

OFFICE



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CORONAVIRUS AND COMMERCIAL LEASES: 10 QUESTIONS ANSWERED

A PROPERTY PERSPECTIVE.

For The Occupier,

At Office Solve, we are working hard to support occupiers so they can continue to operate their businesses during these difficult times. We have created this document to offer helpful responses to questions that an occupier might have about their lease.

We are here to help get you back to work as fast and as cost-effectively as possible. Creating workspace solutions designed around your needs for today and the future. Helping you to meet the changes to the workplace and working practices.

You should look upon this document as a guide and a first step towards formal legal advice from a qualified legal professional.

Our legal representatives are ready to assist you with your lease arrangements.

Best wishes,

The Team at Office Solve

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The following are some of the most pressing queries for commercial occupiers raised as a consequence of the Pandemic crises.



1. Can a tenant terminate a lease?

Tenants are not entitled to terminate their lease because they either choose to close their business or can no longer afford to pay the rent, unless they are entitled to exercise a break clause under the terms of their lease.

Commercial leases do not usually contain a force majeure clause that may (depending on its wording) allow a contracting party to terminate a contract in certain unforeseen circumstances, such as natural disasters, etc.

One exception to the right to terminate would be if a tenant goes into liquidation, in which case the liquidator could terminate the lease by following a procedure called disclaimer. This only applies on a liquidation, not administration or any other form of insolvency.

2. Can a tenant withdraw from an exchanged agreement for lease (AFL)?

This will depend on the various clauses and wording in the AFL that govern termination and rescission. Not all AFLs have a force majeure clause, but most recent legal commentaries do not think that most standard force majeure clauses would apply to the coronavirus outbreak.

A possible situation that could lead to a tenant being able to terminate an AFL is where an AFL is exchanged subject to a landlord carrying out works by a particular longstop date, which the landlord fails to achieve, because the supply chain to do the works is disrupted on account of the virus – eg, material cannot be delivered or contractors leave the site.



Landlords and tenants should be discussing whether to extend any longstop dates if appropriate to overcome this possibility.

3. Can a tenant withhold rent or pay a reduced amount?



A tenant is not entitled to withhold rent or pay a reduced amount due to a reduction in footfall and resulting cashflow problems, whether or not a tenant chooses to cease trading either temporarily or permanently.

The suspension of rent provisions (both for insured and uninsured risks) apply when the premises are damaged or destroyed (i.e. physically), which will not apply here.

An exception to this might be if a tenant becomes insolvent and enters into a company voluntary arrangement (CVA) that involves negotiations with its creditors, including with its landlords to pay lower rents. A number of high-profile retailers have done this. This is clearly an area where an accommodation with tenants in negotiating rent holidays or concessions may be appropriate.

Many household names, such as Debenhams and New Look, have already requested rent holidays and some landlords, such as Argent and Howard de Walden, have already offered them in appropriate circumstances. However, their terms must be clearly identified; “holiday” is an ambiguous term – does it mean a rent waiver, so that the tenant is released from that rent forever, or a rent deferment, where a repayment programme will put in place when times improve?

The terms should be clear and carefully documented, preferably by a solicitor.

4. Does a tenant have to continue paying business rates and could a landlord become responsible?

A tenant will continue to be responsible for business rates and, as long as the lease continues, this obligation will not fall back to a landlord. Any relief or concession will be a matter between the tenant and the local authority. There have also been government concessions announced.



5. Would a tenant be insured?

Tenants may be able to recover some of their rent (and possibly service charge) through their business interruption insurance, and they might be encouraged to look into this.

However, it is worth bearing in mind that there are a number of government grants, subsidies and loans designed to shield businesses during this crises.

6. Who is responsible to manage the virus within let premises?

Tenants usually covenant in their lease to comply with all Acts of Parliament and any delegated laws made under them including byelaws, regulations, etc. Generally, tenants will be responsible for managing the coronavirus situation in their own premises and be responsible for their own employees, customers and visitors.



Employers need to keep on top of safeguarding measures and work-related risks posed by Covid-19. A failure to do so may give rise to criminal enforcement action against the employer or a potential claim for compensation under civil law.

Workplaces should follow sector-specific guidance produced by the government when carrying out their mandatory Covid-19 risk assessments.

Information is available from Public Health England guidance for Covid-19 in the workplace.

Additional resources

As well as the [government guidelines](#), you may also find the following resources useful:

<https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>

<https://hbr.org/2017/03/research-stale-office-air-is-making-you-less-productive>

<https://www.mckinsey.com/business-functions/organization/our-insights/reimagining-the-office-and-work-life-after-ovid-19#>

7. Must tenants comply with their keep-open covenant?

Certain leases will contain a keep-open covenant, particularly in shopping centres, meaning that tenants are obliged to remain open for business. **If they choose to close, can a landlord force them to open under this covenant ?** Probably not, as such covenants are rarely enforced by the courts, although damages may be available if any loss can be proved.

Depending on the drafting of the clause, the tenant may fall into an exception to their keep-open obligations, such as where to do so would be contrary to any regulation or requirement of any statutory or local authority. Arguably, government guidelines would fall into this exception.



8. What are a landlord's obligations?

A landlord will be under an obligation to comply with government guidelines where they affect the common parts of a building or shopping centre and fall within the landlord's service charge obligations.

This will include the common parts of buildings and also to estates generally. These arise from heads of service charge, such as compliance with all requirements of statutes and regulations from any appropriate authority.



9. Can any additional costs be recovered under the service charge?

These costs, for items such as deep cleaning, providing hand sanitisers, etc, will normally be recoverable under the standard service charge provisions found in leases, but as ever will depend on the precise wording.



10. Are there any other potential risks to a landlord?

Apart from the commercial risks of tenants struggling financially, there is a potential for a landlord to be in breach of its obligations to provide services relating to the management of the estate, if an interruption or failure in the supply chain of equipment or materials prevents any of those services being provided or carried out.

Another risk may be if the landlord decides or has to close down a building to prevent the spread of the virus in the common parts or to comply with government guidance. Here, the tenants are not choosing to close, but may be compelled to do so because of the landlord's action. In this case, a landlord could be liable to a damages claim for derogation of grant or breach of its quiet enjoyment covenant. Damages could include loss of profit.

There could also be a risk if a managing agent is unable to manage the site, because a number of its employees are affected by the virus and/or are in isolation, so they have a staff shortage.

If you require specific legal advice in relation to your lease agreement you should contact your legal adviser or we can refer you to one of our legal colleagues who will be able to assist you further.