

**If the government has imposed additional public health requirements, can the landlord require the tenant to comply with these?**

## **Real Estate - Potential Landlord Issues Arising from COVID-19**

In many jurisdictions across the EMEA region, tenants covenant in their leases to comply with all applicable laws or legal obligations of that country. In a COVID-19 outbreak, a government may declare certain activities unlawful. These may include large gatherings of people, or access to certain areas. A government may also require mandatory actions, such as deep cleaning or disinfecting.

A tenant may be in breach of its lease if it continued with, or failed to carry out, such activities, contrary to any legal restrictions. In some civil jurisdictions, the relevant civil code will contain an overriding obligation to comply with government requirements, which would prevail over the terms of the lease in any event.

- Check the relevant lease and consider, on a case by case basis, whether any breach has occurred.
- Also consider the impact of neighbouring tenants' activities. If one tenant of the same building does not comply with government or municipal requirements, other tenants may ask the landlord to enforce compliance.
- If you are a landlord, try to anticipate these issues before landlord-tenant relations are impacted. Be mindful of tenants' activities and deal with all complaints promptly and sensitively.

**Who pays for items such as an enhanced cleaning regime, additional cleaning of common areas, any deep cleaning, provision of additional refuse removal, for example?**

**If the tenant cannot use its property, does it have to continue paying rent?**

A lease of a building with multiple tenants will often contain service charge provisions. The landlord provides services such as cleaning, heating and maintenance, and the cost of this is divided between the tenants and paid as a service charge (which may be capped). In some cases, the list of services that the landlord provides is very specific, and the landlord is only obliged to provide those services, and the tenant will only pay for those services. If the landlord provides other services, it might not be able to claim for the cost of those from the tenant. Sometimes, conversely, the list of services is broad, and includes anything that the landlord considers necessary in accordance with the principles of good management of the property. Here there is a wider range of service costs that may be charged to the tenant (subject to any cap).

- Landlords should keep abreast of changing best practice for cleaning communal premises, and other additional health and safety requirements. It may be the case that the landlord has to provide additional services, such as supplementary cleaning and waste disposal services. Can it easily claim the cost of that back from the tenants? Yes, if the list of services is broad, but not if the list of services is closed or very specific.
- Landlords should check leases for any service charge caps which, if exceeded, may mean that costs fall to the landlord rather than the tenant.
- Both landlords and tenants should review lease documentation early, in order to be prepared for the questions that will arise if circumstances change.

In some jurisdictions, it is usual for a lease to have a rent suspension clause in cases where the premises are damaged, destroyed or in some cases, inaccessible. This will depend on the terms of the lease agreement.

In England and Wales, generally, if the premises are substantially damaged or destroyed by an "insured risk," then the tenant is relieved from its obligations to pay the rent for a period of up to three years. During this time the landlord takes on an obligation to rebuild or reinstate the premises to allow the tenant to resume its occupation. Accordingly, the landlord will usually take out loss of rent insurance, the premium for which may be met by the tenant as part of the service charge.

However, insurance contracts usually refer to specific diseases rather than a general class of notifiable disease. It is rare for a standard lease to contain disease as a risk, against which the relevant party is specifically required to insure. Additionally, the relevant "insured risk", usually has to render the premises damaged or destroyed, before a rent suspension is triggered. But there are times when a well-advised tenant will have negotiated a proviso that the rent suspension is also triggered where the "insured risk" renders the premises inaccessible. This is where the occurrence of COVID-19 is relevant - government restrictions may indeed render a property inaccessible.

- Review this on a case-by-case basis with your legal advisors.
- If a tenant ceases to pay its rent, seek legal advice immediately to ensure that you do not inadvertently waive any such breach.

## What if a tenant requests a rent concession as a result of COVID-19?

## Does the lease contain a tenant's keep-open covenant? Would the closure of the premises due to a governmental quarantine or shut-down result in an actionable breach of the covenant?

It is highly likely that tenants will be requesting rent concessions as a consequence of closure of offices and fall in business. Anticipated requests include (a) monthly rather than quarterly payments, (b) rent reduction for a fixed period, (c) rent deferral (e.g. a short-term rent moratorium, with the missed rental payments made up over the following 6 months when normal business hopefully resumes), (d) a waiver of rent for a fixed period, or (e) in relevant premises, a temporary conversion to a turnover-rent only. Tenants are unlikely to qualify for a rent suspension, which is usually linked to property damage. Tenants' business interruption insurance and landlords' loss of rent insurance may be of little use, as early indications are that COVID-19 repercussions may not be covered unless notifiable diseases are expressly mentioned.

- Check whether the rent suspension and other insurance provisions apply when the premises are rendered inaccessible, or only when damaged or destroyed.
- Check whether the insured risks include notifiable diseases
- Request a copy of the tenant's business interruption insurance policy when considering the tenant's concession request, in case this would mitigate any financial hardship to the tenant of continuing to pay rent;
- Legal advice should be taken to formally document the terms and duration of any rent concession that you agree.

In several jurisdictions, it is common for retail tenants to agree that they will keep the premises open for trading during specified hours, for a certain number of days per year. This is particularly the case where the lease contains turnover rent provisions, so that the landlord can ensure that the tenant is maximising the hours of profitable trading from the premises. Landlords of large shopping centres are also concerned about the reputational effect, and impact on general footfall, if stores are closed for longer periods of time. However in other jurisdictions such covenants are rare.

In the case of a COVID-19 outbreak, tenants may be unable to keep their premises open, whether this is due to staff absence, or enforced by government restrictions. If a government restriction has been imposed, and the relevant lease contains a tenant's covenant to comply with statutory or legal obligations, it seems unlikely that the landlord could successfully seek to enforce a keep-open covenant by specific performance.

- Carefully check the lease to identify the terms of any keep-open covenant. Discuss this with your legal advisers.
- If premises have to be closed, tenants should check if any notices need to be in-store or served on the landlord.
- Landlords should check turnover rent provisions and adjust their modelling accordingly.

## Will the insurance provisions in the lease apply, where the property is inaccessible due to COVID-19?

In some jurisdictions market standard lease insurance provisions apply where the premises are rendered damaged or destroyed by an "insured risk".

If an outbreak of notifiable disease, for example, is included as an "insured risk" in the lease, then it may trigger a period of rent suspension under the lease. COVID-19 was classified as a notifiable disease in England on 5 March 2020. However, many insurance contracts refer to specific diseases rather than a general class of notifiable disease.

It is rare for a standard lease to contain disease as a risk, against which the relevant party is specifically required to insure.

In addition, the relevant "insured risk", usually has to render the premises damaged or destroyed, before a rent suspension is triggered. Sometimes, however, a well-advised tenant will have negotiated a proviso that the insurance provisions also apply where the "insured risk" renders the premises inaccessible.

Again, this is not always market standard, but it may be the case in the relevant lease.

If the category of "insured risks" in the lease includes a risk such as pandemic, infectious or notifiable disease, and the rent suspension and other insurance provisions in the lease apply where the premises are rendered inaccessible, the tenant may benefit from a rent suspension. This may also extend to a termination right if the damage, destruction or inaccessibility as a result of the insured risk is not rectified within a specified period of time (in England and Wales, usually three years). The period of rent suspension usually mirrors the period of time until the right to terminate arises (and so in England and Wales is usually three years). It also mirrors the period of time for which the landlord will have loss of rent insurance.

- Landlords and tenants need to consider their next steps quickly and carefully.
- Check whether the category of "insured risks" in the lease includes a risk such as pandemic, infectious or notifiable disease.
- Check whether the rent suspension and other insurance provisions apply when the premises are rendered inaccessible, or only when damaged or destroyed.
- Check the terms of the relevant insurance policy, and any landlord's loss of rent insurance.
- Review this on a case-by-case basis with your legal and insurance advisers.

**Can the parties claim that COVID-19 is a force majeure event, which excuses the parties from performing the lease obligations?**

The concept of force majeure derives from French civil law and has been carried across to several other civil law jurisdictions. It is also of wide application in common law jurisdictions, where it is frequently used in commercial contracts because of the limited remedies otherwise available to the parties when the contract becomes impossible, difficult or onerous to perform due to events outside the affected party's control.

In several jurisdictions (including England & Wales), it would be very rare for an institutional lease to contain a force majeure clause, entitling the parties to terminate the lease. However, a lease force majeure clause is standard in some civil jurisdictions, and in some civil law jurisdictions such as Italy, the Civil Code contains force majeure provisions in respect of contracts.

Would an outbreak of COVID-19 be a force majeure event in itself? It is more likely that the bar is set higher than this, and to constitute force majeure an event would have to be more significant - such as a government-enforced quarantine. But the legal approach varies widely across jurisdictions. A force majeure clause, if not triggering termination of the lease, may entitle the tenant to terminate or suspend payment of rent, for example. However, it is more likely that a force majeure provision would entitle the landlord to suspend some/all of services under service provisions, or would mitigate against breach of a keep-open covenant.

- You should carefully consider the legal position in the relevant jurisdiction, and the terms of the relevant lease, with your legal advisers on a case by case basis.

**Can the parties claim that the lease contract is frustrated (and therefore terminated) by COVID-19?**

In contrast to force majeure, frustration is a legal doctrine which automatically discharges the contract, so that the parties are no longer bound by it. The bar is therefore set high. For a contract to be frustrated, it must be physically or perhaps commercially impossible for the parties to perform their obligations, or the obligations must have fundamentally changed, not through the fault of either party.

Frustration of a lease of property in England and Wales is theoretically possible, but there is no recorded case in this jurisdiction. Even when a property was closed by the local authority for 20 months, this was not sufficient basis for the tenant to claim that its 10-year lease was frustrated. It appears that the property demised by the lease would have to be absolutely incapable of enjoyment in any form before frustration could be claimed. It is unlikely that COVID-19 would give rise to a right for either party to claim that the relevant lease contract was frustrated in England and Wales.

However, in some jurisdictions, a party may argue that the lease is frustrated if there are extraordinary reasons which would make the lease unbearable for the affected party. It remains to be seen whether it can be successfully argued that COVID-19 constitutes one such extraordinary reason.

- You should carefully consider the legal position in the relevant jurisdiction with your legal advisers, on a case by case basis.

## What steps are being taken by Government on payment holidays and state aid?

One example of steps being taken at a governmental level is the UK Government's decision to grant all retailers 100% relief from business rates (a local government tax paid by occupiers of property) for a twelve month period.

However, EU governments (including UK currently) are bound by EU regulations relating to "state aid" which exceeds a de minimis level of €200,000. Any governmental payment to specific industries which is likely to distort competition or trade above the de minimis threshold is unlawful without, generally speaking prior notification to and approval by the European Commission.

Currently, it is not clear if the UK government has notified the aid measure to the Commission and certainly no clearance decision has been published.

So far, there does not appear to have been any evidence that governments are seeking to intervene and provided state aid in relation to rental payments as between landlords and tenants, presumably on the basis that these are private contractual arrangements.

The main enforcement remedies available to landlords include:

### Forfeiture

- This is a right for a landlord to "forfeit" or terminate a leases based on a tenant breach.
- However, forfeiture will not be available if the breach is capable of being remedied by the tenant i.e. paying any rent previously unpaid or remedying any want of repair.
- It is important to allow tenants a reasonable amount of time to remedy the breach of the lease covenant and it should be noted that a tenant and any interested party (such as the tenant's mortgagee) can claim relief from forfeiture if it can satisfy the court that it would be inequitable for the lease to be terminated.

### Specific performance

- Here a landlord asks a court to make an order for the tenant to conform with all covenants.
- The landlord will need to prove the existence of the covenant and the nature of the breach.
- A court will take into account considerations of fairness, and is not always prepared to compel a tenant to carry out the requested action.

### Injunction

- Injunctions are court orders which can prevent tenants from either commencing or continuing with certain types of conduct.
- This is the most common court action taken by landlords.

## What are a landlord's remedies?

## Damages

- In the event a covenant is breached, a court may consider it appropriate to award damages to the landlord. This can be done in addition to or in lieu of an order for specific performance or an injunction.
- Damages can be calculated on what the tenant would have to have paid to have the covenant lifted, known as a "release fee", or based on any profits the tenant has accrued from their breach of the covenant.