

Coronavirus (COVID-19): considerations for commercial landlords and tenants

Service area / [Property Law](#)

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It's the topic that is impossible to avoid – the coronavirus (COVID-19) outbreak and its implications on every aspect of public life.

Whilst many countries including the UK have, amongst other measures, shut down non-essential shops and require only essential workers to continue to attend their workplace in person, at the time of writing bars and restaurants (save for takeaway or delivery), gyms, spas, massage facilities, museums, galleries, cinemas and betting shops have been forced to close in Jersey, and the government has advised that all non-essential travel cease and citizens practice social distancing.

Although not currently a total lockdown as mandated elsewhere, the effects of the current Jersey governmental guidance will have a profound impact for many local businesses, particularly those in the hospitality and retail sector.

The Government of Jersey is currently reviewing emergency legislation to deal with the COVID-19 pandemic, and we will see over the coming weeks what is proposed in relation to commercial leases. It is possible that Jersey may follow the UK with emergency legislation designed to provide a statutory moratorium on a landlord's ability to terminate a commercial lease for non-payment of rent.

Whatever emergency measures may be introduced, the following note provides a brief summary of some key areas that will need to be considered in relation to commercial leases and associated agreements over the coming months.

Force majeure

Many commercial contracts have "force majeure clauses". These clauses provide parameters for when a party may terminate the contract and/or be excused for failure or delay in complying with the terms of the contract due to a specified event. The contract will usually specify which events constitute a force majeure event, and so depending on the drafting, a pandemic may not necessarily be covered within the force majeure provisions.

Whilst most commercial leases in Jersey may not contain an express force majeure clause (and so the parties will not be able to rely on such an option in the event COVID-19 leads (directly or indirectly) to breaches of the lease), force majeure clauses are regularly included within agreements to lease (commonly known as "Pre-Lets") where parties are committed to take a lease once a building has been constructed or other works completed). Landlords and developers with ongoing development projects should review such force majeure provisions carefully, especially if the COVID-19 pandemic is likely to have an adverse effect on the completion of their development.

Rent suspension / abatement

Most commercial leases will contain provisions allowing for rent to be suspended where the premises have been damaged or destroyed by an insured risk, and it has become increasingly common for this to be extended to also include any damage by uninsured risks.

It is questionable whether such clauses would be triggered by an inability to use a building due to the COVID-19 pandemic as it is highly unlikely that physical damage or destruction will

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arise due to COVID-19. However, some rent suspension clauses may be drafted more broadly, to allow for rent to be suspended in circumstances other than where the premises are damaged or destroyed by an insured risk.

Both landlords and tenants will need to carefully review and consider the rent abatement clauses within their commercial leases. In the current climate, it is also important for landlords to review their buildings insurance policy and rent loss policies to determine if disease or epidemics would be covered as an insured risk. Equally tenants should be reviewing their business interruption policies in the event that they are precluded from occupying the premises from which their business operates.

Unpaid rent

Commercial leases will usually contain express provisions setting out circumstances in when a landlord may take steps to formally cancel the lease and seek an order for vacant possession. Usually this will include where the rent remains unpaid for anywhere between 7 – 30 days after falling due. In this case, the landlord will normally be entitled to terminate the lease and take steps to cancel the lease before the Royal Court and obtain an order for vacant possession of the premises.

A tenant may only be evicted by order of the Court. In accordance with newly published directions in response to the difficulties presented by COVID-19 all eviction proceedings commenced in the Petty Debts Court (i.e. applicable for paper leases where the annual rent does not exceed £45,000) are adjourned to an unspecified future date. This does not apply to the Royal Court as of the time of writing, although we anticipate something similar may follow in the coming weeks.

If a landlord decides to apply for cancellation of the lease due to non-payment of rent, they must carefully consider the cost and other implications of issuing such proceedings. It is likely that the Courts will be sensitive to the extraordinary economic circumstances in which many businesses may suddenly find themselves when requesting relief.

Notwithstanding that a tenant may have missed a rent payment, thereby allowing the landlord to issue proceedings to terminate the lease and evict, landlords will need to consider carefully the potential adverse publicity that may arise where long established local businesses are evicted from premises – and in addition should consider carefully the likelihood or otherwise of finding an alternative tenant to occupy and operate from the premises once matters return to normality.

Landlords may have other options where rent has not been paid by the tenant, such as drawing on a rent deposit or making a claim on a guarantor (if there is one). The terms of such deposit agreements and guarantees would need to be considered carefully.

The best advice for any tenants who are struggling to pay their rent is to speak to their landlord as soon as possible to discuss if any alternative payment or other arrangements can be agreed (see our Practical Steps section below).

Turnover rents

Turnover rents will very likely be significantly impacted, either due to a reduction in turnover or, in cases where the tenant has had to cease operating, no turnover at all. As always, the impact will depend on the drafting of the turnover provisions within the lease.

For example, there may be a clause that, where the premises are closed for trading by the tenant on a trading day during the turnover period, the turnover for that day will be deemed to be equivalent to the average daily turnover for those days that the premises was actually open for trading during the turnover period. Often however, this deemed turnover will not apply where the premises has been closed for reasons beyond the tenant's reasonable control (as would be the case if forced to close due to COVID-19), or for a force majeure event.

Without this deemed turnover, the inevitable result of reduced hours or closure will be lower turnover and consequently, lower turnover rent, but many turnover provisions will likely have a base minimum payable, regardless of actual turnover.

Rent reviews

It is important to remember that, regardless of when the actual rent review is taking place, the key is the date of the rent review. If parties are still negotiating the revised rent for a review date that has already passed, they must determine what the hypothetical rent would have been on that date – not as of the current date.

For imminently approaching rent review dates, it is likely that matters relating to COVID-19 and which affects the property in question will be taken into account when determining the hypothetical rent as at the review date.

Keep-open requirements

Certain commercial leases for retail premises may have keep-open clauses, whereby the tenant must keep the premises open for certain times of certain days. Should the tenant close the premises of its own volition, it will likely be in breach of such obligations. Even if closing due to government requirement, on the face of it the tenant would still be in breach of this clause, and most leases provide a right for the landlord to cancel the lease in the event of breach by the tenant of its obligations.

However, all leases will usually contain a requirement to comply with law. Where compliance with law would put the tenant in breach of another covenant in the lease such as a keep-open clause, compliance with law would of course generally be expected to take precedence.

Building access and security

Where the landlord has closed the building due to a government order, it will be difficult for a tenant to argue that the landlord is in breach of its obligations for granting quiet and peaceful enjoyment of the premises. In such circumstances, the tenant will be required to continue paying rent unless this is covered by the rent suspension provisions in the lease (see above), or otherwise agreed with the landlord.

Continued

If, however, there is no governmental guidance or requirement but the landlord has still shut the building, preventing the tenant from accessing it, then there may be an argument that the landlord has breached its obligation to allow quiet and peaceful enjoyment. By contrast, it should be permissible for a landlord to introduce rules governing access to common parts where reasonable, as most leases for multi-let buildings will provide for this.

Where a building is forced to close, it is essential that it is safely secured. Even where this responsibility falls to the tenant under the lease, the landlord should ensure that it has been properly done so that any insurance policy is not invalidated. It is also important to notify the insurer if the premises will be left unattended for any period of time.

Services and cleaning

In a multi-let building or a building where the landlord provides the usual services, it is likely that the responsible landlord will arrange for heightened cleaning services in order to minimise chances of contagion. Common steps are to schedule more frequent cleaning of door handles, light switches, lift buttons and other high-usage fixtures and fittings, as well as providing hand sanitizer and cleansing wipes.

As to who will bear the cost of such additional services, this will be determined by the drafting of the service charge provisions. Many service charge provisions will allow for costs incurred in compliance with the requirements of local authorities. Additionally, it is common for inclusion of a “sweeper clause”, often expressed to cover any additional services carried out by the landlord in the interests of good estate management, and it would be hard to argue that additional cleaning during a pandemic would not fall within this definition.

Break notices

Many commercial leases contain break clauses, which can be exercised by the landlord, the tenant or both (if a mutual break clause). It is likely that over the next 12 months some tenants may look to exercise any break option available in an effort to mitigate the effect of the COVID-19 pandemic. Tenants or landlords intending to exercise a break option must read the lease provisions carefully, as many attempted breaks have been frustrated by incorrect service of the break notice, or by the tenant not giving vacant possession.

Practical steps

Whilst we await with interest what emergency measures the Government of Jersey may propose in respect of commercial leases, landlords and tenants must start having an open dialogue and work together to find sensible and practical solutions to ensure that a tenant's businesses can survive in the long-term whilst at the same time protecting the landlord's income-stream. It is essential that such commercial negotiations start as soon as possible. Some concessions which might be considered include:

- permitting the tenant to pay rent on a monthly rather than a quarterly basis in order to better regulate cash flow;
- deferring the rent (in whole or in part) for a temporary period,

perhaps coupled with an extension of the term to assist with the payment of deferred rent amounts; and/or

- repay tenants any overpaid service charge at the end of the service charge year following reconciliation, rather than deduct this from future instalments.

Once terms are agreed, it is important that any side letter or forbearance agreement is precisely drafted to ensure that the lease itself is not inadvertently varied or obligations waived, and to ensure all relevant aspects are carefully considered. Landlords must also consider their own obligations to lenders, insurers and any superior landlords.

The Property Law Group at Carey Olsen can assist with the negotiation and drafting of rent concessions and the preparation of necessary and unambiguous documentation to properly record and implement any concessions or forbearance that may be agreed.



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