect of the legislation proposed?*** Overview
  - Presented to Parliament 20 May 2020
  - Most dramatic changes to insolvency law since Insolvency Act 2003
  - Focus on particular areas – some general and permanent – others temporary and COVID-19 specific – focus of this part of the talk is on the temporary changes but to whistle through the permanent ones …

What are the permanent changes proposed?

- ***What are the permanent changes?***
  - Moratorium
    - similar to moratorium on administration
    - 20 business day duration – extendable for a further 20 business days without consent – further extendable for up to one year
  - '*Ipso facto*' clauses banned
    - e.g. "*this contract may be terminated upon insolvency*"
    - prevent suppliers of goods and services from terminating, varying or exercising right under a contract where counterparty enters insolvency or restructuring procedure – has applied in Ch 11 for a long time
    - supplies must be continued notwithstanding arrears pre-insolvency
    - intended to foster corporate rescue by facilitating ongoing trading

What are the permanent changes proposed?

- Restructuring plan
  - based on Scheme of Arrangement
  - creditors divided into classes – if one “in the money” class approves the plan and it delivers a better outcome than the next best alternative (likely liquidation or administration), the plan will become binding if sanctioned by the court
  - the proposals will require greater court involvement

What are the temporary changes proposed?

- **What are the temporary changes?**
  - ***In terms of directors' personal liability?*** Suspension of wrongful trading
    - directors not to be held liable for any worsening of financial position of company from 1 March 2020 until 30 days after Bill enacted
    - following the period of protection ending, though, directors will face an immediate and very pressing issue – whilst they would avoid liability for any deterioration in the outcome for creditors during the relevant period, they would still face liability for other losses which, if continuing, would impact their risk position
  - ***In terms of taking steps to wind companies up?*** Statutory demands and winding up petitions – see below

What are the temporary changes proposed?

- ***Other governance changes (unrelated to insolvency)- eg timing of filing of accounts during COVID-19***

What's changed in relation to statutory demands in winding up petitions?

- ***What's changed in relation to Statutory Demands and Winding up Petitions?***
  - Rather complex matrix of provisions
  - Difficulty arises because UK Gov wants effect to be immediate but there is no legal effect until law is passed. It also wants to provide insulation only against COVID-19 related difficulties. As such, intentions appear to be met as follows:
    - ***Slow down pace of applications for winding up***
      - Restriction on presentation of winding up petitions based on statutory demands (the most common entry route to winding up) – applies to all statutory demands regardless of impact of COVID-19 – demands void rather than suspended or deferred

What's changed in relation to statutory demands in winding up petitions?

- Winding up petitions may still be presented, though, on the following bases:
  - statutory demands served before 1 March 2020
  - unsatisfied judgement debt
  - cash flow test
  - balance sheet test
- ***Ensure winding up only permitted where would have come about regardless of COVID-19***
  - Creditors can only present petitions if they have reasonable grounds to believe:
    - COVID-19 has not had any financial effect on company
    - insolvency would have arisen even without COVID-19
  - Courts can only grant winding up petitions if similarly satisfied

What's changed in relation to statutory demands in winding up petitions?

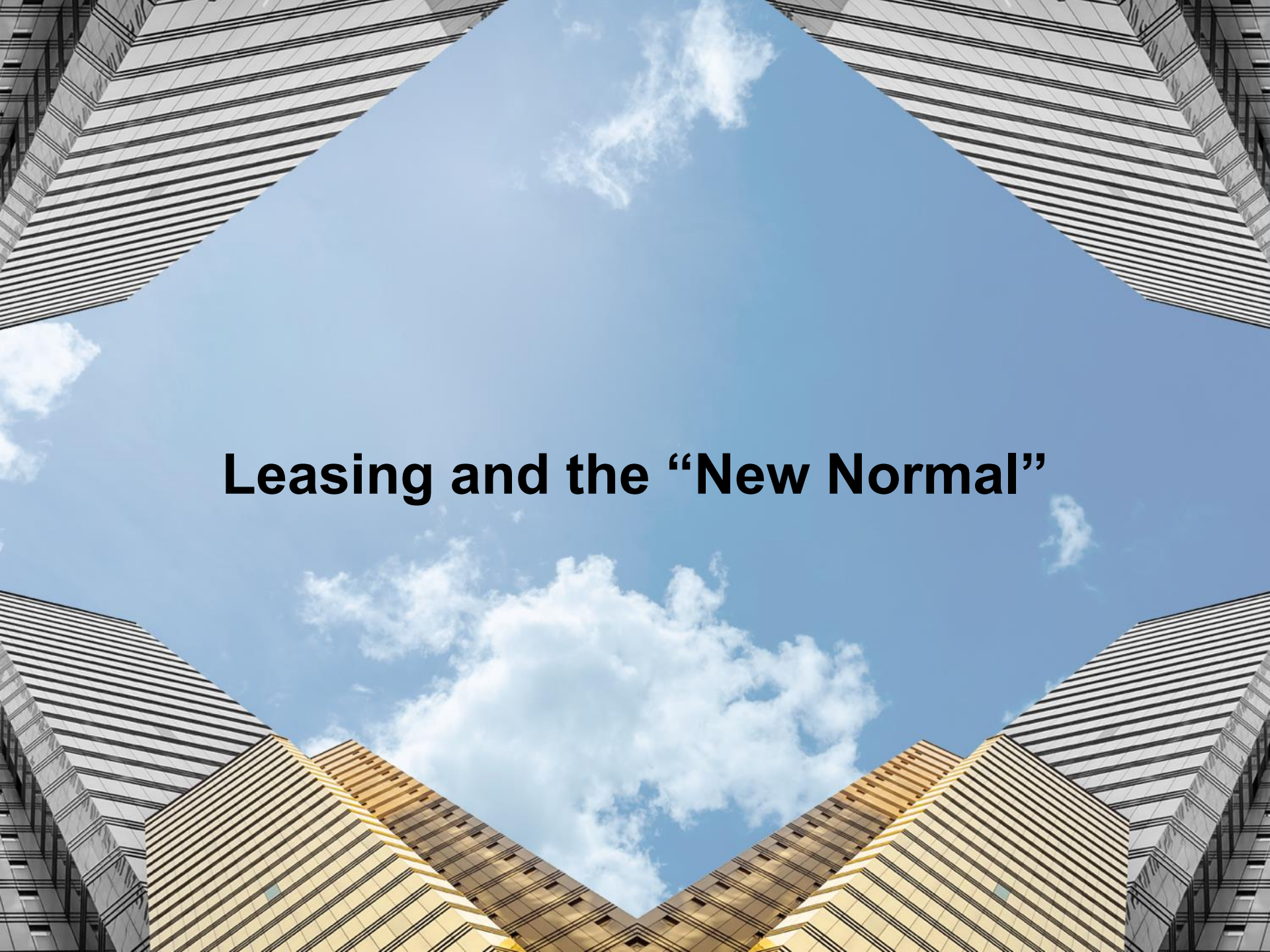
- ***Give retrospective effect to above laws once passed***
  - Courts empowered to reverse winding up orders granted on or after 27 April 2020 if the orders would not have been made as if the law had been in force then and the above tests had been applied
  - It can be anticipated that this element could be very difficult to implement (e.g. if trading has ceased for some period and assets have been disposed of)
- ***Which companies do the changes re Statutory Demands and Winding up Petitions apply to?***
  - Provisions apply to all companies – no exclusions unlike situation in relation to Wrongful Trading

Other Incidental Points

- ***Other incidental***
  - ***If there is more doubt as to whether Winding up Petitions will be granted, what about dispositions being avoided after presentation?***
    - Section 127 – avoidance of post-petition dispositions disapplied in relation to petitions presented during 'relevant period'
    - Avoidance only to apply to post winding up order dispositions

Other Incidental Points

- ***How long do the 'temporary bits' last?***
  - Until one month after Bill enacted BUT …
  - Secretary of State can extend 'relevant time' by up to six months
- ***Other thoughts? What are the implications for loan documents?***
  - Bill does not interfere with default provisions in loan documents
  - Presentation of winding up petition could still trigger default if grace period in loan document expires before court has rejected petition (assuming it would) – considerable processing pressure on courts given difficulties in staffing hearings – and petitions may require evidence to be adduced which can take time


Leasing and the “New Normal”

Leasing – the "New Normal"?

- In light of buildings and businesses reopening / occupiers returning:
  - Common / shared areas e.g. receptions / roof terraces – practical restrictions on access / use / numbers / social distancing in line with government guidance *v* any contractual restrictions in an occupier's lease
  - Big impact on owners who have established their buildings with more of a "*community feel*" i.e. innovative shared spaces as they attempt to limit human interaction, but avoid complete isolation
  - Future "*catch all*" clauses? Owners permitted to limit access to a building / common areas /take other actions in the future, even if not mandatory, if the owner considers this in the best interests of itself / other occupiers
  - Where this would involve having to shut down leased premises (as opposed to simply restricting the use of common areas in a multi-let building) this would assist in countering any argument that an owner is in breach of its covenant for quiet enjoyment

Leasing – the "New Normal"?

- Increased reliance on community hygiene as part of the owner's services, which will bring an increased operational intensity for owners
- Owners may look more towards proptech solutions for cleaning and sanitising buildings and expect the tenant to pay for this via the service charge mechanism
- Increased desire from occupiers for "*information*" and "*data*" generally – levels of cleanliness / air quality etc in respect of shared and public realm spaces
- Move towards turnover rents in sectors where this has not previously been the norm – reward for less income security
- Tenants may request wider rent cesser clauses in the future triggered by their inability to use premises due to something other than damage by an insured risk e.g. closure due to pandemics

Leasing – the "New Normal"?

- Owners may need to consider permitting occupiers who will continue to have low occupancy / under utilised space going forward, to use their leased space more innovatively
- Example – hotels converting rooms into co-working space and / or restaurants
- Flexible change of use clauses - changes to planning laws alone are not enough to prevent rights of forfeiture arising if the tenant is in breach of its user clause e.g. restaurant now operating as a takeaway
- More of a mixed use environment / fluidity of uses between residency / F&B / co-working combinations, generally in new builds
- Storage solutions for tenants who may need to run online businesses from their premises and /or are at risk from excess stock build up

Questions