

COVID-19: Can business tenants stop paying rents

With the closure of restaurants, bars and leisure facilities and with the Government advice being to avoid offices and non-essential shops, businesses are looking to mitigate costs in order to weather the current crisis. While the announcement that all NI businesses will pay zero rates for the next three months (April, May, June) will be welcomed, rents on commercial premises are one of the larger items of expenditure for many businesses and so faced with a potential dip in productivity and revenue they will be looking at ways to reduce this outlay.

Do any of the usual lease provisions assist?

Rent Suspension

Commonly, rent suspension clauses in leases apply to insured risks or (if the lease provides) uninsured risks. Most definitions of insured risks in leases are quite specific and focused on common physical risks to which premises are exposed so would not normally cover pandemic or other disease. However, you should check the lease carefully to see whether they are in fact an insured risk or would alternatively fall within the definition of uninsured risks (if the lease provides for that). Landlords should also check whether they have additional cover under their buildings insurance for disease. In any event what is key will be whether the rent suspension is activated upon destruction or damage or occurrence of an actual insured risk or uninsured risk. While it could be argued that the presence of an infected person or indeed viable contamination being found on premises might constitute damage rendering premises unfit for occupation, on the flip side it could be argued that this still does not constitute the usual meaning of destruction or damage. Despite some landlords being keen to explore whether tenants can rely on these provisions, it seems unlikely that Covid-19 would be covered by the rent suspension provisions in most leases and tenants will therefore not be able to rely on this.

Force majeure

These are clauses which provide that upon occurrence of a specified event the parties can terminate a contract or suspend/delay performance of obligations. These don't tend, however, to be a common feature of commercial leases.

Frustration

This is a legal concept which applies where a supervening event which the parties have not provided for in the lease results in significant changes to the rights or obligations of the parties from what they reasonably expected at the date the lease was completed. The effect of frustration is to permanently terminate the Lease. The threshold to prove frustration is very high so is unlikely to be satisfied. In addition, neither the landlord nor the tenant are likely to want to terminate the lease in response to what is a temporary crisis.

Is the position any different in relation to non-essential commercial premises being closed as directed by Government?

No. Unless law was passed or the courts decided otherwise, the obligations of the landlord and tenant would remain the same and both parties could as a result technically be in breach of the lease. For the landlord, they could be in breach for not ensuring the premises are able to open for trade (quiet enjoyment, derogation of grant, provision of services). The tenant would be in breach if they unilaterally decide to stop making rent payments and may also be in breach if there is a keep open clause in the lease which is not uncommon in retail leases where a turnover rent is payable. However it is a moot point as to what this would actually mean as both parties would have to prove that they have suffered a loss in order to claim damages.

What is happening in practice?

Tenants are approaching landlords asking for rent holidays, to pay a reduced rent over a set period, to switch to paying rents monthly or to a turnover only rent. Landlords are not obliged to agree to this in the absence of any lease provisions requiring them to do so, but may choose to do so to ward off tenant insolvency and ultimately the risk of being left with vacant premises. Tenants who do not pay their rent risk debt proceedings and forfeiture of lease (meaning the lease will come to an end and the Landlord will repossess the premises); however there are many practical reasons why Landlord's may choose not to seek forfeiture of the lease, and in many circumstances a recovering tenant may be better than no tenant at all.

The Northern Ireland Executive has announced the COVID Small Business Grant - Small business grant of £10,000 to be issued immediately with a cost of £267m providing support to 27,000 businesses in NI. This is for all businesses with a NAV up to £15,000. There is also the Hospitality, Tourism and Retail Sectors Grant Scheme, an immediate grant of £25,000 will be provided to companies in these sectors with a rateable value up to £51,000.

The Hospitality sector which has been significantly hit is calling for Landlords to implement a rent freeze while closures continue and many retailers are likely to echo this call. Retail NI are also calling for the full one year 100% rates relief scheme, which is in place in the rest of the UK, to be fully implemented in Northern Ireland.

Looking ahead

- Landlords and tenants alike will reassess their short to medium term property strategy.
- Some landlords as well as tenants will suffer as a result of the crisis, particularly those most exposed in the sectors hit hardest like hospitality and retail.
- Landlords are likely to further scrutinise tenant covenant strength when doing deals to see if they are capable of withstanding issues posed to all businesses by Covid-19.
- For those occupiers that are robust enough to weather the crisis, there will be opportunities to acquire sought-after premises from struggling occupiers or those that are pushed over the brink into insolvency. In the office sector, tenants who have had to accelerate agile working practices as a result of the crisis may re-evaluate their need for larger premises.

Other considerations

Tenants may also be able to start considering temporary repurposing of their premises, to provide take away and delivery services or for other critical uses to satisfy government need. Review would need to be had of the user covenants in the relevant lease and appropriate temporary consent for change of use sought if required. Consideration also needs to be given to the interaction with use restrictions in related documents such as franchise and banking agreements. Of course we now thankfully have some relaxation in the planning regime to relax the delivery hours stipulated in planning permissions and use of restaurants and cafes for takeaway purposes but we will wait to see if government repurposing will follow that.

Further Government intervention may come and the requirement for closures is to be reviewed on a monthly basis. Intervention undoubtedly will be needed to save many of our NI businesses and not least those in the hospitality and retail sectors.