



## Landlord and Tenant Briefing

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The Coronavirus has seen the UK public retreat on a mass scale to the comfort of their own homes with the country in effect in lockdown whilst many have been advised to self-isolate. As a result, normal trading has stalled and many businesses have been forced to close their doors to customers. The hope is that the measures taken to date will slow the spread of the virus to avoid the NHS being overwhelmed but there is no certainty for UK businesses as to when it will be safe to resume business as normal. We cannot stress enough that in spite of all the uncertainty, what is clear is that, much like the rest of the country, landlords and tenants are likely to have to work together and compromise if the threat to health and the economy posed by COVID-19 is to be overcome.

### **A couple of points that we should all consider:**

- Regardless of legal ability for either landlord or tenant to take action, in the current climate public opinion on parties choosing to do so where the problem has arisen as a result of Covid-19 should be borne in mind;
- Proposals have been made to include provisions in the Coronavirus Bill to restrict the right to forfeit some commercial leases and to recover possession, the net effect of which will be that many tenants will decide not to pay the March quarter's rent. There may be further legislative changes to come.

This note reflects the position as at 24 March 2020. Things are changing rapidly so please bear this in mind when considering whether any of the below may be of use to you. Whilst the courts in England and Wales remain open, they are having to deal with matters remotely which is likely to result in delays and adjournments. They are also likely to focus their attentions on more urgent matters, which is unlikely to include disputes between landlords and tenants.

# Landlords

As a result of this unprecedented situation many business tenants are simply not in a position to pay their rent and many will choose not to do so. Set out below are a number of issues that Landlords may need to think about:

## Rent cesser

Does the lease provide for the obligation to pay rent to be suspended where premises are incapable of occupation? Savvy tenants will have checked their lease and will be prepared to argue that the current pandemic amounts to a situation which relieves them of the obligation to pay rent.

Is the provision subject to an obligation on either party to insure? If so, does the insurance policy cover the current situation?

## Waiver of rent

Many tenants are now seeking a break (typically lasting 3 months) on their obligation to pay rent. Most commercial tenants are now unable to trade and so they simply cannot make the rent payments or will choose not to do so. Typical tactics to pressure tenants to pay are unlikely to be successful in prompting (unless there is a guarantor who can plug the gap) and the situation will likely not improve until the virus has dissipated. If the tenant can resume somewhat normal service and resume rent payments once the chaos has calmed down, then it is arguably better to have them in place (and on the hook) rather than an empty unit. Ordinarily, the decision to add on pressure, either until the tenant pays or the lease is forfeited (see section on forfeiture below), would be dictated by whether another tenant can do better in the unit – that is unlikely to be the case at present when everyone is in the same uncertain boat.

## Deferring rent

If the tenant ordinarily has a successful business and the landlord is fairly confident that post Coronavirus, the tenant will resume successful trading, then landlords may want to agree a voluntary moratorium of sorts that provides that the rent arrears arising in the next 3 months will not be actively pursued for a 12 -18 month period, provided the tenant agrees to a repayment plan.

Landlords need to be careful about what is agreed – if the Landlord wants to ultimately recover the rent arrears, then the tenant needs to understand this to avoid any confusion. Any terms or timescales will need to be set out clearly and preferably in writing and signed by both parties. A failure to set out the terms clearly will likely result in litigation about what was agreed.

## Rent reduction

If the tenant is still trading at present but on a reduced basis, then they may not be able to meet the rent payment in full but possibly can afford to pay something. Landlords may acknowledge that in these uncertain times, some rent is better than none. Any agreement should be realistic and clear. Again, where possible, set out the terms in writing and have both parties sign to demonstrate their consideration and agreement.

## Payment frequency

Many rents will be payable on the usual quarter days, the next one being 25 March. Tenants may find it easier to manage

payment runs in smaller, more frequent chunks and so Landlords may want to explore monthly rent for the time being. Again, make any variations clear and keep a record of what has been agreed.

## Rent deposit

Did the tenant provide a deposit at the commencement of the lease and if so, do the terms of the rent deposit deed allow the landlord to draw down on the deposit in the event that rent is not paid?

## Guarantor

Many leases will also put a guarantor on the hook and where the guarantor is an individual (and thus less likely to simply be wound up due to insolvency) the landlord may seek recovery of rent from the guarantor. Ensure that any demands and formal letters before action are compliant with the relevant pre-action protocols and served in accordance with the lease.

## CRAR

If your tenant won't agree a repayment plan to meet the arrears, but you don't want to lose them as a tenant (i.e. if they stop paying the rent going forward, but you want to keep them on the hook for rent because you don't have anyone else to replace them with) then you can issue a claim for commercial rent arrears recovery which is essentially a debt claim specifically for commercial landlords to utilise. It will waive the right to forfeit so take this into consideration before doing anything else.

## Forfeiture

Proposed amendments to the Coronavirus Bill will impose a moratorium that will prohibit forfeiture or the exercise of a right of re-entry for non payment of rent during the period between the coming into force of the legislation, and 30 June 2020, although that date can be extended. Also, during this moratorium, the proposals say that no conduct by a landlord, save for an express waiver in writing is to be regarded as waiving a right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent. This applies to tenancies to which Part 2 of the Landlord and Tenant Act 1954 applies, or a tenancy to which that part would apply if any relevant occupier (being a person other than the tenant who lawfully occupies the property) were the tenant.

The advice is to first check the terms of the lease and have a clear idea of what remedies may be available should they need to be utilised both during and after the moratorium.

The key action that landlords need to be taking is contacting their tenants to assess whether there are likely to be any issues and if so, discuss how best to deal with the issues. Nobody has chosen to be in this situation; tenants don't want to lose their business and landlords appreciate the struggle that their commercial tenants are going through. Landlords too will be hit hard if the absence of incoming rent results in cash flow difficulties; defaulting on funder terms etc.

# Tenants

## And what about tenants?

The same key advice will apply: check the lease so that you are aware of what will amount to a breach of the lease and what action the landlord is entitled to take; and make early contact with your landlord about the current situation and the likelihood of being able to pay rent.

### My rent payment date is looming. What do I do?

Ability to pay rent over the coming weeks (and months) will be the biggest issue concerning many tenants.

If you do nothing and simply don't pay, your landlord can consider all options open to it to deal with breach of lease, which can include CRAR or forfeiture (subject to the proposed moratorium on forfeiture for non-payment of rent).

The short answer is, talk to your landlord, sooner rather than later. The rent will have to be paid at some point and the government moratorium is just providing much needed breathing space. Make sure anything that you do agree with your landlord is evidenced in writing. Could any of the following help?

### Moratorium/delay

If tenants are unlikely to be able to make payment of the rent at this time but expect to 'bounce back' in a few weeks/months, post-Coronavirus, then the landlord may be willing to agree a repayment plan to later recover the arrears.

### Reduced rent

A landlord may be more willing to agree to a voluntary moratorium where the tenant can offer part payment of the rent. Any offer of part payment should be realistic as a lowball offer will likely make the landlord balk but setting the bar too high may not be achievable in the current climate.

### Suspension of rent

Many landlords will agree to a rent-free period to entice new tenants to sign leases with them and the same incentive could be offered to tenants in this difficult period to encourage and help their business survive. The landlord is only likely to agree to any such agreement where it is confident that the business will survive and where there have not been previous disputes. If the landlord is confident that it can fill the premises with a replacement tenant then the landlord may be unwilling to forego the rent.

### What happens if we close?

Many commercial leases place an obligation on the tenant to remain open during set hours. A failure to do so may amount to a breach, entitling your landlord to claim damages or even forfeit as a result.

Where the premises form part of a larger building (such as a shopping centre or office block), the decision to remain open may be taken out of your hands as landlords take the decision to close or closure has been mandated by the Government. Even if you want to be there, you cannot. In that instance, you may have some recourse against your landlord and potentially, may be entitled to damages.

### Force-majeure

The obligation to stay open or even to pay rent may be conditional if there is a force majeure clause suspending the obligation in exceptional circumstances. If the lease does contain a force majeure clause then check it carefully to determine whether the Coronavirus will fall within the definition. Tenants should be careful when interpreting the scope of any force majeure clause and also consider whether there are any other reasons (other than Coronavirus) which has contributed to the breach which may mean that they are unable to rely on the force majeure clause.

### Insolvency

The use of insolvency proceedings has been prominent for even the big high street names in recent years and the current climate is likely to push some businesses over the edge. The British Property Federation have suggested that landlords and tenants on the brink of administration should try to be creative to find a solution as a business that is trading is much better than a business in administration. The key to avoiding insolvency will be in communication between tenants and landlords (or more generally, between debtors and creditors) and taking early steps to manage the situation.

### Termination Provisions

The Lease may have a break clause allowing either the landlord or tenant to bring the lease to an end on giving notice and possibly after complying with certain conditions. You should check the lease carefully to see whether you are able to rely on a break clause, or whether the other party may seek to break the lease. Also check the service provisions and be aware that if a document or notice is served on you at an address where you have vacated and you do not become aware of it, it may still be validly served and therefore binding on you.

### Service Charges

You may wish to seek agreement that you will not be liable for certain service charges if you are not able to use your property, or certain elements of it, or certain services are not provided as a result of Coronavirus. The terms of any service charge provisions in the lease will need to be checked carefully to see what the position is in each case.

### Frustration

You may wish to argue that the lease is brought to an end by "frustration". This is highly unlikely to be successful following the recent case where the European Medicines Agency sought to argue that Brexit would frustrate its lease, but the Court did not agree with them. Again, your individual circumstances would need to be considered.

## Insurance

You should carefully check to see whether you have any kind of insurance cover which would cover your losses in the situation in which you find yourself. You may have General Liability insurance; Business Interruption policy (either a standalone or part of a General Liability policy attached as an endorsement); Crisis Management insurance; and/or Mitigation insurance, in which case you should speak to your insurers.

## Help from the Government

The Government have announced much emergency funding to try and alleviate the effect of Coronavirus on the economy

and you should check whether you are eligible for any financial assistance as the reliefs available are changing on an almost daily basis.

## Speak to your creditors

Whether you are a landlord or tenant, speak to your creditors, lenders, banks and others with whom you have a relationship to try and work out a plan going forward.

# Contact us

If you need any further help or guidance from the Muckle Team we are here to help you so please feel free to contact any of our dedicated team of partners and associates.



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