



Coronavirus – Consequences for Office Tenants

Updated as of 11 June 2020

The most frequent question we are being asked by clients at this uncertain time is “*how can we protect cash flow whilst fulfilling our lease obligations*”. There is no easy answer to this challenge and almost certainly for every one of our clients, there will be circumstances that are particular to them requiring a tailored response. One thing is certain – the strict letter of the law is probably not fit for purpose in these extraordinary times. What matters now is being collegiate, empathetic, realistic, and above all else, communicative.

Cripps Pemberton Greenish and leading tenant advisor [DeVono Cresa](#) have co-authored this paper to highlight the material disconnect between legal obligations contained in leases and the current extreme circumstances we are facing.

We have sought to set out some of the questions that we are frequently asked, and the answers. Further through the paper, we set out what we would like to achieve through a process of reasonable and pragmatic concession from landlords.

Can I stop paying rent if I am forced to close the office?

You might think you ought to be entitled to withhold rent in these situations, but most modern leases contain a provision prohibiting tenants from withholding rent. You should check the terms of your lease to be sure or ask your broker. Failure to pay the rent is classed as a breach of the lease and could leave you exposed to enforcement action by the landlord.

My lease includes rent suspension provisions - do they help?

Possibly, in limited cases, most leases contain a rent suspension clause which (as the name suggests) suspends a tenant's obligation to pay rent in certain circumstances. Most rent suspension clauses are limited to situations where actual physical damage is caused (to the premises or shared areas) rendering the premises unusable or inaccessible.

However, some clauses refer to the premises being unusable or inaccessible without reference to physical damage. It is those situations where a tenant may benefit from rent suspension, but it will depend on the particular wording used. The key message is to make sure the wording in your lease is checked in

conjunction with a review of your landlord's insurance policy.

Please contact us if you would like help with this.

Can I terminate the lease?

Your ability to terminate will be limited and depend on what your lease says. Check whether the lease includes any break options. If so, consider the required notice period and whether there are any conditions attached. Full payment of rent is typically one such condition but there can also be additional payments to make. Pay close attention to the timescales and bear in mind that once you have served a break notice, it cannot easily be retracted.

If I can't terminate the lease, will the principle of 'force majeure' apply?

The vast majority of leases do not contain force majeure clauses and will not be implied into a lease, so, unfortunately, this will not help.

If you have entered into a lease agreement with a view to completing the lease at a later date, for example, once the landlord has completed construction works, then there are likely to be force majeure provisions in the agreement. It is generally thought that the spread of an infectious disease, such as Covid-19, would qualify as a force majeure event as it is outside the will and control of both contracting parties.

The current situation may well affect compliance with obligations in any lease agreement. We would, therefore, recommend that you seek legal advice for further guidance.

Am I able to claim that the lease has been 'frustrated'?

It may be possible for you to rely on the common law principle of frustration. This does not need anything particular to be written into the lease. Frustration arises where an event occurs, after lease completion, which is beyond the parties' control, thereby rendering it impossible to perform the contractual obligations in the lease, or where the relevant obligation is transformed into a radically different obligation from what was contemplated at the time the lease was entered into.

A frustrating event generally must be unforeseen, unexpected or unanticipated at the time the parties entered the contract.

English courts apply the principle of frustration within very narrow limits and the difficulty of successfully arguing frustration of leases was illustrated most recently in *Canary Wharf Limited v European Medicines Agency* [2019] EWHC 335 (Ch). In that case, the European Medicines Agency argued that Brexit would frustrate its lease as it was forced to relocate to another member state. The High Court did not agree.

As things stand, we think it is generally unlikely that a tenant would be successful in claiming that a lease has been frustrated due to the impact of a closure caused by COVID-19. You might be in a stronger position to argue that the lease has been frustrated if your lease is very short or you just have the tail-end of a longer lease left. There is no established precedent for this, however – you would be creating new law. We will be keeping this under review. Courts may change their approach if there is a prolonged period of closure arising from new legislation.

Will my business interruption insurance cover me?

You will need to check the wording of your policy and contact your insurer or broker. The initial feedback we have seen from insurers is that cover for COVID-19 is not available unless it is specifically named in the terms. That will be unlikely in most cases given that Covid-19 has only been identified recently. However, the FCA has now brought a test case in the High Court to obtain legal guidance on the interpretation of policy wording. This should provide more clarity. Watch this space.

Anything else to consider?

- We recommend that you coordinate with other tenants and your landlord to work to minimise ongoing costs in multi-occupied buildings, such as reducing the operating hours for HVAC and less frequent landscaping and in preparing for a return to the office.
- Your lease is likely to include subletting and assignment provisions. In theory, this may provide you with a way to offload the lease liabilities but clearly, it is going to be hard to find anyone willing to take that on within the lease in the current market
- You may need to maintain some security and maintenance programmes for your premises so that they do not fall into disrepair.
- Keep an eye out for further Government announcements providing further needed support for businesses including further changes to the restrictions on landlords seeking to take enforcement action against tenants.

So we know what the lease says, but if your tenant cannot afford to pay the rent or is going through a period of financial recalibration, why would you not listen to their issues? Well, the answer is you would.

From initial discussions we have been having with landlords – large and small – there is a genuine understanding of this difficult situation and a willingness to work with occupiers as if they were customers to try and deliver a solution that works. Whether this means a rent holiday, reduced rental, different payment terms, or perhaps a service charge suspension during extended office absence, grown-up landlords recognise there is an “in it together” aspect to the current situation and with that comes a requirement for equitability.

So whilst it's important to know your responsibilities as a leaseholder, you should also understand that you have rights. In the current climate, you have the right to try and keep your business going through whatever reasonable means possible. We will work with you to support this simple proposition, representing you in discussions with landlords to try and achieve an outcome that meets your short-term requirements and the landlords long-term objectives.

Whatever your concern or challenge, we are here to support you.

For more guidance, and further information, visit our [Coronavirus hub](#).